Weaponizing Post-Election Court Challenges: Assessing Losers' Strategic Motivations

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Abstract

Losing candidates have increasingly relied on courts to settle post-electoral disputes across multiparty regimes. However, scholars have not systematically explored candidates' motivations to mount legal challenges. These motivations are important to understand when assessing whether judicial intervention in elections reinforces democracy. We argue that, while overturning electoral results motivates most candidates, many also use courts for other strategic reasons, such as to bolster future electoral prospects and negotiate government jobs. We pilot and deploy a classification scheme to highlight candidates' multiple motivations to file electoral petitions. Using an original database of sub-national court challenges after the 2013 Kenyan general elections, we code only ten of the cases as '*high probability*' attempts to overturn election outcomes. Meanwhile, the majority of Kenyan candidate petitioners seemingly 'weaponized' the courts by pursuing challenges that reflected multiple motivations. Our findings have implications in African and western democracies, where candidates increasingly use courts to challenge elections.

Introduction

Losing candidates' compliance with electoral results has become a hallmark of legitimate democratic elections (Przeworski 2003). Yet, across multiparty regimes losers' consent is far from guaranteed. Since 1990, in approximately 58% of presidential and parliamentary elections in non-established democracies, losing political parties failed to accept electoral

results by mobilizing supporters in the streets, boycotting second rounds of elections, and mounting legal challenges in courts.¹ Moreover, this rate of non-compliance appears highest in sub-Saharan Africa (80%).²

In recent years, data show that losing executive and parliamentary candidates have relied increasingly on courts to settle post-electoral disputes.³ When taken at face value, judicial intervention into post-electoral dispute resolution may be a democratic boon because it signals losers' willingness to work within the constitutional framework to resolve election-related conflict (Adams and Asante 2020; Henríquez, Ayoub, and Ellis 2010; Mozaffar and Schedler 2002). However, scholars and policymakers should know that jumping to this conclusion may be premature because our understanding of the factors that inform losers' decisions to challenge electoral outcomes in court is underdeveloped. Indeed, there may be unintended consequences of electoral litigiousness if petitioners are not primarily motivated by a desire to remedy perceived electoral irregularities. For instance, in places like Nigeria, the proliferation of sub-national post-election petitions has overwhelmed the judiciary's capacity to handle non-electoral cases, contributed to the politicization of judiciary, and ultimately weakened the legitimacy of the courts (Nkansah 2016; Suberu 2007). Additionally, increased litigiousness can undermine the democratic process as court rulings may potentially subvert the will of voters. Moreover, the negative consequences of electoral litigiousness are not only limited to multiparty regimes in Africa. In the recently concluded U.S. presidential elections, for instance, then incumbent president Donald Trump and his allies filed 64 unique cases that challenged the election results in 12 state courts and the Supreme Court, on allegations on fraud that even officials in his own administration claimed lacked any factual basis (Benner and Schmidt 2020).⁴

¹ Results coded from V-DEM (v.8) 'election losers accept results' variable and reflect the percentage of election years where at least some losing parties failed to accept electoral results.

² Based on the assessment of ten world regions since 1990.

³ Global examples include (Ellis 2012; Enweremadu 2011; Murison 2013; Nkansah 2016).

⁴ Although all but one of these cases were eventually unsuccessful, many believe that the court challenges, along with Donald Trumps' refusal to accept the outcome of the election,

This paper develops a classification of losing candidates' motivations to challenge electoral results in court. We contend that, across democracies, losing candidates who chose to use the courts to challenge electoral outcomes, may do so for diverse set of overlapping strategic and non-strategic reasons, many of which are unrelated to overturning electoral results through the courts. While individual petitioners' motivations are impossible to obtain, we can gain crucial insights about the petitioners' motivations through interviews with candidates and carefully examining 1) the merits of the petitioners' claims, 2) the competitiveness of each sub-national election's outcome, and 3) petitioners' behavior following the court rulings. Based on a comprehensive data set of Kenyan court petitions filed in 2013, supplemented with interviews with MPs and losing candidates, we develop a non-exhaustive set of motivations based on four goals that losing candidates have: 1) overturning election results, 2) managing their political reputation, 3) using the court cases as leverage to obtain a government appointment, and 4) fulfilling psychic needs.

We apply our classification scheme based on the first three of these motivations to the seventy-one post-election petitions brought before Kenyan courts by candidates who challenged the validity of an election outcome at either the constituency or county level following the 2013 Kenyan general elections. This includes cases brought in races for Senator, MP, Women's Representative, and Governor.

Our qualitative analysis of the 2013 Kenyan post-election petitions provides confirmatory evidence of our theory that petitioners have diverse strategic and non-strategic reasons for approaching the court. In fact, our coding scheme suggests that ten out of seventy-one petitions were filed by candidates who had a relatively high expectation that the court would overturn the election outcome. The remaining sixty-one cases, we code as having either a low or medium probability of overturning the elections and many are associated with other overlapping strategic motivations including the desire to buttress one's reputation or to secure a political appointment.

may have, according to one poll, contributed to more than 64% of Republicans distrusting the integrity of the elections (Ognyanova et al. 2020).

Theoretical background

Research on electoral compliance highlights several legal and extra-legal ways that losing candidates and parties can respond the electoral defeat: accept electoral outcomes, mobilize supporters in post-electoral protest, submit petition to institution mandated with electoral adjudication (courts/EMB), boycott second round of executive elections, and boycott newly elected legislature by not taking seats (e.g, Chernykh 2014: 1367). Despite these diverse methods of disputing electoral results, scholars have focused on political parties and losing candidates' decision to engage in post-election protest (e.g., Beaulieu 2014; Brancati 2016; Hafner-Burton, Hyde, and Jablonski 2018). Meanwhile, only a handful of studies have systematically analysed elites' decision to use courts to remedy violations of electoral integrity (Chernykh 2014; Hernández-Huerta 2020; Lago and Coma 2017; Popova 2006, 2010).

