



THE SUPREME COURT OF KENYA

**IN THE MATTER OF AN APPLICATION BY THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION FOR AN ADVISORY OPINION UNDER ARTICLE 163(6)
OF THE CONSTITUTION OF KENYA**

SC REFERENCE NO. E004 OF 2024

DATE OF ADVISORY OPINION: 5TH SEPTEMBER, 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Reference is struck out.

Background

The Applicant, the Independent Electoral and Boundaries Commission (IEBC), filed a request for an Advisory Opinion dated 4th July, 2024 pursuant to Article 163(6) of the Constitution, Section 13 of the Supreme Court Act, Cap 9B and Sections 4(c) & 36 of the Independent Electoral Boundaries Commission Act, Cap 7C. The Reference seeks answers to the following questions:

- i. Whether IEBC can undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners.***
- ii. Whether IEBC can conduct a review of the names and boundaries of constituencies and wards when the timelines envisaged under Articles 89(2) and 89(3) as read with Section 26 of the County Governments Act have lapsed.***
- iii. Whether the constitutional timelines envisaged under the provisions of Article 89(2) and 89(3) as read with Section 26 of the County Governments Act can be extended, and if so, by whom and under what circumstances.***

It was the Applicant's submission that first, on whether IEBC's Secretariat can act in place of Commissioners, IEBC's position was that, while the Secretariat may handle the day-to-day running of the Commission and even defend or institute suits, it cannot undertake core constitutional functions such as boundary delimitation, elections, or referenda. These responsibilities belong exclusively to the Commissioners, who are ultimately accountable to the people of Kenya. Second, on the effect of not carrying out boundary delimitation, IEBC stressed that this undermines one of the most important constitutional principles; equality of the vote. That the last delimitation was based on the 2009 census when the population stood at about 38 million and with the population now above 46 million, failure to revise boundaries risks serious disparities, leading to over- or under-representation and diluting the value of votes. IEBC therefore argued that delimitation after every census, and before the next General Election, is crucial to fair representation. Third, regarding constitutional timelines, IEBC acknowledged that Article 89(2) sets a strict schedule, but argued that it should be read together with Article 81(d) on

fair representation. The Commission thus requested the Court to balance these provisions by excluding from the calculation the period during which the office of Commissioners has remained vacant. In its view, this would prevent punishing the institution for circumstances beyond its control, while still respecting the need for electoral fairness. IEBC also pointed out that the Constitution did not anticipate a situation where delimitation timelines lapse without implementation. With the 2027 General Election fast approaching, it argued that this issue requires urgent resolution, as no concrete legislative process has been identified to address the current gap.

The Office of Attorney General (the Interested Party) in arguing its preliminary objection submitted that the Reference is invalid on account of IEBC not being properly constituted as envisaged under Articles 88 and 250(1) of the Constitution due to the vacancies in the office of the Commissioners thereof at the time the Reference was filed. Second, that the matters/questions raised in the Reference are subject of proceedings before the High Court in *Kilifi HCCHR No. E007 of 2024*, which was instituted first in time. Thirdly, that the matters/questions in issue are not urgent to warrant the exercise of the Court's advisory opinion jurisdiction notwithstanding the pending suit in the High Court; that the urgency, if any, has dissipated in light of the expiry of the constitutional timelines under Article 89(2) of the Constitution and the absence of Commissioners to undertake the delimitation of boundaries of electoral units. Fourthly, that the matters/questions in issue are not novel and have in fact been settled by the Supreme Court in a number of decisions. Finally, that there is a separate legislative process, which is at an advanced stage, to remedy the legal quagmire.

The Court crystallised the following issues for determination:

- i. *Whether this Court has jurisdiction to render the advisory opinion and if so;*
- ii. *Whether IEBC can undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners;*
- iii. *Whether IEBC can conduct a review of the names and boundaries of constituencies and wards when the timelines envisaged under Articles 89(2) and 89(3) as read with Section 26 of the County Governments Act have lapsed.*
- iv. *Whether the constitutional timelines envisaged under the provisions of Article 89(2) and 89(3) as read with Section 26 of the County Governments Act can be extended, and if so, by whom and under what circumstances.*

Upon consideration the Court made the following findings:

1. **Issue 1:** The Court held that the IEBC's Secretary and Chief Executive Officer, irrespective of whether or not IEBC's Commissioners are in office, is constitutionally clothed with the competence to seek an advisory opinion from this Court under Article 163(6) of the Constitution. To do so however, the Secretary must approach this Court with a clear and definite averment that he or she is seeking an advisory opinion in that capacity only or with the authority of the IEBC upon a resolution of that commission which resolution ought to be in writing and presented before the court. Further, that the IEBC is a corporate body while the Secretariat is not and therefore in the absence of the Commissioners, the Secretary has no independent power to bring proceedings in the nature of the Reference before us on behalf of the Commission.

Since, the Reference was filed by IEBC qua IEBC and not by its Secretary in that capacity, the Court held that the Reference was one for striking out. However, in light of the public interest inherent in the matter, the nature of the dispute, the broader interests of the parties, and the need to offer guidance both to the judicial process and to the courts below, the Court considered

it prudent to pronounce itself on all the substantive questions raised. The Court also held that its advisory opinion jurisdiction should not attract the rigidity of adversarial proceedings and so the public interest to render an opinion should override the fact that the proceedings may have been filed without Commissioners in office.

2. **Issue 2:** The Secretary of the Commission, though a constitutional office holder, is an employee of the Commission and cannot be equated to nor be considered a Commissioner. Further, even though the secretariat carries out the day to day functions of the Commission, their duties must be authorized by the Commissioners. The function of delimitation of electoral boundaries, as provided for under Article 88(4)(c), is a substantive constitutional responsibility that requires the deliberation and approval of the Commissioners of IEBC acting as a collective body. In the absence of Commissioners or the requisite quorum of Commissioners, IEBC is constitutionally incapacitated from undertaking or purporting to undertake the exercise of delimitation of electoral boundaries and other constitutionally mandated electoral processes.
3. **Issues 3 & 4:** The question of whether the IEBC can lawfully undertake a review of constituency and ward boundaries after the expiration of the timelines set out in Articles 89(2) and 89(3) of the Constitution, read together with Section 26 of the County Governments Act, is one that only a duly constituted Commission, comprising the Chairperson and other Commissioners, can bring to this court to determine. Prior to the Commission first considering and applying its mind to the matter, particularly in light of the ongoing legislative intervention pending at the Senate, this Court lacks any basis upon which it can assess or evaluate the propriety or validity of any decision, or failure to decide, on its part.

Following the above findings, the Court issued the following consequential orders:

- i. ***The Preliminary Objection by the Attorney General be and is hereby overruled;***
 - ii. ***The Reference dated 4th July, 2024 be and is hereby struck out; and***
 - iii. ***Each party shall bear its costs.***
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