

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

NOTICE OF MOTION

*(Under Rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017
and all other enabling provisions of the Law)*

TAKE NOTICE that this Honourable Court will be moved on the _____ day
_____ of 2017 at 9:00 O'clock in the forenoon or soon
thereafter for the hearing of an Application by Counsel for the
Petitioners/Applicants for the following **ORDERS THAT:**

1. The following documents filed by the 3rd Respondent be struck out and expunged from the Record of the Court for want of service within the time prescribed by law:
 - a) The 3rd Respondent's Response to the Petition dated 24th August 2017;
 - b) Volume 1 and 2 of the Analyses of Winnie Guchu dated 24th August 2017;

- c) Volumes 1 and 2 of the Affidavit of Mr. Davis K. Chirchir sworn on 24th August 2017;
- d) The Affidavits of Mr. Davis K. Chirchir sworn on 24th August 2017 in reply to Mr. Godfrey Osotsi's Affidavits 1 & 2 and the Affidavit of Mr. George Kegoro;
- e) The Affidavit of Winnie Waceke Guchu dated 24th August 2017 in reply to the Affidavits of the 1st Petitioner, Dr, Nyangasi Oduwo and Olga Karani;
- f) The Affidavits of Mary Karen Sorobit dated 24th August 2017 in response to the Affidavits of Mohamed Noor Barre, Moses Wamuru, Benson Wasonga and Ibrahim Muhamud Ibrahim;
- g) The Affidavit of H.E. Uhuru Muigai Kenyatta dated 24th August 2017;
- h) The Affidavits of Brian Gichana Omwenga dated 24th August 2017 in reply to the Affidavits of Koitamett Ole Kina and Aprielle Oichoi;
- i) The Affidavit of Dr. Karanja Kibicho dated 24th August 2017;
- j) The Affidavit of Andrew Wakahiu dated 24th August 2017;
- k) Volumes 1 and 2 of the Report of the list of stations where registered voters matches rejected votes by Winnie Guchu Waceke dated 24th August 2017;
- l) Volumes 1, 2 and 3 of the Analysis of the alleged numerical discrepancies in the affidavit of Dr. Nyangasi Oduwo dated 24th August 2017;
- m) The Affidavit of Brian Gichana Omwenga dated 24th August 2017;
- n) A volume '2' of the Analysis of form 34B;
- o) A list of documents for service and;
- p) A consolidated analysis of alleged numerical discrepancies in the affidavit of Dr. Nyangasi Oduwo.

2. The following documents filed by the firm of V. A Nyamodi and Company Advocates on behalf of the 1st & 2nd Respondents be struck out and expunged from the Court record:
 - a) Volumes 1 and 2 of the 1st and 2nd Respondents' Responses to the Petition;
 - b) The Kenya Gazette Special Issue Vol. CXIX-No. 86;
 - c) Exhibit WWC-4(c)
 - d) Volumes 1, 2 and 3 of IEBC Forms 34B
3. Costs of this Application, and of the struck out proceedings, be paid by Respondents.

WHICH APPLICATION supported by the annexed affidavit of GRACE MWAURA and is based on the following grounds and such further grounds as may be adduced at the hearing hereof:

1. Regulation 11(1) of the Supreme Court (Presidential Election) regulations expressly and mandatorily limit the time for a Respondent wishing to respond to a Petition to file AND serve on the Petitioner the answer to the Petition and affidavits in support of the answer 'within 4 days' of service of the Presidential Election Petition.
2. The Petition herein was lodged in court on 18th August 2017 within the time set by the law
3. The Petition was served on ALL the Respondents on 20th August 2017 within the time prescribed by the Rule created under the Law.

4. Any response to the Petition and/or Replying Affidavits should have been filed and served upon the Petitioners/Petitioners' Advocates on or before 24th August 2017.
5. The Respondents served the documents sought to be struck out and expunged on the Petitioners' Advocates on 25th August 2017 outside the time stipulated.
6. This Court in the case of *Raila Odinga & 5 Others v Independent Electoral & Boundaries Commission & 7 Others* Election Petition No. 5 of 2013 held that time is of the essence in presidential petitions.
7. The Court stated that "the primary justification for the rejection of the "further affidavit" (which was struck out) lies in the requirements of the disciplined trial process required under the Constitution."
8. No leave was sought by the Respondents to file and serve the impugned responses and affidavits out of time.
9. Delay in service of the said affidavits, annexures and or responses to the Petition has prejudiced the Petitioners' right to adequately consider and reply to the issues raised in the said response as they are entitled to.
10. The said affidavits, annexures and or responses to the Petition as have been instituted herein by the Respondents are accordingly improperly on record and ought therefore to be struck out immediately and expunged from the record.