Chernykh (2014), for example, uses an original cross-national database on post-electoral political party behavior in Eastern Europe, and finds that in approximately 5% of elections at least one political party challenged the results in court. Popova's (2006, 2010) research on judicial intervention into Russian and Ukrainian elections shifts the unit analysis from political parties to individual candidates and examines candidates' decision to accept or legally challenge the loss of registration status in the pre-election period. Although her research focuses on candidate engagement with courts during pre-electoral periods, it is instructive for two reasons. First, Popova situates her research in the well-established literature on the outcomes of litigated cases (Klerman and Lee 2014; Priest and Klein 1984) and develops a theoretical model to explain 1) candidates' decision to legally challenge deregistration, and 2) the success rate of challenges. Second, Popova constructs an original database on the characteristics of approximately 4000 candidates in Russia and Ukraine and finds that candidates with a realistic chance of winning were the most likely to challenge their deregistration in the courts and gain a favourable court ruling (Popova 2010: 1221).

While research on electoral justice in Africa has not adopted approaches similar to Popova or Chernykh, it provides crucial insight into the dynamics of electoral challenges. Several studies suggest that courts exercise greater autonomy when making rulings on

parliamentary election disputes, relative to those involving presidential elections (Gloppen and Kanyongolo 2008; Murison 2013). This could account for the higher rates at which parliamentary candidates use the courts to mount challenges (relative to executive candidates) as well as the overtime increase in sub-national petitions in countries like Nigeria, Uganda, and Malawi and the correspondingly higher rate that petitions are being upheld. Murison (2013) highlights this perspective in her assessment of electoral petitions filed recently in Uganda. In 2011, Ugandan lower courts overturned the election results of several 'high-profile' parliamentary candidates affiliated with the ruling National Resistance Movement (NRM), but the Ugandan supreme court remained unwilling to rule against the NRM in the 2006 presidential election petition, even though it acknowledged widespread irregularities.

The conventional wisdom is to consider judicial intervention into the electoral process as a boon for African democracy (e.g., Adams and Asante 2020; Bratton 1998; Enweremadu 2011) because it signals losers' willingness to work within the constitutional framework to resolve election-related conflict, instead of resorting to electoral violence or contentious protests. However, scholarship has also begun to scrutinize the proliferation of electoral petitions and carefully examine the negative implications for democratization. Nkansah (2016) questions the motivations of petitioners in the context of Nigeria, stating the petitioners' use petitions to 'vent their frustration' (Nkansah 2016: 12). Suberu (2007: 104) warns that increased electoral litigiousness in Nigeria will ultimately compromise the legitimacy of the judiciary, as the high volume of sub-national cases delay the dispensation of justice in non-electoral matters and politicize the judiciary. Moreover, the proliferation of court cases may subvert the democratic process, because judges can be manipulated to rule in a particular way (Onapajo and Uzodike 2014), and even if the judiciary exercises impartiality it assumes a role which it was never intended to perform: that of a 'credible and competent electoral administration'. (Suberu 2007: 104)

Our project seeks to make three contributions to these ongoing debates. First, we advance the literature on losers' electoral compliance by expanding the scope of inquiry beyond extra-legal forms of non-compliance (i.e., protests) to include legal challenges. We argue that the focus on the judiciary as a venue for post-electoral dispute resolution is theoretically

important given the apparent rise of legal electoral challenges in Africa and other developing world-regions, and the implications that institutionalized forms of conflict resolution can have for political stability and democratization. Second, we shift the unit of analysis from national-level political parties to individual candidates to sub-national elections in Africa. We do this for methodological and substantive reasons. Methodologically, examining sub-national elections increases the number of observations and improves our leverage in understanding the dynamics of losers' strategies. From a substantive perspective, various studies in the African context indicate that factors influencing losers' electoral compliance strategies at the national level (especially for executive elections) differ in crucial ways for parliamentary elections.

Third, we adopt a similar approach to Popova (2010) and incorporate insights from research on the outcomes of litigated cases (Klerman and Lee 2014; Priest and Klein 1984) to develop a theory to explain the diverse motivations of petitioners. Understanding the strategic calculations of petitioners, will provide leverage in assessing the implications of judicial intervention on electoral integrity and democratization. Building off Nkansah's (2016) criticisms, if we find that petitioners are not only motivated by an attempt to remedy perceived irregularities, or to mobilize support for electoral reforms, we should rethink the perceived positive ramifications of increased judicialization of the electoral process.

Strategic use of Electoral Courts

Our theoretical starting point is to assume that losing candidates' decision to challenge an election outcome in the courts is often informed by cost-benefit rationality. That is, following perceived electoral irregularities, losing candidates carefully consider the costs and benefits of filing a petition and pursue a court challenge when the benefits of doing so outweigh the costs. As a theory building strategy, we assume that the costs for mounting a petition are known before the decision to file a petition. These costs include, court filing fees, legal counsel, securing witnesses, and the opportunity costs to engage in other types of electoral and non-electoral activities. What is less certain, however, are the benefits that potentially accrue to petitioners, which depend crucially on what motivates petitioners' decision to file a petition in the first place.

