

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

REPLYING AFFIDAVIT IN OPPOSITION TO THE PETITION

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 enjoyment 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. Still, the specifics of the 10,000 alleged polling stations have not been provided or made out clearly **in ANY supporting Affidavit** to warrant the grant of the pleas in the Petition, because Paragraph 21.2.3.1 of the Petition is itself a bare-faced contradiction of Paragraph 21.2.2.6.2 of the same Petition.

13. In paragraph 9(a) of his supporting Affidavit, (and repeated in paragraph 25 thereof) Raila Odinga makes a totally blanket allegation against the IEBC without giving the particulars of the alleged 3rd Parties who allegedly interfered with the IEBC KIEMS voting system on the election date. For avoidance of doubt, he alleges thus:

“...by its conduct, actions and/or omissions deliberately and/or negligently compromised the security of the integrated electoral management system (commonly known as KIEMS) and thereby exposed it to unlawful interference by third parties and compromised the verifiability and security of the key component of the Presidential election i.e. tallying and transmission of results.”

(emphasis mine)

14. These allegations are totally unsubstantiated:

- a) The alleged 3rd Party who allegedly interfered with the IEBC system remains **nameless and faceless**;
- b) The alleged unlawful interference has no specifics in terms of **the date(s)** of alleged interference, **manner** of alleged interference, **scope**, the specific nature of interference, or even **the place** of the occurrence of the alleged interference.
- c) There is **NO police report** by the Petitioners of the alleged interference, since it is a criminal offence for anyone to interfere with the IEBC conduct of elections under the Elections Act;
- d) No evidence of the **compromise of the security** features of the IEBC KIEMS system is evidenced.

Although Raila Odinga avers that the evidence of these is contained in the Supporting Affidavits of **Dr. Nyangasi Oduwo**, **Godfrey Osotsi**, **Koitamet Ole Kina**, I have carefully read each of these Affidavits and did NOT see any such extrapolation.

- 15. The allegations of alleged compromise of poll results by the IEBC at polling stations across the nation made out in paragraph 20 of Raila Odinga's Affidavit is in essence a lamentation against his own Party agents' failure to professionally execute their mandate on his behalf not blamable at all on the IEBC or any other Presidential candidate such as the 3rd Respondent or myself.
- 16. I believe that had Raila Odinga perceived that he was handicapped in deploying his party agents across the spread of the polling stations in the 290 constituencies during the August 8th 2017 Presidential election, he ought to now accept the consequences of his own deficient planning and execution of electoral preparedness that may have led to his lack of party agents. He cannot blame the IEBC. I am NOT blaming the IEBC for my loss.

17. I invite this Honourable Court to apply the principle of **Proportionality**, and to adopt a **purposive interpretation** of the Constitution in assessing the heavy mandate of the IEBC which it fully discharged in conducting the August 8th 2017 Presidential Election, and view the general conduct of the Petitioners and their agents during the entire spread of the conduct of the said election as entirely contradictory (on the one hand they are unwilling to accept defeat after the declaration of the results, while their own party agents appended signatures to the Forms 34A spread across the gamut of polling stations' results, without complaints, thereby confirming the electoral outcome).

18. My foregoing averment is buttressed by the averment in paragraph 10 of **DR. NYANGASI ODUWO's 2nd Supporting Affidavit** wherein he avers:

*"...**that only two agents signed the forms from the Petitioner and the 2nd respondent; there are only two signatures of the Returning Officer and only one of the two pages was signed; the RO that signed the Form did not indicate his/her name or date. The total valid votes on form 34B is 26, 602 while the final valid votes add up to 26, 847. Annexed herewith is a copy of the aforesaid Forms.**"*

(underlining and emphasis mine)

19. I also noted that **MOSES WAMURU's supporting Affidavit** contains unproven and unsubstantiated claims that are otherwise sensational. In paragraphs 4, 5, 6, 8, 10, 12, 13, 15, 17, and 18 of his Supporting Affidavit, **MOSES WAMURU** does **NOT** give the name of **ANY** of the alleged NASA agents he alleges were wither chased out of the polling stations or locked out therefrom. **No police reports** are also supplied to prove the offences were reported.

