

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NO. _____ OF 2017

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

~ VERSUS ~

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST RESPONDENT

THE CHAIRPERSON,

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND RESPONDENT

AND

H. E. UHURU KENYATTA	1ST INTERESTED PARTY
RT. HON. RAILA ODINGA	2ND INTERESTED PARTY
DR. EKURU AUKOT JOHN	3RD INTERESTED PARTY
DIDA MOHAMED ABDUBA	4TH INTERESTED PARTY
MWAURA MICHAEL WAINAINA	5TH INTERESTED PARTY
NYAGAH JOSEPH WILLIAM NTHIGA	6TH INTERESTED PARTY
KALUYU JAPHETH KAVINGA	7TH INTERESTED PARTY
SHAKHALAGA KWA JIRONGO	8TH INTERESTED PARTY

CERTIFICATE OF URGENCY

I, **OKIYA OMTATAH OKOITI**, care of Room 4, Floor B1, Block A, Western Wing, NSSF Building, Bishops Road, P. O. Box 60286-00200, **NAIROBI**, the Petitioner / Applicant herein, acting in person, **DO CERTIFY** that this application is extremely urgent and should be heard forthwith on priority basis.

DATED at NAIROBI this 27th day of October 2017

**_____
OKIYA OMTATAH OKOITI
THE PETITIONER**

DRAWN & FILED BY:

**OKIYA OMTATAH OKOITI
ROOM 4, FLOOR B1, WESTERN WING,
NSSF BUILDING,
P.O BOX 60286 - 00200
NAIROBI.**

TO BE SERVED UPON:

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
6TH FLOOR, ANNIVERSARY TOWERS
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI.
2. THE CHAIRPERSON
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
6TH FLOOR, ANNIVERSARY TOWERS
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NYAGAH JOSEPH WILLIAM NTHIGA 6TH INTERESTED PARTY

KALUYU JAPHETH KAVINGA 7TH INTERESTED PARTY

SHAKHALAGA KWA JIRONGO 8TH INTERESTED PARTY

AFFIDAVIT IN SUPPORT OF THE CERTIFICATE OF URGENCY

I, OKIYA OMTATAH OKOITI, a citizen of Kenya resident in Nairobi City County, and of care of Room 4, Floor B1, Block A, Western Wing, NSSF Building, Bishops Road, P. O. Box 60286-00200, NAIROBI, do hereby solemnly make oath and state as follows:

1. THAT I am an adult male of sound mind, the Petitioner / Applicant herein, aware of the matters in issue and hence competent to swear this affidavit on my own behalf as the Applicant.
2. THAT the purported fresh presidential elections held on 26th October 2017 have been conducted outside the law and are, therefore, unconstitutional, null and void *ab initio*.
3. THAT despite being a nullity in law, the purported fresh presidential elections held on 26th October 2017 have literally divided the country down the middle and this Honourable Court needs to pronounce itself on their validity before more harm is done to the republic.
4. THAT before the final results of the purported fresh presidential elections held on 26th October 2017 are announced, the Supreme Court needs to exercise its jurisdiction and

pronounce itself on the consequences on the purported elections of the decision by the 2nd interested party and his running mate (the NASA candidates) to abandoned them (the elections) on 10th October 2017, pursuant to Paragraph 290 of this Court’s binding decision in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR*, (hereinafter, “RAILA ODINGA 2013”).

5. **THAT** the 1st and 2nd respondents need to be restrained from continuing to waste public resources on an exercise in futility.
6. **THAT** the 1st and 2nd respondents need to be restrained from continuing to announce results purportedly belonging to the Rt. Honourable Raila Amolo Odinga who abandoned the purported elections on 10th October 2017, effectively vacating those elections by an act of the law.
7. **THAT** I swear this affidavit in support of the certificate of urgency and to have this application and the petition filed alongside it heard and determined urgently and in priority to any other matter.
8. **THAT** what is deponed to herein is true and to my own knowledge save as to facts deponed to on information and belief the sources and grounds whereof have been respectively specified.