Expecting to overturn the results

Having a court overturn an election's result as a remedy for perceived violation of electoral integrity is the clearest motivation to file an election petition. Based on this motivation, a rational loser would more likely file a petition when there is a good chance of success and the court will overturn the results. While there are factors petitioners potentially consider when assessing their chances of success,⁵ our theory focuses on two: 1) the *margin of victory* of the petitioner's electoral contest and 2) the perceived *merits* of the petitioner's claims. Our logic here is straightforward. All things being equal, petitioners are more likely to expect a favourable petition judgment if they perceive the margin of victory for the winning candidate is relatively small, and believe they possess credible evidence of electoral irregularities, with the scope to indemnify popular will.

We conceptualize case merit by disentangling two interrelated characteristics of petitioners' claims. The first is the *legitimacy of the claims*, which encompasses the credibility of the evidence that the petitioners believe they can provide to support claims of non-compliance with the law. The second characteristic relates to the *scope of claims*: whether the petitioner believes their claims and evidence provided are sufficient in scale to affect the outcome of the election. In other words, does the petitioner satisfy the burden of proof?⁶

We can neither measure petitioners' belief about the closeness of the election or case merit, which may vary by candidate even if two candidates were in the exact same circumstances. However, as a coding exercise, for the margin of victory we use the lax cutoff of 10% between the winning candidate and the runner up to classify cases where candidate may have a reasonable expectation of winning a court case.⁷ Similarly, we adjudge a petition as having

⁵ Other factors include the perceived autonomy of the court, the court's previous petition rulings, petitioners' political affiliation with ruling political party, and petitioners' legal expertise.

⁶ Most countries, including Kenya, will not overturn an election based on procedural irregularities. Courts will only overturn an election when they doubt whether the election reflected the will of the people, requiring any petition to have sufficient scope.

⁷ Admittedly, a 10% margin of victory is a high threshold, but we consider it appropriate in our case, given high levels of uncertainty on how judges might rule following the overhaul

high case merit, when the claims brought before the court appear to be both *legitimate* and *scope* large enough to overturn the election results.⁸

Other Strategic Motivations

Anecdotal accounts suggest that losing candidates mount court challenges, even though the chances of their petitions being upheld are relatively low (Nkansah 2016, 122). Either the claims of electoral fraud/irregularities lack sufficient legitimacy and scope (i.e., low case merit), or the official vote tally indicates a substantial vote differential relative to the winning candidate. Whether we consider these petitioners irrational with respect to costs and benefits, depends on what motivates candidates' decision to file petitions. If overturning electoral results are these candidates' primary goal, then court proceedings are likely a sub-optimal approach. However, other goals may motivate petitioners.

We advance the argument that petitioner motivations are heterogeneous and often overlapping and petitioners may use courts strategically to achieve goals beyond overturning an election outcome. Courts can convey important information to many constituencies, including losing candidates' supporters, political elites, international actors, and citizens more generally. We are not the first to raise the possibility that electoral challenges in the courts (Murison 2013) or on the streets (Beaulieu 2014) can have an informational role. A careful examination of electoral petitions cases, even in sub-national elections, indicate that they generate considerable publicity among domestic and international audiences. Cases often last for weeks or months and involve salacious claims of electoral fraud and malpractice. Although losing candidates frequently make such claims in African elections outside court proceedings, hearing them debated in court can increase these claims' popular legitimacy.

of the legal framework guiding the petition process that occurred prior to the 2013 elections.

⁸ We acknowledge that case merit and electoral competitiveness are endogenous because courts take competitiveness into consideration when considering the standard of proof. However, we analytically disentangle these two factors on the assumption that they provide distinct information for losing candidates' calculations to pursue an electoral challenge.

In sum, we contend that losing candidates are often aware of the informational role of post-election dispute resolution processes and could rationally pursue a petition, even when the probability of success is low if it enhances their future re-election prospects or garners them material or emotional benefits. Consequently, we distinguish between *motivations to overturn results* and motivations to achieve other goals (*other motivations*). This conceptual disentangling is theoretically important because it allows us to examine the implications of petitioner motivations on the electoral dispute resolution process. However, making the empirical distinction between election petition cases is difficult because each petitioner may have multiple motivations for filing a case. Nevertheless, we believe it is important to classify the distinct ways in which filing a petition could be beneficial even when petitioners are not primarily motivated by the prospect of overturning election results.

We suggest three sub-types of *other motivations* that could inform the decision-making of losing candidates considering a post-electoral challenge: reputation management, bargaining chip, and psychic benefits. Our theorizing is based on a total of 36 background interviews with candidates who ran for office during the 2013 Kenyan elections conducted in 2015, and follow-up interviews in 2019-2020 with four candidates who filed petitions. To validate our conceptual approach, we focused in this paper on interview questions that asked Kenyan politicians to evaluate the dominant strategies of their peers because most politicians, especially losing candidates, may be less willing to admit personally pursuing post-election petitions for motivations other than overturning results. Importantly, we engage in this theory building approach with the caveat that these are ideal types of motivations, which are not necessarily mutually exclusive or mutually exhaustive.

Reputation Management

Petitioner believes that the probability of overturning the election outcome is low but pursues the court challenge because it provides a credible signal to supporters and other elites that despite the loss, she still has what it takes to win future elections. By signalling her credibility, a losing candidate can consolidate or increase her support base, ward off potential challengers within her party, and commence, albeit early, the campaign against the incumbent, all motivated by the prospects of winning future elections. Several politicians we interviewed explained how reputation management was an important motivation for many

petitioners. According to one, filing a petition, despite a large margin of loss, could help losing candidates solidify their support base:

[Candidates] want to hold onto, what we call, their backyard. You have people who supported you, however small, and when you throw in the towel so easily, they lose confidence in you. So you want to go to court and move a bit further, so that you can then tell that base that at the end of the day, we tried what we could, under the circumstances. So that they do not abandon your cause and abandon your quest to lead them. So that is usually another very important motivation that people have. (Respondent 37.2019. Author Interview. Nairobi, Kenya)

