

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

H.E. 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 KENYATTA.....3<sup>RD</sup> RESPONDENT

AND

ATTORNEY -GENERAL.....INTENDED *AMICUS CURIAE*/APPLICANT

ATTORNEY GENERAL'S SUBMISSIONS IN SUPPORT OF THE APPLICATION TO BE  
ENJOINED AS AN *AMICUS CURIAE*

(Under Rule 17(1) and (2) of the of the Supreme Court (Presidential Election Petition)  
Rules, 2017)

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The President and Hon. Judges of the Supreme Court,

1. The Attorney General prays that the application dated 23<sup>rd</sup> August, 2017 be allowed in terms of the following prayers;
  - i. The Court do grant leave for the Attorney General to appear as Amicus Curiae in these proceedings; and
  - ii. The Court do make such further order (s) and or direction(s) as it may deem necessary in the circumstances.

2. The Attorney General's application to be enjoined in the proceedings as an *amicus curiae* is brought under Article 156 (5) & (6), Section 6(2)(a) of the Office of the Attorney General Act, Section 24 (1) of the Supreme Court Act, 2012, Rule 23, 54 (1) (a), (2) of the Supreme Court Rules, 2012, Rule 17 (1) & (2) of the Supreme Court (Presidential Election Petition) Rules, 2017.
3. The Attorney General submits that the above provisions of the law, mandates the Attorney General to be enjoined at any stage of the proceedings as an *amicus curiae*, where the National Government is not a party in order to assist the court advance the Rule of Law and public interest involved in the proceedings. In particular;
  - i. The Attorney General is authorised under Article 156 (5) of the Constitution to appear with leave of the court as a friend of the court in any civil proceedings to which the government is not a party;
  - ii. Article 156(6) of the Constitution obligates the Attorney- General to promote, protect and uphold the rule of law and defend the public interest; and
  - iii. Under section 6(2)(a) of The Office of the Attorney General Act, 2012,the Attorney-General is also authorised, with leave of the court to appear in any civil proceedings.
4. The Attorney General submits that his joinder in the proceedings will enhance the right of access to justice in terms of the qualitative normative content of the political right as well as open positive lines of development in electoral law jurisdiction.
5. In the case of **Trusted Society of Human Rights Alliance V Mumo Matemo & 5 Others (2015) e KLR**, the Supreme Court expressed;

*The Constitution of Kenya .2010 by express terms, requires Courts to develop the law to the extent that it does not give effect to a right of fundamental freedom. (Art. 20 (3)(a). This is the very foundation for well-informed inputs before the court, which inherently justifies the admission of amicus curiae. We have a duty to ensure that our decisions enhance the right of access to justice as well as open positive lines of development in jurisdiction, to serve the judicial system within the terms of the Constitution.*

6. In the **Trusted Society of Human Rights Alliance (supra)**, the Supreme Court further stated that;

*e) The court may call upon the Attorney General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admissions admission of the Attorney General is not defeated solely by the subsistence of a state interest in a matter of public interest.*

7. The Attorney General submits that Presidential electoral disputes normally raise constitutional questions of great public interest and importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue.

8. In **Peters v Attorney-General (2002) 3 LRC 32 C.A., Trinidad and Tobago at 101** where Sharma J.A Said:

*“An election petition is not a matter in which the only persons interested are candidates who strive against each other in elections. The public are substantially interested in it and that it is an essential part of the democratic process. It is not a lis between two persons, but a proceeding in which the constituency itself is the principal party interested. The characteristics of an election petition are fundamentally different from civil proceedings. Hence for example there was the need for special rules concerning, for example, the notice and publication, which is outside the courts ordinary jurisdiction and procedures. An election petition is quite unlike any of the initiating proceedings in the High Court. It is not a writ, or originating summons, nor is it in any way close to say a petition in bankruptcy or a petition for divorce which respectively have their own rules of procedure. In a sense an election petition can be described as sui generis.”*

9. The Attorney General submits that the issues framed in the Petition raise questions regarding the interpretation and application of Articles 10, 38, 81, 86, 138 and 140

of the Constitution and have far reaching implications for the future conduct of Presidential elections to which the Attorney-General would wish to make amicus submissions on the following questions:-

- i. What is the proper Constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both Articles 81 and 86 of the Constitution?
- ii. What were the effects as regards the use of technology in presidential elections introduced by Election Laws (Amendment) Act No. 36 of 2016 and Elections Laws (Amendment) Act No. 1 of 2017?
- iii. What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of **IEBC- vs- Maina Kiai & 4 Others (Civil Appeal No. 105 of 2017)** on how IEBC conducted the presidential election in issue?
- iv. How should the Supreme Court treat rejected/spoilt votes in determining the total votes cast under Article 138 (4) of the Constitution?
- v. What is the proper Constitutional and legal threshold for invalidating or upholding a presidential election under Article 140 of the Constitution?
- vi. What remedies can the Supreme Court grant in determining a Presidential election petition under Article 140 of the Constitution?

10. The Attorney General further submits that he has the necessary expertise by virtue of his office to assist the Court in the above issues by placing relevant legal materials and research which will aid in the fair, just and impartial adjudication of the issues in dispute.

11. The Attorney General submits that pursuant to his constitutional mandate under Article 156 of the Constitution, he has been actively involved in the electoral legal

reform processes and preparation by the IEBC (the 1<sup>st</sup> Respondent) in the context of Article 81 of the Constitution. In particular;

- i. The office of the Attorney-General has issued several legal advisory opinions to IEBC on complex issues of law regarding the conduct of elections in Kenya as a preparation prerequisite required for the proper conduct of elections in Kenya;
- ii. The office of the Attorney-General issued a professional legal input to the electoral law reform processes specifically to the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission (IEBC) (commonly referred to as the Senators Orenge/Kiraitu led bi-partisan Parliamentary Committee ) that in a report dated 16<sup>th</sup> August 2017 recommended reforms of the integrated electronic system of voter registration, identification and result transmission;
- iii. The office of the Attorney-General has contributed to parliamentary debates on electoral reforms at the Committee stages;
- iv. The office of the Attorney-General has participated in several court proceedings before the Superior Courts strictly on pure points of law regarding the preparation on the conduct of the elections in Kenya; and
- v. The office of the Attorney-General has participated in the formulation and approval of several electoral laws including Acts of Parliament and the various subsidiary legislations which anchors the legal basis for the conduct of elections in Kenya.

12. The Attorney General submits that at all times of his engagement on the above matters regarding the electoral processes, he exercised the necessary impartiality and independence as demanded by the Constitution and the law.

13. The Attorney General therefore submits that in consideration of the foregoing, the application dated 25<sup>th</sup> August, 2017 should be allowed as prayed.

Dated at Nairobi this                      day of                      2017.

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GITHU MUIGAI, SC  
ATTORNEY GENERAL

**DRAWN AND FILED BY**

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