

SPECIAL ISSUE

Kenya Gazette Supplement No. 161 (Senate Bills No. 48)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

SENATE BILLS, 2021

NAIROBI, 20th August, 2021

CONTENT

Bill for Introduction into the Senate—	PAGE
The Elections (Amendment) (No. 3) Bill, 2021	1209

**THE ELECTIONS (AMENDMENT) (No. 3) BILL,
2021**

A Bill for

**AN ACT of Parliament to amend the Elections Act to
allow the use of a candidate’s popular name in an
election; and for connected purposes**

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Elections
(Amendment) (No. 3) Act, 2021.

Short title.

2. Section 2 of the Elections Act, in this Act referred
to as “the principal Act” is amended by inserting the
following new definitions immediately after the definition
of the word “polling station” —

Amendment of
section 2 of No.
24 of 2011.

“popular name” means a name by which a
candidate is known to the public, but which does
not appear in the national identity card or passport
of the candidate; and

“party primary” means the process by which a
political party elects or selects a candidate for a
forthcoming general election or by-election.

3. The principal Act is amended by inserting the
following new section immediately after section 32—

Insertion of new
section 32A in
No. 24 of 2011.

Use of popular
name on
nomination and
election ballot
papers.

32A. (1) A candidate’s popular name
may be included on a ballot paper for
purposes of a party primary or an election.

(2) A candidate shall apply to the
Commission, in the prescribed form, for the
inclusion of the candidate’s popular name in
terms of subsection (1)—

(a) in the case of a party candidate, no
later than twenty-one days before
the submission of names under

section 31(2B);

- (b) in the case of an independent candidate, at the time of submission of the candidate's symbol under section 32(1) and (1A);

(3) The Commission shall, within seven days of receipt of an application under subsection (2), notify the candidate of its decision in writing.

(4) Where the Commission approves the use of a candidate's popular name under subsection (3)—

- (a) the Commission shall issue the candidate a certificate to prove that the Commission has authorised the use of the popular name in terms of this Act; and
- (b) the candidate's popular name shall appear on a nomination or election ballot paper—
 - (i) in the format approved by the Commission;
 - (ii) on the documents relating sections 31(2A), (2B), 2(C) and 2(D), 33(1)(c) and (2) and 86(1)(c); and
 - (iii) on any other document originating from the candidate, candidate's party or the Commission in relation to that nomination or election.

4. Section 109 of the principal Act is amended—

- (a) in subsection (1) by inserting the following new paragraph immediately after paragraph (c)—
 - (ca) prescribe the criteria for the use of a popular name during a party primary or an election;
- (b) in subsection (3) by inserting the words “and the Senate” immediately after the words “the

Amendment of
section 109 of
No. 24 of 2011.

National Assembly”; and

- (c) in subsection (4) by inserting the words “and the Senate” immediately after the words “the National Assembly”.

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons

The purpose of this Bill is to amend the Elections Act, No. 24 of 2011, to allow a candidate to be presented to the electorate on party primary or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate.

Currently, the law only permits the use of a candidate's official name as it appears in the register of voters and in the candidate's identification documents. A candidate who wishes to have his or her popular name included on a ballot paper has to go through the lengthy process of officially changing his or her name through the procedures set out under the Registration of Persons Act, Cap 107, the Registration of Documents Act, Cap. 285 and the Rules and Regulations made under the two Acts.

The ultimate goal of an election is to ensure that the electorate choose their preferred leaders in a free and fair environment. Name recognition thus becomes an important aspect of a free and fair election and should be enabled to the fullest extent. It ensures that a voter easily identifies his or her preferred candidate on a ballot and therefore votes in the way he or she intended. Candidates should therefore not be unduly restricted in the way they present themselves to the electorate on the ballot and other election-related material as this hinders the realization the candidates' right to, without unreasonable restrictions, contest in an election and the electorate's right to free expression of their will, as contemplated under Article 38 of the Constitution.