Another losing governorship candidate explained how filing a petition could help consume time and resources that a winning candidate would normally devote to constituency service, thereby increasing the losing candidates' electability in future elections:

[S]ometimes they also file because they want to derail the winning candidate. They do not want to give the winning candidate the undivided attention, the time to focus on delivering on their campaign agenda. So you're kept in court. (Respondent 38.2019. Author Interview. Nairobi, Kenya)

Bargaining Chip

Despite a low probability of victory in the courts, a losing candidate strategically files a petition and uses it as a bargaining chip to access some immediate material benefit, such as a government job or money. Research in African politics is replete with examples of how incumbent governments attempt to co-opt losing candidates by awarding them with cushy government jobs or side-payments (e.g., Arriola 2013). We suggest that court challenges offer additional opportunities for a losing candidate to burnish her credibility as 1) someone who could undermine the legitimacy of the winning candidate (or ruling party) between elections, or 2) a formidable opponent in future elections.

Several of the candidates we interviewed corroborated the bargaining chip motivation, explaining how some candidates initially filed petitions in elections involving high-profile candidates expecting to reap some rewards from the candidate/party if they agreed to withdraw the case.

That happened in the Nairobi gubernatorial seat a lot. You see Nairobi is the capital, and the budget for that position is very huge. I remember in 2017 when Governor Sonko won, Kidero, who was the losing candidate, had filed for a petition. It is said, again, that Sonko gave a lot of money for them to withdraw the case [...] Twenty to thirty percent of cases, of petitions are filed with that motivation in mind. (Respondent 39.2019. Author Interview. Nairobi, Kenya)

Non-Strategic Psychic Motivations

Elections are emotionally charged events, and the disappointment that losing candidates experience provides additional motivation to pursue a post-election petition, even when the probability of gaining a favourable ruling is low. Simply put, losing candidates may see the petition process as a way of inflicting financial and reputational costs on the winning candidate (Anderson, Blais, Bowler, Donovan, and Listhaug 2005) or making themselves feel better about their loss and gain a sense of closure. But unlike the reputation maintenance strategy, where the focus is on winning future elections, here the primary goal is the emotional satisfaction that comes from attempting to avenge defeat. Another politician we interviewed seemed to capture the psychic benefit motivation precisely. For him some losers filed post-election petitions in the 2013 elections,

Just because they are upset, and they think that they need to teach the opponents a lesson. We have seen people going to court even when the variance between the winner and the petitioner is over 2,000, 3,000, 10,000 votes, and therefore they could look into that and it's really a pain to decide whether or not, had the election been conducted fairly, that that was going to change the results. (Respondent 40.2019. Author Interview. Nairobi, Kenya)

Observable Implications of Other Strategic Motivations

What are the observable implications of the *other strategic motivations*? As explained previously in our discussion of *motivations to overturn the elections*, we could not directly measure individual expectations about petition success. Instead, we highlighted several

observable measures, which would likely be correlated with petitioner motivations to file a petition: *margin of victory* and *merits of the case*. For two of the three other strategic motivations (*reputation management* and *bargaining chip*), we argue that there are also observable implications of these motivations. However, similar to *motivations to overturn the election*, none of these observable implications represent evidence akin to a ‘smoking gun’; instead, they are preliminary guideposts that provide a foundation for future research.

First, if the motivation is *reputation management* in nature, then an observable implication is that the candidate runs again during the next election cycle — hopefully having burnished, or at least maintained, her reputation among potential voters, in part through the court case. Because potential voters need to be aware of petition and the resulting court case, the candidate should try to seek media coverage of the case and will likely also use traditional news and social media to publicize the case among their followers.

Second, if the petitioner is strongly motivated to use the case as a *bargaining chip*, then, observationally, for those candidates for whom the strategy was successful, after having ostensibly secured a post, the candidates should withdraw their case or upon a decision against them decide to not further appeal their case, so as not to incur further costs. Given they have secured a post, subsequently, we should see this candidate be appointed to a government position. Theoretically, the use of the bargaining chip should occur much more often for sub-national candidates of the party, which won the national elections (e.g. presidential elections in Kenya) because the party that controls the national government has relatively more governmental jobs to distribute to supporters.

Finally, there may be other strategic motivations we have not enumerated because they lack clear observable implications. Take for instance the scenario where a petitioner withdraws a case when provided with a monetary payout, instead of a government position, but we have no way of documenting this payoff. So for our classification purposes, we do not classify either these (which lack clear theoretical expectations) as well as non-strategic motivations,

such as garnering psychological benefits, for which we are unable to develop and explore observable implications.⁹

Court Cases in 2013

We summarize four important stages in the Kenyan election petition process.¹⁰ First, according to Kenyan law, all citizens have a right to file an election petition to contest election results. Petitions for constituency and county-level elections, the focus of our inquiry, are filed at the geographically assigned High Court. Second, any number of individuals can join to file a single petition, which costs 5,000 Ksh to file. Third, for a court to hear a petition it must meet specific procedural requirements set out in the Constitution and the Election Petition Rules. If the High Court grants a petition hearing, then the official petition process begins. After the hearings end, the judge either dismisses or allows (rules in favour of) the petition. Fourth, within thirty days of the High Court's decision, any party to the petition can appeal the ruling in the Appeals Court. Appeals Court judgments can also be appealed at the Supreme Court, whose decision is final.

2013 Kenyan Election in the Context of the Courts

We provide a short background to situate the Kenyan election-related court cases within Kenya's recent electoral development. In 2007, Kenya witnessed post-election violence. In response to the electoral violence, a grand coalition government was formed, and a new constitution was developed (Opalo 2014). The new constitution called for the creation of a bicameral parliament, and devolution, which created gubernatorial, senatorial, and women's representative positions under single member district rules. These new positions were contested for the first time in 2013.

