

## **WHY UHURU IS NOT A TEMPORARY INCUMBENT**

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**Temporary incumbency** of the President occurs according to article 134 of our constitution “during the period commencing on the date of the first vote in a presidential election, and ending when the newly elected President assumes office.” It also occurs during the period when as a result of the absence of the President, the Deputy President acts as President under Article 147 (3). During this period, the President’s power is diminished in as far as the following functions are concerned:

- (a) the nomination or appointment of the judges of the superior courts;
- (b) the nomination or appointment of any other public officer whom this Constitution or legislation requires the President to appoint;
- (c) the nomination or appointment or dismissal of Cabinet Secretaries and other State or Public officers;

The Presidential election of 8<sup>th</sup> August 2017 constitutes a “first vote in a presidential election” and should ordinarily usher in the period of “**temporary incumbency**” pending the assumption to office of the president elect. However, on 1<sup>st</sup> September 2017, the Supreme Court declared that “the presidential election held on 8<sup>th</sup> August 2017 was not conducted in accordance with the constitution and the applicable law, rendering the declared result invalid, null and void.”

*The question then is whether the president elect’s election having been voided by the Supreme Court was restored to the position he was in on or before 7<sup>th</sup> August, a day before the election, (and therefore enjoying full presidential powers including in relation to appointment), or whether in fact, as a result of the election having taken place and only the results thereof being declared invalid, the president was now a temporary incumbent.*

A purposive interpretation of article 134 suggests that “temporary incumbency” sets in only when a first election has been called and concluded and a President elect is unchallenged. In this case, the incumbent is governing on the shadow of an impending change in administration as represented by the President elect. The legal mischief sought to be prevented by this rule is that under no circumstances must such a fading presidency be seen to be making senior appointments that would constrain an oncoming administration. Temporary incumbency therefore exists where there is no controversy that incumbency will cease within a determinate and transitional period.

This interpretation is further reinforced by the phraseology used in article 134. The article provides that during this period the incumbent “*may not exercise the powers of the President specified in clause (2)*.” The constitution uses the permissive term “may” rather than “shall” indicating the non-mandatory nature of such incapacity.

Any other interpretation that suggests that the president in the present circumstance is hemmed in by temporary incumbency restrictions will precipitate a crisis within government, by incapacitating the smooth functioning of the state which the constitution must be assumed to aspire against. An opposite interpretation would also mean that, the president cannot appoint a new IEBC commission if reason should arise to do so (such as mass resignation, the occurrence of a catastrophe etc) rendering the possibility of holding fresh election anticipated by article 140(3) impossible – a crisis not anticipated by the constitution. The constitution’s end is a social order and certitude and not paralysis and chaos which would be the result of the attempts of placing the current period within the realm of “temporary incumbency.”

In my view therefore, that given that the court found the election of August 8<sup>th</sup> was invalid ab initio (and that therefore no election took place), **the first election** contemplated by article 134 has not taken place (instead, “the first vote” has now been set for 17<sup>th</sup> October, 2017)

and the president's appointment authority contemplated by article 132(2) of the constitution remains active for the next 60 days.

Should an interpretation that temporary incumbency has been triggered by the invalidated elections, it follows that a fresh election must by all means possible be held in 60 days. The reason is obvious- the effective functioning of the country must not be impaired by the fettering of presidential powers any longer than the prescribed period. However, if IEBC is rendered unable to conduct elections within the 60 days as prescribed, it becomes clear that the country enters a period of constitutional crisis not envisaged by the current law. NASA's call as represented by its public statement for the resignation of CEO IEBC, one Commissioner and several senior staff, together with a suit seeking to declare the IEBC as currently constituted incompetent to conduct the fresh presidential election as ordered by the supreme court (filed in court on the same day the ruling on the presidential petition was delivered), is an attempt to make it impossible for the fresh elections to be conducted within the prescribed 60 days. The result sought by NASA are clear- trigger a constitutional crisis and negotiate outside the ambit of the current constitution for a form of power sharing.