

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

**BETWEEN**

**H. E. RAILA AMOLO ODINGA.....1<sup>ST</sup> PETITIONER**  
**H. E. STEPHEN KALONZO MUSYOKA.....2<sup>ND</sup> PETITIONER**

**AND**

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

**PETITION**

THE HUMBLE PETITION OF HON RAILA AMOLO ODINGA & HON STEPHEN KALONZO MUSYOKA WHOSE ADDRESS OF SERVICE FOR THE PURPOSE OF THIS PETITION IS CARE OF MURUMBA & AWELE ADVOCATES Mirage Plaza, Mezzanine 1 – Unit 7 Westlands, Chiromo Road P. O. box 22255-00505 Nairobi, Email Address: legal@maadvocates.co.ke. IS AS FOLLOWS:–

**A. THE PARTIES**

1. The Petitioners are adult males of sound mind, citizens of the Republic of Kenya and duly registered voters. The Petitioners were the presidential and deputy presidential candidates of the National Super Alliance (NASA) Coalition of Parties, running on an Orange Democratic Movement (ODM) Party and WIPER Democratic Movement Party tickets respectively. The Petitioners’ address of service for the purposes of this Petition shall be c/o MURUMBA & AWELE ADVOCATES MIRAGE PLAZA, MEZZANINE 1 – UNIT 7 WESTLANDS, CHIROMO RD P. O. BOX 22255-00505 NAIROBI, Email Address: legal@maadvocates.co.ke.

2. The 1<sup>st</sup> Respondent is the Independent Electoral and Boundaries Commission (IEBC). The 1<sup>st</sup> Respondent is an independent commission established under Article 88 as read together with Articles 248 and 249 of the Constitution of Kenya and the IEBC Act No. 9 of 2011. The 1<sup>st</sup> Respondent is constitutionally charged with the mandate and responsibility to conduct and/or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by the Elections Act.
3. The 2<sup>nd</sup> Respondent is the Chairperson of the 1<sup>st</sup> Respondent herein. The 2<sup>nd</sup> Respondent is constitutionally mandated under Article 138(10) of the Constitution of Kenya to a) declare the result of the presidential election; and b) deliver a written notification of the result to the Chief Justice and the incumbent President.
4. The 3<sup>rd</sup> Respondent is the President and was the presidential candidate of the Jubilee Party in the August 2017 presidential elections and was declared the winner of the said elections by the 1<sup>st</sup> Respondent on 11 August 2017.

## **B. BRIEF OVERVIEW OF THE LAW AND THE GROUNDS OF THE PETITION**

5. The Petitioners aver that the Presidential Election was so badly conducted, administered and managed by the 1<sup>st</sup> Respondent that it failed to comply with the governing principles established under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution of Kenya; the Elections Act (as specifically set out herein below) and the Regulations made there under including the Electoral Code of Conduct and other relevant provisions of the Law.
6. The massive, systemic, systematic and deliberate non-compliance with the Constitution and the Law as will be shown and proved by the Petitioners:
  - 6.1 goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya;
  - 6.2 undermines the foundation of the Kenyan system as a sovereign republic where the people are sovereign under Article 4 of the Constitution; and

6.3 severely undermines the very rubric and framework of Kenya as a nation State.

7. Article 1 of the Constitution sets out the foundation and framework of the Nation of Kenya and the social contract between the people and their elected representatives. Article 1 of the Constitution states that:

- (1) “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
- (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
  - (a) Parliament and the legislative assemblies in the county governments;
  - (b) the national executive and the executive structures in the county governments; and
  - (c) the Judiciary and independent tribunals.
- (4) The sovereign power of the people is exercised at—
  - (a) the national level; and
  - (b) the county level.”

8. Article 4 of the Constitution establishes a republican system of governance, which is founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives. Article 4 states,

- (1) “Kenya is a sovereign Republic.
- (2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.”

