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

3rd RESPONDENT'S SUPPLEMENTARY WRITTEN SUBMISSIONS

1. These submissions are made in response to and in opposition of the 1st and 2nd Petitioner's Petition dated 18th August 2017 seeking inter alia for the General Elections held on 8th of August 2017 be annulled.

2. My Lords, the Petition before this Honourable Court is simple "computer" generated petition. It is not premised on the factual realities that inform the just concluded election. It is also not premised on any *bona fide* reading of the law. The petition is a hotchpotch of grievances uninformed by any factual or legal derivative of the election. It is thus conceptualized in a vacuum.

3. My Lords, election in Kenya is about numbers, it is about votes, and it is about the voter turnout. The election was determined by the voter registration and voter turn out in the 29 out of 47 counties in the county. The 3rd Respondent relied on 17 counties while the 1st Petitioner relied on the 12 counties. The 29 counties have 75% of the entire voter registration in the country.

4. The 17 counties that formed the bedrock of the electoral base of the 3rd Respondent are as follows: 1. Kiambu, 2. Murang'a, 3. Kirinyaga, 4. Nakuru, 5. Nyeri, 6. Laikipia, 7. Embu, 8. Meru, 9. Tharaka Nithi, 10. Nyandarua, 11. Baringo, 12. Bomet. 13. Kericho, 14. Uasin Gishu, 15. Nandi, 16. West Pokot, 17. Elgeyo Marakwet with a total voter registration of 7,418,578.

5. The 12 counties the Petitioner relied on as the bedrock of his electoral base are: 1. Kakamega, 2. Vihiga, 3. Trans Nzoia, 4. Busia, 5. Bungoma, 6. Machakos, 7. Kitui, 8. Makueni, 9. Kisumu, 10. Migori, 11. Homa Bay, 12. Siaya with a total voter registration of 5,647,392.

6. My Lords, the voter registration strength between the two different power blocks even before we delve in addressing the voter turn out stood at 1,771,186. It is this voter registration that the 3rd Respondent simply turnout on its voter turn out.

7. On 8th August 2017, millions of Kenya voted in the election to elect their political leaders. Voter turnout was high. The voting was carried out peacefully and not a single incident of violence was reported in any part of the country. Not a single disturbance was reported anywhere in the country. It was a peaceful election.

8. My Lords, we must appreciate that the voting result anywhere in the country didn't produce any unusual voter turnout. Both the 3rd Respondent and the Petitioner scored high in their strongholds. The advantage of the 3rd Respondent had high voter registration, which simply carried over unto the victory he scored against the Petitioner.

9. Vide the Petition dated 8th of August 2017, the Petitioner also seeks that immediately upon the filing of the Petition, the 1st Respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours; and secondly immediately upon the filing of the Petition, the 1st Respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st Respondent in respect of the Presidential Election within 48 hours;

10. From a reading of this, we humbly submit that the Petitioner is engaging in a fishing expedition and ultimately seeking to shift the burden of proof upon the Respondents herein. It is trite law that he who alleges must prove. The burden of proof is on the Petitioners to prove the facts as alleged against the Respondents herein. A petitioner who seeks to annul an election bears the legal burden of proof throughout the proceedings. The Petitioner is required to prove such facts by adducing credible evidence in support and if he fails to do so his case must fail.

11. Honourable Judges of the Supreme Court, we wish to address on the issue of the Standard and Burden of Proof required when it comes to Election Petitions.

12. On doing so, we shall be relying on the case of **AMAMA MBABAZI –VS-YOWERI KAGUTA MUSEVENI & 2 OTHERS PT. NO. 01/2016**. In this case the Petitioner was challenging the result of the election held in Uganda on 18th February 2016 and sought a declaration that Hon. Yoweri Kaguta Museveni was not validly elected; he sought an order that the election be annulled. One of the issues that the Supreme Court of Uganda sought to determine was on the issue of the burden and standard of proof required in electoral petitions.