SWORN by the said OKIYA OMTATAH OKOITI
at Nairobi this 27th day of October, 2017
BEFORE ME

.....
DEPONENT

COMMISSIONER OF OATHS / MAGISTRATE

DRAWN & FILED BY:

OKIYA OMTATAH OKOITI
ROOM 4, FLOOR B1, BLOCK A
WESTERN WING, NSSF BUILDING
BISHOPS ROAD
P. O. BOX 60286-00200
NAIROBI.

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KALUYU JAPHETH KAVINGA 7TH INTERESTED PARTY

SHAKHALAGA KWA JIRONGO 8TH INTERESTED PARTY

NOTICE OF MOTION

(Pursuant to Articles 10, 20, 22, 23, 50(1), 73(1)(a)(iii), 73(2)(b), 159, 163, 258 and 259(1) of the Constitution of Kenya; Sections 21(3), 25(2), 3(b), 8, 18, 24(2), of the Supreme Court Act, 2011; Sections 18, 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013; the principles of natural justice; the inherent powers of the Court; and all other enabling provisions of the law.)

LET ALL PARTIES CONCERNED attend the Honourable Judge in Chambers on the _____ day of _____, 2017, at 9.00 O'clock in the forenoon or as soon thereafter for hearing of an Application by the Applicant for **ORDERS**:

1. **THAT** this application be certified as urgent and fit to be heard forthwith, and be granted *ex-parte*, and in priority to any other matter herein.
2. **THAT** pending the *inter-partes* hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the 1st and 2nd respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to, in any way whatsoever, broadcast, announce or relay in any media or

portal the results attributed to the Rt. Hon. Raila Amolo Odinga because it is done in violation of the law, given that he legally withdrew from the presidential election.

3. **THAT** consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
4. **THAT** the costs of this application be provided for.

THIS APPLICATION is based on the following grounds **THAT**:

1. A restraining order against the 1st and 2nd respondents from announcing, broadcasting, etc., the results attributed to the Rt. Hon. Raila Amolo Odinga is required because it is a violation of his right to dignity under Article 28 given that such broadcasting... Is calculated to humiliate him by implying that he has very low political support when the Commission knows that he legally and effectively abandoned his candidature on 10th October 2017.
2. The petitioner/applicant did not have the opportunity to approach and address this court earlier than he has done today on all the issues raised herein.
3. On 11th October 2017, the Petitioner raised the issues herein before the High Court vide **Constitutional Petition No. 504 of 2017, Okiya Omtatah Okoiti vs. The Independent Electoral and Boundaries Commission & 3 Others.**
4. At around 3.30 pm on 24th October 2017, the High Court (Mativo J.) dismissed the petition upon determining that the High Court had no subject matter jurisdiction, the same being reserved for the exclusive jurisdiction of the Supreme Court.
5. The petitioner/applicant has been forced to approach this court at the 11th hour as a consequence of the High Court declining jurisdiction on 24th October 2017, after holding the file since 11th October 2017.
6. On 25th October 2015, which was a public holiday, the petitioner was informed by the Deputy Registrar of the Supreme Court, Mr. Sangida Ole Keiwa, that the Chief Justice had directed that the petitioner files his pleadings today.

7. This matter is extremely urgent since, despite the presidential and the deputy presidential candidates for the National Super Alliance (the NASA candidates) abandoning and effectively vacating the 26th October 2017 fresh presidential election, by an act of the law, the 1st and 2nd respondents have adamantly gone ahead to organise a purported election on that day.
8. The law as regards the consequences of the NASA candidates decision to abandon the purported elections in line with Paragraph 290 of this Court's binding decision in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR*, (hereinafter, "RAILA ODINGA 2013") needs to be clarified and enforced by this Court as a matter of utmost urgency, and before the final results of the purported election are announced.
9. It has emerged that the 1st respondent has lost its autonomy and is beholden to external partisan interests determined to install a government contrary to the Constitution and which will violate Article 3(2) which decrees that, "*Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.*"
10. The decision by the 1st and 2nd respondents to act outside the law by holding a purported election on 26th October 2017 has divided the country down the middle pitting supporters of the 1st interested party against those of the 2nd interested party.
11. This application and petition will be rendered nugatory if the orders sought herein are not granted.
12. The applicant/petitioner has established a *prima facie* case.
13. The respondents will suffer no prejudice if the orders are granted.
14. Granting the orders sought herein will advance the cause of justice.
15. Granting the orders is not determinative of the Petition.
16. The balance of convenience favours the granting of the orders sought in this application.
17. This Honourable Court has unfettered powers and jurisdiction to make the orders sought.