20. Even where **MOSES WAMURU** mentions an **Eliud Gitau** NASA agent at Kiangongi Primary School in Kieni North, Runyenjes Constituency, in paragraph 11 of his Affidavit, NO substantiation of the allegations are made by Eliud Gitau himself via a deposition

under oath. The events alleged by MOSES WAMURU constituting alleged electoral offences at Kiangongi Primary School in Kieni North, Runyenjes Constituency are in any event NOT reported to ANY police station.

21. In the same breath, the alleged voters who allegedly interacted with MOSES WAMURU have not been named or referred to in paragraph 16 of his Supporting Affidavit. All these are in my belief sensationally made allegations without any bases in fact capable of being proven.
22. For his part, the 1st Petitioner Raila Odinga has not shown WHAT steps he took to punish or bring to book his own party agents he alleges took bribes as alleged by MOSES WAMURU in **paragraph 17 of his Supporting Affidavit**. No OB Police Report has also been supplied by the Petitioners to prove they reported the alleged crime.
23. In the result, I believe that it would be unjust and unconscionable for the Petitioners to have authenticated the August 8th 2017 Presidential poll results through their said polling agents' signatures and then vide these proceedings turn round to seek to invalidate the same documents on purely technical bases, which include alleged absence of the presiding officers' signatures on some documents.
24. For my part, I can only rely on what the IEBC issued as the Presidential Poll results in the presence of my agents and those of the other candidates since it is the Constitutionally-mandated body to so do. There was no secrecy in this entire process at all, and it was so certified by elections observers who confirmed the declared results as founded on a fair, free, credible, and transparent election in furtherance of the law.
25. For me, this raises the threshold for anyone such as the Petitioners challenging the Presidential poll results. As at 25th July 2017 prior to the election date, I wrote the 2nd Respondent IEBC and I asserted that the independence of the IEBC was an imperative that could not be whittled down by engaging politicians in the Presidential ballot

printing process. I DID wish the Commission well and expressed my faith in its delivery of a credible election. I lost fairly. I annex hereto and marked as exhibit **"PW 3"** a copy of the said communication.

26. I believe that the Petitioners ought to have tabled before the Supreme Court the documents in proof of their allegations that they "won" the Presidential election of August 8th 2017 by means of which to compare with the results now declared by the IEBC, such as would demonstrate their claims beyond peradventure. They failed.

27. I am aware that by a Press Conference held on **August 10th 2017**, the 1st Petitioner purported to declare himself as winner of the Presidential poll of August 8th 2017 by 8 million votes, and it was reported by the mass media. I annex hereto and marked as exhibit **"PW 4"** a copy of the press reports. To my shock, this alleged "win" was not demonstrated at all in ANY of the Petitioners' depositions or even asserted at all.

28. From the Petitioners' Supporting Affidavit of **BENSON WASONGA**, this alleged win by the 1st Petitioner has neither been alleged, substantiated nor proven. Indeed, even from his own deposition, **BENSON WASONGA** expressly concedes that the 3rd Respondent won the said election. Indeed, having executed the 2nd Respondent's Electoral code of Conduct, I am aware that such pronouncements are a direct breach of Regulation 6(l) of the IEBC Electoral Code of Conduct.

29. This specific provision is very crucial to these proceedings since it bound ALL the Presidential candidates to:

"reassure voters with regard to the impartiality of the Commission and the secrecy and integrity of the ballot, and to reaffirm that no one should know how any other person has voted."

