

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 KENYATTA3RD RESPONDENT

AND

EKURU AUKOTAPPLICANT/ INTERESTED PARTY

SUPPORTING AFFIDAVIT.

I, **MARTIN GAVOLE AGUYA MWENESI**, a resident of Nairobi within the Republic of Kenya and of P.O. Box 46775-00100 NAIROBI do hereby make oath and solemnly swear as follows:

1. **THAT** I am an adult male of sound mind and disposition and I am the Secretary General of Thirdway Alliance Kenya which is Registered as Political party of Kenya in Accordance to the Political Parties Act 2011 under certificate No. 76.(Annexed and marked "MGAM1" is a copy of certificate) .
2. **THAT** I am aware of the Presidential Petition 1 of 2017 filed by Hon. Raila Amollo Odinga and Hon. Stephen Kalonzo Musyoka challenging the declaration of results of the just concluded Presidential election in which IEBC pronounced Hon. Uhuru Muigai Kenyatta as the duly elected President of the Republic of Kenya.

3. **THAT** the National Executive Council of Thirdway Alliance Kenya, did hold a special NEC meeting on the 17/08/2017 to respond to the important emerging issues of national concern after the just concluded 2017 General elections. The NEC arrived at a resolution that seeks to have the party through our flag bearer Dr. Ekuru Aukot be enjoined in the current Presidential petition 1 Of 2017. I have received the authority of party in accordance to the Party Constitution to swear the same on my behalf and the party's behalf, hence I am duly authorized to state as follows .
4. **THAT** Thirdway Alliance Kenya, is a pragmatic and progressive political party that believes in the rule of law and the spirit of constitutionalism. Our founding compulsion as a party is derived from our six key pillars of which the rule of law is very critical and fundamental in anchoring the nation towards actualization of civil liberties and institutional democracy.
5. **THAT** Thirdway Alliance Kenya, seeks to be enjoined through our Presidential candidate in this Presidential Petition, based on our experience as a party during the national tallying process at BOMAS and the emerging issues that have arisen owing to the declaration of the presidential results. Our decision to be enjoined is also guided by Article 38 & 140 of the Kenyan constitution, as we seek to strengthen the existing democratic space for posterity.
6. **THAT** Thirdway Alliance Kenya did participate in the just concluded General Elections. Thirdway Alliance Kenya, fielded a Presidential candidate in the person of Dr. Ekuru Aukot and whose running mate was Mr. Emmanuel Kombe Nzai. The presidential candidate had Mr. Bill Kagai and Mr. Miruru Waweru as his National Chief agents.
7. **THAT** as the Secretary General of , Thirdway Alliance Kenya, I was part of the Thirdway Alliance Kenya, presidential team accredited by IEBC to observe the Presidential tallying of results from the 290 constituencies as declared by various Returning offices across the country. **Annexed is a copy of the Clearance pass marked "MGAM2"**
8. **THAT** we first visited the National Tallying centre at Bomas on the 8/08/2017 at around 9pm and remained present all though until the results of the Presidential tally were announced. Our first visit to the national tallying centre was not a smooth as we had thought. Challenges pertaining to electronic transmission of results begun to emerge. Apparently the results being broadcast at the national tallying centre screens did not have form 34As annexed to them for purposes of verification and validation.

9. **THAT** the IEBC commission did call a meeting of Presidential chief agents at around 11pm in the night to address the issue of missing scanned form 34As in the KIEMS system and cited challenges with the encryption format that could not allow the scanned images to come through easily. This came as surprise since a dry run test of the system just two days earlier had proved otherwise and IEBC had been in the media several times assuring Kenyans that the system was good to go and it would not fail.

10. **THAT** in the meeting called by the IEBC commission on 8/8/2017 at around 11pm for the Presidential chief agents, the CEO, Mr. Chiloba promised to have accounts created for each Presidential Chief agent, to facilitate the access of the scanned form 34As from various polling stations. Despite the unavailability of form 34As IEBC continued to display polling results from various polling stations despite protests from various presidential chief agents. This led to NASA and us calling for media press briefings to inform the Kenyan public of the challenges we had experienced.

11. **THAT** it was not until around 3pm on the 9/08/2017 that Presidential Chief agents started accessing the scanned form 34As through an intranet facility of IEBC. What was rather disturbing is that the form 34As that had been loaded at the time appeared to have been hastily prepared documents that were not stamped and handwritings on some of the forms appeared to be consistent all through as if they had been written by one person. There was no way to ascertain the authenticity of the documents at the time.

12. **THAT** the IEBC commission started to avail form 34Bs later in the evening on the 9th of August 2017 for purposes of verification and validation. As a party we were able to sample at least 92 form 34Bs and the discrepancies on them were rather glaring and worrying. Issues on forms 34Bs ranged from :
 - (a). wrong summation of candidates votes,
 - (b). null declaration on some forms,
 - (c). wrongly keyed details of form 34As as they were being transferred to form 34Bs,
 - (d). Wrong details of candidates agents on some of the form 34Bs

13. **THAT** we have since compiled an audit report of the said process capturing the discrepancies above which is contained as an annexure in the affidavit sworn by Mr. Miruru Waweru our Presidential chief agent.

14. **THAT** having been involved in political party management in over a decade, I was disappointed to note that IEBC was falling prey to the technological challenges of yester years (Most notably the failed 2013 General elections electronic transmission and the manual system used in the 2007 General elections.)

