

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

PETITION

**TO: THE HONOURABLE JUDGES
SUPREME COURT OF KENYA
SUPREME COURT BUILDING
NAIROBI.**

THE HUMBLE PETITION OF OKIYA OMTATAH OKOITI (HEREIN AFTER REFERRED TO AS “THE PETITIONER”), BEING AN ADULT CITIZEN OF KENYA AND RESIDENT OF NAIROBI CITY COUNTY, WHOSE ADDRESS OF SERVICE FOR PURPOSES OF THIS PETITION IS CARE OF ROOM 4, FLOOR B1, BLOCK A, WESTERN WING, NSSF BUILDING, BISHOPS ROAD, P. O. BOX 60286 - 00200, NAIROBI, IS AS FOLLOWS:

A. PETITIONER’S NAME AND ADDRESS

1. The Petitioner - **OKIYA OMTATAH OKOITI** - a resident of Nairobi City County, is a law abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles and was set up with

the purpose of promoting democratic governance, economic development, and prosperity. His address of service for purposes of this Petition is care of **Room 4, Floor B1, Block A, Western Wing, NSSF Building, Bishops Road, P. O. Box 60286-00200, NAIROBI**.

B. RESPONDENTS' AND INTERESTED PARTIES' NAMES AND ADDRESSES

2. The 1st Respondent - **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** - (hereinafter the IEBC), is established under Article 88 of the Constitution of Kenya, 2010, and the Independent Electoral and Boundaries Commission Act 2011 for the registration of voters, and conducting or supervising accurate, verifiable, secure, accountable and transparent elections and referenda in the Republic of Kenya. The IEBC's address of service for purposes of this Petition is care of **6TH FLOOR, ANNIVERSARY TOWERS, UNIVERSITY WAY, P. O. BOX 45371 - 00100, GPO, NAIROBI**.
3. The 2nd Respondent - **THE CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** - is required within seven days after the presidential election, to declare the result of the election and to deliver a written notification of the result to the Chief Justice and the incumbent President. The IEBC Chairperson's address of service for purposes of this Petition is care of **6TH FLOOR, ANNIVERSARY TOWERS, UNIVERSITY WAY, P. O. BOX 45371 - 00100, GPO, NAIROBI**.
4. The 1st - 8th Respondents - **H. E. UHURU KENYATTA, RT. HON. RAILA ODINGA, DR. EKURU AUKOT JOHN, DIDA MOHAMED ABDUBA, MWAURA MICHAEL WAINAINA, NYAGAH JOSEPH WILLIAM NTHIGA, KALUYU JAPHETH KAVINGA, SHAKHALAGA KWA JIRONGO** - were candidates given **direct nominations** by the Supreme Court (1st and 2nd interested party); the High Court (3rd interested party); and the IEBC (4th, 5th, 6th, 7th and 8th interested parties) to participate at the purported fresh presidential elections held on 26th October 2017 pursuant to their having participated at the annulled presidential elections of 8th August 2017. They will be served their advocates' offices in Nairobi.

C. JURISDICTION

5. On 11th October 2017, among others, the Petitioner raised the main issue herein, of the consequences of the decision by the 2nd interested party and his running mate (the NASA candidates) to abandon the the 26th October 2017 fresh presidential elections, before the High Court vide **Constitutional Petition No. 504 of 2017, Okiya Omtatah Okiiti vs. The Independent Electoral and Boundaries Commission & 3 Others.**
6. 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.
7. Premised on an expanded reading of the jurisdiction of the Supreme Court [mainly, at paragraphs 100 - 104, inclusive of the decision] in **The Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory No. 2 of 2012**, the learned Judge determined that the High Court lacked subject matter jurisdiction over **Constitutional Petition No. 504 of 2017.**
8. In his Ruling, the learned Judge gives his reasons as to why this matter belongs to the jurisdiction of this Honourable Supreme Court. At paragraph 25 of his Ruling, the learned Judge held thus:
 25. *In my view, since the election is a process as correctly pointed out by the Supreme Court, where a candidate withdraws in the course of the process which is clearly an issue that has a bearing on the process, then it is my view that such a dispute falls within the jurisdiction of the Supreme Court.*
9. The above position was taken notwithstanding the decision the Chief Justice made declining jurisdiction with regard to the application Dr. Ekuru Aukot made in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others, Presidential Petition No. 1 of 2017** (hereinafter, “RAILA ODINGA 2017”), seeking to be enjoined as a candidate in the fresh presidential election. The Chief Justice’s Order was couched in the following terms:-

