

REPUBLIC OF KENYA

IN THE MATTER OF THE SUPPLIES PRACTITIONERS MANAGEMENT ACT 2007

IN THE MATTER OF THE ELECTION DISPUTES RESOLUTION COMMITTEE
ESTABLISHED UNDER REGULATION 6 OF THE SUPPLIES PRACTITIONERS
MANAGEMENT (COUNCIL ELECTIONS) REGULATIONS 2022

IN THE MATTER OF ELECTION DISPUTE NO. 6 OF 2022

BETWEEN

MWANIKI GACHUBACOMPLAINANT

AND

THE KENYA INSTITUTE OF SUPPLIES MANAGEMENT..... 1ST RESPONDENT

REGISTRAR, INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA... 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.... 3RD RESPONDENT

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA.... 4TH RESPONDENT

JUDGMENT

BACKGROUND

1. These proceedings arise from a complaint by Mr. Mwaniki Gachuba ID No. 10059650 and a Kenya Institute of Supplies Management (hereafter, “KISM”) member Number 63173, (hereinafter, “the Complainant”) dated 23rd December 2022. The Complaint is against the Kenya Institute of Supplies Management (hereinafter, KISM), Registrar, Institute of Certified Public Accountants of Kenya (hereinafter, Registrar), Independent Electoral and Boundaries Commission (hereinafter, “the IEBC”) and the Institute of Certified Public Accountants of Kenya (hereinafter, “ICPAK”). In the Complaint, the Complainant alleges that “the registration of Members was not approved by the Council of Kenya Institute of Supplies Management.”

2. His complaint also states that “the register of members is inaccurate and includes persons who are ineligible to vote in the election to be held in January 2023.” He further argues that the Kenya Institute of Supplies Management, Institute of Certified Public Accountants, Independent Electoral Boundaries Commission have unlawfully constituted themselves into “a composite elections body” and “ the Kenya Institute of Supplies Management, Institute of Certified Public Accountants have no power known in law to perform any of the functions reserved for the electoral body.”

Summary of proceedings

2. The first Respondent filed responses through its Chief Executive Officer and the Registrar. Matter was heard on 29th and 30th December 2022, at which the Complainant, the CEO and Registrar testified.

DETERMINATION OF ISSUES

Validity of the Register of Members

3. The Complainant argued that the Register of members submitted to the IEBC for the purpose of conducting the KISM 2023 elections was invalid and, also erroneous. This was because in his opinion, the Register was not approved by the KISM Council before submission to the IEBC. According to the Complainant, without the approval of the KISM Council the Members Register submitted to the IEBC was invalid. While the Complainant insists that approval of the Members’ register by the KISM Council was required before its submission to the IEBC, he did not point to any provision of law that makes it a mandatory requirement for the KISM Council to approve the Register of Members. Regulations 9 and 10 of the Supplies Practitioners Management (Council Elections) Regulations 2022 (hereinafter, the Election Regulations) stipulate the procedures for the publication of the Register by the Registrar, inspection of the same by the members and the submission of the Register of Voters to the IEBC.

4. There is no express reference to the KISM Council in these two sections of the Elections Regulations. In her response dated 27th December 2022, the KISM Chief Executive Officer stated that the matter of registration of KISM members is delegated to the Member

Registration Committee under the provisions of section 15(1) and (2) of the Supplies Practitioners Management Act, 2007 (SPMA). At the hearing, the Registrar presented to us several sets of Minutes of the KISM Registration Committee which indicate that the Committee was duly seized of the matter of the registration of members and gave necessary approval to publish the register of 6,325 members eligible to vote in the Council's 2023 elections. We find that there is no express role of the Council, besides the statutory delegation to the Council's Registration Committee in the preparation of the Members' register for all purposes including voting at the KISM Council elections. We have also noted that the provisions of section 7 of the SPMA recognize the competence of the Institute's Committees, officers, employees and agents to execute with finality the various powers and functions of the Institute under delegated authority. It states as follows:

Subject to this Act, the Institute may either generally or in any particular case, delegate to any committee of the Council or to any member, officer, employee or agent of the Institute, the exercise of any of the powers of the Institute under this Act.

5. It appears that the Complainant's insistence on approval by Council or lack of it is at best, a technicality of procedure regarding the day to day operations at KISM, and how the Council confirms the reports of its Committees. Overall, the Complainant has not demonstrated that the approval of the Members' Register given by the Council's Registration Committee, rather than the Council itself, had contravened his individual rights. The upshot of this determination is that there is no merit in the Complainant's invitation to the DRC to invalidate the register of members. Such an order would be without legal basis and is wholly unwarranted in the circumstances.

