

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
**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

AND

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

**SUBMISSIONS BY MICHAEL WAINAINA MWAURA**

**May it please your Honours,**

1. The Petition dated 18<sup>th</sup> August 2017 has no merit, and **falls to be dismissed with costs**. MICHAEL WAINAINA MWAURA, an independent Presidential Candidate in the impugned election swore and Affidavit in opposition to the Petition in which the bases of opposition are enumerated in **paragraph 9 of his Replying Affidavit**.
2. In paragraph 7 of his said deposition, he submitted that this Petition turns on 2 primary issues, and in the end falls for dismissal:
  - a) 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;
  - b) the **weight of the evidence** tabled before the Court by the Petitioners.
3. MICHAEL WAINAINA MWAURA submits that the ENTIRE Petitioners herein base their allegations and seek reliefs that should have been the complaints within the scope and domain of the Petitioners' agents **at the polling stations spread across the 290 Constituencies**, and by default, the Petitioners are abusing the Court process by asking the Supreme Court to assume that role, in the name of contesting the said election. Conversely expressed, HAD the Petitioners placed incontrovertible material before the Court showing that their agents in ALL the 290 constituencies discharged their mandate fully and effectually under **Regulation 79 of the Elections (General Regulations) 2012**, there would be **some merit** in assessing the Petition. **We submit hereunder that NO such evidence is available.**

4. The Petitioners seek various reliefs in their Petition, all **couched in nebulous and vague terms** (with respect). They have failed to tender sufficient evidence to oust the province of Section 83 of the Elections Act. One of the key issues arising for determination by implication of the pleadings is:

***Whether the errors and irregularities alleged by the Petitioners materially affected the quantitative margin and the qualitative aspects of the August 8<sup>th</sup> 2017 Presidential election.***

5. **Section 83** of the **Elections Act** provides that non-compliance with the law during the Presidential election of August 8<sup>th</sup> 2017 shall not invalidate the election if the Court is satisfied that the election was substantially conducted in accordance with the principles laid down in the **Constitution**. The Supreme Court ought in the circumstances to preserve the Presidential Election results.
6. In the case of *John Fitch vs. Tom Stephenson & 3 Others (2008) EWHC 501(QB)* it was held:  
***“.....the courts will strive to preserve an election as being in accordance with the law, even where there has been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches ..... This is because where possible, the courts seek to give effect to the will of the electorate ...”***
7. The significance of candidates’ agents in the conduct of an election is universal, as was echoed in the Canadian case of *Dorothy E. Brownton vs. Jean Hart Kangas & Others suit no.CI 98 – 01 – 10265, Queen’s Bench Division, Manitoba* it was held:

***“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have a free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.”*** [underlining added]

8. The Petitioners have not shown that their agents witnessed, recorded, and reported massive irregularities across the 290 Constituencies during the scope of the impugned elections. It is those agents’ testimony, (spread across the entire span of 290 Constituencies) that would convince this Court that the Petition is worth the paper it is written on.
9. **Regulation 62(1) of the Elections (General Regulations) 2012** authorized the Petitioners’ agents (among others) to be present in all polling stations or County tallying centres in the 47 Counties and ultimately the Chief agent of the 1<sup>st</sup> Respondent at the National Tallying Center. Among the authorization documents an agent must possess are the accreditation letter of appointment from his party or candidate, and the Oath of Secrecy from the 2<sup>nd</sup> Respondent IEBC.

10. From the Forms 34A submitted by the IEBC before this Court, the Petitioners have failed to pinpoint electoral laws beyond the threshold set by Section 83 of the Elections Act. In the result, the Petitioners have failed to dislodge the burden of proof located in their claim in the first instance.
11. Unfortunately, the Petitioners' agents testifying in support of the Petition are NOT credible at all, and their evidence, on the whole, is extremely scanty and framed in general terms insufficient to justify the grant of the relief sought. The common thread in the Affidavit of the Petitioner's **MOSES WAMURU** is that the Petitioners' agents were either locked out of some polling stations or altogether absent.
12. However, **Regulation 62(3) of the Elections (General Regulations) 2012** provides that the absence of agents shall not invalidate the proceedings at a polling station. There was NO application for recount or scrutiny made by ANY of the Petitioners' agents cited in the entire Affidavit of **MOSES WAMURU** and there is therefore no basis for the Petitioners asking for what they could have had effected at the primary polling point – the polling station. To the said extent, the Petition herein constitutes an abuse of the Court process.
13. In his affidavit, **MOSES WAMURU** alleges in paragraph 5 of his deposition:

***“...at about 11 am, I arrived at Thicingi Primary School in Kagaari North Ward, Runyenjes Constituency where I found all the NASA Presidential Candidate Agents locked out of polling station...”***

14. Clearly, there were more than one agent and yet the attendance of agents in a polling station is regulated under **Regulation 74, of the Elections (General Regulations) 2012** which provides at **Regulation 74(3)**.

