

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. _____ OF 2017

BETWEEN

H. E. RAILA AMOLO ODINGA.....1ST PETITIONER
H. E. STEPHEN KALONZO MUSYOKA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
THE CHAIRPERSON OF INDEPENDENT
ELECTORAL AND BOUNDARIES
COMMISSION.....2ND RESPONDENT
H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

PETITIONERS' SUPPORTING AFFIDAVIT

We, RAILA AMOLLO ODINGA and STEPHEN KALONZO MUSYOKA of
Post Office Box Number 10311-00100 Nairobi do make oath and state as follows:

THAT

1. I am a Kenyan Citizen, voter and adult of sound mind, residing and working for gain in the Republic of Kenya and was duly nominated by the National Super Alliance (NASA) to contest the general elections on the 8th August 2017 for the position of President. I am therefore well versed with the facts and circumstances relating to the Petition.
2. I swear this affidavit on my behalf and on behalf of H.E. Stephen Kalonzo Musyoka whose authority is attached to the petition.

3. Save as otherwise expressly stated herein, the contents of this affidavit are based on my personal knowledge acquired in my abovementioned capacity and are true. To extent that any matter in this affidavit is based on information and/or belief, I have disclosed the source and/or ground (as the case may be) of the same, and verily believe the same to be true.
4. On the 8th of August 2017, the 1st Respondent conducted and supervised general elections that included the Presidential election.
5. Kenyan citizens eligible to participate in the said election cast their votes on the said date at various polling stations around the country until 5pm or thereabouts.
6. So soon thereafter, the 2nd Respondent acting through presiding officers appointed for that purpose commenced the process of ballot counting at various polling stations around the country culminating in the declaration by the 2nd Respondent on 11th August 2017 of results as follows.

i. Abduba Dida	38,093
ii. Ekuru Aukot	27,311
iii. Japheth Kavinga	16,482
iv. Jirongo Shakhalaga Khwa	11,705
v. Joseph Nyaga	42,259
vi. Michael Wainaina	13,257
vii. Raila Odinga	6,762,224
viii. Uhuru Kenyatta	8,203,290

7. For the reasons enumerated below, I am aggrieved by the said declaration and believe that the Presidential election was riddled with grave breaches of the Constitution of Kenya 2010 and applicable Electoral laws long before the 8th of August 2017 and during tallying and transmission of results which affected the legitimacy and/or credibility of the process and the final outcome as declared by the 2nd Respondent.
8. As a result, the credibility of the outcome of the presidential election has been gravely compromised and is, on available evidence, not representative of the will of the people.
9. In particular, I am aggrieved that the conduct of the presidential election failed to meet the constitutionally prescribed threshold of free, fair, transparent, accountable, credible and/or verifiable elections on the following brief grounds;
 - (a) The 1st Respondent by its conduct, actions and/or omissions deliberately and/or negligently compromised the security of the integrated electoral management system (commonly known as KIEMS) and thereby exposed it to unlawful interference by third parties and compromised the verifiability and security of the key component of the Presidential election i.e. tallying and transmission of results.
 - (b) The collation, tallying, verification and transmission of presidential election results was riddled with major procedural flaws, illegalities and/or irregularities of the nature and extent that

compromised the credibility of the outcome and/or final results declared on the 11th August 2017.

- (c) The results declared by the 1st Respondent were otherwise substantially at variance with the actual results tallied and declared at the gazetted polling stations as to fundamentally affect the finality of the result declared by the 1st Respondent.
 - (d) The 3rd Respondent in concert with cabinet secretaries and other public officers abused their positions in public office to unduly influence and/or exert improper influence on potential voters to their advantage in flagrant breach of the law.
10. The factual circumstances in support of the above grounds in the Petition are as contained in the affidavits of Dr. Nyangasi Oduwo, Godfrey Osotsi, Koitamet Ole Kina among others and briefly summarized as follows;
- a) **Compromised security of the integrated electoral management system (KIEMS)**
11. It is to be noted that the actual process of balloting and counting of ballots involves inter-alia the organization and management of voting, including the identification and verification of voters and measures to ensure that votes are tallied in a process that inspires confidence in the electorate. Owing to the history of electoral malpractices in the registration and identification of voters and the subsequent tallying and transmission of results, the Elections Act was amended vide the Elections Laws Amendment Act No. 36 of 2016 in a bi-partisan process to introduce measures that would guarantee the

integrity of the said processes in conformity with the electoral principles set out under Articles 81 and 86 of the Constitution of Kenya 2010 key among them the establishment of the KIEMS.