THE ACCURACY OF THE MEMBERS REGISTER AND ELIGIBILITY TO VOTE

6. The gist of the Complainant's claim is that the Register contains members who are not eligible to vote. In his affidavit dated 16th December 2022, the Complainant alleges as follows:

The Register includes persons who are not members in good standing and who did not pay the annual membership fees for the year 2022 as required under section 16(1) and 17 of the Supplies Practitioners Management Act 2007.

The Register includes persons who did not comply with the Continuous Professional Development (CPD) requirements in Year 2021 or at all for purposes of issuance of Membership and Practice Licence for Year 2022 as required under section 16(10) of the Supplies Practitioners Management Act, 2007 and Respondent's CPD Policy.

According to these grounds, and if the Complainant's opinions prevail, no member may be eligible to vote unless (a) they have paid the annual membership fees for the year 2022, **and** (b) they have complied with the CPD requirements in year **2021**.

7. It is not clear where the Complainant derived all these provisions from. Regulation 11 of the Elections Regulations stipulates the criteria for eligibility to vote. It provides that "a member of the Institute shall be eligible to vote in an election if that member has paid the annual subscription prescribed under section 3A(4) of the Act.

8. The Registrar testified that the register of Members that has been submitted to the IEBC consists of members who were **fully paid up as at the 11th October 2022** which was the date when the Registration Committee met to approve the register before it was published on 12th October 2022. Section 3A(4) the SPMA provides that "members of the Institute shall pay such fees and subscriptions as the Council may determine". There is no reference in the SPMA and the Elections Regulations to the Continuing Professional Development Policy. At the hearing, the KISM Chief Executive Officer explained that the CPD policy was still in draft and had not yet come into force. It could not be a basis for registration of members for purposes of the January 2023 Council elections. Therefore, the Complainant's assertion and demand that "only members who complied with the draft CPD policy in the year 2021 could vote in the Council 2023 elections" has no leg to stand on.

9. We have carefully considered the complainant's allegations that some undisclosed members who had not paid their subscription dues for 2022 had been listed in the

Register of Members. The list of such members was not produced before us and the alleged members were not joined to these proceedings to defend themselves against allegations of non-payment of the membership dues. The DRC accepts the representation of the Registrar that the 6,325 members in the published Register were fully paid up as at 12th October 2022 when the Register was published, since there is no evidence before us to the contrary.

THE ROLES OF KISM, IEBC AND ICPAK

10. From the documents and submissions of the Complainant, he believes and insists that all the operations, logistics and activities relating to the KISM Council elections 2023 should be conducted exclusively by the IEBC. The same should be conducted strictly in accordance with the procedures, powers and even resources provided for under the IEBC Act 2011, the Elections Act 2011 and rules made thereunder. If the Complainant were to have his way, there should be no role whatsoever, for the KISM to facilitate and make any supportive arrangements such as procuring a technological platform for use by the IEBC to conduct electronic voting as stipulated in the KISM election regulations. The Complainant did not seem to see any distinction in the scope of operational responsibility between the role of the IEBC when exercising its duties to conduct referenda and elections for the county and national government, on the one hand and, when invited to conduct elections by a department, state agency, or professional or public body, such as KISM Council elections for example.

11. According to the Complainant, the electronic voting platform intended to be used by the IEBC to conduct KISM Council elections 2023 has been procured from ICPAK by KISM. As a result of this, the Complainant argues, these three parties had constituted a “composite electoral body” which is illegal, null and void. In the Complainant’s view, there is no room for IEBC to request logistical or other organizational arrangements from KISM or other organization whose elections IEBC may be invited to supervise.

12. Thus, in the words of the Complainant, “KISM has unlawfully procured and installed an election system from the ICPAK for purposes of conducting the election” and “the IEBC will not be able to perform the functions prescribed under regulation 5 of the Supplies Practitioners Management (Council Election) Regulations as the election is exclusively managed and controlled by the 3rd Respondent.”

13. Evidently, these are very interesting propositions that require careful examination. According to Regulation 5(1) of the KISM Council Elections Regulations 2022 (hereinafter, the Regulations) the body mandated to conduct the KISM Council elections is the Independent Electoral and Boundaries Commission (hereinafter, “the IEBC”). The fundamental quality requirements are set out in regulation 4 which states that “the Elections of the KISM Chairman and members of the Council shall: (a) be by secret ballot, (b) use a system of voting that is simple, transparent and verifiable and (c) be conducted in a free, transparent and fair manner.” A further aspect of the standards for the KISM Council Elections is set out in Regulation 20 to the effect that “voting at an election under these regulations shall be by electronic means.” This contemplates that the IEBC shall be put in a position of adequate resources and capacity to deliver its mandate. At the hearing, the KISM Chief Executive Officer testified that in the course of consultations between the KISM and the IEBC, it was established that the IEBC did not have within its portfolio a platform for conducting electronic voting for KISM 2023 elections at the time of the appointment.