9. Article 38 of the Constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution. Article 38 provides that,
- (1) “Every citizen is free to make political choices, which includes the right—
    - (a) to form, or participate in forming, a political party;
    - (b) to participate in the activities of, or recruit members for, a political party; or
    - (c) to campaign for a political party or cause.
  - (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
    - (a) any elective public body or office established under this Constitution; or
    - (b) any office of any political party of which the citizen is a member.
  - (3) Every adult citizen has the right, without unreasonable restrictions—
    - (a) to be registered as a voter;
    - (b) to vote by secret ballot in any election or referendum; and
    - (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”
10. The 1<sup>st</sup> Respondent is an institution established under the Constitution by the Kenyan people in exercise of their sovereign will in accordance with Articles 1, 4 and 38 of the Constitution. The following are the objectives the Kenyan people set out under Article 88(4) and (5) of the Constitution for the 1<sup>st</sup> Respondent:

“The Commission is responsible for conducting or supervising

referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82 (1)(b) relating to nomination of candidates by parties.”

11. The sole and only purpose for which the 1<sup>st</sup> Respondent was established by the people of Kenya was to give effect to the sovereignty and the exercise of the sovereign will of the people of Kenya. By this very premise, the 1<sup>st</sup> Respondent is not, cannot be and must never be an institution and law unto itself. It is for this reason that Article 88(5) of the Constitution categorically stipulates that the 1<sup>st</sup> Respondent “shall exercise its powers and perform its functions in accordance with [the]

Constitution and national legislation.”

12. One of the Petitioners’ fundamental grounds herein is that in the conduct and management of the Presidential Election the 1<sup>st</sup> Respondent abdicated its role and duty to exercise, protect and safeguard the sovereign will of the people of Kenya. Furthermore, the 1<sup>st</sup> Respondent became a law and institution unto itself in breach of the sovereign will of the people of Kenya. The Petitioners aver that in the conduct of the Presidential Election the 1<sup>st</sup> Respondent so deliberately failed and/or neglected to act in accordance with the Constitution and national legislation thereby subverting the sovereign will of the people.
13. The national legislation and written laws must mean something and be given their legal effect. Otherwise, there is no point of having legal provisions if they will not be obeyed. Similarly, there is no point of holding elections if the law, procedure and regulations to govern their conduct will not be respected and adhered to.
14. The Petitioners aver that the Presidential Election was so badly conducted and marred with irregularities that it does not matter who won or was declared as the winner of the Presidential Election.
15. The Petitioners aver that the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 1<sup>st</sup> Respondent cannot accurately and verifiably determine what results any of the candidates got.
16. Instead of giving effect to the sovereign will of the Kenyan people, the 1<sup>st</sup> Respondent delivered preconceived and predetermined computer generated leaders.
17. Section 83 of the Elections Act contemplates that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even so, although the Petitioners aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners position is that the non-compliance with the Constitution and the written law is by itself sufficient to invalidate the Presidential Election.
18. The Petitioners contend that during the 2017 Presidential Election a number of critical factors including the registration of voters affected the votes cast, their numbers and the final result of the Election. One of these

critical factors is the number of rejected votes that account for at least 2.6% of the total votes cast. In addition to other factors that affect the tally of the votes, this factor has an effect on the final result and outcome of the Presidential Election.

19. In its decision in Presidential Election Petition No. 5 of 2013, *Raila Odinga v Independent Electoral and Boundaries Commission & Others* this Court held that spoiled votes cannot be counted in computing the 50% plus 1 vote threshold to determine the outcome of the Presidential Election. In arriving at this decision, the Court relied on the reasoning of a minority dissenting opinion in the Seychellois Case of *Popular Democratic Movement v Electoral Commission* Constitutional Case No. 16 of 2011. However, the majority held that the total number of votes cast in an election refers to all votes cast whether valid or not; that once a vote is cast into a box regardless of whether it will turn out to be valid or not that vote has been cast and belongs to the context of votes cast.
20. The Petitioners aver that should this Court find that the errors in respect of other votes that had not been properly allocated do not count, what would be produced is an illogical outcome where a significant number of voters, eg 10% go through all the process of casting a vote and it counts for nothing.
21. The framers of the Constitution were fully aware that this is the only Court that can reverse itself as it is not bound by its own decisions. The Petitioners shall call upon this Court to reconsider its decision in Petition No. 5 of 2013 and correct itself.

