

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 1 OF 2017

Between

H.E RAILA AMOLO ODINGA 1ST PETITIONER

H.E STEPHEN KALONZO MUSYOKA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON OF INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

H.E UHURU MUIGAI KENYATTA3RD RESPONDENT

AND

EKURU AUKOTAPPLICANT/ INTERESTED PARTY

APPLICANT'S/INTERESTED PARTY SUBMISSIONS

May it please your Lordships/Ladyships;

These are the written submissions in respect of the Notice of Motion application dated 21st August 2017 seeking the Applicant Dr.Ekuru Aukot to be joined as an interested party in this Petition.

The Applicant/interested party was a Presidential candidate in the just concluded National General elections held on the 8th August, 2017 and in which the 1st and 2nd Respondents

declared the 3rd Respondent on the 11th August 2017 as the duly elected President of the Republic of Kenya and thereafter gazetted him as President elect.

Your Lordships/Ladyships the interested Party's Application is premised on his capacity as a Kenyan citizen, a duly registered voter and a Presidential candidate in the National General Elections held on the 8th August, 2017. The Constitution of Kenya is clear and explicit on the heavy burden and roles it places on the public in the safeguarding, protection and the defence of the Constitution of Kenya 2010 and the Rule of Law. The Constitution of Kenya 2010, under Article 3 stipulates that;

“3. (1) Every person has an obligation to respect, uphold and defend this Constitution.”

As a Presidential candidate and party president of the Third-Way Alliance Kenya, the burden is even heavier by virtue of being an equal political player as the Petitioners and the 3rd Respondents in the National General Elections held on the 8th August, 2017. As a Kenyan and moreso a Presidential candidate, the Applicant/Interested party is entitled under Article 140 of the Constitution to petition this Honourable Court to determine the validity of the Presidential election. Article 140 of the Constitution stipulates that:

1. **(1)A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.**

The Applicant/interested party has an interest in the proceedings of the petition having actively and aggressively participated in the 2017 electoral processes until the 8th August,2017 when the elections were held and thereafter disputed by the Petitioners .The Applicant/interested party believes that the voice of his candidature, that of his party and most importantly that of his constituents shall be well articulated when he is enjoined in the proceedings and champion's their collective cause in the manner that the elections were conducted and the

Applicant/Interested party shall heavily rely on his computed and compiled audit report of the electoral process.

Your Lordships/Ladyship the Applicant/Interested party's right under Article 140 of the Constitution is further fortified by the Supreme Court Rules, 2012. Rule 25 stipulates that:

“(1) A person may at any time in any proceedings before the Court apply for leave to be enjoined as an interested party.

“(2) An application under this rule shall include-

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied;

and

(c) the grounds or submissions to be advanced by the person interested in the proceedings , their relevance to the proceedings and the reasons for believing that the submissions will be useful to the court and different from those of the other parties.”

From the above provisions of Rule 25, the Applicant/Interested party shall heavily rely on the Applicant's audit report. The report has revealed that, even though it is unrealistic to expect Westminster type of election in terms of probity, the absence of thousands of forms 34A meant that at the announcement by the Commission of their final Presidential results, it was not possible to verify the data that was being displayed online. The Commission was in an unwarranted indecent haste. The Commission was by design, in a rush to be provisional at a time when it should have channeled all efforts to erect a system that is transparent, substantial and enduring.

Consequently, the Applicant's chief agents- Martin Gavole and Waweru Miruru in their affidavits have demonstrated that as a result of the missing forms 34A, two issues had happened. That either the results that were announced at the national tallying centre were aggregated at the constituency in the absence of forms 34A, in which case the forms 34B that were used at the

constituency level to generate the presidential results rested on shaky grounds or the commission had the forms in its possession and had failed to make them available.

Your Lordships, the audit report compiled by the applicant and affidavits of the chief agents shall help the court determine whether or not the commission conducted the elections in accordance with inter alia Articles 81 and 86 of the Constitution. The applicants' subsequent postelection electoral independent audit is equally a clear demonstration by the applicant to be enjoined as an interested party. Otherwise the audit report will purely be academic. This Court in **Francis Kariuki muruatetu and Wilson Thirimbu Mwangi v Republic and 4 others, Supreme Court Petition no. 15 and 16 of 2015(consolidated)**, observed that (para37):

[37] From the foregoing legal provisions and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the court by way of formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**
- ii. The prejudice to be suffered by the intended by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replica of what the other parties will be making before the Court.**

Conclusion

Your Lordships, from the foregoing it is clear that as a presidential candidate, and a party president, the applicant has an interest in the petition and that therefore, his postelection electoral audit report will be purely academic if its not resourceful in this petition.

The applicants in equal measure believes that the voice of his candidature, the voice of his party and most fundamentally the voice of his constituents shall not be well articulated unless the applicant is enjoined.

DATED AT NAIROBI THIS.....DAY OF.....2017

MUTUMA GICHURU & ASSOCIATES

ADVOCATES FOR THE APPLICANT

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NAIROBI

H.E UHURU MUIGAI KENYATTA

NAIROBI.

Lodged in the Registry on theday of.....,2017

.....

Registrar.