13. The Supreme Court of Uganda analyzed the test to be established in election petitions. In commenting on the same, they made reference to the Presidential Elections Act and stated as follows:

> "Section 59 (6) of the Presidential Elections Act authorizes the Court to annul an election **only if the allegations made by the petitioner are proved to the satisfaction of the Court. An electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner to place CREDIBLE EVIDENCE before court which will satisfy the court that the allegations made by the petitioner are true. The burden is on the petitioner to prove not only noncompliance with election law but also that the noncompliance affected the result of the election in a substantial manner. Once credible evidence is brought before the Court, the burden shifts to the respondent and it becomes the respondent's responsibility to show either that there was no failure to comply with the law or of if there was any noncompliance, whether that noncompliance was so substantial as to result in the nullification of the election. (emphasis ours)**

14. It goes on further to state in respect of the standard of proof,

> **"Where a petitioner in a Presidential Election Petition brings allegations of noncompliance with electoral laws against the electoral body on the one hand and allegations of electoral offences and/or illegal practices against a candidate declared as the President Elect on the other, as is in the matter before us, varying standards of proof exist within the same case. For the Court to be satisfied that an electoral offense was committed, the allegation must be proved beyond reasonable doubt. On the other hand, the standard of proof required to satisfy the Court that the Electoral Commission failed to comply with the electoral laws is above balance of probabilities, but not beyond reasonable doubt."**

15. Similarly in the case of **Nana Addo Dankwa Afuko Addo & 2 others versus John Dramani Mahama & 2 others, Writ No. J1/6/2013** The court made a

determination on the standard and burden of proof required in electoral petitions. This petition sought to challenge the election of Jon Dramani Mahama as president of the Republic of Ghana pursuant to the presidential elections that was held on 7th and 8th of December 2012. The court at page 22 of its judgment stated as follows:

> **"Before tackling the issues of over voting and voting without biometric verification at length the question of the burden of proof has to be settled. It is settled that election petitions are peculiar in character hence the question of burden of proof has evoked various judicial opinions in the common law world. However upon full reflection on the matter, I have taken the position that the provisions of the Evidence Act. 1975 (N.R.C.D) with the appropriate modifications, where necessary, suffice."**

16. Justice Ansah, JSC in addressing the question of burden and standard of proof at page stated as follows,

> **"I return to the issue on the presumption of regularity of the performance of official acts and state that in election matters there is a presumption that the results declared by the Electoral Commission, are correct until the contrary is proved. This is on account of Section 37 (1) of the Evidence Act, 1975 (NRCD323) which provides that: *"It is presumed that official duty has been regularly performed."***
>
> **This is rendered with some classical flourishes or latinism as *'Omnia praesumuntur rite et solemnite esse acta'* – all things are presumed to be done in proper and regular form; the principle applies to the performance of public functions, no less presidential elections like where the Electoral Commission created by the Constitution and vested with the power to conduct all public elections and referenda in Ghana. They are public functions when it declares results of such elections such declarations are presumed to be correct. Our law goes on to stipulate that such presumptions are rebuttable. Therefore anyone who asserts the results so declared are incorrect or are invalid, bears the onus of proving that assertion. He places himself under section 20 of the Evidence Act (supra). The inference is that the petitioners were required by law to allege sufficient facts to support their claims; secondly, when that is done, the court will have to consider how it was satisfied that the petitioners adduced sufficient evidence to support the facts. This is because they would have succeeded in discharging the evidentiary burden on them.**

If the petitioners are able to establish the facts they rely on to ask for their reliefs, the onus will then shift to the respondents to demonstrate the non- existence of that fact. <u>This was because the court bases its decision on all the evidence before it; the petitioner and the respondent alike have a burden to discharge so as to be entitled to a claim or a defence put up.</u>

17. Justice of the Supreme Court of Ghana, Adinyara (Mrs) posed the following question,

> "**What is the standard of proof required in an election petition brought under constitutional provisions that would impact upon the governance of the nation and the deployment of the constitutional power and authority?**