11.It is in the interests of justice, therefore, that this Application be allowed.

DATED at NAIROBI this 26th day of August 2017.

MURUMBA & AWELE ADVOCATES
FOR THE PETITIONERS/APPLICANTS

Copies to be served upon:

1. V. A. NYAMODI & CO ADVOCATES
LOWER HILL DUPLEX, HSE NO. 7
LOWERHILL ROAD, UPPER HILL
P. O. BOX 51431-00200
NAIROBI

2. ISEME, KAMAU & MAEMA ADVOCATES
IKM PLACE, 5TH FLOOR
FIFTH NGONG AVENUE
OFF BISHOPS ROAD
P.O. BOX 11866-00400
NAIROBI (Ref: IND-006-0047)

Tel: 254 20 2710992/2711021/2711050
Email: info@ikm.co.ke

3. OGETO OTACHI & CO. ADVOCATES
AMBASSADOR COURT, BLOCK C,
2ND FLOOR, DRC-6,
JAKAYA KIKWETE ROAD
P. O. Box 79438-00200
NAIROBI

Lodged in the Registry at Nairobi on theof 2017

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Registrar

IN THE 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

SUPPORTING AFFIDAVIT

(Application dated 25th August 2017)

I, GRACE MWAURA a resident of Nairobi County and of Post Office Box Number 222555-00505 do hereby make oath and state as follows:

1. I am a female adult of sound mind, working for gain as the Front Desk Administrator in the Firm of Murumba & Awele Advocates (the Firm) in the Republic of Kenya. I am therefore competent to make this affidavit.
2. Save as otherwise expressly stated herein, the contents of this affidavit are based on my own knowledge acquired in my abovementioned 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 I verily believe the same to be true.

3. On 25th August 2017 at 1500hrs or thereabouts while in the course of my normal duties in the office, I received service of the following court documents on behalf of the Firm of Murumba & Awele Advocates from the firm of Ogeto Otachi and Company Advocates;
 - a) The 3rd Respondent's Response to the Petition dated 24th August 2017
 - b) Volume 1 and 2 of the analyses of Winnie Guchu dated 24th August 2017.
 - c) Volumes 1 and 2 of the Affidavit of Mr. Davis K. Chirchir sworn on 24th August 2017
 - d) The Affidavits of Mr. Davis K. Chirchir sworn on 24th August 2017 in reply to Mr. Godfrey Osotsi's Affidavits 1 & 2 and the Affidavit of Mr. George kegoro
 - e) The Affidavit of Winnie Waceke Guchu dated 24th August 2017 in reply to the Affidavits of the 1st Petitioner, Dr, Nyangasi Oduwo and Olga Karani.
 - f) The Affidavits of Mary Karen Sorobit dated 24th August 2017 in response to the Affidavits of Mohamed Noor Barre, Moses Wamuru, Benson Wasonga and Ibrahim Muhamud Ibrahim.
 - g) The Affidavit of H.E. Uhuru Muigai Kenyatta dated 24th August 2017
 - h) The Affidavits of Brian Gichana Omwenga dated 24th August 2017 in reply to the Affidavits of Koitamett Ole Kina and Aprielle Oichoi
 - i) The Affidavit of Dr. Karanja Kibicho dated 24th August 2017
 - j) The Affidavit of Andrew Wakahiu dated 24th August 2017

- k) Volumes 1 and 2 of the Report of the list of stations where registered voters matches rejected votes by Winnie Guchu Waceke dated 24th August 2017
 - l) Volumes 1, 2 and 3 of the Analysis of the alleged numerical discrepancies in the affidavit of Dr. Nyangasi Oduwo dated 24th August 2017
 - m) The Affidavit of Brian Gichana Omwenga dated 24th August 2017
 - n) A volume '2' of the Analysis of form 34B
 - o) A list of documents for service and
 - p) A consolidated analysis of alleged numerical discrepancies in the affidavit of Dr. Nyangasi Oduwo.
4. On 25th August 2017 at 1540hrs or thereabouts while in the course of my normal duties in the office, I received service of the following court documents on behalf of the Firm of Murumba & Awele Advocates from the firm of V. A. Nyamodi and Company Advocates;
- a) Volumes 1 and 2 of the 1st and 2nd Respondents' responses to the petition.
 - b) The Kenya Gazette Special Issue Vol. CXIX-No. 86
 - c) Exhibit wwc-4(c)
 - d) Volumes 1, 2 and 3 of IEBC Forms 34B
5. Upon receipt of service of each of the above mentioned documents I stamped the cover-page of each document served upon us with the Firm's official receipt stamp and promptly informed Mr. Jackson Awele - Advocate of the same.