"Further to my Directions/Orders of 7th September, 2017 and having further considered this matter, I hereby vacate suo motto the Registrar's Order fixing this matter for hearing today and instead I now give further Directions/Orders under Section 24 (1) of the Supreme Court Act as follows:-

- i. I note that this application in substance seeks an interpretation of Article 140 (3) of the Constitution as regards the meaning and effect of "fresh elections."*
- ii. As this court has no jurisdiction to interpret the Constitution save as stated in Article 163 (3) and (6) of the Constitution it cannot entertain this matter. The same should have been filed before the High Court under Article 165 (3) (d).*
- iii. In the circumstances, I decline to admit it for hearing instead I hereby strike out the same with no orders as to costs.*

10. It follows therefore that, since this dispute relates to the fresh presidential elections under Article 140(3) of the Constitution of Kenya 2010, the Supreme Court has original and exclusive jurisdiction to hear and determine the matter.

11. A decision by this Court decline jurisdiction herein, in the circumstance above, will be a gross violation of the petitioner's rights secured under articles 48 and 50(1) of the Constitution.

D. FACTS RELIED UPON

12. On 1st September 2017, the Supreme Court of Kenya annulled the 8th August 2017 presidential elections (hereinafter "the August elections") upon establishing that the poll was not conducted in accordance with the Constitution of Kenya and other laws.

13. By a majority of four (with J. B. Ojwang and N. S. Ndungu, Supreme Court JJ dissenting), the Supreme Court of Kenya made the following final Orders:

- (i) *A declaration is hereby issued 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;*
- (ii) *A declaration is hereby issued that the irregularities and illegalities in the Presidential election of 8th August, 2017 were substantial and significant that they affected the integrity of the election, the results notwithstanding.*
- (iii) *A declaration is hereby issued that the 3rd respondent was not validly declared as the President elect and that the declaration is invalid, null and void;*
- (iv) *An Order is hereby issued directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of the determination of 1st September 2017 under Article 140(3) of the Constitution.*
- (v) *Regarding costs, each party shall bear its own costs.*

14. Initially, the 1st and 2nd respondents fixed 17th October 2017, as the date for the fresh presidential election, but changed it to 26th October 2017 because the timeline was not sufficient to adequately prepare for the fresh presidential election.

15. On 5th September 2017, the 2nd respondent issued an internal memo addressed to the 1st respondent's Secretary/CEO REF: IEBC/CO/CON/1/2/VOL.1(51), titled **SC ELECTION PET 1 OF 2017 RAILA ODINGA & ANOTHER VS IEBC & 2 OTHERS**, which portrays the Commissions' loss of autonomy due to the conflicts within it.

16. On 5th September 2017, acting pursuant to paragraphs 289 - 291 of the decision in **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR**, (hereinafter, "RAILA ODINGA 2013"), the 1st and 2nd respondents gazetted the 1st and 2nd interested parties, vide Gazette Notice No. 8751 of 2017, as the two presidential candidates at the 26th October 2017 fresh presidential elections (hereinafter, the "October elections").

17. For clarity, completeness, and the avoidance of doubt, paragraphs 289, 290 and 291 of RAILA ODINGA 2013, provide:

[289] It is clear that a fresh election under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.

[290] Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of Article 138(8) (b) would become applicable, with fresh nominations ensuing.

[291] Barring the foregoing scenario, does the “fresh election” contemplated under Article 140(3) bear the same meaning as the one contemplated under Article 138(5) and (7)? The answer depends on the nature of the petition that invalidated the original election. If the petitioner was only one of the candidates, and who had taken the second position in vote-tally to the President-elect, then the “fresh election” will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates who did not contest the election of the President-elect, will be assumed to have either conceded defeat, or acquiesced in the results as declared by IEBC; and such candidates may not participate in the “fresh election.”

18. On 12th September 2017, in a document titled, “NASA Position Paper on Irreducible Minimums Before the Fresh Elections are held,” the National Super Alliance (NASA) gave a raft of demands for the IEBC to meet before they could accept to participate in the fresh elections.