18. In answering the above question, she hold that indeed the Petitioner has been placed with that burden.

19. Similarly in the Canadian case of **<u>OPITZ V. WRZESNEWSKYJ 2012 SCC 55-2012-10-256</u>**, the Canadian Supreme Court held, by majority opinion, that:

> **"An applicant who seeks to annul an election bears the legal burden of proof throughout..."**

20. In the Nigerian election case of **<u>ABU-BAKR V. YAR'ADUA [2009] ALL FWLR (PT. 457)1 SC</u>;** the Supreme Court of Nigeria held:

> **"that the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election."**

21. Moving closer to home, we wish to rely on the case of **<u>RAILA ODINGA V. UHURU KENYATTA [2013] PETITION NO. 5 OF 2013</u>** where at paragraph 196, this Honourable Supreme Court stated as follows:

> **"Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set**

out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

22. Based on the foregoing, we submit that the Petitioners in their futile attempt to annul a general election failed miserably in discharging their burden.

23. The question that arises is, what are the principles to be applied when a General Election is being challenged on the basis of an irregularity. The guiding law in this respect is Article 81 & 86 of the Constitution and Section 83 of the Election Act.

24. Articles 10, 38, 81 and 86 of the Constitution enjoin the 1st Respondent to conduct elections that are free, fair, secure, and transparent, devoid of discrimination, with full participation of the public and other stakeholders and in a manner that is simple, verifiable and accountable

25. Article 81(e) of the Constitution provides as follows:

"The electoral system shall comply with the following principles-

(a) freedom of citizens to exercise their political rights under Article 38;
(b) …
(c) …
(d) universal suffrage based on the aspiration for fair representation and equality of vote; and
(e) free and fair elections, which are-
- **i. by secret ballot;**
- **ii. free from violence, intimidation, improper influence and corruption;**
- **iii. conducted by an independent body;**
- **iv. transparent**
- v. **administered in an impartial, neutral, efficient, accurate and accountable manner**.

26. **Section 83** of the Election Act provides,

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law, or that the non-compliance did not affect the result of the election."

27. In the case of **Gitirau Peter Munya versus Dickson Mwenda Kithinji & 2 others (2014) eKLR,** the Supreme Court of Kenya noted that the question as

to the nature and extent of electoral irregularities, and their legal effect arises a number of times. The Court further noted that the crisp issue is: **how do regularities and related malfunctions affect the integrity of an election.**

28. The Court at paragraph 216 & 217 of its Judgment provides as follows:

> **"[216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.**
>
> **[217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities."**

29. In determining the above issue, the Court also relied on the Canadian Supreme Court case of **Opitz C v Wrzsenewskyj (2012)** where the court stated as follows:

> **"At issue in this appeal are the principles to be applied when a federal election is challenged on the basis of "irregularities". We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election."**

30. The case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others (2014) eKLR** one of the issue this Honourable Court considered is, **"whether the Migori County gubernatorial elections were conducted in compliance with the principles in Article 81(e) and 86 of the Constitution, as read together with the provisions of Section 83 of the Election Act."**

31. The said principles have all been adhered to by the 1st Respondent, in that the 1st Respondent did the following:

    a. Oversaw the successful increase of polling stations from approximately 31,000 in 2013 to **40, 883** in 2017. This represents a **32%** increase in polling stations.

    b. Updated the voter register, in electronic form, and led a voter registration exercise that pushed the number of registered voters from **14,352,545** voters in 2013 to **19,611,423** in 2017. This represents a **36.6%** increase in the number of voters.

    c. Approximately 15.3 million Kenyans turned out to exercise their sovereign right to vote on 8th August 2017 representing an 80% turnout rate.

    d. Procured the services of a professional audit firm, KPMG, which successfully undertook, for the first time in Kenya's electoral history, a thorough audit of the voters register which established that the voters register did not contain the names 2 million voters as the Petitioners had claimed following the 2013 elections.