Annexed herewith and marked Exhibit “GM - 1’ is a bundle of the true copies of the cover pages of all the documents mentioned above bearing the stamp I affixed upon them upon receipt of service.

6. I having perused the office file relevant to this case, I have seen the Petition and various affidavits and annexures filed in support of the Petition with confirmations of service upon the three (3) Respondents on 20th August 2017 at 5pm or thereabouts.

Annexed herewith and marked Exhibit “GM - 2’ is a bundle of the true copies of the cover page of the Petition confirming service upon the Respondents/Respondents’ Advocates

7. I make this affidavit conscientiously believing the same to be true and in support of the Application dated 26th August 2017.

SWORN at NAIROBI)
By the said **GRACE MWAURA**) _____
This day **26th** day of **August** 2017) **DEPONENT**
BEFORE ME)
)
)
)
)
COMMISSIONER FOR OATHS)

DRAWN & FILED BY:
MURUMBA & AWELE ADVOCATES
MIRAGE PLAZA, MEZZANINE 1 - UNIT 7
WESTLANDS, CHIROMO ROAD

P.O. BOX 22255-00505

NAIROBI.

To:

The Supreme Court of Kenya

Copies to be served on

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LOWERHILL ROAD, UPPER HILL
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NAIROBI

Lodged in the Registry at Nairobi on theday of August 2017

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Registrar

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H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

WRITTEN SUBMISSIONS

(Application dated 26th August 2017)

May it please the Court:

The Petitioner herein commenced these proceedings vide a Presidential Election Petition dated 18th August 2017 challenging the declaration made by the 2nd Respondent in respect of the Presidential Election held on 8th August 2017. Under rule 10 of the Presidential election petition rules, the Petitioner was required to serve the Petition and all supporting documents within 2 days of filing i.e. by or before 0000hrs on 20th August 2017. The said rule provides;

- (1) A petitioner shall, within two days of filing, serve the petition on the respondent—*
- (a) directly on the respondent; or*

(b) by advertisement in a newspaper with nationwide circulation.

(2) Subject to sub rule (1), the petitioner shall, within six hours of filing the petition, serve the respondent with the petition by electronic means.

Rule 11 of the said rules requires a respondent who intends to oppose the petition to, within four days of service of the petition, file and serve an answer to the Petition together with affidavits in support. Rule 11(1) provides;

(1) On service of a petition under rule 10, a respondent who intends to oppose the petition may, within four days of service of the petition, file and serve a response which shall—

(a) be in form of an answer to the petition in the manner specified in Form B set out in the Second Schedule; and

(b) be accompanied by a replying affidavit(s) sworn by the respondent and any witnesses, setting out the substance of the evidence relied on.

The Petitioner submits that despite timeously serving ALL the Respondents with the Petition, annexures and affidavits in support of the petition on 20th August 2017 well within the time prescribed by the rules the Respondents have withheld their answers and affidavits to the Petition and failed to serve them within the period limited for that purpose by the Supreme Court rules. Indeed, despite filing the said affidavits, annexures and or responses to the Petition on the 24th August 2017, the Respondents served the same at the chambers of the Petitioners' Advocates on record on 25th August 2017 from 1500hrs – well out of time and contrary to rule 11(1) of the Presidential Elections rules;

Put in context, Presidential election petitions are by their very nature time sensitive proceedings and the strict timelines established by the rules are deliberately fixed to ensure expeditious disposal of the said proceedings while ensuring that every party is afforded a fair and reasonable opportunity to prepare and present its case. Noting that the issues for consideration in a Petition of this nature are countrywide and therefore the subject of voluminous and complex documentation, strict compliance with prescribed timelines is key to ensuring all parties have a fair chance and fully urging its case.

In the event, the Petitioners submit that the delay in service of the said affidavits, annexures and or responses to the Petition have considerably prejudiced their right to adequately consider and reply to the issues raised in the said response as they are entitled to and by extension unduly prejudiced their right to fair hearing under Article 50 of the Constitution. The same are accordingly improperly on record and ought to be immediately expunged from the record.

DATED at NAIROBI this 26th day of August 2017.

**MURUMBA & AWELE ADVOCATES
FOR THE PETITIONERS/APPLICANTS**

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