30. Further, I am persuaded that to meet the requisite burden of proof, the Petitioners must provide incontrovertible evidence parallel to (not deduced or inferred from) the IEBC poll results in order to satisfy a very high threshold of "beyond a balance of probabilities but not beyond reasonable doubt". In the circumstances, the IEBC August 8th 2017 Presidential poll results cannot be overturned by innuendo and anecdotal evidence as proffered by the Petitioners.
31. I do concede that having embarked on a Presidential campaign over the spread of Kenya in the period leading up to the August 8th 2017 election, and working with a large number of personnel whose training as polling agents over a very short period of time, it was inevitable that inadvertent mistakes and omissions were bound to, and did in fact occur during the election day.
32. This does not in any manner mean that there was any conspiracy between my agents and the IEBC to deprive me or any candidate of any votes accruing to me or them as insinuated by the Petitioners.
33. At the outset, I noted that the Petitioners' Chief agent at the National Tallying Center, one Musalia Mudavadi did not swear any deposition herein, yet being the Petitioners' Chief Agent in the course of the disputed election, I believe that he was the best person to have testified of the alleged irregularities, to provide the best evidence.
34. Since the Petitioners elected to frame their case as they did, I believe they are bound by their pleadings. Altogether, a breach of the "best evidence" principle was clearly made.
35. In the result, I believe that the evidence of **OLGA KARANI** (Deputy Chief Agent of the Petitioners) contained in her Supporting Affidavit is too weak to sustain the evidential threshold for the grant of the relief sought in the Petition. She was NOT at the polling stations across the country when and where the alleged irregularities took place, by reason of which she cannot not be a witness to the events she testified about in Court.

36. In **paragraph 7** of her Supporting Affidavit for instance, she makes a sweeping statement about “NASA agents” without giving ANY particulars of whatever nature. No names, no polling stations, no complaints by such “NASA agents” are supplied. Her evidence is to that extent speculative, amounting to sheer hearsay.
37. I believe that failure to sign an official document such as contested by the Petitioners could be due to **an administrative error**, and hence cannot constitute a ground to invalidate the entire Presidential election result. I am aware that in a similar decision of the Ghana Supreme Court in **Nana Addo Dankwa Akufo-Addo vs. John Dramani Mahama & Others**, the Court in that decision held that a signature in itself has no magic about it. I shall rely on the said decision during trial in proof.
38. I have been informed by my Advocates on record (and I believe and hold their information as correct), that a Petition seeking to challenge the election of a President ought to be drawn in concise terms with clarity as to the particulars forming the bases of the complaint. A party is bound by their pleadings.
39. In the context of this Petition, and in light of the fact that the Petitioners have invited this Honourable Court (in paragraph 19 and 21 of their Petition) to **revisit** and “correct” its decision by the 1st Petitioner in **Raila Odinga vs. IEBC and Others eKLR 2013**, I believe that the Petition as drawn is embarrassing in the nebulous reference to an “election” in paragraph 5, 6, 12, 14, 16, 17, 22, 21.2.2.6.1, 21.2.3.3, 21.3, 21.3.4, 21.3.5, 21.7, 21.9, 21.13, 22.4, 23.1, 23.2, 23.7.1, 23.7.13, 23.7.15, 24, 25, 31, 33, 34, 35, and 36 thereof, and the reliefs set out in paragraph a., b., d., e., f., g., h., i., and k. of the Petition dated 18th August 2017.
40. My foregoing averment is based on the fact that the Petitioners claim that this Supreme Court ought to revisit its cited earlier decision for purposes of re-evaluating its

assessment of the place of spoilt ballots in the matrix of Presidential poll results. I am prejudiced in the circumstances as I cannot distinguish which election the Petitioners wish the Court to render its interpretation or position upon (whether it is the August 8th 2017 or the 2013 presidential election). Am afraid I cannot speculate on such weighty matters, given the Petitioners' own pleadings which are thus confusing.

