

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PRESIDENTIAL ELECTION PETITION NO. OF 2022

RAILA ODINGA1ST PETITIONER

MARTHA WANGARI KARUA2ND PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

WANYONYI WAFULA CHEBUKATI 2ND RESPONDENT

BOYA MOLU3RD RESPONDENT

PROF. ABDI YAKUB GULIYE4TH RESPONDENT

JULIANA WHONGE CHERERA5TH RESPONDENT

JUSTUS NYANGAYA6TH RESPONDENT

FRANCIS WANDERI7TH RESPONDENT

IRENE MASSIT8TH RESPONDENT

WILLIAM SAMOEI RUTO.....9TH RESPONDENT

THE PETITION

DRAWN & FILED BY:

PAUL MWANGI & COMPANY ADVOCATES

VISION PLAZA,

3RD FLOOR, ROOM 16

MOMBASA ROAD

P.O BOX 55903-00200

NAIROBI

MOBILE: 0722518733

EMAIL: PMLAWCHAMBERS12@GMAIL.COM

AWELE@AWELEJACKSON.CO.KE

MAUMO@MAUMOADVOCATES.COM

OCHIENGOGINGAADVOCATES@GMAIL.COM

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PRESIDENTIAL ELECTION PETITION NO. _____ OF 2022

BETWEEN

RAILA ODINGA.....1ST PETITIONER
MARTHA WANGARI KARUA.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
WAFULA WANYONYI CHEBUKATI.....2ND RESPONDENT
BOYA MOLU.....3RD RESPONDENT
PROF. ABDI YAKUB GULIYE.....4TH RESPONDENT
JULIANA WHONGE CHERERA.....5TH RESPONDENT
JUSTUS NYANGAYA.....6TH RESPONDENT
FRANCIS WANDERI.....7TH RESPONDENT
IRENE MASSIT.....8TH RESPONDENT
WILLIAM SAMOEI RUTO.....9TH RESPONDENT

PETITION

THE HUMBLE PETITION of **RAILA ODINGA** and **MARTHA WANGARI KARUA** whose address for service for purposes of this Presidential Petition shall be of c/o PAUL MWANGI & COMPANY ADVOCATES, Vision Plaza, 3rd Floor - Room 16, Mombasa Road, P. O. BOX 55903-00200, Nairobi; **Telephone:** +254 722 518 733; **Email:** pmlawchambers12@gmail.com; paulmwangi12@gmail.com; awele@awelejackson.co.ke; maumoadvocates@gmail.com; and ochiengogingaadvocates@gmail.com; IS AS FOLLOWS:

A. THE PARTIES

1. The 1st and 2nd Petitioners are adult citizens of the Republic of Kenya. The Petitioners were the Presidential candidate and Deputy Presidential candidate respectively, of the Azimio La Umoja One Kenya Coalition Party, in the General Elections held on 09th August 2022.
2. The 1st Respondent is the Independent Electoral and Boundaries Commission (IEBC). The 1st Respondent is an independent commission established under Article 88 as read together with Articles 248 and 249 of **The Constitution of Kenya** and the **Independent Electoral and Boundaries Commission Act No. 9 of 2011**.
3. The 1st Respondent is an independent commission established pursuant to Article 88 of **The Constitution of Kenya, 2010**; and 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**. Pursuant to Article 138(3) of **The Constitution**, in a presidential election, the 1st Respondent “shall tally and verify the count and declare the result”.
4. The 2nd Respondent has been gazetted as the Chairperson of the Independent Electoral and Boundaries Commission (IEBC); and as the National Returning Officer for the purposes of the presidential election held on 09th August 2022. The 2nd 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.

5. The 3rd, 4th, 5th, 6th, 7th and 8th Respondents are Commissioners of the 1st Respondent. The 6th Respondent is also the Vice Chairperson of the 1st Respondent.
6. The 9th Respondent is the Presidential candidate of the United Democratic Alliance Party. On 15th August 2022, following the General Elections held on 09th August 2022, the 1st Respondent declared the 9th Respondent elected as President.
7. The results of the presidential election declared by the 2nd Respondent on 15th August 2022, which are contested in this Petition, are as follows (hereinafter “the result” or “final outcome” or “outcome”):

a)	ODINGA RAILA	6,942,930	48.85%
b)	RUTO WILLIAM SAMOEI	7,176,141	50.49%
c)	WAIHIGA DAVID MWAURE	31,987	0.23%
d)	WAJACKOYAH GEORGE LUCHIRI	61,969	0.44%

B. SUMMARY OF FACTS AND BACKGROUND INFORMATION

**“Any attempt to establish a government otherwise than in compliance with
this Constitution is unlawful.”**

Article 3(2) of The Constitution of Kenya, 2010

8. In **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another v Independent Electoral and Boundaries & 2 Others [2017] eKLR**, this Court refused to validate, and held that the presidential election conducted on 08th August 2017 was so badly conducted that:

“...the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.” [Emphasis supplied]

9. In 2017, this Court was shy to, and spared the 2nd Respondent herein who was also the Chairperson of the IEBC then, from direct responsibility and culpability for the bungled and impugned election. That decision, as this Petition will show emboldened a rogue public officer, who with wilful, fraudulent and criminal intent, set out to subvert the sovereign will of the people of Kenya and the constitutional order in the conduct of the 09th August 2022 presidential election.

10. The manner in which the 09th August 2022 presidential election was conducted, graduated beyond contumacious disregard for **The Constitution**, the rule of law, the national values and principles of good governance, and the lawful authority of the Court; to premeditated unlawful and criminal subversion of the integrity and constitutionality of the electoral process in order to assist and secure a fraudulent result.
11. In the conduct of the 09th August 2022 presidential election, the 2nd Respondent with wilful intent set out to subvert the sovereign will of the people of Kenya and overthrow the constitutional order.
12. Any attempt to overthrow the constitutional order and the sovereign will of the people of Kenya must be called out for what it is – treason. This is the import of Article 3(2) of **The Constitution** which states that an attempt to establish a government otherwise than in compliance with the Constitution is unlawful.
13. Martin Luther King Jr said “our lives begin to end the day we become silent about things that matter.” The life of this Country and **The Constitution of Kenya 2010**, will begin to end unless and until this Court stands firmly and decisively against any attempt to subvert the will and sovereignty of the people of Kenya.
14. The Petitioners contend that in spite of the decision of this Court in 2017, the 2nd Respondent has not only continued to act and operate outside the law; his conduct has

escalated to blatant and wilful subversion of **The Constitution** and the sovereign will of the people of Kenya, and what is simply a criminal enterprise.

15. Throughout the tenure of the 2nd Respondent at the IEBC, a clear pattern has emerged around the 2nd Respondent that shows inability to run the Commission in accordance with constitutional principles including observance of democratic values and principles; inability to operate within the collegiate framework as required under Article 138 of **The Constitution** and the **Independent Electoral and Boundaries Commission Act No. 9 of 2011**.
16. Throughout his tenure as the Chairperson of the 1st Respondent, the 2nd Respondent has had acrimonious public disagreements with critical members of the Commission including Commissioner Rosslyn Akombe who resigned in 2017 in the middle of an election; Commissioners Connie Maina, Margaret Mwachanya and Paul Kurgat who resigned from the Commission in 2018; Ezra Chiloba the CEO/Secretary; and now, the 5th, 6th, 7th and 8th Commissioners.

C. **BRIEF OVERVIEW OF THE LAW AND THE GROUNDS OF THE PETITION**

17. In **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another** (supra), the Court held:

[371] “Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.”

18. The hallowed principles referred to by the Court in the passage above are established in Article 81 of **The Constitution** as follows:

“The electoral system shall comply with the following principles—

- (a) “freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are—

ii. by secret ballot;

iii. free from violence, intimidation, improper influence or corruption;

iv. conducted by an independent body;

v. transparent; and

vi. administered in an impartial, neutral, efficient, accurate and accountable manner.”

19. Article 88 goes further to elaborate:

“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.”

20. In **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another** (supra), the Court also held:

“It is in this spirit, that one must read Article 38 of the Constitution, for it provides *inter alia*, that every citizen is free to make political choices, which include the right to “free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors...”. This “mother principle” must be read and applied together with Articles 81 and 86 of the Constitution, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to

elections, is to nurture a mirage, an illusion of “free will”, hence a still-born democracy. Of such an enterprise, this Court must be wary.”

