

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
**PRESIDENTIAL 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 MUGAI KENYATTA.....3<sup>RD</sup> RESPONDENT**

**NOTICE OF MOTION**

**(Under Article 50 of the Constitution of Kenya, Section 24, 31 of the Supreme Court Act, Rule 10, 12 & 17 of the Supreme Court (Presidential Election Petition) Rules and all other enabling provisions of the law)**

**TAKE NOTICE THAT** this Honorable Court will be moved on the.....day of August 2017 at 9:00 o'clock in the forenoon or soon thereafter as counsel for the 3<sup>rd</sup> Respondent can be heard for **ORDERS**:

1. **THAT** the Honourable court do strike out and/or expunge from the Court record the documents which were not served by the Petitioner upon counsel for the 3<sup>rd</sup> Respondent which are as follows:
  - a. Prof. Kaloki's Affidavit referred to at paragraph 22 of the 1<sup>st</sup> Petitioners Affidavit sworn on 18<sup>th</sup> August 2017 in support of the Petition herein.
  - b. Dr. Nyagasi Oduwo's Further Annexures marked as **(DNO-1)** being a copy of the Blank Form 34A for Ruai Girls Secondary School Polling Station in Kasarani Constituency

- c. Dr. Nyagasi Oduwo's annexures labeled '**Meru**' marked as **(DNO-2A)** in support of the averments contained at paragraphs 12-69 of his Affidavit;
  - d. Dr. Nyagasi's annexures labeled 'Trans Nzoia' (DNO-3N) in support of the averments contained at paragraphs 70 – 137 of his Affidavit;
  - e. Dr Nyagasi's annexures labeled 'Kilifi" (DNO-3P) in support of the averments contained at paragraphs 70 – 137 of his Affidavit;
2. **THAT** the Honourable court do strike out and/or expunge from the Court record the documents which were filed out of time being the following:
- a. Volume 60 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
  - b. Volume 61 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
  - c. Volume 62 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
  - d. Volume 63 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
3. Costs of this Application.

**WHICH APPLICATION** is based on the following grounds:

1. The Petitioners herein failed to serve upon the 3<sup>rd</sup> Respondent the following Affidavit and documents/annexures despite making reference to them in the Affidavit of Dr. Nyagasi Oduwo sworn on 18<sup>th</sup> August 2017 in support of the Petition filed before this Honourable Court:
  - a. Prof. Kaloki's Affidavit referred to at paragraph 22 of the 1<sup>st</sup> Petitioners Affidavit sworn on 18<sup>th</sup> August 2017 in support of the Petition herein;
  - b. Dr. Nyagasi Oduwo's Further Annexures marked as **(DNO-1)** being a copy of the Blank Form 34A for Ruai Girls Secondary School Polling Station in Kasarani Constituency;
  - c. Dr. Nyagasi Oduwo's annexures labeled '**Meru**' marked as **(DNO-2A)** in support of the averments contained at paragraphs 12-69 of his Affidavit;

- d. Dr. Nyagasi's annexures labeled 'Trans Nzoia' (**DNO-3N**) in support of the averments contained at paragraphs 70 – 137 of his Affidavit;
  - e. Dr Nyagasi's annexures labeled 'Kilifi" (DNO-3P) in support of the averments contained at paragraphs 70 – 137 of his Affidavit;
2. Vide a letter dated 21<sup>st</sup> of August 2017 addressed to the Advocate on record for the Petitioners, the deputy Registrar of the Supreme Court intimated that volumes 60, 61, 62 & 63 of the documents in support of the Petition dated 18<sup>th</sup> August 2017 were filed on Sunday 20<sup>th</sup> of August 2017.
  3. Rule 10 of the Supreme Court (Presidential Election Petition) Rules, 2017 provides that the Petitioner shall, within **two days** of filing the Petition, serve the Petition upon the Respondent. The said annexures are in support of the Petition. To date, the Petitioners have deliberately failed to comply with this provision.
  4. Rule 12 provides that pleadings shall be closed upon filing a response. The 3<sup>rd</sup> Respondent filed their response to the said Petition on 24<sup>th</sup> August 2017 marking the close of pleadings.
  4. The following documents were filed out of time being:
    - a. Volume 60 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
    - b. Volume 61 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
    - c. Volume 62 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;
    - d. Volume 63 of the documents in support of the Petition dated 18<sup>th</sup> August 2017;

**WHICH APPLICATION** are further supported by the annexed affidavit of **HANAN EL-KATHIRI** and upon such further grounds as may be adduced at the hearing thereof.

