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

AND

CHARLES KANJAMA……PROPOSED AMICUS CURIAE

PROPOSED AMICUS CURIAE'S BRIEF

May it please Your Lordships:

A. BACKGROUND

B. ISSUE FOR DETERMINATION

C. CONCLUSION

A. BACKGROUND

1. **Every Superior Court Judge is both a Historian and a Prophet**. As a Historian, he considers the question, "*What really happened?*" and seeks to arbitrate the rights and wrongs of the parties before him. As a Prophet, he answers the question, "*What will happen?*" and effectively predicts the future of similar events. As a Historian, he attempts to render Justice to history; as a Prophet, he hopes to render Justice to future generations.

2. When the matter for determination generates great public interest, there is a danger that the Judge will become so engrossed in resolving the Historical question, that he overlooks the consequences of the Historical resolution on the Future. These consequences, which arise from the jurisprudential formulation of the Judgment and the doctrine of *stare decisis*, could convert a particular decision that seemed fair into a fateful or imprudent one. **Hence the importance of Amicus Curiae**, who supplement the submissions of the Parties and aid the Court focus on the wider ramifications of a particular jurisprudential question.

3. In summary therefore, Amicus Curiae are critical in the case herein for three critical reasons:

    a. They help give voice to the public interest in the Case, especially important when Constitutional questions are part and parcel of the disputation and determination (see **Constitution of Kenya 2010, Preamble, art 1, 10, 22, 38, 159, 258, 259** – including on *public interest, public participation, sovereignty of the people, etc*).

    b. They provide technical assistance to the Court, in both legal and non-legal areas. For example, the Petition herein touches on matters that involve various professional competencies, for example:

        i. Verification of documents, figures and processes – The professional role of the Accountancy profession, and in particular of auditors.

ii. The utilization and competencies in the Information Technology deployed – Role of Information and Communication Technology (ICT) experts.

iii. Issues touching on the electoral ecosystem, the structures put in place by the elections management body (EMB) and other stakeholders to ensure free and fair elections – The role of governance specialists, including the Certified Secretary profession.

iv. Issues touching on the objective legal principles applicable to a case, beyond the partisan positions of the principal litigants – The role of lawyers, especially those who have demonstrated expertise in dealing with electoral matters in various aspects including in litigation.

v. Matters touching on public interest, affecting the wider public – The role of other participants in Society, and custodians of various aspects of the public interest, including religious organisations, professional bodies, civil society, etc.

c. Precisely where the Court is dealing with **the tyranny of time**, as in the case herein, it becomes even more important to give other parties an opportunity to participate as Amicus to avoid equally valid viewpoints being lost.

4. The Proposed Amicus herein is an individual who qualifies according to the test set out by the Supreme Court in various cases (set out in our Submissions for Joinder), and who possesses competencies in several areas aforementioned, including Accountancy, ICT, Governance and Legal, as well as the Public Interest perspective due to his various memberships and involvement in relevant organisations. It is meet and just that a practice of admitting individuals as Amicus who possess the relevant competence be allowed to thrive by the Supreme Court, as has happened in the past. The presence of an individual as Amicus, especially when the said person has direct ability to address the Court during the litigation process, can aid in unlocking various conundra that face the Court in the conduct as well as determination of the case, in a way that an expert witness speaking on oath in a passive manner under examination from lawyers cannot.

See Dr Collins Odote, "Friend of the Court of Partisan Irritant? The Role of Amicus Curiae in Kenya's Election Dispute Resolution", Chap 9 in Odote, Musumba (Eds), <u>Balancing the Scales of Electoral Justice</u>, 2017 at 276. In particular, see **pg 281** (question of public interest), **pg 282-3** (role of amicus better informed, and new perspectives), **pg 284** (need to avoid amicus who largely duplicate submissions of litigants), **pg 288-9** (principal considerations to admit amicus), **pg 293-5** (benefit of a liberal approach to admission, where conditions/restrictions are given), **pg 296** (benefit of amicus presenting non-legal technical information), **pg 298** (need for proof of special competence in matters of law beyond general expertise), **pg 300** (parties consent not necessary).