21. Article 10 of **The Constitution** sets out the national values and principles of governance that the Kenyan people have established for themselves. Article 10 provides that

(a) “The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- a. applies or interprets this Constitution;
- b. enacts, applies or interprets any law; or
- c. makes or implements public policy decisions.

(b) The national values and principles of governance include—

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- c. good governance, integrity, transparency and accountability; and
- d. sustainable development.”

22. The Petitioners contend, and shall prove at the hearing of the Petition, that the conduct of the presidential election on 09th August 2022, until the declaration of the result on 15th August 2022, materially failed to, and did not, comply with the following cardinal principles for the electoral system and process, stipulated in Article 81(e)(iii), (iv) & (v) as read together with Articles 10(1) and (2)(a) & (c) of **The Constitution of Kenya**:

- (i) conducted by an independent body;
- (ii) transparent; and
- (iii) administered in an impartial, neutral, efficient, accurate and accountable manner.

23. The material failure and non-compliance with the cardinal principles set out above, were made manifest in *inter alia*, public displays of a dysfunctional, disunited and non-

compliant Independent Electoral and Boundaries Commission (1st Respondent) at odds and loggerheads with itself and with the 2nd Respondent.

24. Article 138(3)(c) of **The Constitution** mandatorily provides:

“after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”

25. In contravention of the mandatory provision of the aforesaid Article 138(3)(c) of **The Constitution**, the 1st Respondent did not tally and verify the count before declaring the ‘result’.

26. Immediately before the declaration of the ‘result’ of the presidential election, four (4) out of the total seven (7) Commissioners of the 1st Respondent, publicly and categorically disowned the result declared by the 2nd Respondent.

27. Articles 138(10)(a) of **The Constitution** stipulates that,

“(10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—

(a) declare the result of the election; and

(b) deliver a written notification of the result to the Chief Justice and the incumbent President.

28. Further, in complete and deliberate disregard of the separate and discrete role and functions of the 1st and 2nd Respondents; and in violation of Article 10(1) and (2)(a) and (c) of **The Constitution**; the 2nd Respondent proceeded to unilaterally declare the final result of the presidential election without the tallying and verification by the 1st Respondent of the results from twenty seven (27) constituencies; and whose outcome or count had an effect on the final result and outcome of the presidential election.
29. The 'result' declared by the 2nd Respondent in the presidential election was not arrived at in accordance with the constitutional requirements of *inter alia* Article 138(3)(c) as read together with Articles 138(10)(a), 81(e)(iii), (iv) & (v) and Article 10(1) and (2)(a) & (c) of **The Constitution**, and are therefore unconstitutional, invalid, null and void.
30. Furthermore, the Petitioners contend and shall prove that the said result declared by the 2nd Respondent is fraudulent, thus further invalid, and null and void because the 9th Respondent did not meet and/or attain the constitutional threshold of 50% plus 1 of all the votes cast in the election.
31. Most significantly, the Petitioners contend and shall prove that there was an elaborate and fraudulent premeditated scheme to interfere with and undermine and defeat the integrity,

credibility and security of the presidential election in violation and/or contravention of Article 86(a) and (e) and other provisions of **The Constitution**.

32. The Petitioners contend that there was in fact, interference with the integrity, credibility and security of the presidential election in violation and/or contravention of Article 86(a) and (e) of **The Constitution**, with the direct knowledge and participation of the 2nd Respondent.
33. The Petitioners further contend that the deliberate interference with the integrity, credibility and security of the presidential election was intended to alter and did in fact alter the outcome of the true results of the presidential election.
34. The Petitioners contend that the 2nd Respondent deliberately did not prevent or remove the setting up of, and thereby compromised the security of the electoral process and system in order to fraudulently manipulate the presidential election results; and that he did in fact fraudulently manipulate and distort the presidential election results to declare an inaccurate and invalid outcome.
35. Section 83 of the **Elections Act No 24 of 2011** 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.

The declared results and outcome of the presidential election conducted on 09th August 2022 were by extension of all the foregoing affected and thus rendered invalid. Further, at the time of arriving at the 'decision' and making the declaration, there was lack of consensus among the Commissioners of the 1st Respondent as to who won the presidential election. Whereas the Commission has seven (7) Commissioners, they were prevented by the 2nd Respondent from arriving at any collective and collegiate decisions, and did not arrive at any decision in compliance with the several applicable articles of **The Constitution**.

36. This Court in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others (2014) eKLR** held as follows in relation to Section 83 of the Elections Act:

"It is clear to us that an election should be conducted substantially in accordance with the principles of **The Constitution**, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The **Elections Act**, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was conducted substantially in accordance with the principles of **The Constitution** and the **Election Act**, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough,

by and of themselves, to vitiate an election...Where an election is conducted in such a manner as demonstrably violates the principles of **The Constitution** and the law, such an election stands to be invalidated.”

37. The Petitioners contend and will prove that the irregularities and errors in the 2022 presidential election were not minor or administrative or occasioned by human imperfection; the Petitioners will demonstrate that the presidential election was conducted from beginning to ‘end’ by a rogue chairperson, with the premeditated intent and objective of subverting and undermining the integrity of the electoral process in order to secure a fraudulent result.
38. The Petitioners aver that the 2nd Respondent was culpable of grave misconduct in his decision in 2017 which emboldened him to graduate the acts of misconduct to blatant criminality and subversion. At the conclusion of the Petition, the Petitioners pray that the Court should give appropriate orders.

D. GROUND AND SUPPORTING ARGUMENTS FOR THE PETITION

- (i) **Violation of and/or lack of an electoral system and process that is conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner**

39. The declaration of the false ‘outcome’ of the presidential election contravened the cardinal principles of Article 81(e)(iii), (iv) and (v) of **The Constitution** as read together with Sections 39 of the Elections Act and the Regulations there under.

(i) Article 81(e)(iii), (iv) and (v) of **The Constitution** stipulates that the electoral system shall comply with the following principles—

(e) “free and fair elections, which are—

(ii) free from ... improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

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

(ii) Section 39 of the Elections Act provides that

(a) ...

(b) Before determining and declaring the final results of an election

under subsection (1), the Commission may announce the provisional results of an election.

- (c) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.
- (iii) Following the holding in **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another v Independent Electoral and Boundaries & 2 Others** (supra) that elections are a process and not an event, it follows that the declaration of the false final result, exposed and confirmed a simmering Tower of Babel built on a process that had been waiting to crumble together with everything built on it.
- (iv) Moments before the declaration of the final 'result', four (4) of the seven (7) Commissioners of the 1st Respondent comprising the majority, unprecedentedly and publicly came out and disowned the final result declared by the 2nd Respondent, exposing the underlying and/or behind closed door and clandestine interference and suppression of the deliberations and conduct of the electoral process in the 1st Respondent.
- (v) The declaration of the 'outcome' of the presidential result – the public accusations and counter-accusations emanating from the Commissioners of the 1st Respondent exposed the more critical fact that the electoral process had not been transparent, impartial, neutral, efficient, accurate and accountable; and the actions of the 1st

Respondent had in reality often been only the actions of the 2nd Respondent, Chairperson alone, and were as such, wholly unconstitutional.

Usurpation of the constitutional mandate of the IEBC by the 2nd Respondent

40. The Petitioners aver that the electoral process and system, and the presidential election result was marred by the following factors:

i) The 2nd Respondent usurped the role and functions of the 1st Respondent in contravention of Article 138(3)(c) of **The Constitution** and purported to declare a result that had not been tallied and/or verified by the 1st Respondent.

ii) The 2nd Respondent usurped the role and functions of the 1st Respondent in contravention of Article 138(3)(c) of **The Constitution** and purported to declare a result that had not been tallied and/or verified in the following 27 constituencies:

- 1) Mvita
- 2) Matuga
- 3) Kilifi North
- 4) Bura
- 5) Fafi
- 6) Wajir North
- 7) Eldas

- 8) Mandera West
- 9) Tigania east
- 10) Mbeere north
- 11) Ndaragua
- 12) Kapenguria
- 13) Kacheliba
- 14) Narok north
- 15) Narok South
- 16) Narok West
- 17) Kajiado East
- 18) Kandunyi
- 19) Nyakach
- 20) Rangwe
- 21) Ndhiwa
- 22) Suba North
- 23) Kuria East
- 24) Bomachoge
- 25) Borabu
- 26) Kitutu Chache North
- 27) West Mugirango

- iii) Immediately before the declaration of the result of the presidential election, four (4) out of the total seven (7) Commissioners of the 1st Respondent comprising the

majority, publicly and categorically disowned the result declared by the 2nd Respondent.

