

**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/APPLICANT**

**H. E. STEPHEN KALONZO MUSYOKA.....2<sup>ND</sup> PETITIONER/APPLICANT**

**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**

**PETITIONERS' REPLYING AFFIDAVIT TO APPLICATIONS BY**  
**INTENDED INTERESTED PARTIES AND AMICUS CURIAE**

**I, RAILA AMOLO ODINGA** a resident of Nairobi and of Post Office Box Number 10311-00100 Nairobi do hereby make oath and state as follows:

1. I am a Kenyan Citizen, voter and adult of sound mind, residing and working for gain in the Republic of Kenya. I was duly nominated by the Coalition of Parties known as the National Super Alliance (NASA) to contest the Presidential Election held on 8<sup>th</sup> August 2017 for the position of President.
2. I am well versed with the facts and circumstances relating to the Petition and to the present application. I am therefore competent to swear affidavit on my own behalf and on behalf of the 2<sup>nd</sup> Petitioner.

3. I have the authority and consent of the 2<sup>nd</sup> Petitioner to swear this affidavit.
4. Save as otherwise expressly stated herein, the contents of this affidavit are based on my personal knowledge acquired in my above mentioned capacity and are true. To extent that any matter in this affidavit is based on information and/or belief, I have disclosed the source and/or ground (as the case may be) of the same, and verily believe the same to be true as informed and advised by my advocates on record.
5. I have read and understood and had explained to me by my Advocates on record the following interlocutory applications:
  - a) Notice of motion application dated 25<sup>th</sup> August, 2017 by the Attorney General; Notice of motion application dated 21<sup>st</sup> August, 2017 by Information Communication Technology Association of Kenya; and Notice of motion application dated 25<sup>th</sup> August, 2017 by Charles Kanjama – all seeking to be joined as amicus curiae.
  - b) Notice of Motion application dated 23<sup>rd</sup> August, 2017 by Michael Wainaina Mwaura seeking to be joined as a Respondent/ amicus curiae.
  - c) Notice of motion application dated 21<sup>st</sup> August, 2017 by Ekuru Aukot seeking to be joined as an interested party.
  - d) Notice of motion application dated 24<sup>th</sup> August, 2017 by Benjamin Barasa Wafula seeking to be joined as an interested party.
6. I wish to respond as follows to the aforesaid applications:
  - a) Application seeking to join the Attorney General as amicus curiae

7. The National Government is not a party to these proceedings and the Attorney-General can only appear as *amicus* with leave of the court, which leave ought to be denied in the circumstances of this Petition.
8. The principle of neutrality and fidelity to the law must govern the relationship of an *amicus curiae* with the principal parties and their arguments.
9. I reasonably believe based on the Attorney General's past/previous conduct that the Attorney General is decidedly partisan on the issues before the Court.
10. As the principal legal adviser to the Government, the Attorney General performs functions conferred on him by the 3<sup>rd</sup> Respondent and serves in the present government at the leisure of the 3<sup>rd</sup> Respondent under Article 132(2)(b) of the Constitution and is currently serving in the 3<sup>rd</sup> Respondent's Cabinet as a Cabinet Secretary under Article 152(2)(1)(c) of the Constitution. The Petitioners would be prejudiced by the admission of the Attorney General in any capacity into the Petition.
11. I invite the Court to take judicial notice of the fact that having been admitted as *amicus curiae* in the Petition I filed in 2013, the Attorney General proceeded to take a partisan view and wholly supported the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's case to the Petitioner's detriment.
12. It is similarly a matter of public notoriety that the Attorney-General has previously canvassed the 3<sup>rd</sup> Respondent's case at the International Criminal Court.

13. The Attorney-General by his admission has been ‘*actively involved*’ in the post-2013 legal reform process that was severally litigated by the Petitioners. In all cases the Attorney-General has not been impartial or neutral and has consistently supported the 1<sup>st</sup> Respondent’s case in opposition to any position taken by the Petitioners. The Attorney General has not once found the Petitioners to raise a matter of public interest worth his support. These cases among others are:

- i. Independent Electoral Commission v Maina Civil Appeal No 105 of 2017;*
- ii. Maina Kiai v IEBC Petition No 207 of 2016; National Super Alliance v Al Ghurair Judicial Review No.378 of 2017;*
- iii. National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission Petition No 328 of 2017; and*
- iv. National Super Alliance (NASA) Kenya v Independent Electoral & Boundaries Commission Civil Appeal No 258 of 2017.*

14. Whereas the Attorney-General has a constitutional duty to promote, protect and uphold the rule of law and defend the public interest, public interest is distinct from the personal interest of the President elect which is the issue at play in the present Petition.

15. The Application by the Attorney General does not disclose any distinctive or novel aspects of the legal issues in question that he would address and that has not already covered adequately by the Parties.