B. <u>ISSUE FOR DETERMINATION</u>

5. Your Lordships, the Amicus has narrowed down the issues for the Amicus Brief to eight critical points:

a. Burden and Standard of Proof

b. Electoral Irregularities: the Constitutional & Statutory Standards

c. Managing Electoral Timelines

d. Context and application of Information & Communication Technology (ICT)

e. Verification of tallying and transmission of results

f. Interlocutory Applications, Scrutiny and Recount in a limited time frame

g. Developing the Role of Amicus Curiae

h. The Public Interest

I Burden and Standard of Proof

6. The Amicus proposes that the Court has an opportunity to address and further refine the dual questions of the burden and standard of proof. In doing so, the Amicus proposes that the Court considers the following vital questions:

a. The unique Constitutional and Electoral history of Kenya, as encouraged by Chief Justice Mutunga in his various concurring opinions as follows:

i. **Gatirau Peter Munya vs Dickson Kithinji**, [2014] eKLR, at paras 245-53. He states, "*Kenya's political history has been characterized by large scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain and has scarred our body politic.*"

ii. **Jasbir Rai vs Tarlochan Rai** [2013] eKLR at paras 88, 100, 108. He states, "*In the development and growth of our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. … [O]ur progressive needs, under our Constitution, are different, and there is the need to bear in mind that our Constitution remains always, as our brother Judge Ojwang has emphasized, a transformative charter of good governance.*"

iii. **Judges & Magistrates Vetting Board & others vs Centre for Human Rights & Democracy & others** [2014] eKLR at paras 207, 209, 210, 211, 217. He states, "*Thus, in interpreting the Constitution, Courts must stake cognizance of Kenya's unique historical context which is aptly captured in the majority opinion…*"

b. The question of public interest, which flows throughout our Constitution, right from **the Preamble**. This question is captured well in **article 24 of the Constitution of Kenya**, where even individual fundamental rights are balanced by the public interest using two rules (automatic, statutory limitation). The Court should thus ask itself:

i. What rendering of the burden and standard of proof is consistent with the power of the respective litigating parties, and their custody of evidence and documents necessary to determine the case? (E.g. in employment cases, the evidentiary burden of proof shifts to the Employer to prove that he did not dismiss the employee for a discriminatory ground, or that the contractual pay claimed by the employee was not the actual pay, etc).

ii. If the burden and standard of proof is placed too high, could that discourage future candidates with an arguable case from coming to and having confidence in the court dispute resolution process? In contrast, if placed too low, could that permit a proliferation of frivolous litigation?

iii. Can a clear standard of Constitutional compliance with articles 81 and 86 of the Constitution of Kenya be established, to caution the electoral management body from the danger of moral hazard? I.e. the tendency to laxity in policing and avoid irregularities due to insulation from the Court under section 83 of the Elections Act.

c. The use of ICT in securing free and fair elections and the need to promote accountability, transparency and verifiability of ICT. ICT involves "**a black box element**" where none of the participants can see what is happening through the programmed code, but can only see the inputs, the outputs, and deduce the process being followed. Security and Information architecture matters may be technical, and vulnerable to damage with too much transparency. Yet there is a Constitutional need for accountability. Thus, how will the burden and standard of proof work where ICT is deployed? In Sale of Goods law, there is a concept of overt and covert defects. A purchaser must bear the cost of overt defects, while a vendor must bear liability for covert defects. Could a similar principle be applied, with the electoral management body being treated *mutatis mutandis* like the vendor in sale of goods? (Similar reasoning may require refining the legal principles developed in cases of scrutiny and recount to take into account the ICT element).

d. The incorporation of generally accepted principles and practices from Accountancy, which follows the mantra "**Trust but Verify**", and uses methodology like sampling, voucher audits, the concept of materiality, etc in ascertaining whether the financial statements (a summary of numerous accounting transactions) give a true and fair view of the actual financial position. A Petitioner requires a level of access to source documents and records so as to verify the results presented by the electoral management body. How would that be encouraged through use of reasonable standard of proof?

e. The acknowledged consideration that an election dispute is not purely adversarial in nature, but that certain inquisitorial elements need to be brought in to enable effective and fair determination of the disputes, e.g. in cases of scrutiny and recount. This needs to be reconciled with the standard and burden of proof.