- iv) The tally and count in the aforesaid 27 constituencies would have affected the outcome of the presidential election.
- v) Before declaring the final result the 2nd Respondent did not state or claim that the result was provisional in contravention of section 39 of the **Elections Act**, if at all the results were provisional.
- vi) At the time of declaring the final result of the presidential election, the 1st Respondent had not received, uploaded and made publicly available for scrutiny on the public IEBC portal, Forms 34A in the 27 constituencies.
- vii) The final result declared by the 1st Respondent was therefore not complete, accurate, verifiable or accountable and cannot be the basis for a valid and legitimate declaration.
- viii) The 2nd Respondent without reason or justification, wilfully refused to share and circulate the final presidential results with the presidential candidates' Chief Agents, Observers, Media or even his fellow members of the Commission before declaring the decision of the 1st Respondent (IEBC), on tallying and verification

making the final announcement and declaration of the 'result' unverifiable, unaccountable and unconstitutional.

- ix) The public declaration by the Commissioners of the 1st Respondent whose further duty was to tally and verify the result before declaration, admitted and declared that the process was opaque and they disowned the result.
- x) The final 'result' declared by the 2nd Respondent did not comply with **The Constitution** and the law and was therefore illegal, invalid, null and void ab initio.
- xi) The 2nd Respondent in isolation and by himself in contravention of Article 138(c) purported to tally and verify the results leading to the final result declared. Such tallying and verification, if any, was a nullity ab initio and did not constitute compliance with **The Constitution's** mandatory requirements.
- xii) The unilateral action by the 2nd Respondent removed all checks and balances and destroyed the "appropriate structures and mechanism to eliminate electoral malpractices" in violation of Article 86(d) as read with Articles 10(2)(a) & (c), 88(4) and (5); 138(3)(c) of **The Constitution**; together with Sections 5(1) and 8 and 2nd Schedule (Paras 5 & 7) of the **IEBC Act, 2011**.

41. The Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** while interpreting the role of the 1st Respondent in the tallying and verification of results of a presidential election held that:

“Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in Sub Article (3)(c) is not to be construed to mean the chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, is required to tally and “verify” the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in Article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President.”

Lack of transparency and accountability at the National Tallying Centre

42. The Petitioners contend that the 1st Respondent’s Commissioners’ collapsed Tower of Babel was the final outcome of the following preceding facts that further demonstrate the

lack of transparency, accountability, verifiability, and efficiency which are complained of and which preceded the impugned declaration by the 2nd Respondent:

- i) The unexplained and suspicious stoppage of the public display of running results at the National Tallying Centre at Bomas of Kenya on 13th August 2022 at or about 1500hrs.
- ii) At the said stoppage time, the following were the publicly displayed results which the Petitioner's Chief Agent was closely monitoring:

Candidate	Counties with +25%	Total Votes	%
Odinga Raila	20	2,061,909	54.30%
Ruto William Samoei	28	1,708,801	45.00
Wajackoyah George Luchiri	0	17,770	0.46%
Waihiga David Mwaure	0	8,725	0.22%

Valid Votes: - 3,797,205

Rejected Votes: - 31,978

Electronically Received Forms 34A:-46,205 of 46,229 (99.94%)

Verified Forms 34A:- 12,204 of 46,229

Registered Voters Reported:- 5,762,180

Turnout in Reported Polling Stations:-66.45%

- iii) The 1st Respondent thereafter never resumed the public display of results at the National Tallying Centre and the Petitioners' agents and other observers have no way or means of auditing, tallying and verifying what was happening at the National Tallying Centre or the results received and/or computed by the 1st and 2nd Respondents.

(ii) Lack of accuracy, verifiability and accountability of the Voter Turnout data/information

Inconsistencies in official reports of the Voter Turnout

43. First, the number of voters who turned out to vote in the General Election held on 09th August 2022 remains indeterminate. The 2nd Respondent has been issuing contradictory figures on the voter turnout.

- (i) On 09th August 2022 at or about 1600hrs, one hour before the close of polls, the 1st Respondent reported through various public news media outlets that the voter turnout around the Country was fairly low and was at an average of 52% of the registered number of voters.

- (ii) On 10th August 2022 at or about 1300hrs, in his first media briefing to the public following the close of polling, the 2nd Respondent announced that the total voter

turnout in the General Election as captured in the electronic voter identification Kits (KIEMS KITS) was 65.4% equivalent to 14,466,779 voters.

- (iii) The 2nd Respondent however indicated that he expected the above number to rise once the number of votes identified manually was taken into account.
- (iv) Contrary to the above declaration and reasonable legitimate expectation, the final Voter Turnout captured and declared in the final 'results' of the presidential election in Form 34C is stated to be 14,213,137 votes, which is absurdly lower and not higher as anticipated.
- (v) Notwithstanding, a computation using addition of the valid votes in figures for the presidential candidates in the aggregate results shows that the total number of valid votes is 14,213,027.
- (vi) The fact that the chairperson of the commission declared results that were patently inconsistent with his own declaration of voter turnout at 65.4% in and of itself demonstrates that the results transmission and management system for forms 34A, 34B and 34C was tampered with, compromised and/or unable to accurately provide reliable and accountable results as constitutionally required. Going by the chairperson's own representations to the public, the commission is unable to account for over 250,000 votes that were cast in the election excluding votes cast by voters who voted manually.

- (vii) The discrepancy between what is written as the total valid votes and the actual computation cannot be dismissed as a simple mistake or error in the light of the totality of the above evidence; and the effect on the final outcome.
- (viii) Nonetheless, there is a variance/difference of 140,028 votes between the total number of votes as recorded in Form 34C and the total number of voters identified using the KIEMS Kits.
- (ix) The 2nd Respondent cannot and has not accounted for the turnout of voters who were identified using the complementary system of voter identification (commonly referred to as the manual system).

Non-qualification of 50% plus one requirement

44. Based on the scientific and verifiable arithmetic calculations of the Petitioners' witness Dr. Edgar Otumba shown below, it is evident that the 9th Respondent did not garner 50% plus 1 of the total valid votes cast.

% Turnout	Total Registered Voters	Total votes Cast	Valid votes cast	Rejected votes	50% of valid votes cast
0.654	22,120,458	14,466,779.5	14,353,165.53	113,614	7,176,582.77

Candidate	IEBC % Reported	Total Votes Reported	50% of valid votes cast	Deficit to 50% votes	Calculated % votes
Raila Odinga	48.85	6,942,930	7,176,582.766	233,652.766	48.372
William Ruto	50.49	7,176,141	7,176,582.766	441.766	49.997
David Mwaure	0.23	31,987	7,176,582.766	7,144,595.766	0.223
George Wajackoyah	0.44	61,969	7,176,582.766	7,114,613.766	0.432
	100.010	14,213,027			99.024

45. Secondly, the 2nd Respondent was continuously deleting and uploading different result declaration Forms i.e. Forms 34A, 34B and 34C even after the declaration of the final ‘outcome’ on 15th August 2022.
46. On 17th August 2022, the 2nd Respondent posted a different Form 34C on its website – which was different from the Form 34C that was uploaded on its website and earlier used to declare the 9th Respondent as the ‘winner’ of the presidential elections.
47. Even based on the disparities in the fraudulently manipulated numbers of the voter turnout, the Petitioners state that the 9th Respondent did not meet the constitutional threshold of 50% plus 1 of the valid votes cast.