This Bill therefore seeks to provide for the inclusion of a candidate's popular name on a ballot paper while at the same time safeguarding the sanctity of the electoral process.

Further, to ensure that this flexibility does not prejudice a free and fair election in any way, the Independent Electoral and Boundaries Commission would be required to approve the use of a popular name in an election.

The Bill also proposes to amend section 109 of the Elections Act to ensure compliance with Articles 94(5) of the Constitution in the approval of Regulations made pursuant to the proposed new clauses, and the Elections Act in general.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative power to the Independent Electoral and Boundaries Commission to enable the Commission to determine the conditions that may limit the use of a popular name on a ballot paper.

The Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

Under Article 110(1) of the Constitution, a Bill concerning county governments includes a Bill relating to the election of members of a county assembly or a county executive. This Bill seeks to amend the Elections Act to allow the use of a candidate's popular name on nomination and ballot papers. This includes a candidate who contests in a county assembly or in a gubernatorial election.

The Bill is therefore one that concerns county governments in terms of Article 110(1)(a) of the Constitution.

Statement that the Bill is not a money Bill, within the meaning of Article 114 of the Constitution

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

EPHRAIM MAINA,
Senator.

Section 2 of No. 24 of 2011 which it is proposed to amend—

2. Interpretation

In this Act, unless the context otherwise requires—

“adult” has the meaning assigned to it in Article 260 of the Constitution;

“agent” means a person duly appointed by— (a) a political party or an independent candidate for the purposes of an election under this Act; or (b) a referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent;

“ballot box” means a transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period;

“ballot paper” means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;

“biometric” means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures;

“campaign period” means the period specified as such in the notice issued by the Commission in relation to an election;

“candidate” means a person contesting for an elective post;

“Commission” means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

“constituency” means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;

“constituency register” means the register of voters compiled in respect of each constituency by the Commission;

“county” means one of the counties into which Kenya is divided under Article 6(1) of the Constitution and specified in the First Schedule of the Constitution;

“county assembly” means a county assembly constituted in accordance with Article 177 of the Constitution;

“county election” means one of the election of a county governor or a member of a county assembly;

“disability” has the meaning assigned to it in Article 260 of the Constitution;

“election” means a presidential, parliamentary or county election and includes a by-election;

“electoral area” means a constituency, a county or a ward;

“election court” means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution or the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of this Act;

“election material” means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election;

“election offence” means an offence under this Act;

“elections officer” means a person appointed by the Commission for the purposes of conducting an election under this Act;

“election period” means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14, 16, 17 and 19 and the Gazettement of the election results;

“election results” means the declared outcome of the casting of votes by voters at an election;

“harambee” means the public collection of monies or other property in aid or support of a cause or a project;

“identification document” means a Kenyan national identification card or a Kenyan passport;

“illegal practice” means an offence specified in Part VI; “independent candidate” means a candidate for presidential, parliamentary or county elections who is not a member of a political party;

“integrated electronic electoral system” refers to a system that includes biometric voter registration, biometric voter identification and electronic result transmission system.

“nomination” means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;

“nomination day” in respect of an election, means the day gazetted at least sixty days before an election by the Commission as the day for the nomination of candidates for that election;

“observer” means a person or an organisation accredited by the Commission to observe an election or a referendum;

“parliamentary election” means the election of one or more members of Parliament;

“party list” means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 28, 34, 35, 36 and 37;

“petition” means an application to the election court under the Constitution or under this Act;

“political party” has the meaning assigned to it in Article 260 of the Constitution;

“polling station” means any room, place, vehicle or vessel set apart and equipped for the casting of votes by voters at an election;

“presidential election” means an election of a President in accordance with Articles 136, 139(1)(b) and 146(2)(b) of the Constitution;

“public officer” has the meaning assigned to it in Article 260 of the Constitution;

“public resources” include—

- (a) any vehicle, or equipment owned by or in the possession; or
- (b) premises owned or occupied by, any government, state organ, statutory corporation or a company in which the Government owns a controlling interest; “referendum” means a poll held under Part V;