7. On the question of burden of proof, the Amicus considers that the jurisprudence of this Court has rightly dealt with the legal and evidentiary burden of proof in principle. In practice, the Court should consider and articulate various instances when the evidentiary burden shifts to the electoral management body and/or the Respondent.

8. On the standard of proof, the Amicus considers that the Court has rightly considered three possible standards of proof, in view of our specific and unique Constitutional history, i.e the **civil standard**, the **criminal standard** and an **intermediate standard**. The Amicus feels that the Court needs to better articulate the three standards, and specify the third one. While mathematical formulations would not be appropriate in doing so, as analogical aids to formulation, they may play a useful part. A review of jurisprudence shows as follows:

a. The civil standard, on a balance of probabilities, requires the weight of the Plaintiff's case to rise to more than just a slight improvement on the Defendant's case. Hence, **a good case**, or say 55% probability.

b. The criminal standard, beyond reasonable doubt, requires no reasonable doubt about the evidence in favour of the Prosecution. 'Unreasonable' doubt is a different question. Hence, **a sure case**, or say 95% probability.

c. The intermediate standard, of greater assurance, has been used in various cases, including to prove adultery in matrimonial disputes. Hence, **a strong case**, or say 75% probability.

The strong case, without the mathematical analogy, should be clearly formulated by the Court, including the instances where it will be required in election petitions.

II <u>Electoral Irregularities: the Constitutional and Statutory Standards</u>

9. The Constitutional Standards to free and fair elections (arts 38,81, 86 Constitution of Kenya), considered together with the statutory standard (s.83 Elections Act) have been heavily discussed in this Court's jurisprudence, including in **Hassan Joho vs Suleiman Shabhal**, **Peter Munya vs Dickson Kithinji**, **Okoth Obado vs Zachary Oyugi**, **Fred**

Outa vs Jared Okelo, **Anami Lisamula vs IEBC**, and so on. The Amicus does not intend to recanvass the point.

10. However, the Amicus will make substantial reference to the comprehensive paper by Hon. Justice (Prof) Otieno-Odek, "***Election Technology Law and the Concept of "Did the Irregularity affect the Result of Elections***", 2017. The Paper, presented at the Judicial Colloquium, was later presented at the LSK Nairobi Branch training on Election Dispute Resolution (June 2017) and became the subject of substantial discussion. In particular, the Amicus intends to address the two critical points:

a. The Qualitative Test (substantial non-compliance). Could the Audit principle of Materiality, applied in testing internal controls, verifiability and fraud in organisations, assist the Court as it refines further the Qualitative test? Does the Qualitative test require some reference or consideration of the Quantitative effect, and if so in what situations?

b. The Quantitative Test (verifying the impact of non-compliance or inaccuracy on the actual vote numbers and final outcome). Could Audit practices involved in testing final results of an election gain currency or usage in resolving this question? What would be the impact of exit polls, opinion polls, sampling methodology on declared results, results of elections observers, etc in determining the quantitative test?

11. The Amicus proposes that in articulating the Constitutional test, greater definition and elaboration of the meaning of the various key words used would have to be made by the Court, i.e **simple, accurate, verifiable, secure, accountable and transparent** (art 86(a) Constitution of Kenya).

12. The Amicus finally suggests that the legal principles developed by the Constitutional Courts, including the Supreme Court, in balancing competing constitutional and fundamental right questions, including in particular the principles of proportionality, public interest, liberal interpretation, holistic approach, and the values in the Preamble and Arts.10 & 259 be applied and considered.

III & VI **<u>Managing Electoral Timelines & Interlocutory Processes</u>**

13. One of the biggest challenges in dealing effectively with the Supreme Court Petition on presidential elections is the strict 21-day time-frame, effectively involving:

a. 7 days for a Petitioner to file his case.

b. 7 days for Service and for the Responses

c. 7 days for Hearing and for the Determination

14. Some of the reform needed to effectively handle election petitions is of a legislative nature. Yet, the Court could – through directions and rulings on the effect of delayed compliance – also assist in effective management of electoral timelines while recognizing the art.159 Constitutional principles which do not cease to apply to the presidential election petition.

15. The Court needs to become more involved and proactive in the second seven-day period, so as to facilitate the effective conclusion of the matter in the third seven day period. Interlocutory applications seeking evidence or better particulars (discovery, scrutiny & recount) should be given a specific time frame, so that they can be handled while the Respondents are concurrently working on their responses. There should be better formulation of the degree of specificity required in pleadings, and in applications touching on discovery.