19. On 9th October 2017, Commissioner Dr. Roselyne Akombe (the Chairperson of the Election Operations Committee) authored an Internal Memo, Ref: IEBC/RA/01/2017, and titled, *Re: Planning for the Fresh Presidential Election*, wherein she lamented that the *“window of opportunity to create a conducive environment for free, fair and credible elections continue to shrink. Contributing factors to this unhealthy environment are both internal to the Commission while others are external.”* Further and in particular, she went on to state:

- 19.1. The Fresh Presidential Elections Implementation Team was being sabotaged and that was jeopardizing the 1st respondent’s ability and capacity to conduct a free, fair and credible elections;
- 19.2. Four unnamed commissioners were hampering preparations for the fresh presidential elections.
- 19.3. Members of her family and herself had received death threats intended to intimidate and force her to resign.
- 19.4. An unnamed Commissioner of the 1st respondent had physically threatened her at a plenary meeting in the boardroom on 18th September 2017.
- 19.5. The 1st respondent was unable to take administrative action against its errant staff members who had contributed to the invalidation and nullification of the presidential elections.
- 19.6. An Audit of the ICT system used at the August elections, and the quality assurance of the ICT system to be used at 26th October 2017 Elections, had not been undertaken.
- 19.7. There were machinations to delay and or stall measures aimed at restoring public confidence in the Commission as had happened on the 28th and 29th August 2017 following the Orders by the Supreme Court relating to opening up of the Servers.

- 19.8. Although the 1st respondent might be technically, logistically and operationally prepared for the fresh elections, holding the elections required more than logistics and operations and that political environment and confidence by Kenyan is key.
20. On 10th October 2017, pursuant to **Paragraph 290** of the **RAILA ODINGA 2013** decision, the 2nd interested party and his running mate (the NASA presidential candidate) jointly abandoned the October elections claiming that the 1st respondent had failed to undertake basic reforms to ensure credible elections. The decision to abandon the elections vacated them by an act of the law.
21. The petitioner avers that, irrespective of whether other persons or lower courts disagree with them, **paragraph 286 - 294** in **RAILA ODINGA 2013** constitute an **authoritative and binding interpretation** of **Article 140(3)** of the Constitution by the Supreme Court of Kenya that can only be set aside or vacated by the Supreme Court itself pursuant to **Article 163 (7)** of the Constitution. But since nobody has ever challenged **paragraph 286 - 294** in **RAILA ODINGA 2013** in this Court or sought to set them aside, **paragraphs 286 - 294** in **RAILA ODINGA 2013** are the law pursuant to **Article 163 (7)** of the Constitution.
22. The petitioner avers that the effect of the NASA candidates' abandonment of the October elections was within the law and, essentially, [as pronounced by the Supreme Court at **paragraph 290** in **RAILA ODINGA (2013)**], it vacated the October elections by an act of the law.
23. The abandonment by the NASA candidates required the 1st and 2nd respondents to abandon the October elections and to organise a fresh presidential election within sixty days of the 10th October 2017, with fresh nominations, and in tandem with **Article 138(9)** as read with **Article 138(8)(b)** of the Constitution. The fresh presidential elections preceded by fresh nominations would mean a new date, on or before the 10th of December 2017, be gazetted for the elections.
24. The crisis has created a situation which requires this Honourable Court to clarify the law and pronounce itself on the validity of the fresh presidential elections held on 26th October 2017 after the NASA candidates had abandoned the race on 10th October 2017.

25. The petitioner reiterates that, under the law as pronounced by the Supreme Court at paragraphs 286 - 294 in **RAILA ODINGA 2013**, the withdrawal of the NASA candidates:

25.1. Irrevocably vacated the 26th October 2017 fresh presidential elections by an act of the law;

25.2. Precipitated a fresh presidential outside the 60 day period provided in Article 140(3), and required the 1st and 2nd respondents to apply the provisions of Article 138(8) (b), and conduct fresh presidential elections within 60 days of 10th October 2017, with fresh nominations ensuing.

25.3. The purported fresh presidential elections held on 26th October 2017 were irregular before they were held, and were an exercise in futility as the same were invalid, null and void *ab initio* having been vacated by the decision of the NASA candidates to abandon them.

25.4. The results of the purported fresh presidential elections held on 26th October 2017 are invalid, null and void and of no consequences under the law .

26. Since it is trite case law that even *obiter* decisions of the Supreme Court are binding on lower Courts and, therefore, on the 1st and 2nd respondents, the petitioner urges this Honourable Court to compel the IEBC to comply with **Paragraph 290** of the decision in **RAILA ODINGA 2013** by nullifying the purported fresh presidential elections of 28th October 2017 in their entirety.