48. A reasonable, calculable, ascertainable and logical imputation of the variance in Voter Turnout in the Form 34C shows that the 9th Respondent could not and did not attain the mandatory constitutional threshold of at least 50% plus 1 of the total valid votes cast in the election. Therefore, the result declared for the 9th Respondent is further inaccurate, illegal, invalid and null and void.

iii) Lack of security of IEBC election materials, systems and devices and interference through foreign nationals

49. The foregoing inconsistencies and variations in the Voter Turnout captured in the KIEMS Kits and the Form 34C generated under conditions and returns that cannot be verified or accounted for, are confirmed by other evidence.
50. By manipulating the Voter Turnout, the 1st and 2nd Respondent were able to alter and/or change the outcome of the presidential election and determine whether or not the constitutional threshold of 50% plus 1 of the total valid votes cast was met.
51. The Petitioners aver that the 2nd Respondent did in fact manipulate and alter the Voter Turnout and the results of the presidential elections to give the 9th Respondent 50.49% of the total valid votes cast when in fact the 9th Respondent did not garner enough votes to meet the said constitutional threshold.

52. The Petitioners aver that the 1st and 2nd Respondents deliberately created and had opportunity to manipulate the Voter Turnout and the KIEMS Kits as set out hereinafter.
53. In contravention of the constitutional law, the electoral process and system did not meet the following five tests of a secure and transparent system and; and, were deliberately and/or negligently set to fail the tests and allow for easy and fraudulent manipulation:
- (i) Confidentiality: this requires that information should only be accessed by those persons that are authorized.
 - (ii) Integrity: Information used should be accurate and complete and protected from malicious modification either by authorized or unauthorized persons.
 - (iii) Availability: Information required must be available as and when required by those authorized to use and access it in compliance with the Constitution and the **Elections Act**.
 - (iv) Non Repudiation: An audit trail must be maintained on activities related to the information. This principle presupposes that if someone or anything has access to or modifies the information or database or system it should leave a footprint; and a log should be maintained in order to trace back sources and actions. There is evidence of abnormal activities on the IEBC public portal during and after official dates for transmission of results from polling stations to the public portal. Some

of the statutory Forms 34A that were transmitted into the portal are different from physical copies of supposedly the same forms that were issued to the Petitioners' agents in substance and form.

- (v) Authenticity: The information itself must be established to be genuine and the source must also be established to be genuine. The system was corruptly manipulated to the extent that the result generated and declared on form 34A's is incomplete and provides inaccurate results as to the total number of votes cast and the results obtained by the respective presidential candidates in the election.

54. On 21st July 2022, three foreign nationals from Venezuela, Salvador Javier Sosa Suarez, Jose Grecorio Camarigo Castellanos and Joel Gustavo Rodriguez Garcia, were arrested while entering the Country with IEBC election materials and electronic devices containing crucial and sensitive IEBC election materials and information that ought to have been secure and/or secured.

55. Upon the arrest of the three Venezuelans, the 2nd Respondent issued public statements/press releases on 21st and 22nd July 2022 admitting that the arrested persons were in possession of very sensitive strategic equipment and information, and offering his protection and protest for them, in intemperate and inappropriate terms. The said press releases are annexed to the Supporting Affidavit of the 2nd Petitioner.

56. On 23rd July 2022, the Director of Criminal Investigations also issued a press release detailing the arrest of the three (3) Venezuelans, and the record of sensitive IEBC materials, documents and property found in their possession. The Directorate of Criminal Investigations conducted a Forensic Communication Analysis of the three (3) Venezuelans and the electronic devices and the IEBC election materials that were in their possession; and prepared a Report dated 05th August 2022. The said press release by the Director of Criminal Investigations and the Report is produced in the Supporting Affidavit of the 2nd Petitioner.
57. Evidence obtained from the forensic communication analysis of the electronic devices that were in the possession of the three foreigners on the eve of the General Election, contained in the afore said Report dated 05th August 2022 revealed the following serious and alarming facts *inter alia*, that later manifested in the impugned electoral process, system and conduct of the elections and the variance in the Voter Turnout among others:
- (i) the electronic devices which included laptops had sensitive IEBC documents and election related materials and information;
 - (ii) The history analysis of one of the laptops indicated the user is able to directly log in remotely using remote desktop tools into IEBC local IP address;
 - (iii) The history demonstrates that the remote access to IEBC IP address began in March 2022;

(iv) The laptop had:

- (a) IEBC database schematic diagram
- (b) IEBC network diagram
- (c) IEBC KIEMS Kit
- (d) IEBC KIEMS Kit deployment list
- (e) User name and passwords
- (f) Local IP address configurations
- (g) Virtual Private Network (VPN) settings

(v) The 1-TB hard disc had file folders which had IEBC election system information on:

- (a) System network details
- (b) Database development credentials

- (c) KIEMS project schedule
 - (d) Travels details of Jose Grecorio Camarigo Catellanos
 - (e) VPN access credentials
 - (f) Settings for remote access to IEBC server
 - (g) Results Transmission System
 - (h) Dashboard users IEBC system user's access rights
 - (i) Integrated data management system updates development
- (vi) Jose Grecorio Camarigo Catellanos is the super administrator of IEBC IDMs; has all rights using this tool to manage IEBC field staff using KIEMS Kit; can add, remove and delete using the system; and can assign rolls to IEBC staff.
- (vii) It was established that the users who have administrative rights in the system are twenty one (21), nineteen of whom are foreigners. Only two (2) Kenyans have access to the IEBC system.

- (viii) The confiscated exhibits had substantial IEBC data and information on IEBC election systems.
58. The arrest of the said foreign nationals travelling with sensitive IEBC election related materials and information under self evidently questionable circumstances shows incredible, inexcusable and unacceptable violation of the integrity and security of the electoral process and system.
59. Combined with the capability of the foreigners and anyone in possession of the contents and information in the electronic devices to remotely access and manipulate the entire IEBC data; and the manifest discrepancies and irregularities manifest during the General Election and the tallying, verification of count and declaration of the presidential election result; it is the inevitable and inescapable inference and conclusion that not only was the presidential election not secure, it is not verifiable, accountable, neutral or transparent.
60. The Petitioners further contend that the deliberate interference with the integrity, credibility and security of the presidential election was intended to alter and did in fact alter the outcome of the results of the presidential election.
61. The Petitioners shall seek an order of the Court directing the National Police Service, and in particular the Director of Criminal Investigations to produce statements, photographs, reports, equipment, laptops, phones, other gadgets and devices and any other materials

connected or related to the conduct of the elections and found in possession of the Venezuelan nationals.

Evidence of interference and penetration of IEBC systems

- Staging

62. On 12th August 2022 in the evening, a suspicious bag with a black Lenovo laptop model E14 belonging to Koech Geoffrey Kipngosos – an Agent of the United Democratic Alliance (UDA) Party, that was left unattended at the verification auditorium at the National Tallying Centre was confiscated by the Directorate of Criminal Investigations.
63. The Directorate of Criminal Investigations (DCI) conducted an onsite forensic image of the laptop to determine why it was being used at the National Tallying Centre whereas parties had agreed by consensus that no agent would be permitted to use laptops in the verification auditorium.
64. The DCI took and shared a copy of the image of the said laptop with all presidential candidates' agents. A forensic analysis of the said image showed that the said laptop was connected to the IP <http://173.249.40.177/>, which is an external IP that does not belong to IEBC and where Forms 34A were being stored temporarily, downloaded, and then re-uploaded to the IEBC portal through an application for sharing data (SharePoint).

65. The Petitioners shall seek an order of the Court directing the National Police Service and in particular the Director of Criminal Investigations to produce the laptop(s) retrieved and seized from the said Koech Geoffrey Kipngosos agent of UDA and the report of the Forensic Analysis and Examination of the laptop(s) and its contents.
66. The temporary storage of Forms 34A in an external address not belonging to the IEBC was to allow the interceptor to manipulate the Forms 34A before re-uploading and/or to upload different Forms 34A.
67. The aforesaid evidence is contained in the Further Affidavit of the Petitioners' Witness Benson Wesonga and corroborate the testimony in his principal affidavit that the RTS had a 'staging' platform from where forms were converted, manipulated and unlawfully dumped into the public IEBC portal contrary to law.
68. The evidence of 'staging' above corroborate the evidence inter alia that the IEBC portal and system was not secure; that third parties were able to obtain and did have access to the IEBC portal and system; the results were capable of fraudulent manipulation and were in fact fraudulently manipulated.
69. The 2nd Respondent's admission and vehement defence of the foreign nationals found in possession of sensitive IEBC materials and devices capable of manipulating IEBC returns remotely proves beyond doubt that the conduct of the election was in fact a criminal

enterprise conducted with the knowledge, connivance and collusion of the 2nd Respondent.