14. A reading of the provisions Regulations 4, 5 and 20 suggests that the IEBC would have within its stable the platforms for conducting electronic voting at all times and whenever required. However, in the circumstances, the issue arose as to the proper manner for the IEBC to acquire the necessary equipment to conduct electronic elections. Several options were submitted to us including a prayer for an order to the IEBC to procure the electronic voting system for the purpose of conducting the KISM elections 2023. The DRC takes the view that the manner of procuring or acquiring facilities for conducting electronic voting is an operational issue over which the IEBC has a broad latitude of discretion.

15. We have made reference to the provisions of the Constitution, the Independent Electoral and Boundaries Commission Act 2011 and the Elections Act 2011. We considered the proposition that the provisions of these legislative provisions can be applied as the basis to direct the IEBC to procure the electronic voting system for KISM elections. Article 88(4) of the Constitution states that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament. Section 3 of the IEBC Act 2011, affirms that the purpose of the legislation is to provide for **“the operations, powers, responsibilities and functions of the Commission to supervise elections and referenda at County and National government levels.”**

16. At the risk of repetition, we are persuaded that the whole regime of legislation under the Elections Act and the IEBC Act is concerned with the performance by the Commission of its core constitutional mandates, powers, responsibilities and operations, and functions to supervise elections and referenda at County and National government levels. Arising from this proposition, the IEBC does not have automatic or general authority to conduct and/or supervise **Departmental Elections**, that is to say, elections other than referenda and elections at County and National government levels. Such **Departmental Elections** may be in respect of electoral offices in State Corporations, other statutory and public agencies as well as professional bodies. We can distinguish between **“County and National government Elections and referenda”** on the one hand and **“Departmental Elections”** on the other hand. In order to conduct Departmental Elections, the IEBC requires express authority under specific enabling legislation. In that case, as in the case before us, the provisions of the KISM Council Elections 2022 provide the basis for the functions and role of the IEBC in the January 2023 KISM Council Elections.

17. While the Regulations prescribe that the IEBC shall conduct Council elections by way of electronic voting, the Regulations do not specify by whom and/or how the technological platforms necessary for conducting electronic voting may be procured. The Complainant urged the DRC to issue an order that the procurement of the electronic voting system for KISM elections should be procured by the IEBC. However, reading the

specific roles of the IEBC in the Regulations especially Regulation 5(2) we do not find a basis for the proposition that the IEBC should undertake the functions of procurement of the electronic voting system or incur expenditure for the purpose of conducting KISM elections.

18. We have looked at the emerging practice to see how the IEBC normally approaches this kind of assignments. We have looked at the letter by the Chief Executive Officer of IEBC REF:IEBC/VREO/2/4/VOL.IV dated 13th October 2022, which states in part as follows:

RE: Appointment to conduct the Council (KISM) Election

We refer to your letters dated 15th July 2022 and 6th October 2022 regarding the above matter.....The Commission is therefore pleased to appoint the County Elections Manager, Nairobi City, Mr Albert Gogo to coordinate this activity on behalf of the Commission. He is a seasoned and experienced elections manager well briefed on this matter. Kindly give him all the cooperation he may require to make your election experience memorable."

19. From this correspondence we note that whereas KISM had written to the IEBC appointing the Commission to conduct the 2023 Council Elections, the Commission clearly indicated that the scope of its commitment would be limited to providing expertise ie resource persons to coordinate the activity on behalf of the Commission. We note that from the point of view of its Chief Executive Officer, the IEBC would not be drawn into the other operational functions of procuring the platform for electronic voting. The DRC noted that in such Departmental Elections, it is the settled practice and understanding that the IEBC provides human resource expertise, while the client organization makes necessary arrangements for the voting platforms, systems and other logistics.

20. Therefore, in approaching its duties and responsibilities under the KISM elections Regulations, the IEBC has considerable level of discretion in terms of operations and logistics. The IEBC could utilize its own in-house electronic voting platforms (if available) or use such technology in the possession of the client organization or, in consultation

with the client organization (in this case KISM), hire the same from suitable third parties. The DRC concludes that there is no provision in law that would support a decision to direct the IEBC to procure systems for electronic voting at Departmental Elections such as the KISM 2023 Council elections. In the same vein, there is no legal provision that bars KISM from using its own in-house electronic elections Platform system (if any) or, outsourcing such from another suitable public entity, to be deployed to conduct its electronic voting at its Council elections.