12. In this regard, the Election Laws Amendment Acts 2016 and 2017 introduced a new section 44 of the Elections Act establishing an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The said provision mandated the 1st Respondent to ensure that the technology is simple, accurate, verifiable, secure, accountable and transparent and to procure and put in place the same at least eight months before the general elections and to test, verify and deploy such technology at least sixty days before a general election. Furthermore, the said section tasked the 1st Respondent to promulgate regulations in consultation with relevant agencies, institutions and stakeholders, including political parties, providing for inter-alia data storage and information security, data retention and disposal, access to electoral system software source codes, capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process, telecommunication network for voter validation and result transmission and the operations of ETAC to oversee the adoption of technology in the electoral process.
13. The amended Section 39 (1A)(ii) & (iii) and 1(C) of the Elections Act mandatorily required the commission to appoint constituency returning officers to collate and announce the results from each polling station in the constituency for the election of inter-alia the President and to submit, *in the prescribed form*, the collated results to the national tallying centre. In this regard, the commission is mandatorily required to electronically transmit, in

the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre and to tally and verify the results received at the national tallying centre; and publish the polling result forms on an online public portal maintained by the Commission. In essence the law mandatorily required that ALL results transmitted from a polling station must be validated instantaneously in order to avoid manipulation as had been the case in past elections. Indeed this was one of the mischiefs that informed the amendment of the laws.

14. In enacting the aforesaid amendments, parliament sought to secure the sanctity and integrity of the voters register and to ensure the accountability, security, verifiability and accuracy of the ballots cast in the election. In this regard, we fully rely on the affidavit sworn by Mr. Godfrey Ososti on the 17th July 2017.
15. As required by section 44 of the Elections Act as amended, the 1st Respondent developed various regulations to give effect to the aforesaid provisions including the Elections (technology) regulations 2017 which provided for inter-alia the establishment of the Elections Technology Advisory Committee (ETAC) to among other things, advise the Commission on adoption and implementation of election technology including the development of policies for the progressive use of election technology in the electoral process and the participation of stakeholders in the implementation and deployment of election technology.
16. Regrettably however, as soon as the said regulations were effected vide inter-alia the procurement of KIEMS and the establishment of ETAC the 1st

Respondent conducted itself in a manner that, with the benefit of hindsight, weakened the security integrated electronic electoral system and exposed it to serious risks of interference from third parties that may have compromised the integrity of the system as follows;

17. Firstly, so soon after the establishment of ETAC, unknown to stakeholders and members of ETAC, a party in Petition Number 127 of 2017 sought to declare and did succeed in declaring ETAC unconstitutional. The 1st Respondent failed to defend the regulations and/or notify relevant stakeholders of the said suit. The disbandment of ETAC accordingly compromised the transparency of the preparations leading up to the elections by monopolizing the management of the system to the exclusion of political actors in the concluded elections.
18. Secondly, the 1st Respondent through an Advocate that has and continues to advise it in contentious and non-contentious matters filed Petition No. 415 of 2016 to declare section 39(1C) unconstitutional. It is to be noted that the said section is the basis of electronic transmission of results as I have stated in the foregoing paragraphs. In essence it is clear, that the 1st Respondent was never keen on fully, efficiently and effectively implementing the integrated, electronic electoral management system. The failures of the system at the hour of need confirms this.
19. Thirdly, in the 1st Respondent failed to put in place several preparatory measures that were deliberately set up by the law to assure the integrity and efficiency of KIEMS key among them being the preparation, development, publication and implementation of a disaster recovery and operations continuity plan in the event KIEMS collapses. As a result, the failure in the

transmission of prescribed forms grossly affected the security and verifiability of the delayed results that were relayed in the online public portal over 7 days after the announcement of results.