Further evidence of staging

70. On 11th August, 2022, two days after close of polling, the 1st Respondent dumped over 11,000 Forms 34A into the public portal between 1101hrs–1109hrs.
71. Dumping of forms in this manner suggests that the system was designed to allow ‘staging’ which enables any person with access to the RTS to ‘detain’ the forms for a while before they become visible to the public in order to make changes to them before releasing them to the intended destination.
72. Forms were staged to convert them into PDF and thereafter make such changes on them as anyone with fraudulent intent would want before being released into the public portal. Noting that results from polling stations are final, staging exposes such results to additional human intervention which defeats the verification objective of the RTS and confirms the 1st Respondent’s system is not secure.
73. The foregoing is further corroborated by an email from Paul Wachanga Mugo - the IEBC ICT Support Coordinator in charge of Counties, in which he states that as of 11:02am of the day after the election, there were over 7500 KIEMS kits that were yet to transmit data

related to the electronic identification of voters (EVI) yet all EVID tablets closed successfully.

74. All the above data should have been transmitted to the National Tally Centre when voting closed on 09th August, 2022. According to Paul Wachanga Mugo's email, there were 687 kits still reading as open a day after the election, which is evidence that the same were still being actively used to transmit manipulated/unauthorized data from polling stations.
75. The above evidence is contained in the principal affidavit of Benson Wesonga in support of the Petition.

iv) Sabotage, criminal and/or fraudulent interference, deliberate tampering with and/or manipulation of election results and returns

Fraudulent establishment of parallel Form 34A

76. The 1st and 2nd Respondent fraudulently ordered the Ballot Paper printing firm, Inform Lykos Hellas SA, to print a parallel set of Form 34A Result Declaration Forms and declined to make an order for the requisite Forms 34B when printing other election materials. The 1st Respondent stated that Forms 34B shall be self-generated from the KIEMS kits after close of polling.

77. The Petitioners wrote a letter dated 27th July 2022 to the 1st Respondent questioning why there were two booklets of Form 34A and why Forms 34B were not printed by the Ballot Paper printing firm.
78. In response, the 1st and 2nd Respondents invited all Presidential Election stakeholders to a consultative meeting. It was agreed by consent that the 1st Respondent shall print Form 34B and shall not use Form 34A Booklet 2 of 2. The terms of the Consent were gazetted by the 1st and 2nd Respondents vide Gazette notice number 9280.
79. The Tender for printing of ballot papers, Results declaration forms and other election materials prescribes the format and security features of the Results declaration forms. According to the Tender document, Form 34B was to be printed together with other election materials. The Supreme Court in **Raila Odinga 2017** reiterated that results must be recorded in the correct results declaration forms. The 1st Respondent should have instructed the ballot paper printing company to Print Form 34B.
80. In 2017 Presidential Elections, the 1st Respondent stated that they shall use Form 34B that have “ the first page preprinted, with statutory details such as title of the Form, relevant citation from the regulations and heading of the form”

Manipulation and/or deliberate tampering with Forms 34A

81. There was wilful, deliberate and criminal tampering and/or manipulation of the results of the presidential election as demonstrated in the facts herein.
82. The facts and evidence obtained by the Petitioners show a systematic pattern of criminal and fraudulent interference with the electronically transmitted results in Forms 34A in the IEBC portal after declaration of results at the polling stations.
83. The Forms 34A issued to the Petitioners' agents at the polling stations and electronically transmitted through the KIEMS Kits to the National Tallying Centre vary from the Forms 34A displayed in the IEBC portal.
84. Evidence from a sample of forty one (41) Forms 34A from the following polling stations in Bomet and Kiambu Counties show the following facts and evidence:
- 1) Chepalungu Borut Pry. School polling station 1 of 1
 - 2) Chepalungu Cheserton Pry. School polling station 1 of 1
 - 3) Chepalungu Kiplombe Pry. School polling station 1 of 1
 - 4) Chepalungu Chebunyo Pry. School polling station 1 of 2
 - 5) Chepalungu Kimindilil Pry. School polling station 1 of 1
 - 6) Sotik Gorgor Pry. School polling station 2 of 2
 - 7) Chepalungu St. Joseph's Kapsirich Pry. School polling station 1 of 1
 - 8) Chepalungu Saunet Pry. School polling station 1 of 1
 - 9) Sotik Kagasik Pry. School polling station 1 of 1

- 10) Chepalungu Kapchumbe Pry. School polling station 1 of 1
- 11) Chepalungu Kiboson Pry. School polling station 1 of 1
- 12) Chepalungu Sing'oiwek Pry. School polling station 1 of 1
- 13) Sotik Chepkawal Pry. School polling station 1 of 1
- 14) Konoin Boito polling station 2 of 2.
- 15) Konoin Boito polling station 1 of 2.
- 16) Konoin Besiobei Pry. School polling station 1 of 1.
- 17) Konoin Tuiyobei Pry. School polling station 1 of 1.
- 18) Kiambaa Kawaida Pry. School polling station 1 of 6
- 19) Kiambaa Kawaida Pry. School polling station 4 of 6
- 20) Kiambaa Kawaida Pry. School polling station 5 of 6
- 21) Kiambaa Kawaida Pry. School polling station 1 of 6
- 22) Kiambaa Kawaida Nursery School polling station 1 of 5
- 23) Kiambaa Kawaida Nursery School polling station 2 of 5
- 24) Gatundu North Kanjuku Pry School polling station 1 of 3
- 25) Gatundu North Kanjuku Pry School polling station 2 of 3
- 26) Gatundu North Kanjuku Pry School polling station 3 of 3
- 27) Gatundu North Kangaita Pry School polling station 1 of 2
- 28) Gatundu North Kangaita Pry School polling station 2 of 2
- 29) Gatundu North Kamwangi Pry School polling station 2 of 6
- 30) Gatundu North Kamwangi Pry School polling station 3 of 6
- 31) Gatundu North Kamwangi Pry School polling station 4 of 6
- 32) Gatundu North Kamwangi Pry School polling station 5 of 6

- 33) Gatundu North Kamwangi Pry School polling station 6 of 6
- 34) Gatundu North Kairi Pry School polling station 1 of 2
- 35) Gatundu North Kairi Pry School polling station 2 Or 2
- 36) Gatundu North Igeganja Pry School polling station 4 of 4.
- 37) Gatundu North Igeganja Pry School polling station 3 of 4.
- 38) Gatundu North St. Anne's Mariaini Pry. School polling station 1 of 2
- 39) Kiambaa Gatono Nursing School polling station 1 of 1.
- 40) Kiambaa Gacharage School polling station 2 of 5.
- 41) Kiambaa Gacharage School polling station 1 of 5.
- 42) Lurambi Constituency Kakamega High School polling station 1 of 2.

- a. The votes recorded for the 1st Petitioner and the 9th Respondent in the physical copies of Forms 34A issued to the Petitioners' agents at the polling stations, differ from the Forms 34A in the IEBC portal;
- b. In all the 41 Forms 34A in the IEBC portal, the votes of the 1st Petitioner have been reduced and the votes for the 9th Respondent have been increased by the same number of votes deducted from the 1st Petitioner, so that the total vote remains the same while camouflaging the alterations.
- c. The serial numbers in the altered Forms 34A in the IEBC portal are exactly the same as copies of Forms 34A issued to the Petitioners' agents at the polling stations. It therefore shows an ability or possibility of selective interference with

the data only, while giving the impression of non-interference at all. Other details including serial numbers of the Forms 34A apart from the 1st Petitioner's and 9th Respondent's votes, would be kept the same, so that the total number of valid votes would show to be the same.

