

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

BETWEEN

H.E. RAILA AMOLO ODINGA.....1<sup>ST</sup> PETITIONER

H.E. 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 KENYATTA.....3<sup>RD</sup> RESPONDENT

AND

ATTORNEY -GENERAL.....INTENDED *AMICUS CURIAE*/APPLICANT

NOTICE OF MOTION

(Under Articles 156 (5) & (6), 140 of the Constitution; Section 6(2)(a) of the Office of the Attorney -General Act; Section 24 (1) of the Supreme Court Act, 2012; Rules 23, 54 (1) (a), (2) of the Supreme Court Rules, 2012 and Rule 17 (1) & (2) of the Supreme Court (Presidential Election Petition) Rules, 2017)

TAKE NOTICE that this court will be moved on the ..... Day of .....2017 at .....O'clock in the forenoon or so soon thereafter as the Attorney General will be heard, in an application, for orders **THAT**:

1. The Court do grant leave to the Attorney-General to appear as *Amicus Curiae* in these proceedings.
2. The Court do make such further order(s) and/ or direction(s) as it may deem necessary in the circumstances.

**This application is premised on the grounds that;**

1. The Applicant has Constitutional and statutory obligation to assist the court in matters involving complex constitutional and legal questions and to place materials and expert research which will aid in the fair, just and impartial adjudication of the issues in dispute. In particular;
  - a. The Attorney General is authorised under Article 156 (5) of the Constitution to appear with leave of the court as a friend of the court in any civil proceedings to which the government is not a party;
  - b. Article 156(6) of the Constitution obligates the Attorney- General to promote, protect and uphold the rule of law and defend the public interest; and
  - c. Under section 6(2)(a) of The Office of the Attorney General Act, 2012,the Attorney-General is also authorised, with leave of the court to appear in any civil proceedings.
2. The Office of the Attorney-General, having been actively involved in the post 2013 electoral legal reform processes in the context of Article 81 of the Constitution is in a special position to assist the Court in making a determination on the issues raised in the Petition.
3. The instant Petition raises complex constitutional and legal questions relating to the conduct of Presidential elections in respect of which this Court has previously allowed the participation of the Attorney-General as *Amicus Curiae*.
4. The conduct of presidential elections is a matter of great public interest necessitating the participation of the Attorney-General as the principal legal advisor to the Government, promoter, protector of the rule of law and defender of the public interest.

5. The Petition raises significant constitutional and legal questions applicable in the Kenyan electoral processes in which the Attorney-General has been actively involved.
  
6. The Petition raises questions regarding the interpretation and application of Articles 10, 38, 81, 86, 138 and 140 of the Constitution which have implications on the conduct of the Presidential elections. In this regard, the Attorney-General intends to assist the court by making submissions on the following questions: -
  - a. What is the proper Constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both Articles 81 and 86 of the Constitution?
  
  - b. What were the effects as regards the use of technology in presidential election introduced by the Elections Laws (Amendment) Act No.36 of 2016 and Elections Laws (Amendment) Act No. 1 of 2017?
  
  - c. What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of **IEBC- vs- Maina Kiai & 4 Others (Civil Appeal No. 105 of 2017)** on how IEBC conducted the presidential election in issue?
  
  - d. How should the Supreme Court treat rejected/spoilt votes in determining the total votes cast under Article 138 (4) of the Constitution?
  
  - e. What is the proper Constitutional and legal threshold for invalidating or upholding a presidential election under Article 140 of the Constitution?
  
  - f. What remedies can the Court grant in determining a Presidential election petition under Article 140 of the Constitution?

THE APPLICATION is supported by the affidavit of **Githu Muigai** sworn on the .....Day of ..... 2017. The address for service of the Applicant is the Attorney General, Attorney General's Chambers, Harambee Avenue, P.O. Box 40112-00100 Nairobi.

DATED at **NAIROBI** this ..... day of .....2017.

.....  
**GITHU MUIGAI, SC**  
**ATTORNEY-GENERAL**

**DRAWN AND FILED BY:-**

Attorney General  
Attorney General's Chambers  
Harambee Avenue  
**NAIROBI.**

**TO BE SERVED UPON:**

1. Murumba & Awele Advocates  
Mirage Plaza, Mezzanine 1-Unit 7  
Chiromo Road, Westlands  
P.O. Box 22255-00505  
**NAIROBI.**
  
2. Independent Electoral & Boundaries Commission  
Anniversary Towers, 6<sup>th</sup> Floor  
University Way  
P.O. Box 45371-00100  
**NAIROBI.**