⁹ For non-strategic motivations, there may be no observable implications without administering invasive experimental or psychological batteries to candidates.

¹⁰ Appendix A1 discusses Kenyan petition process in greater depth.

Regarding election management, the constitution specified a new electoral management body — the Independent Electoral and Boundaries Commission (IEBC). The constitution attempted to strengthen the independence of the body through several measures, including requiring a vetting procedure for potential commissioners and banning political party members and candidates from applying. The IEBC also attempted to improve the accuracy of the voter register and the efficiency of results transmission by introducing a biometric voter registration (BVR) and a new computerized results transmission system (Barkan 2013).

The 2013 election witnessed a new alliance (Jubilee Alliance) with Uhuru Kenyatta, as presidential candidate, and William Ruto, the vice-presidential candidate. Many perceived Kenyatta and Ruto as the incumbents, since they continued the dominance of ethnic presidential rule in Kenya since independence. Running against the Jubilee Alliance was the Orange Democratic Movement (ODM) and its coalition (Coalition for Reform and Democracy (CORD)), led by previous presidential contenders, Raila Odinga, and Kalonzo Musyoka.

A series of near disastrous technological failures marred the 2013 election day itself and played a large role in the court cases that ensued (Barkan 2013). According to the announced election results, Kenyatta narrowly escaped a second-round runoff with Odinga and the Jubilee Coalition won the majority of seats in the National Assembly (see Ferree, Gibson, and Long 2014). CORD lost their 2013 presidential bid, immediately cried foul play, and sought remedy in the Supreme Court. The Supreme Court, however, ruled in favour of the IEBC and upheld the presidential election results. As explained below, the Odinga court case was just one of many adjudicated by Kenyan courts after the 2013 elections.

Kenyan 2013 Petition Data & Petitioner Classification

We outlined *four* distinct motivations that potentially inform losers' decision to file an electoral petition: motivations to overturn the results, reputation management, bargaining chip, and garnering psychic benefits. In this section, we introduce a measurement strategy for sorting the non-psychic strategic motivations based on an analysis of sub-national post-

election court petitions following the 2013 Kenyan elections.¹¹ To undertake this measurement strategy, we build a database of all judgments and rulings of the 103 election petitions filed following the 2013 elections (see Appendix B1). Our analysis focuses on the 71 petitions clearly filed by candidates who lost an election, of which twenty-five were appealed at least once, and seven resulted in an overturned election.

Before discussing motivations, we show that petitions were evenly distributed across parties and major coalitions. Figure 1, indicates that while the absolute number of petitions filed by CORD and Jubilee is nearly identical (29, 27), CORD candidates filed more petitions as a percentage of their candidates at all levels.¹² Furthermore, the outcome of the presidential election was unclear when the majority of petitions were filed.¹³

Figure 1: Number of petitions filed by coalition

¹¹ One co-author, with detailed knowledge of Kenyan electoral law, coded the petitioner motivations.

¹² This difference is statistically significant χ^2 statistic ($p < .05$), but substantively small. Note, the number of candidates who file is greater than the number of petitions, as six petitions include multiple filers.

¹³ There was a four-day period between the filing deadline 4 April 2013 and the announcement of the presidential petition 30 March 2013.

To assess whether a candidate petition in our sample will have a reasonable chance of the courts overturning the election, we code petitions as ‘High probability’, ‘Medium probability’, and ‘Low probability’. We code these probabilities by examining the *competitiveness* of the candidate petitioner’s sub-national election, and the *merits* of the claims.

We assess electoral competitiveness based on the differences between the first two candidates using official results from the IEBC. Given the uncertainty of the electoral environment, we consider an election competitive if the difference in vote share between the winning candidate and the runner up is 10% or less.

We operationalize case merit through two indicators, *legitimacy* and *scope* of claims. To do so, we conduct a content analysis of petitioners’ claims included in the official court judgments made available to the public for each petition that received a hearing.¹⁴ We code legitimacy and scope based on the text of the summary of the grounds section of the petition. Importantly, we do not examine the determination of the judge while coding the case, because this could potentially bias our assessment of the merit and scope of the claims.¹⁵

For legitimacy, the coder checked each petition to see if the evidence provided was sufficient to prove the allegation.¹⁶ Whether the evidence was sufficient or not depended on the type of allegation. For a claim of inaccurate election results, a presentation of statutory forms showing discrepancies in all the polling stations allegedly affected constituted sufficient evidence. Accusations of bribery or violence are, by nature of the claim, harder to prove, since the petitioner had to show — through witnesses, physical evidence, police reports, etc. — that the event happened, *and* that the respondent perpetrated it. If the petitioner brought strong evidence to prove only that the event happened, the allegation was coded as having *medium legitimacy*. It was coded as having *high legitimacy* only if the petitioner provided

¹⁴ A court judgment includes a summary of the petitioner’s grounds, the responses from the respondents, witnesses’ testimonies, and the determination of the judge on each allegation.

¹⁵ We also did not examine petitions that were struck out or withdrawn, since these petitions’ court rulings do not discuss claims of election irregularities.

¹⁶ We only examined the sections on the summary of the grounds and the petitioner’s witness testimonies so that it would exclude evidence presented by the respondents or subsequent findings that the court made through scrutiny and recount exercises.

evidence that any of the respondents (i.e., winning candidates or IEBC officials) perpetrated the claim. After coding the individual allegations, a petition was coded as having legitimacy if most of its allegations had *medium* to *high* level legitimacy.

