

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
**PRESIDENTIAL ELECTION PETITION NO. 1 OF 2017**

**BETWEEN**

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

**AND**

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

**3<sup>RD</sup> RESPONDENT'S AFFIDAVIT IN REPLY TO THE AFFIDAVIT OF MS.  
APPRIELLE OICHOE**

I, **BRIAN GICHANA OMWENGA** of P.O. Box 1067-00517 do hereby make oath and state as follows:

1. **THAT** I am a Technology Advisor employed by Jubilee Party, a software and systems engineer, holding a Masters Degree in Engineering Systems, Technology and Policy from the Massachusetts Institute of Technology (MIT). I am a PhD Candidate in Computer Science, and I lecture computer science at the University of Nairobi, I am the Chairman of the Industry Technical Committee that sets software and systems engineering standards for the Kenya Bureau of Standards (KEBS). I am also an Information Technology Consultant.
2. **THAT** I have seen, read and have had the contents of Ms. Apprielle Oichoe's Affidavit sworn on 18<sup>th</sup> of August 2017 in support of the Petition. I am duly authorized to make this Affidavit on behalf of Jubilee Party and on behalf of the 3<sup>rd</sup> Respondent herein. Jubilee Party is the party on whose ticket the 3<sup>rd</sup> Respondent contested the Presidential Election in the 2017 elections.
3. **THAT** the deponent describes herself as a PhD cyber security expert and proceeds to share her opinion on the six main components or principles which the IEBC's systems and database ought to have been tested against.
4. **THAT** the opinion of the deponent on how the IEBC system should have been is at best a subjective opinion which has no scientific basis.

5. **THAT** in response to paragraph 4(i) of the Affidavit, where she addresses the confidentiality principle, I wish to state that she makes such generalized allegations and or claims without producing before this Honourable Court any evidence to support such assertions. I am advised by the Advocate on record for the 3<sup>rd</sup> Respondent, which advise I verily believe to be true that he who alleges must prove. She claims that the said affidavit will demonstrate that the 1<sup>st</sup> Respondent’s website and database which was maintained in its portal were compromised and other parties allegedly had access to it. She fails even on the most basic threshold, to show how, who and when the said website or database was allegedly compromised.
6. **THAT** in response to paragraph 4(ii) of the said Affidavit under the sub-topic ‘integrity’, she similarly asserts that any information used should be accurate and complete and protected from malicious modification. She further asserts that non authenticated non prescribed results through form and format that is unknown to law found itself into the IEBC portal. Again she fails to produce any iota of evidence or grounds of belief to corroborate this averment. On this ground specifically, this Affidavit should not be considered by this Honourable Court.
7. **THAT** in response to paragraph 4(iii) under the sub-topic “availability”, I am advised by the advocate on record for the 3<sup>rd</sup> Respondent which advise I verily believe to be true that the following provisions deal with the Register of Voters:
  - a. Section 6 of the *Elections Act* as amended by the *Election Laws (Amendment) Act of 2017* states that: ***(1) The Commission shall cause the Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate. (2) The Commission shall, within ninety days from the date of the notice for a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary.***
  - b. Section 6A of the *Elections Act* provides that ***(1) The Commission shall, not later than sixty days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days. (2) The Commission shall, upon the expiry of the period for verification under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process. (3) The Commission shall, upon expiry of the period for verification specified under subsection (1) publish— (a) a notice in the Gazette to the effect that the revision under subsection (2) has been completed; and (b) the Register of Voters online and in such other manner as may be prescribed by regulations.***
  - c. Section 8 of the *Elections Act* provides as follows:<sup>[SEP]</sup>***(1) The Commission shall maintain an updated Register of Voters.***<sup>[SEP]</sup>***(2) For purposes of maintaining an updated register of voters, the Commission shall— (a) regularly revise the Register of Voters; (b) update the Register of Voters by deleting the names of deceased voters***

*and rectifying the particulars therein; (c) conduct a fresh voter registration, if necessary, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the Constitution; (d) review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and (e) revise the Register of Voters whenever county boundaries are altered in accordance with Article 94(3) of the Constitution.*