21. It appears that the conduct of Departmental Elections involves a measure of shared responsibility between the IEBC and its client organizations. The DRC also takes judicial notice of the fact that in the recent past, the IEBC has conducted fair, free, transparent and credible elections for various professional bodies in Kenya that are members of the Association of Professional Societies in East Africa (APSEA) employing electronic voting platforms supplied by ICPAK which, like IEBC and KISM, is also a public body.

22. For all his numerous objections to the aspects of procurement of an electronic voting platform, the Complainant has not alleged or presented any evidence to suggest, that the electronic voting platform hired from the ICPAK is not suitable or otherwise of unacceptable quality. The complaint is based solely on misconceptions and misunderstanding of how the system of electronic voting works. We take judicial of the fact that ICPAK is a public body and one of the organizations that owns technological solutions for electronic voting. Even if, for argument's sake, the IEBC were directed to procure such a platform, ICPAK stands in a prime position to be awarded the tender to provide electronic voting platform facilities because of its reputation and position as a public body, and the provisions of law regarding intra-government procurement. This is affirmed by the provisions of section 4 (2) (c) of the Public Procurement and Asset Disposal Act 2015 which states as follows:

For the avoidance of doubt, the following are not procurement or asset disposal with respect to which this Act applies: (c) acquiring of services, provided by government or government departments.

Considering the balance of convenience, we do not find any merit in the Complainant's motion to invalidate the ongoing procurement of the electronic voting system from ICPAK.

23. In view of our findings and observations, we have not been presented with any evidence to suggest that the fundamental principles for free and fair elections set out in Regulations 4 and 20 have been or are being contravened. In the circumstances the claim for orders for the IEBC to procure systems for electronic voting is not merited and fails.

Transparency, fairness and role of agents in the electronic voting process

24. It is within the mandate of the IEBC to inter alia supervise the casting of votes, and accredit a person as an agent or observer for purposes of the KISM elections. The Regulations also provide that the KISM Council elections shall be conducted in a free, transparent and fair manner. From the evidence before the DRC, the IEBC Returning Officer shall have full access rights to log into the system for electronic voting, monitor and supervise the casting of votes at any time during the voting period. There is nothing in the regulations or operational procedures that prevents the Returning officer from ensuring that Candidates and their accredited Agents are present to observe proceedings specifically at the time that he would be logging into the system to supervise the casting of votes.

25. In an electronic voting system, it may be difficult to ensure the participation of candidates' agents and observers since there are no physical polling stations. The DRC being seized of a complaint about the electoral process, and having listened to the parties and witnesses, is satisfied that from the mock election held on the 8th December 2022, candidates and their agents did not have any reasonable opportunity to observe or otherwise ascertain the fairness or transparency of the voting process.

26. During the hearing, the Complainant informed the DRC that despite his name being on the Register of Members, he did not receive the token and link to enable him cast his vote. He was apprehensive that many other members might be similarly inconvenienced and would fail to cast their votes at the January 2023 KISM elections.

To address these issues we give the following directions:

(i). During the voting period, KISM and the IEBC shall make appropriate provisions and arrangements for a tallying centre at which the Returning Officer shall access the electronic voting platform in the presence of candidates and any accredited agents, for purposes of supervising the casting and tallying of votes.

(ii). During the voting period, KISM and IEBC shall make administrative and operational protocols to provide all appropriate assistance to voters who might be facing any connectivity challenges or other system issues relating to the validation of their credentials to resolve any such challenges and enable them to cast their votes.

(ii). The arrangements and protocols referred to in the preceding paragraph shall include but not be limited to the provision of adequate and accessible: (A) Help Desks, (B) Dedicated Telephone numbers or hotlines (C) Duly trained Voter-Support Officers and (D) Voter Assistance Centres. Accredited Agents shall be granted access to the Help desks.

(iii). The onus of proving that all necessary resources and facilities required to give effect to these directions have been provided, shall be upon KISM.

CONCLUSION

27. In conclusion the Complainant's case before us is not merited and fails. However, arising from his oral presentations made during the hearing of his case, the DRC has granted the orders and directions indicated hereinabove to secure the democratic rights of the Complainant and any other parties seeking to participate in the KISM Council January 2023 elections. The parties shall bear their own costs. It is so ordered.

28. The foregoing is the judgment of the Majority of the DRC with one member dissenting in respect of the determinations relating to the mandate, power and functions of the IEBC.

Judgment dated and delivered at KISM, Nairobi on the 6th day of January 2023.

G. Wamaitha (Ms)

M. N. Wabwile (Prof).....

M. Mburugu (Ms) 

K. Muema (Mr)..... 

C. Odida (Mr)..... 

IN THE PRESENCE OF:

.....For the Complainant
.....For KISM
.....For the KISM Registrar
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