For scope, we estimated the number of voters affected by each allegation based on the number of affected polling stations or voters reported in the petitioner's claims, if this information was provided.¹⁷ If the sum of affected voters for all allegations was approximately greater than or equal to the vote margin between the election winner and the runner-up, we coded the petition as having sufficient scope.

Altogether, we code cases in the following manner (see Table 1). For a case to be 'High probability', it should be competitive with high legitimacy and sufficient scope. For a case to be 'Medium probability' the case has to be either competitive, irrespective of scope and legitimacy or uncompetitive but with high scope and legitimacy. A 'Low probability' case is uncompetitive and lacks both high legitimacy and scope.

High Probability	Under 10% difference (competitive), high legitimacy, sufficient scope
Medium Probability	EITHER Under 10% (competitive) irrespective of legitimacy and scope OR Over 10% (uncompetitive) AND high legitimacy and sufficient scope
Low Probability	Over 10% (uncompetitive) WITHOUT high legitimacy and sufficient scope

Table 1: Coding Classification for Probability of Overturning Election Results

To code observable implications of *bargaining chip* and *reputation management* we incorporate data on petitioners' behavior 1) before and after the petition ruling (i.e. do they

¹⁷ We estimate the number if the court documents did not contain this information.

withdraw cases or appeal unfavourable decisions) and 2) in subsequent elections (i.e. do they register as candidates in the 2017 elections).

We begin by exploring the observable implications of *bargaining chip* motivations, in which losing candidates may use the petition to access a government job or some material benefit. First, we limit the petitions under consideration to those that were withdrawn or struck out or cases where the petitioner did not file an appeal or lost the petition. Because a losing candidate who filed an appeal or won the petition would no longer have a potential concession to offer when negotiating for a government job. Among this subset of cases, we classified cases as bargaining chip if petitioners received either a government/parastatal appointment between 2013 and 2015. However, our approach cannot rule out the possibility that the candidate was offered a position without explicitly using the case as a bargaining chip. Moreover, it does not account for petitioners who may have failed at using their petition as a bargaining tool.

To examine *reputation management*, we merge a list of all candidates who ran for office in the next cycle of sub-national elections held in 2017. If we find that the candidate ran again, then we code the case as one consonant with evidence of reputation building.¹⁸ Finally, our observable implications, however, cannot rule out that the cases classified as *other* were failed attempts at using the case as reputation building or as a bargaining chip.

Since our categorization of election petitions involves a close reading of the petition judgment documents and an evaluation of the entire petition procedure, factors that can affect the writing of the judgment document, the capacity of a petitioner to collect evidence to present them professionally, and to pursue appeals could potentially have an effect on our categorization. Appendix D discusses how justices, lawyers and wealth of the petitioner may potentially bias our coding scheme and our approach for minimizing these sources of bias.

The result of our coding exercise reveals evidence that Kenyan candidates are potentially using the courts strategically for additional motivations other than overturning election results (See Table 2). As Figures 2 illustrates, as expected, there is a positive relationship

¹⁸ Appendix C addresses alternative strategies for measuring our motivations.

between the competitiveness of elections and the probability of filing. However, this relationship is far from deterministic. Indeed, in over half of the cases where a candidate filed the petition (36 out of 71), the winner was not within 10 percentage points of the second candidate. Of the 35 cases that were within 10 percentage points, we only code 10 of them as 'High probability' of overturning the outcome, because of low levels of legitimacy or insufficient scope to indemnify the outcome.¹⁹

Figure 2: Competitiveness of MP elections (top) and governor elections (centre) and Women's rep (bottom) whether a candidate petition was filed for each election

¹⁹ In one case (the Trans Nzoia women's rep), the petition was struck out.

Evidence derived from our theory and supported by the theory's observable implications suggest that candidates are using petitions to burnish their reputations to further their electoral career. Consistent with our expectations of *reputation building*, in more than half of the court cases, (51 or 71% of) petitioners ran again for office in subsequent elections.

We also find observable implications of bargaining chip motivations, especially among Jubilee coalition candidates. As it became clear that the Jubilee coalition had won the election, it would make sense that losing coalition candidates would agree to drop their claims in exchange for government posts.²⁰ Our data indicates that the newly elected government appointed six Jubilee petitioners who withdrew their cases or did not file appeals. There were also two CORD candidates from non-CORD stronghold areas who were granted appointments.

Case Probability	Reputation	Reputation %	Bargaining	Bargaining %	Neither	Neither Pct	Cases
Low	24	65%	5	14%	11	30%	37
Medium	19	79%	2	8%	4	17%	24
High	8	80%	1	10%	2	20%	10
Total	51	-	8	-	17	-	71

Table 2: Number of documented reputation-building and bargaining instances observed for each level of case probability. Note since Reputation-building and bargaining are not mutually exclusive these numbers add to a larger number than the number of cases

Examples of Types

We further validate the relevance of our approach to understanding the strategic uses of courts by presenting ideal types of claims across our four theoretical petitioner-motivation types.

²⁰ Particularly, when two Jubilee coalition candidates ran against each other.

The Bungoma senatorial election petition provides an ideal case in which the petitioner may have had a *high probability* of reasonably believing that the election results would be overturned. The official results indicated a competitive election with a 5.5 percentage point difference between Musikari Kombo, the petitioner and runner-up, and Moses Wetangula, the winner. Kombo levelled numerous allegations including results inaccuracies, bribery, and ballot stuffing all of which were supported with details and evidence that were far more extensive than other petitions we coded.²¹ Although we coded this case as ‘High probability’ without looking at the court judgment, upon post-coding examination, the findings of the scrutiny and recount exercise corroborated the petitioner’s allegations, and the court annulled the results of the election in its final decision.