### **C. GROUNDS AND ARGUMENTS SUPPORTING THE PETITION**

#### **a) Violation of the principles of a free and fair election and electoral process**

22. The Presidential Election contravened the principles of a free and fair election under Article 81(e) of the Constitution as read together with Sections 39 of the Elections Act and the Regulations there under.

21.1 Article 81 of the Constitution stipulates that the electoral system shall comply with the following principles—

- (a) “freedom of citizens to exercise their political rights under Article 38;

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

### **Relay and transmission of results**

21.2 The entire process of relay and transmission of results from polling stations to the constituency and National Tallying Centre (NTC) on the one hand; and from the constituency tallying centres to the NTC on the other; was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt. This process therefore substantially compromised and affected the requirement of free and fair elections under Article 81(e) (iv) and (v) of the Constitution.

21.2.1 The data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS Kits at the individual polling stations;

21.2.2 It is a mandatory requirement and legitimate expectation that before transmission of the data from the KIEMS Kits to the NTC, the data entered into the KIEMS Kits must be accompanied by an electronic picture or image of the prescribed Forms 34A.

21.2.2.1 The Practice Manual which was verbally communicated by the 1<sup>st</sup> Respondent to the parties, stakeholders and observers and also publically demonstrated provided that the transmission of any data from the KIEMS Kits to the NTC was only possible if the data was simultaneously accompanied by the image of the Forms 34A.



21.2.2.2 Furthermore, the late Chris Msando the ICT Manager of the 1<sup>st</sup> Respondent stated that the SUBMIT button was programmed to function only when the data was also simultaneously accompanied and transmitted with the electronic image of Form 34A.

21.2.2.3 The Petitioners aver that results from in excess of 10,000 polling stations transmitted to the NTC did not comply with the mandatory requirement set out above. The results were not accompanied by the electronic image of Forms 34A.

21.2.2.4 By an internal circular dated 25<sup>th</sup> July 2017, the 1<sup>st</sup> Respondent adopted a procedure that was contrary to and did not comply with the law as set out under Regulation 87(3) of the Elections (General) Regulations made pursuant to Sections 39 and 109 of the Elections Act and Article 82 of the Constitution.

21.2.2.5 The 1<sup>st</sup> Respondent deliberately predetermined and set itself on a path of subverting the law and being a law unto itself.

21.2.2.6 The effect of the 1<sup>st</sup> Respondent's action complained about hereof was twofold:

21.2.2.6.1 First, that the Presidential Election was not administered by the 1<sup>st</sup> Respondent in an impartial, neutral and accountable manner as required under Article 81(e)(v) of the Constitution; and

21.2.2.6.2 Second, that the 1<sup>st</sup> Respondent declared the result without verification of the results from over 10,000 polling station representing approximately 5 million voters.

21.2.3 It is a mandatory requirement and legitimate expectation that the data entered into the KIEMS Kits should be consistent,

comparable and verifiable with the information recorded in the Forms 34A.

21.2.3.1 The Petitioners aver that in more than 10,000 polling stations the data entered into the KIEMS Kits was not consistent with the information and data from the respective Forms 34A.

21.2.3.2 The Petitioners aver that the data that was being displayed publically by the 1<sup>st</sup> Respondent at the NTC was not consistent with the information and data in the respective Forms 34A.