DATED AT NAIROBI THIS

DAY OF

2017

**OGETTO, OTACHI & COMPANY**  
**ADVOCATES FOR THE 3<sup>RD</sup> RESPONDENT**

**DRAWN AND FILED BY:**

**OGETTO, OTACHI & COMPANY ADVOCATES**

SIFA TOWERS, 7<sup>TH</sup> FLOOR

LENANA/RING ROAD KILIMANI JUNCTION

P.O. BOX. 79438-00200

**NAIROBI**

**CELL:-020-02309060**

**TO BE SERVED UPON:**

**MURUMBA & AWELE ADVOCATES**

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**ISEME, KAMAU & MAEMA ADVOCATES**

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**NAIROBI**

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**SUPPORTING AFFIDAVIT**

I, **HANAN EL-KATHIRI** of P.O. Box 34124-00200 NAIROBI do hereby make oath and state as follows:

1. **THAT** I am an Advocate of the High Court of Kenya, conversant with the facts surrounding the Petition, duly authorized by the 3<sup>rd</sup> Respondent to swear this Affidavit on his behalf in support of the Motion herein.
2. **THAT** I am one of the Advocates in the legal team acting for the 3<sup>rd</sup> Respondent and have full conduct in respect of the pleadings filed and served thereof.
3. **THAT** the Petitioners herein filed a Petition dated 18<sup>th</sup> August 2017 seeking inter alia for the General Elections held on 8<sup>th</sup> August 2017 be nullified.
4. **THAT** the Petitioners herein failed to serve upon the 3<sup>rd</sup> Respondent the following Affidavit and documents/annexures despite making reference to them in the Affidavit of Dr. Nyagasi Oduwo sworn on 18<sup>th</sup> August 2017 in support of the Petition filed before this Honourable Court:

- a. Prof. Kaloki's Affidavit referred to at paragraph 22 of the 1<sup>st</sup> Petitioners Affidavit sworn on 18<sup>th</sup> August 2017 in support of the Petition herein; (Annexed herein and marked as **HE-1** is an excerpt of the said paragraph)
- b. Dr. Nyagasi Oduwo's Further Annexures marked as (**DNO-1**) being a copy of the Blank Form 34A for Ruai Girls Secondary School Polling Station in Kasarani Constituency;
- c. Dr. Nyagasi Oduwo's annexures labeled '**Meru**' marked as (**DNO-2A**) in support of the averments contained at paragraphs 12-69 of his Affidavit;
- d. Dr. Nyagasi's annexures labeled 'Trans Nzoia' (DNO-3N) in support of the averments contained at paragraphs 70 – 137 of his Affidavit;
- e. Dr Nyagasi's annexures labeled 'Kilifi' (DNO-3P) in support of the averments contained at paragraphs 70 – 137 of his Affidavit;

(annexed herein and marked as **HE-2** is a copy of the Index of Documents filed on 18<sup>th</sup> August 2017 and signed on behalf of the 3<sup>rd</sup> Respondent)

5. **THAT** vide a letter dated 21<sup>st</sup> of August 2017 addressed to the Advocate on record for the Petitioners, the deputy Registrar of the Supreme Court intimated that volumes 60, 61, 62 & 63 of the documents in support of the Petition dated 18<sup>th</sup> August 2017 were filed on Sunday 20<sup>th</sup> of August 2017. (Annexed herein and marked as **HE-3** is a copy of the said letter)
6. **THAT** Rule 10 of the Supreme Court (Presidential Election Petition) Rules, 2017 provides that the Petitioner shall, within **two days** of filing the Petition, serve the Petition to the Respondent. The said annexures are in support of the



**OGETTO, OTACHI & COMPANY ADVOCATES**

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