- d. In Lurambi Constituency Kakamega High School polling station 1 of 2, the 1st Petitioner's votes were reduced by 100 but not accounted for or added to any candidate. The total number of valid votes cast in the return does not add up with what is declared. The Petitioner contends that in his strongholds, his votes would simply be reduced without adding them to any candidate.

85. The facts and evidence show that the fraudulent interference with the electronic copies of the results declared in Forms 34A were fraudulently altered after the transmission of Forms 34A from the polling station.

86. The facts and evidence show that the interference with the Forms 34A transmitted to the National Tallying Centre was deliberate and done with criminal intent to alter and reduce the votes cast for the Petitioner; and increase the 9th Respondent's votes without interfering with the total valid votes cast.

87. The manipulation of the transmitted results could only be done by somebody with access to the IEBC portal; someone with the opportunity and someone with the capability to interfere with the results remotely and electronically.

88. The evidence collected from the sample of 41 Forms 34A in just two constituencies – Bomet and Kiambu – indicate a widespread pattern that would significantly alter the results of the presidential election.

89. Therefore, based on the unearthed evidence already obtained in the sample of the 41 Forms 34A out of only two constituencies, the Petitioners shall seek 1) a scrutiny; and 2) a forensic audit of all the Forms 34A from Bomet and Kiambu counties and constituencies and the results of the election on the following basis:

- (i) The fact that there are 41 Forms 34A with the same serial number but different results is an anomaly and/or aberration that necessitate a scrutiny, forensic audit and investigation of the Forms 34A. This evidence is set out in the affidavits of Celestine Anyango and Arnold Ochieng Oginga.
- (ii) The sophisticated tampering or interference with the Forms 34A appearing in the IEBC portal demonstrates that the electoral process and system is not secure; which the Court has a duty to inquire into.
- (iii) The arrest of the foreigners with means and opportunity to remotely manipulate, delete, change and interfere with the information in the IEBC portal and KIEMS Kits points to fraud and criminal acts that warrant scrutiny, forensic audit and investigation of those involved including the 2nd Respondent and the CEO of the

1st Respondent who rushed to the defence of the arrested foreigners and publicly declared that they are/were persons authorised by the of the 1st Respondent.

(iv) There is software that can allow one to alter or change the contents of a PDF.

90. Out of the sample of 41 Forms 34A above, the total number of votes reduced from the 1st Petitioner and added to the 9th Respondent is 2,793.

91. The Petitioners contend that the fraudulent manipulation of the 1st Petitioner's votes to increase the 9th Respondent's votes was done with the knowledge, connivance and collusion of the 9th Respondent.

Further evidence of fraudulent digital manipulation of Forms 34A

92. The Petitioners' witness John Mark Githongo, contains direct incriminating evidence from a hacker contracted by the 9th Respondent's agent Dennis Itumbi, detailing how he and others were tasked to intercept and manipulate Forms 34A transmitted from the KIEMS Kit and thereafter transmit the altered Forms to the IEBC public portal.

93. John Mark Githongo's testimony proves how the hackers effectively stole thousands of votes from the 1st Petitioner and exaggerating the votes of the 9th Respondent, with the knowledge, connivance, collusion and full sanction of the 2nd Respondent and other officials of the 1st Respondent.

94. The testimony of John Mark Githongo proves the criminal conspiracy between the 2nd Respondent and some officials of the 1st Respondent and the 9th Respondent to affect and alter the outcome of the presidential election.

v) Vote differentials

95. The Petitioners aver that there was systemic voter suppression and ballot stuffing in the Petitioners' strongholds and in certain counties in the Rift Valley and Central parts of Kenya respectively.
96. The Petitioners analyzed Forms 34C alongside Forms 37C, 38C and 39C from various counties in which there were variances between the total number of votes cast for the presidential position and the other three elective positions namely Governor, Senator and Women Representative. The said variances are summarized in the table below.

S/NO.	COUNTY	PRESIDENTIAL 2	GOVERNOR	SENATOR	WOMAN REPRESENTATIVE	DIFFERENCE
2	KWALE	180,368	180,304			64
18	NYANDARUA	242,238	241,402	242,846	242,029	608
19	NYERI	326,880	335,709			6,541
20	KIRINYAGA	260,900	237,183			23,550
23	TURKANA	144,631	144,705	147,760	144,616	74
24	WEST POKOT	174,963	174,775			188
38	VIHIGA	186,448	184,974	187,545		1,097
44	MIGORI	349,384	348,298			1,086
	TOTAL	1,865,812				
						33208

97. The above evidence shows the number of voters who purportedly voted for the President only but did not vote for the other elective positions. It also shows counties where voters voted for the other elective positions but did not vote for the president, which is a practically improbable scenario.
98. Results from the 8 counties presented above show that over 33,208 voters were supposedly not given the 6 ballots, which represents more than 21% of the counties, a statistically significant number. Extrapolated across the remaining 39 Counties, the number could be much higher.
99. The Results Declaration Forms in Othaya Constituency in Nyeri show that the number of registered voters for Senate is 61,879, for member of National Assembly is 62,492 while the registered number for the President is 44,205. There are 18,287 voters who are unaccounted for in respect to the President in Othaya Constituency.
100. In North Imenti Constituency in Meru County, the number of registered voters for the National Assembly is 96,241 yet the number of registered voters for the President is 96,623. Registered voters for the President exceeds the registered voters for the National Assembly by 382.
101. The total number of valid votes and rejected votes in North Imenti Constituency for the National Assembly is 62,196, and the number of valid votes and rejected votes for the

President in the same constituency is 62,258. Therefore an additional 62 more people voted in favour of the President in North Imenti than the National Assembly.

102. The above evidence is contained and further elaborated in the affidavits of the Petitioners' witnesses, Celestine Anyango and Arnold Ochieng Oginga.

Cancellation of gubernatorial elections for ulterior motives

103. Article 101(1), 136(2), 180(1) and 171(1)(a) provide for the election of Members of Parliament, President, Governor and Members of County Assembly at a general election, being the second Tuesday in August in every fifth year in which registered voters in the Republic of Kenya exercise their franchise in one single day their political rights under Article 38 of the Constitution.
104. The 2nd Respondent with the knowledge, connivance and collusion of the 9th Respondent arbitrarily postponed and staggered the election of Governor for the populous counties of Kakamega and Mombasa without any constitutional authority, legal justification or reasonable excuse.
105. The said counties are electoral areas where the 1st Petitioner has a strong base and support of the voters and the general populace and the postponement was to the disadvantage of the 1st Petitioner and for the benefit of the Respondents.

106. Mombasa and Kakamega Counties are the strongholds of the Petitioners herein and are largely considered the Petitioners' vote basket. Postponement of the gubernatorial elections was a strategic ploy that substantially affected voter turnout to the detriment of the Petitioners. The Petitioners assert that due to the postponement of elections, they garnered fewer votes compared to the votes they would have garnered if the gubernatorial elections had not been postponed thereby affecting the outcome of the election.

Failure of KIEMS Kits

107. There was deliberate failure of KIEMS kits and the 1st Respondent did not use KIEMS kits to identify voters in polling stations within Kakamega and Makueni Counties, partly as a voter suppression strategy, which disproportionately affected the 1st Petitioner those being his strongholds.
108. The Petitioners aver that the voter turnout in the two Counties aforesaid was demonstrably below the national average and the turn out in previous elections.
109. The Petitioners further aver that KIEMS kits failure delayed the commencement of voting from the statutory timeline of 6:00AM with voting commencing beyond 11:00AM, disenfranchising many voters who left the polling stations without casting their vote, after waiting for over five hours.

110. Further, the 1st Respondent did not give simple, timely and consistent instructions regarding the use of the complementary (manual) system of voter identification.
111. The Petitioners further aver lack of proper communication from the 1st Respondent to its presiding officers caused delay in commencement of voting beyond 11:00AM because there was mismatch of KIEMS kits between constituencies and the Presiding Officers of the 1st Respondent.
112. The 1st Respondent's presiding offices would postpone voting to await communication and action from the 1st Respondent's Nairobi Office for dispatch of the KIEMS kits to the rightful constituencies, thereby disenfranchising voters in the affected polling stations.

vi) E-forensics analysis of the 2022 Kenya Presidential Election

113. Professor Walter Richard Mebane, a research professor at the Institute for Political Research, who is also the leading expert on detecting electoral fraud conducted an e-forensics analysis of the 2022 Kenya Presidential Election and published a Report dated 21st August 2022 in which he concluded *inter alia* that:

- (i) there was electoral fraud; and

- (ii) the number of votes that are potentially fraudulent is greater than the margin of votes between the 1st Petitioner and the 9th Respondent. In other words, the 1st Petitioner may have won the election.