20. Fourth, without prior reasonable notice to stakeholders and barely 2 days to the presidential elections, the 1st Respondent announced over 11000 polling stations that were purportedly out of range for the 3G and 4G network and which were therefore expected to transmit election results from locations other than gazetted polling stations and/or manually. This action was in my view an unreasonable ambush that compromised my ability to put in place adequate measures to secure transmission of results from the 11000 polling stations (approximately 7,700,000 votes).
21. Fifth, in spite of the clear mandatory requirement for the testing, verification and deployment of technology at least sixty days before a general election, the 1st Respondent only commenced the said test, verification and deployment 2 days to the election and therefore denied the public an opportunity to verify the efficiency and security of the same particularly considering that ETAC had been disbanded. Indeed, this been done, the issues of transmission that arose on polling day would have been avoided among other credibility concerns of the results.
22. Sixth, despite clear advise from the Communications Authority of Kenya advising against the hosting a private cloud to supplement the 1st Respondent's primary and disaster recovery sites given the sensitivity of its systems, the 1st Respondent went ahead and contracted OT Morpho SAS (France) and thereby compromised the security of the cloud. The compromises enumerated in Prof. Kaloki's Affidavits are accordingly not a

coincidence. They were the result of the 1st Respondent's wilful with suspicious intent.

23. Finally, barely a week to the elections, the 1st Respondent's key ICT manager in charge of the management of the integrated electronic electoral system with a clear understanding of the security systems of the KIEMS was murdered in cold blood in a clear attempt to further weaken the electronic electoral system.
24. I believe that the only reasonable inference from the foregoing events is that the security of the integrated electronic electoral systems was deliberately and/or negligently compromised so much so that the presidential election was substantially conducted using manual processes, methods and/or techniques that are totally incompatible with the transformative principles of the electoral system under Article 81 and 86 of the Constitution or at all. The same was accordingly a sham and a nullity.
25. Indeed, it is our belief, that the electronic system was in fact compromised by unauthorized third parties and data therein manipulated and subsequently unlawfully transmitted to the constituency and national tallying centers.

b) Procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of presidential election results

26. I am advised by my advocates on record, which advise I believe to be true that Articles 81 and 86 of the Constitution as read together with Section 39 of the Elections Act require that the votes cast in an election are counted, tabulated and the results announced and electronically

- transmitted promptly by the presiding officer at each polling station and the results from the polling stations are in turn openly and accurately collated and promptly announced by the returning officer.
27. In spite of the said clear and mandatory provisions, the 1st Respondent either deliberately or negligently failed to electronically transmit results from polling stations and the constituency tallying centers together with the prescribed forms and thereby exposed the collation and tallying processes to manipulation by using methods and/or techniques that were grossly incompatible with the constitutional electoral principles of accountability, verifiability, security, and credibility of the electoral process.
 28. Bearing in mind the mischief that electronic transmission of results sought to cure and the constitutional obligation that the transmission be *prompt, secure, accurate, verifiable, accountable* and *efficient*, the unreasonable delay in electronically transmitting results together with the prescribed forms grossly affected the credibility and therefore the validity of the results purportedly declared by the 1st Respondent. Indeed the 1st Respondent's Chief Executive Officer, Ezra Chiloba is on record admitting that as at 17th August, the 1st Respondent was yet to provide all the forms 34A and 34B – over 9 days after close of polling.
 29. Indeed, I am aware that some observer missions in Kenya that purported to hail the election as fair and credible have now expressed concern on the credibility of the results declared by the 1st Respondent with the continued delay in availing the prescribed forms.

30. As a matter of fact, from our review of the results as declared vis-à-vis forms 34A and 34B obtained from the 1st Respondent, I have discovered substantial, systemic, glaring, qualitative anomalies that put to question the credibility of the presidential election and are otherwise totally incompatible with the normative electoral principles established by the constitution. The substance of the evidence of the said anomalies are detailed in inter-alia Dr. Nyangasi Oduwo's affidavit sworn on 17th August 2017.
31. In my view therefore, the transmission of results without prescribed forms had no basis in law. Indeed, based on the anomalies identified in the affidavit sworn by Dr. Nyangasi Oduwo the only reasonable inference from the foregoing is that the results declared by the 1st Respondent were unsupported by credible, verifiable, and accountable prescribed forms as by law required. The said results are accordingly a sham and unlawful.

c) The variance between the declared result and the actual results as tallied by the Petitioners.

32. Having reviewed and reconciled the forms 34A and B supplied to us by the 1st Respondent on their own and against the forms 34A and B obtained from our agents, I have discovered that the results declared by the 1st Respondent have massive numerical discrepancies that fundamentally affected the final result to our disadvantage. A detailed analysis of the said discrepancies are contained in Dr. Nyangasi Oduwo's Affidavits.

d) Voter intimidation, undue influence, bribery and/or flagrant commission of Electoral offences by the 3rd Respondent.