21.2.3.3 As a result the of the foregoing the 1<sup>st</sup> Respondent did not administer the Presidential Election in an efficient, accurate and accountable manner as required under the law and in contravention of Article 81(e) of the Constitution.

21.2.4 The information in Forms 34A is not consistent with the information recorded in Forms 34B as required and legitimately expected.

21.2.4.1 Therefore, whatever Forms 34B were purported to have been relied upon by the 1<sup>st</sup> Respondent at the NTC and on the basis of which the final result of the Presidential Election was declared were inaccurate as they were inconsistent with the Forms 34A which were the primary documents from which they are required by law to be created;

21.2.4.2 As a result of the immediately forgoing the Forms 34B were not accurate and verifiable and consequently invalid;

21.2.4.3 As an ultimate result, the results declared by the 1<sup>st</sup> Respondent on the basis of the impugned Forms 34B was rendered invalid and a nullity.

21.2.5 The computation and tabulation of the results in a significant number of Forms 34B is not accurate, verifiable and internally consistent.

21.2.5.1 The additions and figures do not add up.

21.2.5.2 The Petitioners aver that the nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

21.2.5.3 The Petitioners aver that the inaccuracies and inconsistencies affect and account for at least 7 million votes.

21.2.6 The purported results in the 1<sup>st</sup> Respondent's Forms 34B are materially different from what the 1<sup>st</sup> Respondent publically relayed and continues to relay as at the time of filing in its website or portal.

21.2.7 The Petitioners aver that the 1<sup>st</sup> Respondent abetted and allowed the electronic media and news channels to relay and continue relaying the purported results, which the 1<sup>st</sup> Respondent was aware had no legal or factual basis. The Petitioners aver that this was deliberate and calculated to create a false narrative and national psyche in preparation to steal the election in favour of the 3<sup>rd</sup> Respondent.

21.2.8 Notwithstanding the foregoing averments in respect of Forms 34B, the Petitioners further aver that at the time of declaration of the result, the 1<sup>st</sup> Respondent did not have 187 Forms 34B nor did it publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.

#### Impartiality, neutrality, efficiency, accuracy and accountability

21.3 The Presidential Election was not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to Article 81(e)(v) as read together with sections 39, 44 and 44A of the Elections Act, the Regulations made there under, and section 25 of the IEBC Act.

21.3.1 The Petitioners aver that in numerous instances the 1<sup>st</sup> Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted in his favour thereby affecting the final results tallied.

21.3.2 The Petitioners aver that in numerous instances the 1<sup>st</sup> Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3<sup>rd</sup> Respondent thereby affecting the final results tallied.

21.3.3 The Petitioners aver that in a substantial and significant number of instances the 1<sup>st</sup> Respondent grossly inflated the votes cast in favour of the 3<sup>rd</sup> Respondent thereby affecting the final results tallied.

21.3.4 The grounds, information and evidence detailed in the supporting affidavits are indicators of a deliberate and/or systemic and systematic interference and manipulation of the results of the Presidential Election by the 1<sup>st</sup> Respondent.

21.3.5 The effect of the systemic and systematic manipulation and distortion of the results renders it impossible to determine who actually won the Presidential Election and/or whether the threshold for winning the Election under the Constitution was met.

#### Lack and failure of operational transparency

21.4 The Petitioners aver that there was massive and deliberate failure in operational transparency.

21.5 In so doing The 1<sup>st</sup> Respondent deliberately and intentionally disregarded the decision of the Court of Appeal rendered in the case of *Independent and Electoral Boundaries Commission v Maina Kiai* Court of Appeal Civil No. 105 of 2017 as shown below:

21.5.1 The 1<sup>st</sup> Respondent failed to electronically collate, tally and transmit the results accurately as per the Court decision;

21.5.2 By declaring results per County the 1<sup>st</sup> Respondent failed to make the results at the polling stations final as per the decision;

21.5.3 The 1<sup>st</sup> Respondent failed to ensure accurate, verifiable and accountable results by allowing transmission and display of unverified provisional results not provided for in law.