114. The aforesaid report dated 21st August 2022 is produced in the 2nd Petitioner's supporting affidavit to this Petition.

vii) Offences and ethical breaches committed by the 2nd Respondent

115. In view of the totality of the foregoing facts, the Petitioners contend that the 2nd Respondent with the knowledge, connivance and collusion of the 9th Respondent has committed and should be found culpable of the following election offences:

- (i) As the National Returning Officer of the 1st Respondent, the 2nd Respondent is guilty of the following election offences:

116. Making entries which he knew to be false contrary to section 6(a) of the Election Offences Act No. 37 of 2016

On 15th August 2022, the 2nd Respondent made false entries in Form 34C which he knew were false to declare the 9th Respondent the President-elect.

117. Omitting to include results in breach of his official duty contrary to section 6(j) of the Election Offences Act No. 37 of 2016

On 15th August 2022, the 2nd Respondent omitted to include the results of Forms 34A from polling stations and proceeded to declare a fraudulent result.

118. Wilfully contravening the law to give undue advantage to a presidential candidate contrary to section 6(l) of the **Election Offences Act No. 37 of 2016**

On 15th August 2022, the 2nd Respondent wilfully contravened Article 81(e) (ii, iii, iv, v) by, without reason or justification, wilfully refusing to share and circulate the final presidential results with the presidential candidates' Chief Agents, Observers, Media or even his fellow members of the Commission so as to declare a fraudulent result.

119. Indirectly procuring election materials in connection with the election without the authority of the Commission contrary to section 13(e) of the **Election Offences Act No. 37 of 2016**

On or about July 2022, the 2nd Respondent without discussion with or consensus from the other six (6) Commissioners, illegally and unilaterally procured additional unsecured election materials and electronic devices containing sensitive information through three foreign nationals from Venezuela.

120. Obstructing election officers in the the execution of their lawful duties contrary to section 13(i) of the **Election Offences Act No. 37 of 2016**

The 2nd Respondent obstructed the working of the other six (6) Commissioners by denying them access to the portal as well as the verification process of the physical Forms 34A against those uploaded on the portal.

121. Making a false statement knowing the statement to be false contrary to section 13(j) of the Election Offences Act No. 37 of 2016

On 15th August 2022, the 2nd Respondent wrongly and wilfully made a false statement stating that the 9th Respondent had garnered 7,176,141 votes, a representation of 50.49% of the votes cast thus making him the President-elect.

122. Publishing and disseminating information with the intention to influence the outcome of the election contrary to section 13(j) of the Election Offences Act No. 37 of 2016

The 2nd Respondent published and uploaded an inaccurate Form 34C on the 1st Respondent's portal to manipulate and distort the presidential election results to declare an inaccurate and invalid outcome.

123. Intentionally altering the IEBC network and portal contrary to section 17(b) of the Election Offences Act No. 37 of 2016

On or about August 2022, the 2nd Respondent altered the IEBC network and portal to disable access by other parties, and presidential candidates' Chief Agents, Observers, Media or even his fellow members of the Commission so as to declare a fraudulent result.

124. Altering information residing in the IEBC portal knowing he is likely to cause wrongful loss or damage to the public contrary to section 17(c) of the **Election Offences Act No. 37 of 2016**

On or about August 2022, the 2nd Respondent intentionally altered electronically directly or indirectly altered the results of the Forms 34A uploaded to the IEBC portal so as to influence the outcome of the presidential election and to declare a fraudulent result.

125. Knowingly inputting, altering and deleting computer data with the intent that the result be considered or acted upon for legal purposes as if it were authentic, regardless of whether or not the data is directly readable and intelligible contrary to section 17(h) of the **Election Offences Act No. 37 of 2016**

The 2nd Respondent tampered with and altered the contents of the Forms 34A that were uploaded on the 1st Respondent's portal by officers in the polling stations nationwide with the intention do declare a fraudulent result.

126. Using his office to improperly confer a benefit on a presidential candidate contrary to section 46 of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**

The 2nd Respondent used his office as the National Returning Officer to usurp the powers, duties and responsibilities of the commissioners and unilaterally and secretly tallied, verified and declared to declare a fraudulent outcome.

127. As a public officer, the 2nd Respondent is guilty of the following ethical breaches:
- (i) Failure to carry out his duties in a way that maintains public confidence contrary to section 9(a) of the **Public Officer Ethics Act No. 4 of 2003**.
 - (ii) Failure to treat the public and his fellow public officers with courtesy and respect contrary to section 9(b) of the **Public Officer Ethics Act No. 4 of 2003**
 - (iii) Failure to seek to improve the standards of performance and level of professionalism in his organisation contrary to section 9(c) of the **Public Officer Ethics Act No. 4 of 2003**
 - (iv) Failure to observe the ethical and professional requirements of the Law Society of Kenya contrary to section 9(d) of the **Public Officer Ethics Act No. 4 of 2003**;
 - (v) Failure to discharge any professional responsibilities in a professional manner contrary to section 9(g) of the **Public Officer Ethics Act No. 4 of 2003**

(vi) Failure to carry out his duties in accordance with the law contrary to section 10(1) of the **Public Officer Ethics Act No. 4 of 2003**

(vii) Failure to use his best efforts to avoid being in a position in which his personal interests conflict with his official duties contrary to section 12(1) of the **Public Officer Ethics Act No. 4 of 2003;**

(viii) Acting as an agent for and furthering the interest of a political party contrary to section 16(1) of the Public Officer Ethics Act No. 4 of 2003.

E. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:

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

(i) Was the presidential election conducted in accordance with and in compliance with **The Constitution;**

(ii) Was the presidential election conducted in accordance with and in compliance with the written law and national legislation;

- (iii) Did the 2nd Respondent's non-compliance with **The Constitution** and/or the Law in the conduct of the presidential election affect the result of the presidential election;
- (iv) Did the 2nd Respondent's non-compliance with **The Constitution** and/or the law affect the validity of the result of the presidential election?
- (v) Was the 2nd Respondent bound by, and bound to observe and make manifest, the national values as set out in Article 10 of **The Constitution**?
- (vi) Did the 2nd Respondent in applying and or interpreting **The Constitution** observe and enhance the value of democracy at all relevant times?
- (vii) Did the 2nd Respondent in applying and or interpreting **The Constitution** observe and enhance the value of the participation of the people at all relevant times?
- (viii) Did the 2nd Respondent in applying and or interpreting **The Constitution** observe and enhance the value of the rule of law at all relevant times?
- (ix) Did the 2nd Respondent arrive at the declaration of the result in compliance with Article 81 of **The Constitution**?

- (x) Did the 2nd Respondent conduct his part in the administration of the election in an impartial, neutral, efficient, accurate and accountable manner?
- (xi) Did the 2nd Respondent follow the constitutionally set procedure as mandated in Article 138 of **The Constitution** at all relevant times?
- (xii) After counting the votes in the polling stations, did the IEBC tally and verify the count as mandatorily required by Article 183(3)(c) of **The Constitution**?
- (xiii) Was the result that was declared on 15th August 2022 in compliance with **The Constitution**?
- (xiv) Did the 2nd Respondent observe the values and principles of public service set out in Article 232 of **The Constitution**, which applied to him by virtue of Article 232(2(a))?
- (xv) Was the authority assigned to the 2nd Respondent as a State Officer exercised in the manner set out in Article 73 of **The Constitution of Kenya**, Chapter Six and constitutionally derived legislation thereunder?
- (xvi) Did the non-compliance, irregularities and improprieties affect the validity of the result of the presidential election?