    e. Following the said voter register audit, the 1st Respondent made the entire voters register available for public scrutiny on its website. Consequently, unlike in 2013, there were no allegations of multiple voter registers made against the 1st Respondent.

    f. In an unprecedented transparency initiative and following 5 separate protracted cases regarding procurement of ballot papers at the Public Procurement Administrative Board, the High Court and at the Court of Appeal, the 1st Respondent made arrangements for representatives of the presidential candidates, members of the local and international media and observers to travel to Dubai to assure themselves of the integrity of the process.

    g. Successfully procured and implemented the integrated electronic electoral system (known as KIEMS) that was used in the following aspects of the electoral process:

        i. biometric voter registration,
        ii. biometric voter identification and
        iii. Electronic result transmission system.

h. Presided over the procurement and distribution of election materials for the largest number of candidates in Kenya's history including **45,000** KIEMS kits.

i. Recruited and trained **362, 858** election officials drawn from all corners of Kenya and in accordance with the values and principles of civil service set out at Article 232(1) (i) of the Constitution of Kenya. , from a pool of 982, 381 applications, to conduct the elections.

j. Successfully processed the nomination of **14,552** political party and independent candidates, the highest number of candidates to contest in any election in Kenya. Jubilee presented the largest number of candidates followed by ODM and Maendeleo Chap Chap which was supporting Jubilees Presidential candidates. The number of candidates presented by the 3 parties is as follows:

i. Jubilee - 1801
ii. ODM - 1289
iii. Chap Chap - 911

k. The introduction of the KIEMS system enhanced the integrity of the electoral process as the configuration of the KIEMS kit eliminated opportunities for electoral fraud.

l. Held three separate sessions at Safari Park Hotel, Lillian Towers and at KICC for political parties, the media, election observers and the public to demonstrate how the KIEMS kits were expected to work on Election Day regarding voter identification and results transmission.

m. For example, the kits were configured to reject any recording of votes in excess of the number of registered voters, and ballot stuffing by extension, in any polling station.

n. In addition, due to some of the amendments made to the electoral laws, the maximum number of voters per stream was standardized at 700 which led to a very significant improvement in the voting process, vote counting and announcement of results.

o. Engaged in meetings and other initiatives with Kenyan security personnel to ensure there is adequate security during the entire electoral process including the election date itself.

p. Convened a National Elections Conference for over 1000 stakeholders, including the Petitioners representatives, between 12th

and 14th June 2017 at the Kenyatta International Conference Centre to discuss preparations for the elections.

q. Conducted extensive voter education programmes through all forms of media including seminars, village meetings, posters, newspaper advertisements, digital campaigns on Facebook, Twitter and the Internet, television and radio advertisements, mobile phones and through other fora. Some of the aforesaid material is still readily available at the 1st Respondent's website, www.iebc.or.ke , its Facebook book page and its twitter handle.

r. Released an Elections Agent manual to assist political parties and independent agents to train their agents.

s. Prior to its disbandment by the high court, convened the Elections Technology Advisory Committee whose role was to advise the 1st Respondent on the adoption and implementation of election technology.

t. Among the technological innovations introduced by the 1st Respondent pursuant to the provisions of Article 83(3) of the Constitution of Kenya was a Short Message Service (SMS) application that allowed voters to verify their registration status and particulars.

u. Published and supervised the execution of an electoral code of conduct as required by section 110 of the Elections Act. The said code has been extremely helpful, at least until the election was held, in ensuring the elections were held in a civil and pacific environment.

v. Held proceedings to enforce the electoral code of conduct. Several candidates were censured which helped keep the campaign period generally peaceful in most areas.

w. Kept the public and other stakeholders fully updated and informed regarding all aspects of preparation for the General Election. I now produce a bundle of some of the many notices published by the 1st Respondent on its website and in the daily print media.

x. Indeed, the Petitioners concede that the 1st Respondent was very forthcoming with information, assurances and whatever clarification their respective political parties sought over a wide range of issues that covered practically every aspect of the elections.