- 21.5.4 The 1<sup>st</sup> Respondent failed to ensure accurate, verifiable and accountable results by posting varied, contradictory and ever changing results in Forms 34A, 34B and in its portal even at the time of filing this Petition;
- 21.5.5 The 1<sup>st</sup> Respondent failed to ensure accurate, verifiable and accountable final result by declaring final results on 11 August 2017 before receiving all the results from all polling stations;
- 21.5.6 By colluding with the 3<sup>rd</sup> Respondent and ejecting the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley Regions, the 1<sup>st</sup> Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results;
- 21.5.7 By allowing in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 million votes, the 1<sup>st</sup> Respondent abdicated its responsibility of delivering verifiable results;
- 21.5.8 It is instructive that the Court of Appeal called out the 1<sup>st</sup> Respondent for attempting to circumvent the preceding High Court decision which they had appealed.
- 21.6 The reason and purpose of the Court decision was to set out a clear and transparent procedure on the process and requirements of the transmission of results and to maintain the Rule of Law.
- 21.7 The transmission of the Presidential Election results was deliberately carried out in defiance and contravention of the decision of the Court of Appeal on the transmission of results. The failure to comply with the Court's decision setting out the process betrays the 1<sup>st</sup> Respondent's predetermined scheme and intention to deliver a pre-determined outcome.
- 21.8 As a result of the foregoing failure, the 1<sup>st</sup> Respondent declared final results that were not based on the results declared at the polling stations and constituency tallying centres in a substantial number of cases.

21.9 The 1<sup>st</sup> Respondent's deliberate failure to respect, follow and abide by the Constitution and the Rule of Law which includes Court orders and decisions, rendered the process of the Presidential Election and the transmission of results and final outcome a nullity as it lacked in integrity, fairness and transparency.

#### Verifiability

21.10 The results and the returns made by the 1<sup>st</sup> Respondent do not comply with the law and regulations governing the electoral process and do not meet or satisfy the test of verifiability.

21.11 The information in Forms 34A is not consistent with the information recorded in Forms 34B therefore they are not verifiable.

21.12 The information in Forms 34B are not internally consistent. The additions and figures do not add up. The information and figures in the Forms 34B are not what was and continues to be publically relayed and transmitted on the 1<sup>st</sup> Respondent's public website or portal. The purpose of transmission is transparency and accountability. The Petitioners aver that without verifiability the purported results are unconstitutional and therefore invalid.

21.13 In any case the Presidential Election failed to meet the test of transparency contrary to Article 81(e)(iv) as read together with Article 86 of the Constitution.

#### **b) Voting, counting and tabulation of results**

22 Article 86 of the Constitution stipulates that:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

- 22.1 The votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under Article 86(b) and 86(c) of the Constitution as read together with the Elections Act.
- 22.2 In a significant number of polling stations the votes cast as captured in Forms 34A differ from the results as captured in the 1<sup>st</sup> Respondent’s Forms 34B and also as displayed in the 1<sup>st</sup> Respondent own portal.
- 22.3 Furthermore, the results as displayed in the 1<sup>st</sup> Respondent’s Forms 34B variously exclude substantial numbers of polling stations within the constituencies and are incorrigibly inaccurate in mathematical additions in favour of the 3<sup>rd</sup> Respondent.
- 22.4 As a direct result of the foregoing, the purported results contained in Forms 34B in respect of the Presidential Election are not the results required under Article 86 and are therefore a nullity.
- 22.5 Based on the foregoing, the purported results announced by the Returning Officers were not openly and accurately collated. Therefore, the purported results tabulated in Forms 34B were not and could not have been accurate rendering the election and electoral process fundamentally flawed and invalid.