- (xvii) Was the 9th Respondent validly declared as the president elect?
- (xviii) Should the rejected votes be included in the final tally to determine whether a presidential candidate has attained the threshold under Article 138(10) of **The Constitution**?
- (xix) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of the authority and public trust assigned to a State officer under Article 73(1) of **The Constitution**.
- (xx) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 6(a) of the **Election Offences Act No. 37 of 2016**
- (xxi) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of his official duty contrary to section 6(j) of the **Election Offences Act No. 37 of 2016**
- (xxii) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of 6(l) of the **Election Offences Act No. 37 of 2016**
- (xxiii) Whether the Court should make a declaration or finding that the 2nd Respondent is in section 13(e) of the **Election Offences Act No. 37 of 2016**

- (xxiv) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 13(i) of the **Election Offences Act No. 37 of 2016**
- (xxv) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 13(j) of the **Elections Act No. 37 of 2016**
- (xxvi) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 13(j) of the **Elections Act No. 37 of 2016**
- (xxvii) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 17(b) of the **Elections Act No. 37 of 2016**
- (xxviii) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 17(c) of the **Elections Act No. 37 of 2016**
- (xxix) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of section 17(h) of the **Elections Act No. 37 of 2016**
- (xxx) Whether the Court should make a declaration or finding that the 2nd Respondent used his office to improperly confer a benefit on a presidential candidate contrary to section 46 of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**

(xxxi) Whether the Court should make a declaration or finding that the 2nd Respondent is in violation of the following ethical breaches and corrupt practices:

- i. Failure to carry out his duties in a way that maintains public confidence contrary to section 9(a) of the **Public Officer Ethics Act No. 4 of 2003**.
- ii. Failure to treat the public and his fellow public officers with courtesy and respect contrary to section 9(b) of the **Public Officer Ethics Act No. 4 of 2003**
- iii. Failure to seek to improve the standards of performance and level of professionalism in his organisation contrary to section 9(c) of the **Public Officer Ethics Act No. 4 of 2003**
- iv. Failure to observe the ethical and professional requirements of the Law Society of Kenya contrary to section 9(d) of the **Public Officer Ethics Act No. 4 of 2003**;
- v. Failure to discharge any professional responsibilities in a professional manner contrary to section 9(g) of the **Public Officer Ethics Act No. 4 of 2003**

- vi. Failure to carry out his duties in accordance with the law contrary to section 10(1) of the **Public Officer Ethics Act No. 4 of 2003**
- vii. Failure to use his best efforts to avoid being in a position in which his personal interests conflict with his official duties contrary to section 12(1) of the **Public Officer Ethics Act No. 4 of 2003**;
- viii. Acting as an agent for and furthering the interest of a political party contrary to section 16(1) of the Public Officer Ethics Act No. 4 of 2003.

(xxxii) What are the appropriate orders to be made by the Court?

F. RELIEFS SOUGHT

- (1) Immediately upon the filing of the Petition, the 1st and 2nd Respondents do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours;
- (2) Immediately upon the filing of the Petition, the 1st and 2nd Respondents do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st Respondent in respect of the Presidential Election within 48 hours;

- (3) AN ORDER be and is hereby made for summons to issue to the Director of Criminal Investigations to produce statements, photographs, reports, equipment, laptops, phones, other gadgets and devices and any other materials connected or related to the conduct of the elections and found in possession of the Venezuelan nationals.
- (4) AN ORDER be and is hereby issued for summons to issue to the Director of Criminal Investigations directing him to produce the laptop(s) retrieved and seized from one Koech Geoffrey Kipngosos agent of UDA Political Party and the report of the Forensic Analysis and Examination of the laptop(s) and contents.
- (5) AN ORDER be and is hereby made for scrutiny of the rejected and spoilt votes;
- (6) A DECLARATION be and is hereby issued that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election;
- (7) AN ORDER be and is hereby made for scrutiny and forensic audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C;
- (8) AN ORDER be and is hereby made for scrutiny and forensic audit of all equipment, system and technology used by the 1st Respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal;

- (9) AN ORDER be and is hereby made consequent upon the nullification of the declaration of the results by the 2nd Respondent directing the 1st Respondent to tally and verify the count and declare the 1st and 2nd Petitioners as duly elected as President Elect and Deputy President Elect respectively;
- (10) A DECLARATION be and is hereby made **in the alternative** to (9) above that the 1st Respondent as presently constituted, and as presently functioning, is incapable of presiding over and rendering a proper, credible, verifiable and valid presidential election; and the Court do make appropriate orders to uphold The Constitution and defend the sovereign will and power of the people of Kenya.
- (11) A DECLARATION be and is hereby made that the non-compliance with the law, irregularities and improprieties in the Presidential Election were so substantial and significant and that they affected the result thereof.
- (12) A DECLARATION be and is hereby made that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and computation of the Presidential Election results; and the genuine results tallied and verified after the scrutiny and forensic audit be and are hereby considered the valid outcome of the Presidential Election.

- (13) A DECLARATION be and is hereby made **in the alternative** to (12) above that the Presidential election held on 09th August 2022 was not conducted in accordance with The Constitution and the applicable law rendering the declared result invalid, null and void.
- (14) A DECLARATION be and is hereby made that the 9th Respondent did not meet the constitutional threshold of attaining more than half (50% plus 1) of all the votes cast in the impugned presidential election held on 09th August 2022.
- (15) A DECLARATION be and is hereby made that the 9th Respondent was not validly declared as the President Elect and that the declaration made on 15th August 2022 is invalid, null and void ab initio.
- (16) AN ORDER be and is hereby issued quashing the Certificate issued to the 9th Respondent and Gazette Notice Number 9773 declaring the 9th Respondent as the President Elect.
- (17) AN ORDER be and is hereby made directing the 1st Respondent to organize and conduct a fresh Presidential Election in strict conformity with **The Constitution** and the **Elections Act**.
- (18) A DECLARATION be and is hereby made that the decision by the 5th, 6th 7th and 8th Respondents on 15th August 2022 in rejecting the declaration of the 2nd Respondent is consistent with **The Constitution** and be upheld.

- (19) A DECLARATION be and is hereby made that the decision by the 1st, 2nd, 3rd, 4th and 9th Respondents jointly and severally committed election irregularities.
- (20) A declaration be and is hereby made that the 2nd Respondent is unfit to hold public office.
- (21) A further declaration be and is hereby made that the 2nd Respondent is in breach of the authority and trust assigned to his office as a State Officer and has brought dishonour to the nation and indignity to the office of Chair of the 1st Respondent and undermined public confidence and the integrity bestowed in his office.
- (22) Costs of the Petition; and
- (23) The 1st, 2nd and 9th Respondents to bear costs of this Petition
- (24) Any other and/or further orders that the Court deems just and fit to grant in the circumstances.

DATED at NAIROBI this 21st day of August 2022.



PAUL MWANGI & COMPANY
ADVOCATES FOR THE PETITIONERS

DRAWN & FILED BY:

PAUL MWANGI & COMPANY
ADVOCATES

VISION PLAZA (3RD FL - ROOM 16)
MOMBASA ROAD
P. O. BOX 55903-00200

NAIROBI

Tel: 0722518733

Email: pmlawchambers12@gmail.com
paulmwangi12@gmail.com
awele@awelejackson.co.ke
maumoadvocates@gmail.com
ochiengogingaadvocates@gmail.com

TO: THE SUPREME COURT OF KENYA
NAIROBI

COPIES TO BE SERVED ON:

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
2. WAFULA WANYONYI CHEBUKATI - CHAIRPERSON
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
3. BOYA MOLU
C/O INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke

4. PROF. ABDI YAKUB GULIYE
C/O INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
5. JULIANA WHONGE CHERERA
C/O INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
6. JUSTUS NYANGAYA
C/O INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
7. FRANCIS WANDERI
C/O INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
8. IRENE MASIT
C/O INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ANNIVERSARY TOWERS (6TH FL)
UNIVERSITY WAY
P. O. BOX 45371 - 00100
NAIROBI
Email: info@iebc.or.ke
9. WILLIAM SAMOEI RUTO
HARAMBEE HOUSE ANNEXE
HARAMBEE AVENUE
P. O. Box 74434 - 00200
NAIROBI
Email: dp@deputyresident.go.ke

LODGED in the Registry at Nairobi on the 22nd day August of 2022.

.....
REGISTRAR