***“The presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee, as the case may be to the counting venue.”***

15. This constitutes the mandate of the presiding officer in order to control and to provide an environment conducive to lawful voting. The presiding officer faulted by **MOSES WAMURU** acted within his mandate under **Regulation 74(3)**.
16. The Petitioners alleged further that a substantial number of Forms 34A were allegedly impugned in regard to the non- signing of results declaration by agents and candidates. **Regulation 79 of the Elections (General Regulations) 2012** governs the duty of the presiding officer, the candidates and agents on declaration of an election in that regard and so far as relevant, Regulation 79(7) states:

***“7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.”***

17. It was the Petitioners' Agents unceasing debt to the Petitioners across the 290 Constituencies on August 8<sup>th</sup> 2017 to DISCHARGE their obligations under **Regulation 79 of the Elections (General Regulations) 2012**. Rhetorically, did the Petitioners **PROVE** beyond peradventure that this obligation was discharged by their **OWN** agents in providing incontrovertible evidence as to the conduct of the election in each of those constituencies as alleged by the Petitioners so as to **SHIFT the burden of proof of DEFAULT** on the IEBC? The answer is NO.
18. Pitiably, there is **NO** complete list of the Petitioners' agents in the **290 Constituencies** during the August 8<sup>th</sup> 2017 Presidential election produced before this Court such as would convince the Court that the Petitioners even had Agents in ALL those constituencies. The Petitioners have been hedgy about this evidence and hence it can only be construed in favor of the IEBC that **Regulation 79(7) of the Elections (General Regulations) 2012** be invoked NOT to invalidate the election.
19. The Petitioners can only blame themselves if their agents failed. In the High Court case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2013] eKLR* it was held:

***"The role of an agent in a polling station is a legal requirement which must not be taken lightly. A vigilant polling agent would detect some wrongful acts at a polling station. He could initiate a complaint at the polling station or tallying centre with minimum delay. ...An agent ceases to be of any use to his candidate or party if he lacks the tools."*** [emphasis added]

20. The will of the people was in this instance demonstrated by the high number of votes cast in favour of the 3<sup>rd</sup> Respondent as the winning candidate, being in excess of 1.4 Million votes. The Petitioners' Agents across the 290 Constituencies would have been the best placed witnesses to provide **the best evidence** to impeach the manner in which the 3<sup>rd</sup> Respondent's numbers were obtained. As **there is no such evidence now**, this Court cannot assume the role of the Petitioner's agents to then cast aspersions on the integrity of the said election.
21. **Rule 6(o) of the IEBC Electoral Code of Conduct** demands of ALL Presidential candidates in the impugned election to accept the outcome of the election. which I executed prior to the acceptance of my nomination. It provides that a Candidate binds themselves to:

***"without prejudice to the right to present a petition to an election court, accept the final outcome of the election and the Commission's declaration and certification of the results thereof."***

22. The Petitioners herein ought to abide by this provision, which is a function of Article 84 of the Constitution. There is NO evidence of any electronic "hacking" of the IEBC KIEMS system or servers as shown in the Affidavit of **GEORGE KARIUKI NJOROGE** an IT expert testifying on behalf of MICHAEL WAINAINA MWAURA and sworn on August 23<sup>rd</sup> 2017.

Such allegations of electronic interference of the IEBC KIEMS systems having been DISPROVED there is NO evidence sufficient to grant the Petition. It should be dismissed with costs.

**DATED AT NAIROBI THIS 25<sup>th</sup> DAY OF AUGUST 2017**

**J. HARRISON KINYANJUI & COMPANY**  
**ADVOCATES FOR MICHAEL WAINAINA MWAURA**

**DRAWN & FILED BY:**

J. HARRISON KINYANJUI & CO. ADVOCATES  
ST. ELLIS HOUSE, 4<sup>TH</sup> FLOOR, SUITE 416,  
WABERA STREET,  
P.O. BOX 10024-00100 (G.P.O.)  
N A I R O B I, KENYA.

**TO BE SERVED UPON:**

MURUMBA & AWELE ADVOCATES  
MIRAGE PLAZA, MEZZANINE 1 – UNIT 7 **NAIROBI**

ISEME KAMAU & MAEMA ADVOCATES  
IKM PLACE, 5<sup>TH</sup> FLOOR, TOWER A **NAIROBI**

V. NYAMODI & CO. ADVOCATES  
LOWER NO. 7 DUPLEX APARTMENTS **NAIROBI**

OGETTO, OTACHI & CO. ADVOCATES  
SIFA TOWERS, 7<sup>TH</sup> FLOOR **NAIROBI**

MUTUMA GICHURU & ASSOCIATES ADVOCATES  
CHAKA APARTMENTS **NAIROBI**

INFORMATION COMMUNICATION TECHNOLOGY ASSOCIATION OF KENYA (ICTAK)  
PSC WING, 9<sup>TH</sup> FLOOR, HAZINA TOWERS  
**NAIROBI**

ISAAC ALUOCHIER **NAIROBI**

LODGED in the Supreme Court of Kenya Registry at Nairobi on the **25<sup>TH</sup>** day **August** of 2017.

.....  
REGISTRAR, SUPREME COURT OF KENYA