

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 KENYATTA.....3RD RESPONDENT

AND

MICHAEL WAINAINA MWAURA.....INTENDED RESPONDENT / AMICUS CURIAE

AFFIDAVIT IN SUPPORT OF ENJOINMENT MOTION

I, **PROFESSOR MICHAEL WAINAINA MWAURA**, an adult male of sound mind resident in the Republic of Kenya within Nairobi County, and of Post Office Box Number 2002-00200 Nairobi do hereby make oath and state as follows:

1. My running mate **MIRIAM M. MUTUA** and I seek to be enjoined in these proceedings as amicus curiae/ Respondent opposing the Petition (but subject to my name only appearing in the proceedings since I was the Presidential candidate), in as much as we are directly affected by the pleas sought by the Petitioners.
2. I was an **Independent Presidential candidate** in the August 8th 2017 Presidential Poll, having garnered 13,257 votes as declared by the IEBC on August 11th 2017. I was issued

with a nomination Certificate as such candidate on 29th May 2017 by the IEBC and I annex a copy hereto marked as exhibit "PW 1". I make this deposition as such.

3. In consequence of the declaration of the 3rd Respondent, His Excellency the Honourable Uhuru Muigai Kenyatta as the winner of the Presidential election, I accepted the electoral outcome results declared by the 2nd Respondent, and unequivocally accepted the results without qualification or disclaimer. I annex hereto and marked as exhibit "PW 2" a copy of my concession speech in proof. I now hereunder expound on the bases of my enjoinder in opposing the Petition.
4. As an independent Candidate I believe that it is imperative for the Court to afford me an opportunity to table material that brings to bear objectivity in the process of adjudicating the issues. I am not affiliated to Political parties unlike the main protagonists herein, hence the peculiar nature of the amicus curiae brief I hold.
5. My Advocates on record have shown and explained to me the provisions of Rule 22 of The Supreme Court (Presidential Election Petition) Rules 2017 governing the joinder of a Respondent to the Petition such as I now seek. I invoke the same in support.
6. I have carefully perused the evidence contained in all the affidavits presented by the Petitioners and aver that (with respect) I find absolutely no merit that would warrant an annulment of the August 8th 2017 Presidential poll. I would urge (with respect) this Honourable Supreme Court to so find.
7. I submit that this Petition turns on 2 primary issues and in the end falls for dismissal:
 1. the role of party agents during the conduct of the Presidential election as the key players in the electoral process and as respective candidates' observers of the credibility and conduct of the election, and;

2. the weight of the evidence tabled before the Court placed by the Petitioners.
8. Indeed, the Petitioners' deponent, **GODFREY OSOTSI** in paragraph 7 of his Supporting Affidavit apprehends and emphasizes this point. He however, does not mention even a single agent in his "team" referenced in paragraph 13 of his deposition.
9. I oppose this Petition on the following bases which I explicate hereinafter more specifically:
 - a) It constitutes a gross abuse of Court process, and is an after-thought;
 - b) It is frivolous, being a rushed face-saving act of the Petitioners in the face of their declared electoral loss (Petitioners did not even invoke Article 140 of the Constitution of Kenya anywhere as the jurisdictional underpinning of their Petition);
 - c) It has no merit;
 - d) The substance of the "evidence" adduced by the Petitioners in their depositions constitutes of generalized sweeping statements which is essentially hearsay, and hence inadmissible to challenge the August 8th 2017 Presidential election;
 - e) The evidential threshold to warrant the grant of the relief sought has not been met by the Petitioners;
 - f) The Constitutional mandate conferred upon the IEBC to conduct the August 8th 2017 Presidential election was fully discharged and met in the execution of the said election;

- g) Even if there were irregularities as complained of by the Petitioners (which remain unproven), they are insufficient to overturn the 8th August 2017 declared Presidential poll results;
- h) The Supreme Court has NO jurisdiction to adjudicate on disputes BEFORE the election of August 8th 2017, which is the province of the IEBC pursuant to Article 88(4)(e) of the Constitution. (please see paragraph 7 of Raila Odinga's Affidavit, paragraph 7 thereof);
- i) The Petition is based on claims of **post-election events**, which this Honourable Supreme Court is divested of adjudicating upon;
- j) These proceedings do not constitute **forums conveniens** to revisit the **Raila Odinga vs. IEBC and Others eKLR 2013**, on the issue of spoilt ballots as sought in paragraph 19 and 21 of the Petition, there having been many Elections Petitions lodged before this Honourable Court post the said Supreme Court Petition No. 5 of 2013, which provided **sufficient time and fora** to adjudicate upon the said issue exhaustively.

Time allotted for this Petition is too short for such an adventure.

10. From my reading of the Petition and the Petitioners' supporting depositions against the backdrop of Regulation 8 of this Honourable Court's **Supreme Court (Presidential Petition) Rules, 2017 (Legal Notice 113 of 2017)** there are only 2 discernible Grounds in this Petition arising for determination:

- 1. the validity of the conduct of a presidential election (presumably the August 8th 2017 Presidential election);

2. the commission of an election offence as provided under the Election Offences Act ([No. 37 of 2016](#)).

11. Obliquely, the Petitioners introduce 2 unsubstantiated Grounds:

- a. of allegedly discrepant data between the Forms 34A and the poll data results at the National Tallying Center posted Presidential of allegedly 10,000 polling stations in paragraph 21.2.3.1 of their Petition.
- b. Alleged ballot stuffing in consequence of alleged eviction of the Petitioners' agents at polling stations, alleged in paragraph 21.3.3 of the Petition and paragraph 21.5.6 of the Petition.

Neither of these ancillary Grounds have been proven.

12. I now wish to tender my Replying Affidavit in proof of the strength of my opposition and in demonstrating that my enjoyment is neither frivolous nor intended to derail the trial.

13. I pray that the enjoyment order will be made in furtherance of Justice.

14. What is deposed to herein above it true and within my personal knowledge, save what is based on information and belief, the bases and the sources of which I have duly indicated.

SWORN BY THE SAID, **MICHAEL WAINAINA MWAURA**

AT NAIROBI ON THIS 23RD DAY OF AUGUST 2017

BEFORE ME

COMMISSIONER FOR OATHS

DRAWN & FILED BY:

J. HARRISON KINYANJUI & CO.ADVOCATES,

ST. ELLIS , 4TH FLOOR, SUITE 416,

WABERA STREET,

P.O. BOX 10024-00100 (G.P.O.)

N A I R O B I, KENYA.