“referendum committee” means a national or a parliamentary constituency committee comprising of persons intending to support or oppose a referendum question;

“referendum officer” means a person appointed by the Commission for the purpose of conducting a referendum;

“referendum question” means a question upon which voters shall vote in a referendum as specified in section 49;

“registration officer” means a person appointed by the Commission for the purpose of preparing a register of voters;

“Register of Voters” means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically;

“returning officer” means a person appointed by the Commission for the purpose of conducting an election under this Act;

“supporter” means a voter who supports the nomination of a candidate;

“vessel” includes any ship, boat or any other description of vessel used in navigation;

“voter” means a person whose name is included in a current register of voters;

“voter’s card” deleted by Act No. 12 of 2012, Sch.;

“voting period” means the period specified as such in the notice issued by the Commission in relation to an election;

“ward” means an electoral area within a county delimited in accordance with Article 89 of the Constitution.

Section 109 of No. 24 of 2011 which it is proposed to amend—

109. Regulations

(1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

- (a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;
- (b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad prisoner;
- (c) to provide for the regulation of the process by which parties nominate candidates for elections;
- (d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;
- (e) prescribe the procedure for making and determining claims to be registered and objections to registration;

- (f) authorise any registration officer to consider or determine any application, claim, objection or appeal, to summon any person to appear before them and give evidence on oath, and to administer an oath for that purpose and to order the production of any document relevant to any issue which the officer is required to consider and determine;
- (g) provide for the division of constituencies into units for the purpose of the registration of voters;
- (h) prescribe the conditions under which elections may be held in accordance with the provisions of the Constitution, this Act or any other written law relating to elections;
- (i) prescribe the amount of the deposit to be paid by or on behalf of candidates at all elections and the circumstances in which the deposit may be forfeited;
- (j) provide for the appointment of officers to preside at polling stations;
- (k) prescribe the facilities to be provided at polling stations and the persons who may be admitted to polling stations;
- (l) prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;
- (m) provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;
- (n) provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;
- (o) provide for the manner in which a voter with special needs including a person with a disability may vote or be assisted in voting;
- (p) prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;
- (q) prescribe conditions for the use of private motor vehicles, vessels or buildings at elections;
- (r) prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and

the persons entitled so to vote and the circumstances in which persons may so vote;

- (s) provide for the allocation by the Commission, in a just and equitable manner of the use of state owned radio and television broadcasting services during any election period;
- (t) prescribe the procedure to be adopted by the public in making representations for the alteration of electoral area boundaries;
- (u) prescribe the forms which may be used under this Act and the fees in respect of anything to be done under this Act;
- (v) prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, armed forces, elections officers and other citizens of Kenya providing essential services;
- (w) prescribe the procedure for voting for citizens residing outside Kenya;
- (x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;
- (y) provide for the conduct of election observers, the media, monitors and evaluators and organisations carrying out civic and voter education;
- (z) provide with reasonable grounds for the postponement of elections;
- (aa) provide for mechanisms for carrying out effective voter education;
- (bb) provide for the mode of declaration of the result of an election;
- (cc) prescribe the manner of enforcing the Electoral Code of Conduct; or
- (dd) provide for the conduct of campaigns during a referendum or an election;
- (ee) provide for the financing of campaigns during a referendum or an election;
- (ff) prescribe anything which is required to be prescribed or is necessary or desirable for the better giving effect to this Act.

(2) The power to make regulations conferred on the Commission under this Act shall be—

- (a) for the purpose and objective of giving effect to the Constitution and this Act;
- (b) limited to the nature and scope specifically stipulated in the Constitution and this Act; and
- (c) based on the general principles and standards contained in the Constitution and this Act.

(3) The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election: Provided that this applies to the first general election under this Act.

(4) The Commission shall publish in the Gazette, not later than sixty days prior to the date of a general election, the regulations approved by the National Assembly under subsection (3).