A clear example of a candidate engaging in **reputation management** was Paul Odalo Mak’Ojuando Abuor, a candidate from a small party (The Independent Party), who lost the 2013 Rongo MP race. Although the 2013 race was not competitive—22 percentage points separated Abuor and the winner, Dalmas Otieno—Abuor nevertheless filed a petition. Unsurprisingly, Abuor lost his case, but news outlets covered the petition and allegations of bribery against Otieno.²² After the 2013 election, having exposure through the petition, Abuor quickly switched parties to the main opposition ODM. By 2016, Abuor became the ‘ODM point man in Rongo’.²³ Under ODM’s banner, Abuor reran for the same Rongo constituency in 2017 and emerged victorious.²⁴

The petition filed by Samuel Kambi Kazungu in the 2013 Kaloleni MP election exemplifies the potential use of a court case as a **bargaining chip**. Kazungu, the third-place finisher, filed a petition alleging that the winner Chea Mwinga Gunga had engaged in serious malpractices such as violence against election officials. Although, Kazungu ran on the United Republican Party (URP) platform and Gunga the Kenya African Democratic Union-Asili (KADU-A), both

²¹ Musikari Nazi Kombo v Moses Masika Wetangula & 2 others [2013] eKLR.

²² Odeny, Manuel. 2013. ‘[Court to Rule on Rongo Case Today.](#)’ *The Star*, September.; Onyango, Habil. 2013. ‘[Witness Says Dalmas Bribed Rongo Voters.](#)’ *The Star*, June.

²³ Otieno, Scophine. 2016. ‘[My Absence Is Strategic, Rongo Mp Dalmas Otieno Now Declares.](#)’ *The Standard*, May.

²⁴ Appendix D highlights other examples of the reputation management motivations.

candidates belonged to the Jubilee coalition. Kazungu withdrew his case immediately after he was appointed as the Cabinet Secretary of Labour 3 June 2013. The court's withdrawal ruling explicitly stated that Kazungu's appointment as cabinet secretary was the main reason for withdrawing the petition.²⁵

We also highlight two particularly interesting examples of cases that for which we do not have strong observable implications and for the strategic reasons we develop in this paper, but we want to reiterate that other motivations, both strategic and non-strategic, including psychic, may exist for filing a petition, which deserve further exploration.

In the Kilifi governor's race, the last-place candidate, Lenno Mbagi filed a petition which alleging election-day incidents of violence and intimidation. Kilifi county was one of the few areas affected by fatal election-day violence during the 2013 Kenyan general election, but the margin of victory in the governor race was massive (over 57,000 votes separating winner and runner up). Therefore, the chance of the election being overturned by the court was 'Low probability'. Moreover, Mbagi's petition only provided evidence to support his allegations of violence in 19 polling stations, a number too small in scope to reasonably overturn the election results. But the case did not fit neatly into the reputation management or bargaining chip motivations either.

Indeed, Mbagi may have felt compelled to file a petition to raise public awareness about the severity of electoral malpractice with the hope that this symbolic action could help improve the quality of future elections or seek redress for directly affected individuals. Conversely, Mbagi could have believed that he was engaging in reputation management, but for whatever reason chose not to run again (he died in 2018). Therefore, we classify the case as *neither* because we do not have any evidence to suggest that Mbagi used the case as a way enhancing his future chances of being elected.

A second example, petitioner Hosea Kiplagat, illustrates a potential non-strategic psychic motivation. Kiplagat, former president Daniel Arap Moi's nephew and aide, ran for MP in Baringo Central in 2007 and 2013, losing to Sammy Mwaita both times. Kiplagat filed a

²⁵ Samuel Kambi Kazungu v Chea Gunga Mwinga & another [2013] eKLR.

petition following the 2013 election; although he trailed Mwaita by eight percentage points (competitive), our coding scheme revealed that the number of voters subject to irregularities enumerated in the petitions was much lower than needed to overturn the election (insufficient scope). In fact, the High Court dismissed the petition citing lack of evidence. Following the dismissal, Kiplagat announced his departure from politics.²⁶ Kiplagat also did not run again in the 2017 elections. Without having convincing evidence of malpractice or the expectation that a petition would boost his reputation in future elections (that may have been his intent which we do not observe), Kiplagat may have alternatively filed the petition as a psychological reaction to losing a second consecutive election (again, we code this as *neither* in Table 2). While this evidence does not completely rule out the possibility that Kiplagat used the petition to enhance his future electoral prospects, it does suggest that there may be other motivations, such as losers' remorse, that may have influenced his behavior.

Conclusion

The last 20 years has witnessed an upsurge in electoral petitions in sub-national elections, with many opposition candidates winning their petitions, even in competitive authoritarian regimes such as Uganda (Murison 2013). Undoubtedly, the peaceful resolution of electoral disputes enhances the prospects for democratic consolidation in Africa (Adams and Asante 2020). Especially, when we consider the consequences of post-electoral violence which pushed Kenya (2007) and Ivory Coast (2011) to the brink of disaster.

This article, however, examines the proliferation of sub-national electoral petitions in Africa from a different vantage point. We contend that post-election petitioners have diverse and often strategic motivations for mounting legal challenges. We need not look any further than the recent example in the U.S. 2020 presidential elections, to see that some losing candidates may use the courts even when the chances of overturning the results are low. Drawing on comparative scholarship and in-depth candidate interviews, we develop a theory on how

²⁶ Counties Team. 2013. 'Dramatic Changes for Kenya's Former Political Bigwigs.' *The Standard*, December.

candidates petition the court system to achieve ends other than overturning an electoral outcome. Through a careful reading of the cases filed during the 2013 Kenyan elections, we find that candidates more likely had a mixture of strategic motives rather than solely a desire to overturn an electoral outcome tainted by violations of electoral integrity.