16. There is no complex constitutional issue requiring the intervention of the Attorney-General as amicus.
17. As a matter of fact, the issues posed as complex constitutional issues proposed to be addressed by the Attorney-General were largely decided by this court in *Raila Odinga v Independent Electoral and Boundaries Commission [2013] eKLR (Petition No 5 of 2013)*, namely:
  - i) What is the proper constitutional and legal standard of proof applicable to the conduct of presidential elections in Kenya as envisaged under both Article 81 and 86 of the Constitution?
  - ii) How should the court treat rejected/spoilt votes in determining the total votes cast under Article 138(4) of the Constitution?
  - iii) What is the proper constitutional and legal threshold for invalidating or upholding a presidential election under Article 140 of the Constitution?
  - iv) What remedies can the Supreme Court grant in determining a presidential election petition under Article 140 of the Constitution?
18. The Attorney-General neither demonstrates how the submissions he intends to advance will give such assistance to the Court as would otherwise not have been available nor does he draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the Attorney General has failed to demonstrate that there is no intention of repeating arguments already made by the parties.
19. I am advised by the Petitioners' Advocates which advice I believe to be correct that given the strict and limited time frame for the hearing and

determination of the Petition, the interests of time and justice would not be served by the admission of the Attorney General as amicus.

20. I verily believe his application is brought in bad faith in order to limit or compromise the time the Petitioners should have to make their case.
21. I therefore oppose the application seeking joinder of the Attorney General as amicus curiae in these proceedings and pray that the application be dismissed.

Application by Charles Kanjama to be enjoined as amicus curiae

22. I am advised by the Petitioners' Advocates which advice I believe to be correct that the Applicant has not shown any expertise in the electoral process as to be relevant to the matter in dispute since general expertise in law does not suffice for one to be amicus curiae.
23. I am advised by the Petitioners' Advocates which advice I believe to be correct that the Applicant does not limit his intervention to legal matters but, forays beyond the scope of amicus by seeking to introduce fresh evidence, which is not part of the record as opposed to commenting on data already laid before the Court. Thus, joinder of the Applicant will be an abuse of process.
24. I am advised by the Petitioners' Advocates which advice I believe to be correct that given the strict and limited time frame for the hearing and

determination of the Petition, the interests of time and justice would not be served. I therefore pray that the application be dismissed with costs.

Application by Information Communication Technology Association of Kenya to be enjoined as amicus curiae

25. I am advised by the Petitioners' Advocates which advice I believe to be correct that sufficient information and evidence of Information Technology experts has been laid before the Court; and that given the strict and limited time frame for the hearing and determination of the Petition, the interests of time and justice would not be served by admitting the applicant.
26. I pray that the application be dismissed with costs.

Application by Michael Wainaina Mwaura to be enjoined as Respondent/Amicus Curiae

27. I am advised by the Petitioners' Advocates which advice I believe to be correct that the above application dated 25<sup>th</sup> August, 2017 is bad in law and untenable for the following reasons:
  - a) the Applicant has not demonstrated any identifiable stake or legal interest in the proceedings and how the submissions he seeks to advance are relevant to the proceedings, useful to the Court and different from those of the Respondents;
  - b) the Applicant does not state that he would suffer any prejudice if his intervention were denied.

- c) The Applicant wishes to advance his own personal interests and is a mere busybody.
- d) The Applicant is partisan and has filed a Replying Affidavit in opposition to the Petition. He cannot be admitted as amicus curiae.
- e) The Applicant was a presidential candidate in the elections and has already taken a partisan position. I verily believe his application is brought in bad faith in order to compromise the time the Petitioners should have to make their case.

28. I pray that the application be dismissed with costs.

Application by Benjamin Barasa Wafula to be enjoined as an Interested Party

29. The Application has been filed mala fides with the intention of diverting the real issues in controversy, which relate to the conduct of elections by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the announcement of the 3<sup>rd</sup> Respondent as the winner of the presidential election held on 8<sup>th</sup> August, 2017.
30. I have never been served with any pleadings by the Applicant relating to Bungoma Civil Suit No. 5 of 2016, or any at all.
31. I am advised by the Petitioners' Advocates which advice I believe to be correct that the application is frivolous, vexatious and an abuse of the Court process. The application is intended to annoy by raising issues that have no legal basis whatsoever or any connection to the Petition including:
- a. That the Presidential election petition is res judicata.
  - b. There is no co-relation between the alleged Bungoma Civil Suit No. 5 of 2016 and the instant petition.

c. The Applicant has not demonstrated his legal interest in this Petition.

32. Therefore I pray that the application be dismissed with costs.

33. I wish to further state that the aforementioned interlocutory applications were filed and served out of time and the same are should be struck out instantly.

34. The applications are brought in bad faith and are intended to limit and compromise the time the Petitioners would have to make their case.

35. What is stated above is true and to my own knowledge, save as to matters deponed to on information and belief, the sources and grounds whereof have been specified and set out hereinabove.

**SWORN at NAIROBI** )

On this 26<sup>th</sup> day of August 2017 )

By the said **RAILA AMOLO ODINGA** )

**BEFORE ME** )

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**DEPONENT**

**COMMISSIONER FOR OATHS** )

**Drawn & Filed by:**

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

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Registrar