27. Contrary to the legitimate expectation of the petitioner that, pursuant to **paragraph 290** of **RAILA ODINGA 2013**, the decision of the NASA candidates to abandon the October elections vacated those elections and simultaneously and automatically kicked in the operation of Article 138(8)(b) as read with 138(9), the 1st and 2nd respondents went on to organise the October elections, albeit with an expanded list of all the eight candidates who vied at the nullified August elections. Further and in particular:

27.1. The expanded list was based on the decision the High Court (Mativo J.) made on 11th October 2017, which was a day after the NASA candidates had

abandoned the October elections, in the case of *Dr. Ekuru Aukot vs. Independent Electoral & Boundaries Commission & 3 Others, Nairobi High Court Petition No. 471 of 2017*, wherein the High Court directed the 1st and 2nd respondents to include the 3rd interested party as a candidate at the elections.

27.2. Later the same day, on 11th October 2017, the 1st and 2nd Respondents' released to the public an unsigned communiqué titled, "*Press Statement on the Forthcoming Fresh Presidential Election*," wherein the IEBC announced that it had decided to include all those who had participated at the annulled August elections.

27.3. On 13th October 2017, the 1st and 2nd respondents issued an addendum modifying the Gazette Notice 8751 of 2017, Vol. CXIX-No.130 thereby including five (5) other candidates and omitting one Shakhalaga Kwa Jirongo for being constitutionally disqualified.

27.4. On 18th October 2017, in a public interview in national media, Prof. Abdi Guliye, a Commissioner of the 1st respondent, let it be known that Mr. Shakhalaga Kwa Jirongo would be on the ballot.

28. The question as to the consequences of the decision by the NASA candidates to abandon the October elections was not an issue for determination before the High Court, and in his decision in *Dr. Ekuru Aukot* (supra), Mativo J. did not address it.

29. It is also important to note that the reasoning of Mativo J. in making a direct nomination of candidates, that all who vied at the annulled and voided August elections were entitled to participate at the fresh elections, is in accord with the Supreme Court reasoning at **paragraphs 286 - 294 of RAILA ODINGA 2013**. In essence, the both the Supreme Court and the High Court made direct nominations under Article 140(3) just like the Constitution at Article 138(5) makes direct nominations of candidates to vie at the runoff elections.

30. In the untenable event it is argued that **paragraphs 286 - 294 of RAILA ODINGA 2013** are not part of the election laws the Supreme Court demanded strict compliance with,

then the October elections are still also invalid on the grounds that no fresh nominations were held by the 1st and 2nd respondents. It is only **paragraphs 286 - 294** of **RAILA ODINGA 2013** that lay the basis for direct nominations. Further and in particular, at this stage, the petitioner avers that this Court should isolate the meaning of **fresh elections** as used in Article 140(3) by considering all the following provisions of the Constitution that directly address the subject of fresh/new presidential elections:

30.1. Article 138(5) where **no fresh nominations are envisaged** because there is a constitutional **“DIRECT NOMINATION”** of candidates to participate at the fresh presidential elections within 30 days. Since the Candidates are known, the elections are held with only 30 days.

30.2. **Article 138(8) & (9)** where a scheduled presidential election is cancelled and a new one held within 60 days; Article 139(1)(b) when the President-elect dies before assuming office, fresh nominations are envisaged for new presidential candidate(s) within the 60 day period; **Article 139(3)(b)** where if both the President-elect & Deputy President-elect die, fresh presidential election is to be held within 60 days; and **Article 140(3)** where a presidential election has been nullified by the Supreme Court a new one is held within 60 days.

31. The petitioner posits that the 60 day period given in Article 140(3) was to allow for fresh nominations. Otherwise, if no nominations were anticipated under Article 140(3) the framers of the Constitution would simply have given a shorter period as they did at Article 138(5). Hence, unless **paragraphs 286 - 294** of **RAILA ODINGA 2013** are binding, then the exercise the 1st and 2nd respondents carried out on 26th October 2017 was a nullity in law *ab initio* because it was not the fresh presidential election anticipated under Article 140(3) because there were no fresh nominations of candidates.

32. Though some pundits argue that the decision by the NASA candidates to abandon the October elections was incompetent for noncompliance with Regulation 52 of the Elections (General) Regulations 2017, because they did not do so by filling the statutory Form 24A, the petitioner urges that such a procedure is not applicable herein where there were no fresh nominations. Had the 1st and 2nd respondents held fresh nominations, then the 2nd interested party would have been under obligation to fill Form 24A as provided for under the Regulations.