3. Chairman

Independent Electoral & Boundaries Commission

Anniversary Towers, 6th Floor

University Way

P.O. Box 45371-00100

**NAIROBI.**

4. H.E Uhuru Kenyatta

**NAIROBI.**

Lodged in the Registry at Nairobi on the ..... day of ..... 2017

**Registrar**

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
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H.E.UHURU KENYATTA.....3<sup>RD</sup> RESPONDENT

**AND**

ATTORNEY-GENERAL.....INTENDED AMICUS CURIAE/APPLICANT

**AFFIDAVIT IN SUPPORT**

I, **GITHU MUIGAI, SC**, a resident of Nairobi within the Republic of Kenya do hereby made oath and state as follows:

1. **THAT** I am the Attorney-General of the Republic of Kenya and thus competent to swear this affidavit.
2. **THAT** I have read and understood the Petition dated 18<sup>th</sup>August, 2017 and filed on even date by the Petitioners herein.

3. **THAT** the Applicant has Constitutional and statutory obligation to assist the Court in matters involving complex constitutional and legal questions and to place materials and expert research which will aid in the fair, just and impartial adjudication of the issues in dispute. In particular;
  - a. The Attorney-General is authorised under Article 156 (5) of the Constitution to appear with leave of the court as a friend of the court in any civil proceedings to which the government is not a party;
  - b. Article 156(6) of the Constitution obligates the Attorney- General to promote, protect and uphold the rule of law and defend the public interest; and
  - c. Under section 6(2) (a) of The Office of the Attorney General Act, 2012, the Attorney-General is also authorised, with leave of the court to appear in any civil proceedings.
4. **THAT** the instant Petition raises complex constitutional and legal questions relating to the conduct of Presidential elections in respect of which this Court has previously allowed the participation of the Attorney-General as *Amicus Curiae*.
5. **THAT** the Petition raises significant constitutional and legal questions applicable in the Kenyan electoral processes in which the Attorney-General has been actively involved.
6. **THAT** the Attorney General having been actively involved in the post 2013 electoral legal reform processes in the context of Article 81 of the Constitution has the necessary expertise to assist the Court in making a determination on the issues raised in the Petition.

7. **THAT** the proper conduct of presidential elections is a matter of great public interest and importance in respect of which the participation of the Attorney-General as the custodian of the law and public interest is merited.
  
8. **THAT** in my capacity as the Attorney-General, I have been actively involved in the electoral legal reform processes and electoral law implementation processes in the context of Article 81 of the Constitution and I therefore, possess the necessary expertise to assist the Court making a fair and just determination on the issues raised in the Petition. In particular;
  - a. The office of the Attorney-General has issued several legal advisory opinions to IEBC on complex issues of law regarding the conduct of elections in Kenya as a preparation prerequisite required for the proper conduct of elections in Kenya;
  
  - b. The office of the Attorney-General issued a professional legal input to the electoral law reform processes specifically to the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission (IEBC) (commonly referred to as the Senators Orendo/Kiraitu led bi-partisan Parliamentary Committee ) that in a report dated 16<sup>th</sup> August 2017 recommended reforms of the integrated electronic system of voter registration, identification and result transmission;
  
  - c. The office of the Attorney-General has contributed to parliamentary debates on electoral reforms at the Committee stages;
  
  - d. The office of the Attorney-General has participated in several court proceedings before the Superior Courts strictly on pure points of law regarding the preparation on the conduct of the elections in Kenya; and



- e. The office of the Attorney-General has participated in the formulation and approval of several electoral laws including Acts of Parliament and the various subsidiary legislations which anchors the legal basis for the conduct of elections in Kenya.
9. **THAT** throughout my tenure as the Attorney General I have exercised the necessary impartiality and independence as demanded by the Constitution and the law throughout the electoral processes leading to the 2017 General elections.
  10. **THAT** I make this affidavit in support of my application dated 24<sup>th</sup>August, 2017 seeking orders that I be granted leave and be enjoined in this Petition as *Amicus Curiae*.
  11. **THAT** what is deponent to herein above is true and within my knowledge, belief and information save wherein otherwise stated which sources of information have been disclosed.

SWORN AT NAIROBI	)	
	)	
This ..... Day of .....2017	)	
	)	
By the said	)	
GITHU MUIGAI, SC	)	DEPONENT
Before me	)	
	)	
Commissioner for Oaths	)	

**DRAWN AND FILED BY**

Attorney General

Attorney General's Chambers

Harambee Avenue

**NAIROBI.**

**TO BE SERVED UPON:**

1. Murumba & Awele Advocates  
Mirage Plaza, Mezzanine 1-Unit 7  
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