41. Having participated in the August 8th 2017 Presidential election as a candidate, am persuaded overall that if there was any noncompliance with the relevant electoral law on the part of the IEBC as alleged by the Petitioners, then it did not affect the final results of the said August 8th 2017 Presidential election in any fundamental or significant manner as to warrant overturning the declared results.
42. I am aware that the burden of proof in these proceedings squarely lies on the Petitioners in the first instance to prove their allegations, and that the standard of proof required is proof beyond "on a balance of probabilities" but not exactly at the "beyond reasonable doubt" level. I am familiar with the setting of this threshold as settled by the Supreme Court in the case of **Raila Odinga vs the IEBC and Others, Supreme Court Petition No. 5 of 2013**, eKLR, 2013.
43. In my own understanding, this is proof which leaves the Court without doubt as to the veracity of the claims of a flawed election, (which is a threshold the Petitioners have failed to meet as I presently demonstrate hereunder). In the result, their Petition dated August 18th 2017 falls to be dismissed with costs.
44. Still on the nebulous state of the Petitioners' claims, I noted that the 1st Petitioner (RAILA AMOLO ODINGA) in paragraph 9(a) of his Supporting Affidavit sworn on 18th August 2017, alleges that "[t]he 1st Respondent [IEBC] **by its conduct, actions and/or omissions deliberately and/or negligently compromised that security of the integrated electoral management system....**", without supplying ANY particulars of the alleged

omissions, or negligence. As a candidate, I am prejudiced in the circumstances and unable to react to such wild and spurious allegations.

45. Further, I noted that such is the feeble and cross-cutting framing of the Petitioners' entire case and depositions before this Honourable Court that it is so nebulous, making sweeping and blanket statements that are starkly lacking in precision, and hence totally incapable of particularized response.
46. I note that although Raila Odinga sensationally drags into these proceedings the unfortunate demise of the hitherto IEBC ICT manager **Chris Msando** in paragraph 23 and 24 of his Supporting affidavit, there is NO proven nexus of the alleged KIEMS system run by the IEBC and the stated unresolved death. **DR. NYANGASI ODUWO** equally makes generalized allegations on the election. I stand prejudiced.
47. My prejudice is that I cannot in the circumstances discern with precision how the very same Presidential election I as involved in on August 8th 2017 could have suffered the alleged deficiencies that totally were never brought to other Presidential candidates' attention such as myself and are only being leveled now in extremely thin and general terms.
48. I note that one of the Grounds raised by the Petitioners is that there are a number of Forms 34A that were allegedly not signed by the Presiding Officers. However, there are no demonstrable or proven complaints from the Petitioners' agents regarding this purported objection, with specific objection to such alleged polling stations.
49. My Advocates on record have shown and explained to me the provisions of the law that requires the IEBC presiding officers to record on the Forms 34A why a candidate or an agent has failed or refused to sign the declaration of results form.
50. In the same vein I have noted that such Presiding Officer is required to state whether the candidate or the agent was absent during the declaration of results. Failure to do

any of the stated actions does not in law invalidate the results which have been declared as validly obtained by each candidate in the election.

51. I believe that where the agents of the Petitioners **did not disown their signatures** (to date), contained in ALL impugned Forms 34A subject of this Petition, the electoral results from all such polling stations were properly included in the final tally of the Presidential poll by the IEBC, and the Petition lacks merit to that extent.
52. I know of a fact that candidates' agents are appointed and assigned specific functions to perform during the Presidential Election upon their taking the secrecy oath. Clearly, breaching their oath or performing their duties unlawfully attracts penal consequences, which the Petitioners failed to demonstrate had been invoked at all. No Police reports are annexed even to the Affidavits of MOHAMMED BARRE or IBRAHIM MUHAMUD in respect of "rigging" claims in Mandera North Constituency.
53. From my own analysis of the Petitioners' claims, the evidence adduced by the Petitioners and their witnesses does not prove that the 3rd Respondent (or myself) benefited from the alleged extra votes cast at the many generalized and unspecified polling stations. Indeed, **paragraph 27** of the Supporting Affidavit of **Raila Amolo Odinga** does not even insinuate such an eventuality. It is a bland generalization constituting a sweeping statement with no evidential value.
54. My Advocates on record have explained to me that according to the applicable electoral law, even if the allegedly unaccounted for votes are deducted from the final Presidential poll tally, the final outcome as declared by the IEBC in regard to this Presidential election of 8th August 2017 would not change significantly as to place the victory of the 3rd Respondent in doubt.
55. I am persuaded that lack of evidence showing beyond peradventure the alleged election irregularities in each and every polling station in the 290 Constituencies in Kenya over

the span of the August 8th 2017 Presidential election means that the allegations remain unproven. The Petition ought therefore be dismissed.