**c) Substantive non-compliance, irregularities and improprieties**

- 23 The Petitioners aver that the Presidential Election was materially marred, fundamentally flawed and affected by the following non-compliances, irregularities and improprieties contrary to Articles 38, 81 and 86 of the Constitution of Kenya as read together with, Sections 39(1C), 44 of the Elections Act and the Regulations made there under and section 25 of the IEBC Act:

**Ungazetted and undesignated polling stations**

- 23.1 The Petitioners aver that contrary to Regulation 7(1)(c) of the Elections (General) Regulations the 1<sup>st</sup> Respondent illegally and

fraudulently established secret and ungazetted polling stations wherefrom results were added to the final tally thereby undermining the integrity of the Presidential Election.

- 23.2 The Petitioners contends that the 1<sup>st</sup> Respondent included in the final tally the purported results from the ungazetted polling stations thereby materially affecting the result of the Presidential Election.

#### Ungazetted and undesignated returning and presiding officers

- 23.3 The Petitioners aver that a significant number of Forms 34B were executed by persons not gazetted as Returning Officers and not accredited as such by the 1<sup>st</sup> Respondent thereby rendering those results invalid.
- 23.4 The Petitioners further aver that all returns without the IEBC's official stamp not bearing the particulars and signatures of the Returning Officers, not bearing the particulars and signatures of the agents and those not borne on the prescribed forms are invalid.
- 23.5 The 1<sup>st</sup> Respondent did not comply with Regulation 5 of the Elections (General) Regulations in the appointment of presiding officers; in particular the 1<sup>st</sup> Respondent did not provide a list of persons proposed for appointment as presiding officers.
- 23.6 Consequently, a significant number of returns were signed by strangers who could not be held to account thereby rendering those results invalid and unconstitutional.

#### Improper and invalid returns

- 23.7 The Petitioners aver that the returns used in a material number of stations at polling and constituency levels such as but not limited to the examples hereinafter provided were not in the prescribed forms 34A and 34B contrary to Regulation 79(2)(a) and 87(1)(a):

23.7.1 The Petitioners aver that the 1<sup>st</sup> Respondent preconceived and deliberately set out to conduct an inconsistent, impartial un-uniform Presidential Election with the goal of manipulating the results by using different forms 34A and 34B at the polling stations and constituency tallying centres.



- 23.7.2 The Petitioners aver that the Forms 34B which ought to have been accurate, legitimate and verifiable across the Country are demonstrably contradictory, defective and bear fatal irregularities affecting 14,078 polling stations out of the 25,000 Forms 34B.
- 23.7.3 The Petitioners aver that the deliberate use of inconsistent and different forms and returns demonstrates lack of consistency, uniformity, neutrality, impartiality and indicates an intention to manipulate the results and the returns.
- 23.7.4 The Petitioners aver that a substantial number of the Forms 34A and Forms 34B have been tampered with and in the following manner,
- 23.7.5 The Petitioners further aver that even at the time of filing the Petition the 1<sup>st</sup> Respondent is still in the process fraudulently altering and tampering with the Forms 34A. The 1<sup>st</sup> Respondent is summoning agents to go to its offices to sign Forms 34A.
- 23.7.6 A number of forms and returns are not signed as required under the law and Regulations.
- 23.7.7 A number of Forms 34B do not indicate the names of the Returning Officer.
- 23.7.8 A substantial number of Forms 34A and 34B do not bear the IEBC authentic stamp or at all.
- 23.7.9 A substantial number of Forms 34A and 34B do not bear the signatures of the candidates agents nor the reason for refusing to sign.
- 23.7.10 A considerable number of polling stations in different areas curiously show the same person as presiding in those stations.
- 23.7.11 In more than half of the 290 constituencies, the returning officers failed to indicate the number of Forms 34A handed over to them as required under the law and the Regulations.