16. The Amicus proposes that applications for discovery be made concurrently with filing of the Petition, and by the Respondents concurrently with their Responses. There should be reduction of the time required for service of the Petition, to avoid consuming two of the 14 days required for dealing with the Petition. If managed effectively, the applications for discovery will be handled early enough within the second 7-day period.

17. There is a place for Amicus and Interested Parties in presidential election petitions, which should not be lost due to *the tyranny of time*. Amicus especially will enable the Court to rise beyond the partisan interests and stratagems of litigants. For example, in dealing with an application for discovery touching on ICT materials, the Court would be served well by hearing from Amicus with technical knowhow, so as to know what is or is not capable of granting within the limited time frames.

18. As stated before, the Court should reach a wise jurisprudential balance on the question of burden and standard of proof to justify grant of prayers for scrutiny, recount and verification. Failure to do so will enhance the moral hazard, where the electoral management body (EMB) potentially benefits from non-disclosure about matters of significant non-compliance that could harm its case. On the contrary, there is a moral hazard that litigants with little evidence will mount petitions for publicity exercise and harass the EMB with frivolous and time-consuming applications for all kinds of discovery, interrogatories, etc.

IV Context and application of Information and Communication Technology (ICT)

19. ICT has been integrated into the elections processes through the Election Technology Regulations. This integration of ICT is expected to grow in coming elections. ICT currently plays a complementary, and even direct role in various instances, in securing free and fair elections. It will be necessary that all the technology deployed and used can demonstrate accuracy, transparency and verifiability.

20. In general ICT parlance, the applicable mantra is "Garbage In, Garbage Out". In other words, if the user of the system puts in garbage as data, the system will produce garbage at the other end. There will need to be a place for ICT experts to audit the electoral technology deployed, by reviewing the system processes and the outputs, to determine whether the said systems have sufficient integrity and verifiability.

21. These audits involve examining the management or user controls within an information systems ecosystem. This includes protocols or processes of data processing, security including access and data transmission, data consistency, oversight of data management, examination of the physical ICT infrastructure, etc. Several of the steps in ICT audit would take longer than the seven or 14 days available for the hearing of the Petition. The Court needs to reflect on what legal processes would be available to the candidates to ensure confidence in the use of the electoral technology before, during and after the voting/counting process.

22. The Amicus suggests that the Court should review how expert witnesses, ICT expert reports and amicus with an ICT background can be included in the court process for better assurance in future elections. The Court should also review the level of information available and shared by IEBC about the working of the elections technology in determining whether the 2017 elections passed the free and fair test.

V Verification of Tallying and Transmission of Results

23. The 2017 election petition is premised principally on allegations about improper tallying and transmission of results. The Parties have sufficiently dealt with most of the questions for determination by the Court. The Amicus intends to make the following supplementary points.

24. Regarding the electronic transmission of results:

a. It seems that s.39(1C) of the Elections Act requires electronic transmission of results. IEBC submits that the results transmitted were mere statistics. The Petitioners argue that they were displayed as results and received as such by the public. The Amicus posits that the electronic transmission, and the infrastructure and processes put in place by IEBC, shows that the object of the transmission was the polling station results (found in forms 34A). It is therefore a valid question whether this transmission was done in a free and fair manner, noting however that

there was a complementary and legally final alternative process involving manual tallying into Forms 34B.

b. The allegation by the Petitioners that there was a steady gap in the election results of 11% caused by a computer algorithm is one that ought to be interrogated by the Court. In doing so, we propose that the Court consider:

    i. Whether sufficient evidence has been given in support of the claim?

    ii. The existence and effect of **the law of large numbers** in statistics. In particular, the phenomenon called **regression to the mean**, which is a naturally occurring phenomenon, explained in various documents and material. Put simply:

        1. Where you have a large number of small units being counted randomly, a pattern develops pretty early, say by 10% to 20% of the bunch being counted, and does not vary substantially thereafter.

        2. The evidence presented by the parties is that the returns were coming in randomly from all counties without major variations. The early results were therefore turned into an unscientific poll sample. With proper and scientific poll samples, it is common knowledge that even a sample size of 2,000 gives fairly predictive outcomes of a population of 20 million possible voters (Kenya) or even over 100 million voters (USA).