33. On 14th October 2017, the 1st respondent's Secretary/CEO authored an Internal Memo Ref: IEBC/CEO/10/2017, addressed to Directors, Managers, CEMS, and CECs titled, Revised Results Transmission Workflow, stating that they will not be able to fully deploy the Results Transmission System due to time constraints.

34. On 17th October 2017, Commissioner Dr. Roselyn Akombe released a signed Press Statement [from her political exile] in New York, in which she condemned the preparations for the October elections, declared that the Commission had no capacity to hold free, fair and credible elections, and announcing that she had resigned from being a Commissioner of the 1st respondent. In the terse statement, she categorically states in part that:

“We need the Commission to be courageous and speak out, that this election as planned cannot meet the basic expectations of a CREDIBLE election. Not when the staff are getting last minute instructions on changes in technology and electronic transmission of results. Not when in parts of country, the training of presiding officers is being rushed for fear of attacks from protestors. Not when Commissioners and staff are intimidated by political actors and protestors and fear for their lives. Not when senior Secretariat staff and Commissioners are serving partisan political interests. Not when the Commission is saddled with endless legal cases in the courts, and losing most of them. Not when legal advice is skewed to fit partisan political interests. The Commission in its current state can surely not guarantee a credible election on 26 October 2017. I do not want to be party to such a mockery to electoral integrity.”

35. On 18th October 2017, the 2nd respondent convened a Press Conference where in his signed statement titled, Chairman's Address on Status of Preparedness for the Elections - 18th October 2017,” he acknowledged that the NASA candidates had withdrawn from the October elections, and categorically stated that the 1st respondent was not ready to hold free, fair and credible elections on 26th October 2017.

36. On 23rd October In the morning on 25th October 2017, in Republic vs. The Independent Electoral and Boundaries Commission, Ex Parte Khelef Khalifa & Another, the High Court (Odunga J.) determined that the 1st respondent violated Regulation 3 (2) of the Elections (General) Regulations 2017, as read with Articles 38 and 81 of the

Constitution, meaning that all the Returning Officers for the October elections were hired illegally, and all their actions are a nullity and void in law. However, later the same day, in *The Independent Electoral and Boundaries Commission vs. Khelef Khalifa & Another, Civil Application No.246 of 2017*, the Court of Appeal allowed the October elections to proceed when, *ex-parte*, it suspended both the finding of Odunga J. and its implementation.

37. The petitioner is also aggrieved that, acting against the principles of natural justice that underpin the Constitution of Kenya 2010, Parliament changed the rules of the game midway by changing election laws to depart radically from the laws in force during the annulled August elections, and to defeat the Supreme Court order that the 1st and 2nd respondents “*conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of the determination of 1st September 2017...*” The new laws came into force at the expiry of 14 days since the Speaker of the National Assembly transmitted the Bill to the President, and were used at the October elections.

38. This Honourable Court is enjoined to urgently and speedily make a determination of the validity of the purported 26th October 2017 fresh presidential elections in the wake of:

38.1. The withdrawal of the NASA candidates;

38.2. The untenable goings on at the commission which point in the direction of the Commission having lost its independence and being unable to conduct a free, fair and credible elections;

38.3. The illegalities determined by the High Court in the appointment of all the Returning Officers; and

38.4. Parliament’s decision to change the election laws midway.

39. Given that the public announcement by the 2nd respondent that he cannot guarantee free, fair and credible elections had not been withdrawn at the time the exercise on 26th October 2017 was held, makes the results he will announce untrustworthy.