- 23.7.12 The Petitioners aver that it is therefore not possible to verify a number of forms and returns used in the election as required under the law and as would render the election accurate and verifiable.
- 23.7.13 The totality and effect of the forgoing is that the integrity of a material number of forms 34A and forms 34B used in the Presidential Election was wholly compromised and the results therein cannot be relied upon rendering invalid a material number of votes cast and represented by those forms and returns.
- 23.7.14 The Petitioners aver that the cumulative number of the invalidated votes materially affects the final result declared by the 1<sup>st</sup> Respondent.
- 23.7.15 Furthermore, the Petitioners aver that by using returns and forms unknown to the law, the 1<sup>st</sup> Respondent manufactured the results of the Presidential Election to an extent that substantially affected the final outcome of the Presidential Election.
- 23.7.16 As stated heretofore, a colossal total of 14,078 Forms 34A supplied by the 1<sup>st</sup> Respondent on request by the Petitioners have shown fatal and irredeemable irregularities.
- 23.7.17 Before and at the time of the declaration of the final result, the 1<sup>st</sup> Respondent publically admitted that they had not seen, received or secured results from 11,883 polling stations and from 17 Constituency Tallying Centres.
- 23.7.18 It is instructive to note that by the 1<sup>st</sup> Respondent's own admission in its letter of 15 August 2017 it was yet to receive authentic Forms 34A from 5,015 polling stations. As at the date of this Petition, the same remain outstanding.
- 23.7.19 It is the Petitioners' averment that the said outstanding Forms 34A represent in excess of 3.5million votes.

23.7.20 The Petitioners have knowledge and information confirmed by the 1<sup>st</sup> Respondent's own averments that the more than 10,000 Forms 34A which were not availed before declaration of the result are being scanned in Nairobi at the Bomas of Kenya and Anniversary Towers contrary to the regulations and legitimate expectation set out above on the relay and transmission of results.

#### Contradictory and inconsistent operational procedures

23.8 The Petitioners relies upon and sets out all the grounds set out in Clause 1.4 to 1.9 above.

23.9 The 1<sup>st</sup> Respondent gave its officers instructions that were contrary to the law and the laid down Regulations regarding voter identification, the voting process and delivery of results in the following cases and in the following manner:

23.9.1 Regulation 69 of the Election (General) Regulations vis a vis the 1<sup>st</sup> Respondent's Memo of 27 July 2017 with regard to voter identification;

23.9.2 Voter transmission;

23.9.3 The process of handing over and taking over of the Forms 34A at the national tallying centre was not transparent, was not verifiable and did not meet the requirements of the law or the procedures laid down by the 1<sup>st</sup> Respondent which were aimed at ensuring transparency and accountability.

24 The sum total and effect of the non-compliance with the law, irregularities and improprieties seriously affected and grossly undermined the integrity of the Presidential Election and rendered the results of the Presidential Election a nullity.

#### **d) Rejected votes/ballots**

25 The Petitioners note that the quantity and percentage of the allegedly rejected votes in this Presidential Election, standing at a colossal 2.6% (477,195) in actual summation of Forms 34B, 403,495 as per the 1<sup>st</sup> Respondent's portal and 81,685 as per the 1<sup>st</sup> Respondent's Form 34C of the total votes cast is unprecedented, contradictory, unbelievable and

deserving of an inquiry.

- 26 The Petitioners aver and shall pray that the election returns be examined, audited and scrutinised.
- 27 It is the Petitioners' contention that upon scrutiny of the total rejected and spoilt votes, this Honourable Court will confirm that a total of 395,510 votes were unlawfully deducted from the 1<sup>st</sup> Petitioner and added to the 3<sup>rd</sup> Respondent.
- 28 The Petitioners draw the Honourable Court's attention to the discrepancy in rejected and spoilt votes as shown in the 1<sup>st</sup> Respondent's Forms 34B and its public portal, with the latter showing a significantly higher number.
- 29 The Petitioners aver that this Honourable Court should consider the total number of verified rejected votes in ascertaining whether any candidate met the constitutional threshold.