        3. The phenomenon of regression to the mean results in the average results trending more accurately towards the mean (average) of the total votes cast as more votes keep coming in with a fairly random sequence.

        4. However, it is possible for regression to the mean to be achieved artificially through the selection of batches of returns to be displayed on an electronic portal. The Court will need to consider whether either party has given sufficient evidence to discharge their respective burden and standard of proof in this case.

c. The Court should consider the effect and propriety of **IEBC vs Maina Kiai** [2017] eKLR, where the Court of Appeal declared that the results at the polling station were final, that those collated at the Constituency tallying centres were final, and that the role of IEBC was only to tally the figures from the Constituency Returning Officers (CROs). The Court will need to consider the effect of discrepancy in the final results at the polling stations (Forms 34A, transmitted to Bomas) and the final results at the Constituencies (Forms 34B, also transmitted to Bomas).

d. The Amicus is of the view that there will arise errors in this process involving 40,000 polling station presiding officers (POs), 290 CROs and then the Chair of IEBC. The errors could arise from one of two sources:

    i. Human error e.g. transposition, transcription, addition, etc.

    ii. Deliberate manipulation of data.

e. It is proposed that the Court examine the nature of errors to determine (1) their magnitude, (2) their spread, and (3) whether there is evidence of malicious and widespread intent to compromise the results of the election.

f. It is suggested that previous findings of the Special Parliamentary Committee (2016), the Kriegler Report after 2007 elections, as well as various Court cases on the matter, favour rapid electronic transmission of results as a means of increasing verifiability and credibility of the results declared.

25. There is an important point that has been raised by the parties touching on the verification of the Forms 34A, and the transmission of results to Bomas. The Amicus suggests that there is some misunderstanding of the technical aspect of data capture that will need to be clarified to the Court, namely:

a. The nature of a database: Fields (columns, data types) and Records (rows).

b. The various data types and nature of database records (numeric, text, logical, image).

c. The fact that unlike the human brain, a computer cannot apply mathematical formulae or operations on data that is not converted into numeric form, and that the conversion to numeric form from an image Form 34A requires human verification.

d. Whether the verification was done, what the law required, and whether the verification at polling station level by the presiding officer was or was not sufficient for the purpose.

26. Regarding the manual transmission of results, the Court will need to check whether the inbuilt controls into the elections tallying and transmission process, including availability of agents, verification at various stages, etc were implemented as required by electoral regulations, or whether there were substantial instances of non-compliance.

VII The Role of Amicus Curiae

27. This has been referenced in the Introduction to the Submissions (paras 2 to 4 above).

28. We suggest that the Court consider substantially the comparative review of Dr Collins Odote, and adopt a more liberal approach that will help to strengthen the jurisprudence emerging from the Courts. Amici well-managed will assist the Court, not merely during submissions on the case, but also possibly in various other areas including:

a. In the presentation of evidence, especially in matters touching on public interest.

b. By focused interventions during interlocutory applications, that may assist a Court in resolving quandaries and avoiding quagmires that sometimes it may be drawn to by excessively partisan litigating.

29. It is proposed that Amicus be permitted to speak after the Respondents' respond but prior to the Petitioners' final response, as a matter of practice and timing, so that they avoid duplicating what has been stated by other parties. It is also suggested that Amici be allowed limited rights to intervene during the other aspects of a case, on condition that they seek leave and lay justification, including showing the necessary expertise.

VIII The Public Interest

30. It is submitted that presidential election petitions, as well as other similar disputes, are not merely the property of the parties litigating, but have substantial implications on the Public Interest. The Amicus proposes that the Courts apply their developed jurisprudence on public interest in helping to resolve electoral disputes.

31. In summary, there is a public interest:

a. To have an election repeated if it fails the Constitutional and statutory standards.

b. To have an election result stand if it meets the legal threshold.

c. To ensure that the Constitutional and legal organs and processes are allowed to operate during the entire dispute resolution process.

C. CONCLUSION

32. Your Lordships, the Amicus requests the Court to consider this summarized brief, and if admitted will supply the necessary Authorities in support of the various postulations herein.

DATED this ***27th*** day of ***August*** 2017

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