18. It is meet and just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.

AND FURTHER SUPPORTED by the affidavit of **OKIYA OMTATAH OKOITI** annexed herewith, the nature of the case and other grounds and reasons to be adduced at the hearing hereof.

DATED at **NAIROBI** this **27th** day of **October 2017**

OKIYA OMTATAH OKOITI
THE PETITIONER

DRAWN & FILED BY:

OKIYA OMTATAH OKOITI
ROOM 4, FLOOR B1, WESTERN WING,
NSSF BUILDING,
P.O BOX 60286 - 00200
NAIROBI.

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Note: If any party served does not appear at the time and place above mentioned such orders will be made and such proceedings taken as the Court may deem just and expedient.

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SUPPORTING AFFIDAVIT

I, OKIYA OMTATAH OKOITI, a resident of Kenya and of care of Room 4, Floor B1, Western Wing, Block A, Social Security House, P.O Box 60286-00200, Nairobi, do hereby solemnly make oath and state as follows:

1. **THAT** I am the Applicant/Petitioner herein, aware of the matters in issue and, hence, competent to swear this affidavit on my own behalf.
2. **THAT** I have perused the Application herein and confirm that the facts stated therein are true and correct, and I swear this affidavit in good faith in support of the Application herein.
3. **THAT** I hereby reaffirm and solemnly repeat the facts and averments stated and included in the Application, including each of the paragraphs (each individually as well as cumulatively), and solemnly state that the facts therein are true and to my own knowledge, information and belief.

4. **THAT** I have sworn a supporting affidavit in support of the Petition and I hereby reiterate and repeat the averments in the said Supporting Affidavit and Petition, and I intend to, and I hereby seek the leave of the Honourable Court, to rely on the annexure to the said Supporting affidavit in support of the application herein.
5. **THAT** the Application and the Petition are about the implementation of the 2010 Constitution of Kenya, and relate to the defence of the Constitution of Kenya, 2010, including the enjoyment of fundamental rights and freedoms secured and guaranteed by the Constitution.
6. **THAT** both the application and petition raise matters of grave public concern.
7. **THAT** the facts stated establish a sufficient case with a high possibility of success in respect to the Applicants'/Petitioners' claims, and that further there is an overarching requirement of justice that the orders sought be granted.
8. **THAT** I have a right of access to the Honourable Court to safeguard my rights and those of others, and to defend the Constitution of Kenya, 2010, which has been, is being and is in danger of further infringement.
9. **THAT** I verily believe, that in regard to the continuing threats to and violation of the Constitution, it is of utmost importance and urgency that the violations and threats to the Constitution be stopped by the court without delay.
10. **THAT** the Honourable Court has unfettered powers and the jurisdiction to stop the blatant disregard for the rule of law.
11. **THAT** it is meet and just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.
12. **THAT** unless the application is urgently heard and determined, the applicants and the people of Kenya will suffer great loss and damage in the very likely event that the violations of rights and fundamental freedoms enshrined in the constitution are not stopped.

13. **THAT** in view of the above, and pursuant to this Court’s duty to promote and safeguard constitutionalism and the rule of law, I verily believe that it is now incumbent for this Honourable Court to determine the issues raised in this Application to ensure that both statute and the Constitution are protected, and that the law will henceforth be applied with certainty.

14. **THAT** what is deponed to herein is true to the best of my knowledge save what has been deponed to on information and belief the sources and grounds whereof have been respectively specified.

SWORN by the said OKIYA OMTATAH OKOITI
at Nairobi this 24th day of October, 2017
BEFORE ME

}
DEPONENT

COMMISSIONER OF OATHS / MAGISTRATE

DRAWN & FILED BY:

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ROOM 4, FLOOR B1, BLOCK A,
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