**e) Other contraventions and violations**

Contravention of Article 35(2) of the Constitution

- 30 The Petitioners aver that the 1<sup>st</sup> Respondent contravened and violated the Petitioners' right under Article 35(2) of the Constitution by putting up and publicly maintaining false, inaccurate and misleading information which affected the Petitioners and deliberately mislead the general public and the people of Kenya.

Intimidation and improper influence

- 31 The Petitioners aver that the Presidential Election was marred and significantly compromised by intimidation and improper influence or corruption contrary to Articles 81(e)(ii) of the Constitution as read together with the Elections Act and Regulations 3 and 6 of the Electoral Code of Conduct.
- 32 With impunity, the 3<sup>rd</sup> Respondent contravened the Rule of Law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters.

33 The aforesaid violations and contraventions taken singly and/or cumulatively affected the conduct, result and outcome of the Presidential Election and rendered it void and a nullity.

**AND**

34 In totality, the manner in which the Presidential Election was so badly conducted, administered and managed by the 1<sup>st</sup> Respondent as to contravene and violated Article 38, 81 and 86 of the Constitution of Kenya as read together with section 44 of the Elections Act.

35 The effect of the foregoing is that the Presidential Election and the resultant declaration of the 3rd Respondent as the winner of the Election subverted the will and intentions of the people of Kenya is unconstitutional, invalid and a nullity and should be declared as such. To uphold the Presidential Election as conducted and the declaration of the 3rd Respondent as the winner would deal a fatal blow to the sovereign will and spirit of the Kenyan people as captured and enshrined under Articles 1; and the Republican nature of our system of Government under Article 4 of the Constitution of Kenya.

**D. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:**

36 The following are the questions or issues for determination as considered by the Petitioners:

- a) Whether the Presidential Election was conducted in accordance with and in compliance with the Constitution;
- b) Whether the Presidential Election was conducted in accordance with and in compliance with the written law and national legislation;
- c) Whether the 1<sup>st</sup> Respondent's non-compliance with the Constitution and/or the Law in the conduct of the Presidential Election affected the result of the Presidential Election;
- d) Whether the 1<sup>st</sup> Respondent's non-compliance with the Constitution and/or the Law affected the validity of the result of the Presidential Election;

- e) Whether the non-compliance, irregularities and improprieties affected the validity of the result of the Presidential Election;
- f) Whether the non-compliance, irregularities and improprieties affected the result of the Presidential Election;
- g) Whether the colossal 2.6% of the total votes cast substantially affects and/or invalidates the count and tally of the Presidential Election;
- h) Whether the total number of verified rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold.
- i) Whether the 3<sup>rd</sup> Respondent was validly declared as the president elect;
- j) Whether the 3<sup>rd</sup> Respondent committed election irregularities;
- k) What are the appropriate orders to be made by the Court?

#### **E. RELIEFS SOUGHT IN THE PETITION**

- a. Immediately upon the filing of the Petition, the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 8<sup>th</sup> August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;
- j. A declaration that the 3<sup>rd</sup> Respondent was not validly declared as the president elect and that the declaration is invalid, null and void;
- k. An order directing the 1<sup>st</sup> 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.

DATED at NAIROBI this 18<sup>th</sup> day of August 2017.

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**MURUMBA & AWELE ADVOCATES  
FOR THE PETITIONER**

**DRAWN & FILED BY:**  
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**NAIROBI**

To: THE SUPREME COURT OF KENYA  
NAIROBI

**COPIES TO BE SERVED ON:**

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
ANNIVERSARY TOWERS  
6TH FLOOR  
UNIVERSITY WAY  
P. O. BOX 45371 - 00100  
NAIROBI
  
2. H.E. UHURU MUIGAI KENYATTA  
NAIROBI

LODGED in the Registry at Nairobi on the 18<sup>th</sup> day August of 2017.

.....  
REGISTRAR