56. I state the foregoing in light of the generalized averments in paragraph 21.5.6 for instance of the Petition, alleging that ***“By colluding with the 3rd Respondent and ejecting the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley regions, the 1st Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results”***. [underlining mine]
57. Such a sweeping statement without proof of collusion or particulars thereof does NOT disclose at WHICH specific polling stations the alleged acts were done, nor is there proof tendered of ANY complaint to the IEBC of such acts. At any rate, the appendage of signatures by the agents of the Petitioners in THESE polling stations to Forms 34 automatically disproves the said allegations.
58. Upon my perusal of the Petitioners’ evidence further, it was clear that not even the Petitioners’ Chief agent complained against anything at the alleged “10,000” polling stations’ results now sought to be impugned. The direct inference then is that the Petitioners have no basis to complain at all.
59. In regard to the Petitioners’ allegations that the campaign period was soiled by the 3rd Respondent (see paragraphs 33 to 41 of the Supporting Affidavit of Raila Amollo Odinga), I note that the Petitioners themselves were engaged in a lot of activities before polling day that could be said to be a violation of the Electoral Code of Conduct such as the 2nd Petitioners telling Mt. Kenya residents (implying the Kikuyu tribe – to lie low).
60. In my own assessment, such acts were in direct breach of the Electoral Code of Conduct and a violation of Article 94 of the Constitution of Kenya.

61. In the result, the evidence of the alleged malpractices occurred if any during the campaign period was **not adduced sufficiently**. Moreover, I noted that there is not a single Police report made by the Petitioners indicating the alleged intimidation of voters during the campaign period, since I understand this to be an electoral offence.
62. In the absence of such evidence, I am persuaded that this Supreme Court can safely conclude that the period prior to the August 8th 2017 polling day was generally within the scope of the electoral law. Not a single complaint by the Petitioners has been shown to have been lodged with the **IEBC Electoral Code of Conduct Enforcement Committee**.
63. I am aware that pursuant to Rule 15(1) of The Elections (General Regulations) RULES OF PROCEDURE ON SETTLEMENT DISPUTES, any aggrieved person is directed to file a written complaint against any political party participating in an election for violation of the provisions of the electoral code of conduct. No such Complaint was lodged.
64. It is too late in the day for the Petitioners to now claim that there was such a violation of the election process during the electioneering period.
65. I also believe that the Petitioners ought to have exhausted that Constitutionally-mandated dispute resolution mechanism before alleging there was such an alleged electoral offence or offences. Not a single person has been demonstrated to have failed to vote for the Petitioners on account of such alleged influence, or the totality of such votes.
66. The only conclusion in the circumstances which I believe should commend itself to this Honourable Court is that the results of the August 8th 2017 Presidential election across the 290 constituencies and the 47 Counties reflected the will of the majority expressed in the election of the 3rd Respondent as the President of the Republic of Kenya.

67. To this majority, an injustice will have been visited if the declaration of the Presidential poll is overturned, yet there is a generally accepted principle in any democracy that the electoral outcome (such a contested) produces a winner and (a) loser(s). I happen to be such a loser, (with respect), and I put in as much labour as the Petitioners in the run up, and even during the contest itself, hence it behoves the Petitioners to accept the outcome in respect of our institutions and Constitutional mandate of the IEBC.
68. I have also been informed by my Advocates on record that where a constitutional infraction causes no injustice by way of injurious prejudice to any person, such an infraction or infractions should not have an invalidating effect on the Presidential election result. I am persuaded that on the evidence tendered, the Petitioners have NOT dislodged their burden of proof.
69. Having participated in the Presidential election on the 8th August 2017, I am certain it was conducted substantially in accordance with the law relating to elections, and the fact that a small number of errors could be said to have affected the poll result is not in my humble view a sufficient reason for declaring it invalid.
70. I believe that this Petition constitutes a gross abuse of the Court process. My belief is based on the fact of the general obstructionist legal posturing of the Petitioners before the 8th August 2017 Presidential elections. Am aware that the Petitioners and their NASA coalition lodged numerous proceedings before Courts around the country to make the IEBC's work very difficult through frivolous and vexatious litigation.
71. In proof of the foregoing, a Judicial Review suit was lodged by the Petitioners' NASA coalition filed to nullify the Presidential ballot printing tender awarded to Al Ghurair Printing and Publishing LLC. Am aware that the Court of Appeal of Kenya eventually ruled that the claims upon which the Petitioners had filed the suit were baseless.