Our research has implications for the study of elections, post-election dispute resolution, and democratic legitimacy. First, our results demonstrate that courts have the ability to channel some of the post-election bargaining that may have resulted in post-election violence. In fact, similar to existing research on post-election violence that argues that losing candidates often use violence to extract concessions from the incumbent and to build their reputations (Beaulieu 2014), our study suggests that losing candidates can also use legal, non-violent avenues to achieve similar goals.

Moreover, our research demonstrates that scholars need to be more cautious in assuming that losing candidates' use of the courts is democracy enhancing. Because electoral losers have an incentive to use courts strategically to signal information to other elites and to voters, post-election petitions may also undermine the quality of elections and democracy. First, strategic use of petitions can dampen public confidence in the electoral process by drawing public attention to allegations of electoral fraud and procedural irregularities. Second, strategic use of petitions can unduly clog the judicial system, crowd out more legitimate petitions, and frustrate access to justice in non-electoral cases.

Works Cited

- Adams S and Asante W** (2020) The Judiciary and Post-Election Conflict Resolution and Democratic Consolidation in Ghana's Fourth Republic. *Journal of Contemporary African Studies* **38**(2), 243–256.
- Anderson C et al.** (2005) *Losers' Consent: Elections and Democratic Legitimacy*. Oxford ; Oxford University Press.
- Arriola LR** (2013) Capital and Opposition in Africa: Coalition Building in Multiethnic Societies. *World Politics* **65**(2), 233–272.
- Barkan JD** (2013) Technology Is Not Democracy. *Journal of Democracy* **24**(3), 156–165.

- Beaulieu E** (2014) *Electoral Protest and Democracy in the Developing World*. New York , N.Y.: Cambridge University Press.
- Benner K and Schmidt MS** (2020, December 2) Barr Acknowledges Justice Dept. Has Found No Widespread Voter Fraud. *The New York Times*.
- Brancati D** (2016) *Democracy Protests*. Cambridge University Press.
- Bratton M** (1998) Second Elections in Africa. *Journal of Democracy* **9**(3), 51–66.
- Chernykh S** (2014) When Do Political Parties Protest Election Results? *Comparative Political Studies* **47**(10), 1359–1383.
- Ellis A** (2012) *The cycle of electoral manipulation and its links to electoral justice systems*. Presented at the Challenged to Electoral Integrity Pre-IPSA workshop, Madrid.
- Enweremadu DU** (2011) The Judiciary and the Survival of Democracy in Nigeria: Analysis of the 2003 and 2007 Elections. *Journal of African Elections* **10**(1), 114–142.
- Ferree KE, Gibson CC, and Long JD** (2014) Voting Behavior and Electoral Irregularities in Kenya’s 2013 Election. *Journal of Eastern African Studies* **8**(1).
- Gloppen S and Kanyongolo F** (2008) The Role Of The Judiciary In The 2004 General Elections In Malawi. *East African Journal of Peace and Human Rights* **12**(2).
- Hafner-Burton EM, Hyde SD, and Jablonski RS** (2018) Surviving Elections: Election Violence, Incumbent Victory and Post-Election Repercussions. *British Journal of Political Science* **48**(2), 459–488.
- Henríquez J de JO, Ayoub A, and Ellis A** (2010) *Electoral justice: The international IDEA handbook*. International IDEA.
- Hernández-Huerta VA** (2020) Disputed Elections in Presidential Democracies: Contexts of Electoral ‘Blackmail’. *Journal of Politics* **82**(1), 89–103.
- Klerman D and Lee Y-HA** (2014) Inferences from Litigated Cases. *The Journal of Legal Studies* **43**(2), 209–248.
- Lago I and Coma FM i** (2017) Challenge or Consent? Understanding Losers’ Reactions in Mass Elections. *Government and Opposition* **52**(3), 412–436.
- Mozaffar S and Schedler A** (2002) The Comparative Study of Electoral Governance: Introduction. *International Political Science Review* **23**(1), 5–27.
- Murison J** (2013) Judicial Politics: Election Petitions and Electoral Fraud in Uganda. *Journal of Eastern African Studies* **7**(3), 492–508.

- Nkansah LA** (2016) Dispute Resolution and Electoral Justice in Africa: The Way Forward. *Africa Development* **41**(2), 97–131.
- Ognyanova K et al.** (2020) *The Covid States Project: A 50-State Covid-19 Survey Report #29: Election Fairness and Trust in Institutions*. The COVID-19 Consortium for Understanding the Public's Policy Preferences Across States.
- Onapajo H and Uzodike UO** (2014) Rigging through the Courts : The Judiciary and Electoral Fraud in Nigeria. *Journal of African Elections* **13**(2), 137–168.
- Opalo K** (2014) The Long Road to Institutionalization: The Kenyan Parliament and the 2013 Elections. *Journal of Eastern African Studies* **8**(1), 63–77.
- Popova M** (2006) Watchdogs or Attack Dogs? The Role of the Russian Courts and the Central Election Commission in the Resolution of Electoral Disputes. *Europe-Asia Studies* **58**(3), 391–414.
- Popova M** (2010) Political Competition as an Obstacle to Judicial Independence: Evidence From Russia and Ukraine. *Comparative Political Studies* **43**(10), 1202–1229.
- Priest GL and Klein B** (1984) The Selection of Disputes for Litigation. *The Journal of Legal Studies* **13**(1), 1–55.
- Przeworski A** (2003) Why Do Political Parties Obey Results of Elections? In A Przeworski and J M Maravall (eds.), *Democracy and the Rule of Law* (Vol. 5). p. 114146.
- Suberu RT** (2007) Nigeria's Muddled Elections. *Journal of Democracy* **18**(4), 95–110.