- d. Section 8A of the *Elections Act* provides that:<sup>[SEP]</sup>*(1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of— (a) verifying the accuracy of the Register;*<sup>[SEP]</sup>*(b) recommending mechanisms of enhancing the accuracy of the Register; and (c) updating the register. (2) The Kenya Citizens and Foreign Nationals Management Service established under section 3 of the Kenya Citizens and Foreign Nationals Management Service Act, No. 3 of 2011 shall make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit under subsection (1). (3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of — (a) verifying the accuracy of the Register; (b) recommending mechanisms of enhancing the accuracy of the Register; and (c) updating the register.*
- e. Similarly Regulation 27 of the *Elections (Registration of Voters) Regulations, 2012* provides as follows: *The Commission shall make available the Register of Voters for inspection to the public at all polling stations, by way of public web portal or any other medium the Commission may approve.*
8. **THAT** therefore in further response to paragraph 4(iii), it is worthy to note that the following were carried out by the IEBC, the 1<sup>st</sup> Respondent herein pursuant to the above mentioned regulations:
- a. That on 18<sup>th</sup> May 2017, the 1<sup>st</sup> Respondent issued a press statement titled, ‘Verification of the Register of Voters whereby the 1<sup>st</sup> Respondent urged all Kenyan voters to check their biometric details on or before the 9<sup>th</sup> of June 2017; **(Annexed herein and marked as BGO-1 is a copy of the said press statement)**
  - b. That on Friday, 9<sup>th</sup> of June 2017, 60 days before the General Elections, the 1<sup>st</sup> Respondent updated the country on the status of the conduct of the general elections. They address the issue of preparation of the voter register where the 1<sup>st</sup> Respondent duly informs the members of the public that the verification exercise that started on 9<sup>th</sup> of May 2017 ended that day and that they were going to proceed to revise the register of voters as per the findings of the verification

exercise. **(Annexed herein and marked as BGO-2 is a copy of the said update)**

- c. That on 9<sup>th</sup> June 2017, the 1<sup>st</sup> Respondent issued a media release on the report of the Register of Voters. The main objective of the audit was to verify the accuracy of the register and recommend a mechanism for enhancing the accuracy of the register and updating the register. **(Annexed herein and marked as BGO-3 is a copy of the said media release)**
  - d. The 1<sup>st</sup> Respondent herein established a portal on their website which granted voters access to the voter register for the year 2017; the same was done in fulfillment of the obligation vested upon the 1<sup>st</sup> Respondent by dint of section 6(2) of the *Elections Act* as read with Regulation 27 of the *Elections Registration of Voters] Regulations 2012*.
  - e. That I am advised by the Advocate on record for the 3<sup>rd</sup> Respondent which advise I verily believe to be true that that Regulation 27 of the *Elections (Registration of Voters) Regulations 2012* contemplates that any person desirous of inspecting the Register of Voters as provided for by Section 6(2) of the *Elections Act* need not physically present themselves to so inspect the register as it envisages an online inspection;
  - f. The information contained in the said portal provided for information that included but not limited to, the audit report, the 2017 register of voters which included statistics per polling station, statistics per county assembly ward, statistics per constituency, diaspora statistics and prison statistics. This was posted on their website on 5<sup>th</sup> of July 2017 as confirmed by the web history of the published site, a month before the general election that was held on the 8<sup>th</sup> of August 2017.
  - g. That the site was created by the 1<sup>st</sup> Respondent as a gateway to the Register of Voters to be used in the 2017 General Election. It provided the said statistics on the number of registered voters as gazetted by the Commission as well as the findings on the audit on the Register of Voters by KPMG. The 1<sup>st</sup> Respondent duly informed the members of the public that they can verify their registration detail online. **(Annexed herein and marked as BGO-4 is a copy of the Audit Report)**
  - h. Further to that members of the public were also allowed to verify their registration details by sending an SMS by simply inputting their Identity Card Number or Passport number to 70000.
9. **THAT** she further alleges that during voting, some persons could not find their names on the register and explanation allegedly given to her from the returning officer in

Upper Hill School Polling Station was that the affected persons were allegedly sharing their IDs or that their data had been lost. In this respect, I wish to respond as follows:

- a. That once again, the Deponent has yet again failed to adduce any evidence before this Honourable Court to support any of the allegation contained in her averments; she does not identify the specific presiding officer; neither is there any affidavit sworn by the said presiding officer to corroborate such unsubstantiated claims.
- b. The deponent, Ms Apprielle avers at paragraph 3 of her Affidavit that she observed and followed the August 8<sup>th</sup> General Elections. She makes no indication as to the manner in which she observed and the question arises as to whether she was present at Upper Hill High School Polling Station to make such conclusions. The contents contained therein are hearsay and should not be entertained by this Honourable Court.
- c. On the issue of her being an observer, I am advised by the Advocate on record for the 3<sup>rd</sup> Respondent which advise I verily believe to be true that Regulation 62 of the Elections (General) Regulations, 2012 provides that the presiding officer shall regulate the number of voters to be admitted to the polling station and may exclude persons except observers and representatives of the print and electronic media **accredited by the Commission.**
- d. I am further advised that Regulation 94 provides for the Accreditation of observers. Regulation 94(5) categorically states that no person or organization may observe any election unless the person or organization has been accredited by the Commission. The Deponent has failed to disclose whether she has been accredited by the Commission but still proceeds to give her opinion based on what she allegedly observed.
- e. Further Regulation 94(6) provides that all the accredited election observers shall submit to the commission a written report in accordance with the guidelines issued by the Commission. No report has been produced before this Honourable Court.
- f. I have noted that the deponent has not disclosed and/or identified the alleged affected persons as alluded to in her Affidavit and has not substantiated the allegations contained therein and the same remain mere allegations that should not be admitted as evidence.
- g. That yet again, from her failed understanding of election related matter, a presiding officer is the one assigned to a polling station and not a returning officer.

h. That be that it may be, Regulation 69 of the Elections (General) Regulations 2012 (as amended by legal notice NO. 72 of 2017) which was published on 21<sup>st</sup> of April 2017 provides for the complementary mechanism in those circumstances whereby the electronic voter identification device failed to identify the voter. It provides as follows:

**“(e) in case the electronic voter identification device fails to identify a voter, the presiding officer shall-**

- (i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;**
- (ii) complete verification Form 32A in the presence of agents and candidates;**
- (iii) identify the voter using the printed register of voters; and**
- (iv) once identified proceed to issue the voter with the ballot paper to vote.**

10. **THAT** in response to paragraph 4(iv) under the sub-topic ‘non-repudiation’, the deponent avers, without evidence, that the Petition has established that entry was made into the system and a strange return was allegedly made. The failure to do so questions the probative value of the allegation being made. No evidence has been adduced.

11. **THAT** in specific response to paragraph 4(iv) of the said Affidavit, she alleges that the statutory forms known in law for transmitting results is statutory form 34. The deponent has a failed understanding of the law and believes that results can only be transmitted through the said specific forms. I am advised by the advocate on record, advise I verily believe to be true that:

- a. Regulation 82 of the Election (General) Regulation Rules provides that the presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, **in such manner as the Commission may direct;**
- b. Section 39(1)(c) provides, for purposes of presidential election, the Commission shall (a) electronically transmit, in the prescribed form, the tabulated results of an election for president from a polling station to the constituency tallying centre and to the national tallying centre;
- c. Section 44(2) of the Election Act provides that the Commission shall, for purposes of sub-section (1), develop a policy on the progressive use of technology in the electoral process.
- d. That Section 72 of the Interpretation and General Provision Act, CAP 2 provides ‘save as is otherwise expressly provided, **whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which**

**does not affect the substance of the instrument or document, or which is not calculated to mislead.**

12. **THAT** in specific response to paragraph 4(v) of the Affidavit, under the sub-topic ‘Authenticity’, I wish to respond as follows:

- a. I wish to state that there is no legal requirement obliging the 1<sup>st</sup> Respondent to avail Form 34A to any of the presidential candidates for verification which was the basis of the streamed result to be on the electronic portal. The reasons for the same are fairly straight forward.
- b. The role of the 2<sup>nd</sup> Respondent at the National Tallying Center was limited to collating the results recorded in the 290 Form 34Bs.
- c. I am advised by the advocate on record for the 3<sup>rd</sup> Respondent which advise I verily believe to be true that the role of the 2<sup>nd</sup> Respondent, according the Court of Appeal decision in **Independent Electoral and Boundaries Commission v Maina Kiai & others (2017) eKLR** was proscribed in the following terms, **“It cannot be denied that the Chairman of the appellant has a significant constitutional role under Sub-Article 10 of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course before he makes the declaration, his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in each of more than half of the counties.**
- d. That I am advised by the Advocate on record for the 3<sup>rd</sup> Respondent, advise I verily believe to be true that the is no Section 44B in the Election Act.

13. **THAT** the opinion rendered by the deponent herein is not founded on any real material evidence. The deponent at paragraph 5 of her Affidavit attaches her analysis titled, “the Travesty that was the electoral process- Kenya 2017. The said opinion by the deponent is not founded on any material evidence produced before this Honourable Court. More importantly, upon reading the said article, I have reached the conclusion that the opinion deliberately runs away from the statutory provisions regulating General Elections in Kenya.

14. **THAT** what I have stated herein is true to the best of my knowledge, information and belief, save as to the facts based on information and belief, the sources and grounds whereupon have been respectively specified.