40. The 2nd respondent's decision to preside over the events of 26th October 2017 in the circumstances where he has publicly denounced the process and stated that he is not in control, is a violation of Articles 73(1) to the extent that: (i) it is NOT consistent with the purposes and objects of the Constitution; (ii) it does NOT demonstrate respect for the people; (iii) it does NOT bring honour to the nation and dignity to the office; and (iv) it does NOT promote public confidence in the integrity of the office. It also does not demonstrate the 2nd respondent's responsibility to serve the people, rather than the power to rule them.
41. In an unprecedented development, the 2nd respondent postponed the purported elections in four counties in Nyanza region on security grounds. But the postponement was very insensitive because the date appointed for the purported elections in Nyanza is unconstitutional because it is a violation of the right to religion and a disenfranchisement of the many Seventh Day Adventist worshippers in the area. It also discriminates them under Article 27 of the Constitution especially when compared to persons of other religions/denominations.
42. The petitioner posits further that Section 83 of the Elections Act 2012 is unconstitutional as it undermines the rule of law by stating that, ***"No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***
43. Section 83 is unconstitutional because it is worded in a manner to oust or minimize the Constitutional provisions relating to free, fair and credible elections, including Articles 38, 81 and 86 of the Constitution. Further, given the doctrine of void for vagueness, the section is unconstitutional because it is worded in such manner that is so vague so as to render the provision imprecise and incapable of being law under the Constitution."
44. Finally, the petitioner avers that the legality and legitimacy of the purported election held on 26th October 2017, is the fundamental question here. It must not be lost on this Honourable Court that elections are the mechanism of transferring sovereign power from the people to a government. Hence, elections ought to result in a social contract and the formation of constitutional governance. If vast sections of the population do

Not transfer their power to government by participating in an election, that voting exercise, that act is not an election according to the Constitution and laws of Kenya. The President or government that results from such an exercise fails the legitimacy test, and is a recipe for disaster.

E. THREATS TO THE CONSTITUTION

45. The purported elections of 26th October have left the country divided down the middle and that poses a threat to the entire Constitution of Kenya 2010.

46. In particular, the current state of affairs threatens to violate the following provisions of the Constitution:

46.1. Article 1(1) on the sovereignty of the people.

46.2. Article 2(1 - 4) on the supremacy of the Constitution.

46.3. Article 3(2) that categorically declares that, “Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.”

46.4. Article 10(2) including, on the rule of law, patriotism, national unity, democracy and participation of the people; equity, social justice, inclusiveness; and good governance, integrity, transparency and accountability.

46.5. Article 38 on political rights.

46.6. Articles 81 and 86 on the General principles for the electoral system.

46.7. Articles 88 and 249 on the mandate of the 1st respondent, and the obligation to execute that mandate in accordance with this Constitution and national legislation.

46.8. Article 82(1)(d) & (2) as read with 93(2) on the mandate of Parliament to enact legislation to govern elections.

F. CASES RELATED TO ISSUES IN THE PETITION

47. There is no case pending in any court of competent jurisdiction between the parties over the subject matter herein.

G. RELIEFS SOUGHT BY THE PETITIONER

48. **The Honourable Court be pleased to determine the following QUESTIONS:**

- (i) Whether the 10th October 2017 withdrawal of the NASA presidential candidate and his running mate from the 26th October 2017 repeat presidential election vacated those elections?
- (ii) Whether the elections of 26th October 2017 are invalid, null and void *ab initio* and the 1st and 2nd respondents should be ordered to conduct fresh presidential elections under Article 138 (8) (b) of the Constitution.
- (iii) Whether the IEBC complied with the orders of the Supreme Court concerning the irregularities and illegalities that resulted in the nullification of the 8th August 2017 presidential election and, if not, whether the IEBC as presently constituted is capable of conducting a free, fair and credible fresh presidential election?
- (iv) Whether the IEBC organized to conduct the fresh presidential election on 26th October 2017 in strict compliance with the Constitution and applicable statutes as ordered by the Supreme Court?
- (v) Whether the IEBC put in place the mechanisms, staff and instruments necessary to conduct a free, fair and credible fresh presidential election as ordered by the Supreme Court?
- (vi) Whether the laws that governed the nullified 8th August 2017 presidential elections can validly be changed midway by Parliament and whether the new law can be used to conduct the fresh presidential election?

(vii) Whether Section 83 of the Elections Act 2012 is unconstitutional, null and void.

(viii) Whether costs are payable?

49. REASONS WHEREFORE Your Petitioner therefore humbly prays for:

(i) **A DECLARATION THAT:**

- a. The decision of the Supreme Court in **RAILA ODINGA 2013** was part of the election laws in force when the NASA presidential and deputy presidential candidates abandoned the repeat presidential elections scheduled for 26th October 2017.
- b. The decision by the NASA presidential and deputy presidential candidates to withdraw from the repeat presidential elections scheduled for 26th October 2017, was fatal to the said elections, and effectively and irreversibly cancelled the said elections; exiting Article 140(3) of the Constitution; and kicking in the operation of Article 138(8)(b) of Constitution.
- c. The 26th October 2017 presidential elections held pursuant to Article 140(3) of the Constitution after the withdrawal of the NASA presidential and deputy presidential candidates is invalid, null and void *ab initio*.
- d. The IEBC ought to have organised to hold fresh elections within sixty days of the 10th of October, 2017, being on or before the 10th of December 2017, preceded by fresh nominations.
- e. The laws in force during the 8th August 2017 presidential elections will be the applicable laws during the presidential elections to be held as a consequence of the invalidation of the 8th August 2017 elections.
- f. Section 83 of the Elections Act 2012 is unconstitutional, null and void.