y. Some of the extensive correspondence exchanged between the 1st Respondent and NASA is produced at pages 1 to 87, inclusive, of the bundle of documents bound together with the affidavit of Godfrey Osotsi and again at pages 180 to 202 of the same bundle of documents.

z. Accredited numerous local and international observers, agents and media representation as required by section 42 of the Elections Act.

aa. Published guidelines and a Code of Ethics for election observers.

bb. Convened a tribunal with guidelines for dispute resolution mechanisms to deal with settlement of disputes arising out of political party nominations as required by Article 88(4) (e) of the Constitution, Section 74 of the Elections Act.

cc. The said tribunal and the Political Parties Tribunal handled well over 370 cases within a span of one month and sat to hear disputes late into the night and on weekends.

dd. Caused printing of ballot papers and procured election materials for over 40,883 polling stations despite the short period left to the 1st Respondent following amendments to electoral laws early this year, and numerous court cases which disrupted the electoral process preparation calendar.

ee. Improved an extremely useful and resourceful website, Facebook page and twitter handle which contain all the information required to satisfy the transparency requirements under Articles 10, 81 and 86 of the Constitution.

ff. Facilitated the Political Parties Liaison Committee which was a forum established to give voice to political parties and their candidates, during the electoral processes so as to minimise unnecessary misunderstanding.

gg. As a tool of transparency and accountability, the 1st Respondent, put up a call centre facility to receive and respond to any concerns raised by voters and other stakeholders. The call centre, at the National Elections Center at Bomas of Kenya, had 70 attendants working in shifts round the clock. Over 10,000 calls were received during before, during and after the General Election.

32. We therefore humbly submit that based on the foregoing, the 1st Respondent has duly complied with the said constitutional threshold.

33. My Lords and Ladies of the Supreme Court, we now wish to address you on the importance of judicial precedence and stare decisis. Stare decisis is even more important in constitutional adjudication. It secures the constitutional text and ensures that it is not subject to various changes at different times of its political evolution.

34. It is the Petitioner's position that the alleged non-compliance with the provisions of the Constitution and the written law it by itself sufficient to invalidate the Presidential Election. They further contend that during the 2017 Presidential election, that the registration of voters allegedly affected the votes cast and the final results of the Election.

35. They make reference to the **Presidential Election Petition No. 5 of 2013, Raila Odinga v Independent Electoral and Boundaries Commission & others** where the Supreme Court held that the spoilt votes cannot be counted in computing the 50% plus 1 votes.

36. The Petitioners are asking this Honourable Court to find that the alleged errors in respect of the other votes that had not been properly allocated should be counted in the final tallying and if they are not counted, what would allegedly be produced would be an illogical outcome where a significant number of voters, eg 10% go through all the process of casting a vote and it counts for nothing.

37. The Petitioners are therefore calling upon this Honourable Court to reconsider its decision in Petition No. 5 of 2013 and correct itself.

38. On the definition of Stare Decisis and the importance, role, benefits and its flaws, Michael Sinclair analyses in his article **Michael Sinclair, Precedent, Super-Precedent, [2007] 363;**, as follows

> "…**By far the most popular virtue of stare decisis and surely its most significant is the stability, continuity, and predictability it lends to the law**. *E.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *69 (1765): **For it is an established rule to abide by former precedents, where the same points come again in litigation: . . . as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his own private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain**

and expound an old one.

"…The great virtue of stability and predictability in the law is that the denizens governed can plan their actions in reliance on it…According to Justice Brandeis, **"Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."**

Stability and certainty reduce judicial discretion. The author relies on the workings of F.F. Alexander Hamilton who saw this as central:

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.. Stare decisis is not merely about garnering support from a prior case with which one agrees. If the virtues of stability and certainty are to be meaningful, a judge's choices must be constrained by prior cases.

A corollary virtue of stare decisis is that it "contributes to the actual and perceived integrity of the judicial process."