72. I am thus persuaded that this petition is an extension of this inauspicious pattern and does not demonstrate any improvement in the quality and substance of the Petitioners' perceived objections to the Presidential poll declaration, outside the trend of frivolous and vexatious litigation prior to the election date. I annex hereto marked exhibit "PM 5" a bundle of Press releases demonstrating this recalcitrance.
73. Clearly, the declaration of results figures issued by the IEBC and which the Petitioners are challenging indicate that the 1st Petitioner lost the August 8th 2017 Presidential election. Other electoral indicators concur with the narrative of loss built by the numbers issued by IEBC.
74. In other elective outcomes of August 8th 2017 election, I have noted that the 1st Petitioner lost County Assemblies, lost numbers in both Houses of Parliament, lost gubernatorial contest, including the coveted Nairobi County Governorship hitherto held by an ODM member.
75. By contrast, I note that 3rd Respondent increased electoral numbers overall in the August 8th 2013 election as compared to the 2013 outcome, and made his "tyranny of numbers" even more potent. The Petitioners' claims of manipulated electoral results are therefore not backed by a national assessment of the elective results across the board.
76. On the contrary, an objective analysis of the national electoral outcome patterns across the other 5 elections held on August 8th 2017 affirm that the 3rd Respondent secured a sound victory, and one not impeachable by means of these proceedings. My belief is based on the results submitted by the 2nd Respondent demonstrating that the Petitioners indisputably lost in their so called "stronghold" areas.
77. The Petitioners lost in Kisii, Nyanza areas; they lost ground in Western Kenya which they had claimed to have turned from "battleground" area into their "stronghold", they lost foothold in South Rift, in the Coast and in North Eastern. It is unfathomable that the

volume, extent, and severity of all these loses would have resulted in a Presidential win for the Petitioners as they purport.

78. To me, these electoral outcome patterns do not support the claims made in the Petition or the reliefs sought, and therefore the Petition should be dismissed.

79. Throughout this process, my well documented position has been that the IEBC acting independently and within the law is the only and final arbiter in matters of the general election, and therefore this Honourable Court ought to be supplied with compelling evidence by the Petitioners as to why the pleas they seek should be so granted. They had NOT.

80. It is further in the public domain (and I invite this Honourable Court to take Judicial Notice) that none of the political parties including those of the Petitioners conducted free, fair or credible party nominations. The petitioners are therefore morally bereft of any credible bases to cast aspersions on the IEBC's conduct of the August 8th 2017 Presidential election.

81. I believe, and based on the totality of the foregoing, that had the Petitioners been so concerned with the process of democracy and free and fair elections, they should have first afforded the same to the members of their own political parties. The claim that the election as conducted by IEBC is an attack on our democracy is therefore flippant and diversionary.

82. My commitment to the support of democratic institutions remains strong and in replying to the Petitioner's claims, I reaffirm that same commitment by opposing the frivolous Petition whose undeclared purpose is to undermine democracy and its established institutions. I stood bound by the provisions of **Rule 6(o) of the Electoral Code of Conduct** which I executed prior to the acceptance of my nomination.

83. I do not believe that the Petitioners have seriously sought to abide by the said provision which I reproduce here:

“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.”

(emphasis mine)

84. I therefore seek that this Honourable court will render its verdict and dismiss the Petition at the conclusion hereof, and declare the election of the 3rd Respondent as the President-elect following the Presidential election conducted on August 8th 2017 to be valid, and to dismiss the Petition with costs awarded to me, as envisaged under Rule 26(1)(d) of The Supreme Court (Presidential Election Petition) Rules, 2017.

85. I now make this deposition in opposition to the Petitioners’ Petition.

86. What is deposed to herein above is 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:

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