(ii) **AN ORDER:**

a. **Compelling** the 1st and 2nd respondents to hold fresh presidential elections, preceded by fresh nominations, pursuant to Article 138(8)(b) and 138(9) of the Constitution and under the election laws in force during the annulled 8th August 2017 presidential elections.

b. **THAT** the costs of this suit be provided.

(iii) Any other relief the court may deem just to grant.

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
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI.

3. H. E. UHURU KENYATTA
4. RT. HON. RAILA ODINGA
5. DR. EKURU AUKOT JOHN
6. DIDA MOHAMED ABDUBA
7. MWAURA MICHAEL WAINAINA
8. NYAGAH JOSEPH WILLIAM NTHIGA
9. KALUYU JAPHETH KAVINGA
10. SHAKHALAGA KWA JIRONGO

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

SUPPORTING AFFIDAVIT

I, **OKIYA OMTATAH OKOITI**, a resident of Nairobi County in the Republic of Kenya and of P.O Box 60286 - 00200, Nairobi within the Republic aforesaid make oath and state as follows.

1. **THAT** I am the Petitioner herein hence competent to swear this affidavit.

2. **THAT** I swear this affidavit in good faith in support of the Petition filed herewith.

3. **THAT** I have perused the Petition herein and confirm that the facts stated therein are true and correct.

4. **THAT** I hereby reaffirm and solemnly repeat the facts and averments stated and included in the Petition, 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.

5. **THAT** in support of my averments above, I annex a bundle marked as **EXHIBIT 000-1**, containing the following documents:
- a. The 2nd interested party's communiqué dated at Nairobi on October 10th 2017, and titled, **National Super Alliance Coalition Statement on Withdrawal of the Candidature of Rt. Hon. Raila Odinga and H. E. Stephen Kalonzo Musyoka in the Presidential Election scheduled for 26th October, 2017.**
 - b. The 1st and 2nd Respondents' communiqué dated at Nairobi on October 11th 2017, and titled, **Press Statement on the Forthcoming Fresh Presidential Election.**
 - c. The Internal Memo Ref: IEBC/CEO/10/2017, dated 14th October 2017, and titled, **Revised Results Transmission Workflow;**
 - d. The **Press Statement** by Dr. Roselyne Akombe stating she had resigned from being a commissioner of the 1st respondent.
 - e. The 2nd respondent's document titled, **Chairman's Address on Status of Preparedness for the Elections - 18th October 2017.**
 - f. The Internal Memo dated 9 October 2017, Ref: IEBC/RA/01/2017, and titled, **Re: Planning for the Fresh Presidential Election.**
 - g. The Ruling of Mativo J. in **Okiya Omtatah Okoiti Vs. The Independent Electoral and Boundaries Commission & 3 Others, Constitutional Petition No. 504 of 2017.**
 - h. The Ruling of Mativo J. in **Dr. Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 Others, Nairobi High Court Petition No. 471 of 2017.**
 - i. The various **Gazette Notices** published pursuant to the fresh presidential elections.

- j. “NASA Position Paper on Irreducible Minimums before the Fresh Elections are held.”
- k. The 2nd respondent’s internal memo REF: IEBC/CO/CON/1/2/VOL.1(51), titled SC ELECTION PET 1 OF 2017 RAILA ODINGA & ANOTHER VS IEBC & 2 OTHERS, dated 5th September 2017, and addressed to the 1st respondent’s Secretary/CEO.
- l. High Court decision in Republic vs. The Independent Electoral and Boundaries Commission, Ex Parte Khelef Khalifa & Another.
- m. Court of Appeal decision in The Independent Electoral and Boundaries Commission vs. Khelef Khalifa & Another, Civil Application No.246 of 2017.

6. **THAT** what is deponed to herein is true to the best of my knowledge, information and belief.

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.

EXHIBIT 000-1