15. **THAT** In late 2013 into 2014, the IEBC under the leadership of the former chairperson Mr. Isaak Hassan, had done an audit report of the 2013 General elections

which was never made public but nevertheless identified the technological challenges that led to failure of electronic transmission of election results among other many challenges and the commission had promised to have an efficient, verifiable, and measurable system in place before the 2017 General elections.

16. **THAT** how is it possible that the same predicament of 2013 General elections would once more bedevil the 2017 General elections? Could it be that this electronic failure in transmission of election results is by design? Or is that the KIEMS system being utilized by IEBC is overrated and perhaps is a very basic result transmission system and nothing much to write home about? Ten years on after recommendations in the Kreigler report that Kenya moves from a manual electoral system and begins integrating ICT into the electoral processes for purposes of efficiency, transparency and accountability in an effort to deliver credible election results that are verifiable, Kenyans and IEBC are still stuck on the pet subject of technological application in electoral matters.

17. **THAT** while at the National Tallying centre on the 10/082017, undertaking the verification and validation process of forms 34As and Bs. I had the opportunity to engage the CEO of IEBC Mr. Ezra Chiloba, in order to gain a better understanding of the administration of Form 34As from the polling station , the Returning officers collating duty and declaration of results from the constituency, the Compilations of Form 34Bs, and the commission's role in declaring the final result of the Presidential election and this is what I was able to gather from him.
 - a. That some the forms 34As that were in the system should have been stamped as a way of authenticating them as Commission documents though he was non committal on whether to reject form 34As that were not stamped.
 - b. That the forms 34Bs as they were, had been generated from excel sheets and not printed reports from the KIEMS system no wonder the summation errors.
 - c. That the Returning officer is the one mandated to feed in all figures from the 34As into 34Bs manually before finally announcing and declaring the winner.
 - d. That one particular Returning Officer had incidentally signed results of other constituencies; how this is possible it still remains a mystery unless some of the 34BS were manufactured at a specific location hurriedly without noticing the glaring errors.
 - e. Details of agents on some of the form 34As were either incorrect or falsified information as a random check proved that the details were incorrect.
 - f. There were inconsistencies and blatant discrepancies in the final constituency tallies for the various presidential candidates as displayed at the national tallying centre with reference to the forms 34BS that the commission had just issued the presidential chief agents to verify and validate.
 - g. At the time of making the declaration of results of the Presidential election by the Chief Returning Officer, we as Thirdway Alliance were yet to complete our verification and validation process. The commission did not bother to ask us as on the status of our verification and validation exercise.

18. **THAT** the Kenya Integrated Electoral Management System is actually not as high tech and sophisticated as political parties and Kenyans have been meant to believe. **System integration** is defined in engineering as the process of bringing together the

- component sub-systems into one system (an aggregation of subsystems cooperating so that the system is able to deliver the overarching functionality) and ensuring that the subsystems function together as a system, and in information technology as the process of linking together different computing systems and software applications physically or functionally, to act as a coordinated whole.
19. THAT apart from the biometric identification of voters (which in some instances it failed) and the partial transmission (without scanned images of form 34As) of election results there is nothing spectacular about the KIEMS system. The system cannot even generate a constituency report of form 34As from the various polling stations. The form 34Bs which are tallied by the Returning officers manually ought to be computer generated reports and not figures inputted in excel sheets. How can a system in which data is keyed in be unable to generate very basic reports?
 20. THAT the system put in place by IEBC of manually collating form 34As by ROs is old fashioned and outdated in this era of computerization and enterprising technological innovations. Such an opaque system in the hands of frivolous ROs is bound to be abused and election results manipulated to suit competing interests. The returning officer of 2017 has to adopt similar tallying practices as that of an RO of 2007 as old fashioned as they maybe in collating form 34B despite the existence of the KIEMS system.
 21. THAT if the KIEMS system was that efficient and high-tech then form 34C (Presidential Declaration of the 290 constituencies) should equally be generated automatically from the KIEMS system and signed before final declaration of the presidential results. The truth is that today IEBC cannot rely on the KIEMS system for purposes verifying and validating votes cast and tallied, as the system has a serious limitation on generation of reports. The technological challenges of 2007 and 2013 are still with the IEBC commission to date and by a greater extend Kenyans. This is the hard truth that we must face a country. IEBC is only technologically savvy in as far as biometric identification of registered voters is concerned. Tallying, transmission, verifying and validating of election results still remains a challenge.
 22. **THAT** the failure by IEBC to offer a simple, measurable and verifiable system in place has greatly hampered them in delivering a free, fair and credible electoral process as expected of them by the people of Kenya. Instead it has served to erode public trust and create a sense of voter apathy and complete loss in the electoral processes of our nation.
 23. THAT at the time of making the final declaration of Presidential results from the 290 constituencies; we had not received all copies of the 290 constituencies. There were still form 34As that had not been delivered to the commission either by way of soft or hard copy and the Presidential Chief agents had not accessed them yet. As a party we refused to sign the final results of the presidential elections as declared. Unfortunately our Presidential Chief agent, Mr. Bill Kagai went against the decision of our Presidential candidate, and appended his signature on the final results. Thirdway

TO BE SERVED UPON

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NAIROBI

H.E UHURU MUIGAI KENYATTA

NAIROBI

Lodged in the Registry on theday of.....,2017

.....

Registrar