Following precedent tends to show that the court is not following the whims of political winds or the judge's own predilections; that she is not, in the fashionable phrase, legislating from the bench.

39. The author also relies on excerpts from Mr. Thomas Lee's works who defines stare decisis to mean the following,

"stare decisis means a court "*must* [follow a prior case] when it perceives an error in the ways of the past." Justice and fairness are sometimes proffered as values enhanced by the doctrine, the idea being that it requires treating right cases alike. But that is only a virtue where the prior case was decided justly; otherwise it means "an imprisonment of reason" and the perpetuation of error, of injustice.

40. In **Daniel A. Farber And Suzanna Sherry, Judgment Calls: Principle And Politics In Constitutional Law, 72(2009)** on commenting on the special place of precedent in a constitutional set up stated:

"One purpose of having a written constitution is to create a stable framework for government. As even most originalists have recognized, this goal would be undermined if the Court failed to give special credence to bedrock precedents- precedents that have become the foundation for large areas of important doctrine. Some

obvious examples involve the rulings of the New Deal era upholding the validity of the Social Security system and other federal jurisdiction over the economy. These omelets cannot be unscrambled today, as even the most devoted believers in originalism often acknowledge. Likewise, it is far too late in the day to invalidate independent agencies, as some originalists would like, or to undo the twentieth-century rulings that incorporated the Bill of Rights and made it applicable to the states, or to reconsider the constitutionality of segregation. It is not simply that it would be imprudent to overrule these doctrines, though obviously it would be. But in an important sense, it would run against the purposes of constitutionalism. Overruling these doctrines would create just the kind of uncertainty and instability that constitutions (even more than other laws) are designed to avoid. As one distinguished conservative constitutional scholar explains, "stability and continuity of political institutions (and of shared values) are important goals of the process of constitutional adjudication, particularly 'in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." "Moreover," He elaborates, "these values are in part at least among the values that the new constitutional order was specifically designed to secure," and the Federalist Papers, "even decried appeals to the people in order to 'maintain the constitutional equilibrium of government."

41. The American Supreme Court in **Planned parenthood of South Eastern Pennsylvania et al -v- Casey, Governor of Pennsylvania, et, al 505 U.S 833(1992)** while underscoring the importance of precedent and whether the court should overturn the rule in **Roe v Wade** stated as follows:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. Even when the decision to overrule a prior case is not as in the rare, latter instant, virtually foreordained, it is common wisdom that the rule of stare decisis is not "inexorable command," and certainly it is not such in every constitutional case. Rather when this court reexamines a prior holding, its judgment is customarily informed by a series of

prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in define practical workability, whether the rule is subject to a kind of reliance that will lend a special hardship to the consequences of overruling and add in equity to the costs of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. So in this case we may enquire whether Roe's central role has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left Roe's central rule a doctrinal premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

42. We further wish to rely on **John Carrol, 'Justice Mchugh: A moderately conservative approach to precedent in constitutional law', The Western Australian Jurist,** the paper analyses the authors approach to precedent in constitutional law and the role of a judge in upholding the Constitution. The author states as follows:

> **"In constitutional law, precedent carries a special significance, due to considerations respecting the Constitution. First, due to the entrenched nature of the Constitution, the High Court is more willing to reconsider past constitutional cases rather than non-constitutional cases, since the Parliament is unable to 'correct' a decision that is thought to be erroneous. Second, in constitutional law, judges have two loyalties – loyalty to existing precedent, and loyalty to the Constitution itself."**

43. Honourable Chief Justice Mutunga in **Peter Munya case** observed as follows:

> **"Under Article 163(7) of the Constitution, all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Thus, the adopted theory of interpretation of the Constitution will bind all Courts, other than the Supreme Court. It will also undergird various streams and strands of our**

jurisprudence, that represent the holistic interpretation of the Constitution."

44. We further wish to rely on the case on **Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR** in support of our submissions to have this Petition dismissed with costs.

45. We are most obliged.

DATED AT NAIROBI THIS DAY OF 2017

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