33. One of the hallmarks of free and fair elections is the right of a potential voter to make an independent and objective choice of leaders without undue influence, bribery, inducement or manipulative interference of any kind. The 3rd Respondent being the head of government and contestant in the presidential elections is guilty of unduly influencing voters in the lead up to the 8th August 2017 general elections without punishment and/or as much as a warning from the 1st Respondent. The brief particulars of instances of undue influence, inducement, bribery and intimidation are as follows;
34. Firstly, on 2nd August 2017 while campaigning in the county of Makueni, the 3rd Respondent while addressing residents of Makueni during campaigns issued thinly veiled threats to chiefs in the area with dire consequences in the event he wins elections ostensibly for not actively campaigning for him.
35. Secondly, despite clear and express provisions of section 16 of the Public Officer Ethics Act that prohibits them from engaging in politics, cabinet secretaries actively and openly abused their influence and state resources to actively solicit for votes and or further the political interests of the 3rd Respondent. In some cases, the said cabinet secretaries openly made official directives relating the elections in a manner smacking of intimidation.

36. Thirdly, in the guise of launching official state projects and paying reparations to victims of the 2007 post-election violence in various parts of the country the 3rd Respondent used the same platforms to canvass for votes for personal political benefit in the said electoral areas contrary to the Election offences Act.
37. Fourthly, the 3rd Respondent brazenly violated section 14 of the Elections Act by sponsoring and/or causing sponsorship, during the election period, of publications of advertisements in the print and electronic media and in banners and billboards of the government's achievements.
38. In a country like Kenya where 44% of the population lives below the poverty line and 38.5 per cent of the adult population is illiterate is highly probable that a substantial number of voters may have been easily influenced by improper considerations and/or representations by the 3rd Respondent using public resources.
39. I am advised by my advocates on record, which advise I believe is true that the aforesaid were blatant violations of clear provisions of electoral laws to the disadvantage of the other presidential candidates. Furthermore, to the extent that the 1st Respondent turned a blind eye to the said violations while punishing other candidates for violation of the same laws, the 1st Respondent acted discriminatorily, partially, unlawfully and/or unfairly to the advantage of the 3rd Respondent.
40. I rely fully on the substance of evidence of the above malpractices annexed to the affidavit of Dr. Nyangasi Oduwo.

41. For the foregoing reasons and the reasons contained in all the affidavits sworn in support of the petition and the submissions of law made by my advocates, I believe that the presidential election was fundamentally flawed and/or incompatible with the electoral values and principles of the Constitution of Kenya 2010 including transparency, accountability, accuracy, security, verifiability, transparency and efficiency
42. The Presidential election was riddled with egregious procedural irregularities, systemic failures and massive numerical discrepancies whose cumulative extent and degree fundamentally affected the credibility and/or legitimacy of the presidential election as conducted and supervised by the 1st Respondent.
43. Reasons wherefore we pray for the following reliefs;
 - (a) Immediately upon the filing of the Petition, the 1st Respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours;
 - (b) Immediately upon the filing of the Petition, the 1st Respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st Respondent in respect of the Presidential Election within 48 hours;
 - (c) A specific order for scrutiny of the rejected and spoilt votes;
 - (d) A declaration that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election;

- (e) An order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C;
- (f) An order for scrutiny and audit of the system and technology used by the 1st Respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal;
- (g) A declaration that the non-compliance, irregularities and improprieties in the Presidential Election were substantial and significant that they affected the result thereof;
- (h) A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off the from the final tally and computation of the Presidential Election;
- (i) A declaration that the Presidential election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;
- (j) A declaration that the 3rd Respondent was not validly declared as the president elect and that the declaration is invalid, null and void;
- (k) An order directing the 1st Respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the Elections Act;

(l) A declaration that each and all of the Respondents jointly and severally committed election irregularities;

(m) Costs of the Petition; and

(n) Any other orders that the Honourable Court may deem just and fit to grant.

44. **THAT** in the circumstances, it is just and proper that all the reliefs sought as enumerated above be granted.

45. **THAT** I make this affidavit in support of the Petition.

SWORN at NAIROBI)
By the said)
RAILA AMOLO ODINGA).....
)**DEPONENT**

)
BEFORE ME)

COMMISSIONER FOR OATHS)

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3. H.E. UHURU MUIGAI KENYATTA
HARAMBEE HOUSE,
HARAMBEE AVENUE
NAIROBI.

Lodged in the Registry at Nairobi on theday of August 2017

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Registrar