

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NUMBER OF 2017

-BETWEEN-

KHELEF KHALIFA.....1ST PETITIONER

SAMWEL M. MOHOCHI.....2ND PETITIONER

**NAHASHON G.
KAMAU.....3RD PETITIONER**

-VERSUS-

**THE CHAIRPERSON OF
INDEPENDENT ELECTORAL
AND BOUNDARIES
COMMISSION.....1ST RESPONDENT**

**INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....2ND RESPONDENT**

TO:

The Supreme Court of Kenya

NAIROBI.

PETITION

The humble petition of **Khelef Khalifa, Samwel Mohochi, Nahashon Gachihi Kamau** whose address of service for purposes of this Petition shall be Care of **Haron M. Ndubi Advocate C/O HAKI FOCUS-SIGNAGE, KWAME & ASSOCIATES, DIAMOND PLAZA, MAIN BULDING DOOR NO A4 MASARA ROAD, PARKLANDS EMAIL: haron.ndubi@gmail.com TEL: +254717168467** within the Republic of Kenya showeth as follows:-

A. THE PARTIES

1. The Petitioners are adult males of sound mind, citizens of the Republic of Kenya and duly registered voters in the following electoral areas from within the Republic of Kenya;
 - a) The 1st Petitioner is a registered voter in Nyali, Constituency, Mombasa County.
 - b) The 2nd Petitioner is a registered voter in Westlands, Constituency, Nairobi County.
 - c) The 3rd Petitioner is a registered voter in Mathare, Constituency, Nairobi County.
2. The 1st Respondent is the Chairperson of the 2nd Respondent herein and the National Returning Officer of the Fresh Presidential election scheduled for the 26th October 2017. 1st Respondent is constitutionally mandated under Article 138(10) of the Constitution of Kenya to;
 - a) declare the result of the presidential election; and
 - b) deliver a written notification of the result to the Chief Justice and the incumbent President.
3. 2nd Respondent is the Independent Electoral and Boundaries Commission (IEBC). The 2nd Respondent is an Independent Commission established under Article 88 as read together with

Articles 248 and 249 of the Constitution of Kenya and the IEBC Act No. 9 of 2011. The 2nd Respondent is constitutionally charged with the mandate and responsibility to conduct and/or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by the Elections Act.

4. The Petitioners bring this petition in their own behalf and in the public interest.

B. JURISDICTION

5. In *The Matter of the Principle of Gender Representation in The National Assembly and the Senate, Advisory Opinion No. 2 of 2012* the Court noted that its jurisdiction in respect of Presidential Election went beyond what was provided for in Article 140(1). This Court noted:

[100] It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. ...

[102] Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon all such disputes as would arise from the Presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election – while excluding those disputes which might arise during the conduct of election....

[104] It is our unanimous opinion that the validity of the Presidential election is not for determination only after the administrative pronouncement of the final result; at any stage in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity.

6. This Petition presents a dispute arising at a stage within the “critical steps” of a Presidential election and the resolution of the dispute has a direct bearing on the validity of the Presidential election.

C. FACTS IN SUPPORT OF THE PETITION

7. Kenya’s General Election were held on August 8, 2017. Following the election, the 1st Respondent declared that Hon. Uhuru Muigai Kenyatta had won the presidential election.
8. Pursuant to Article 140 of the Constitution the results of the presidential election held on 8th August 2017 were successfully challenged by the Orange Democratic Movement Party (ODM)/ National Super Alliance (NASA) presidential candidate, the Right Hon. Raila Amolo Odinga and his running mate Hon. Stephen Kalonzo Musyoka. On 1st September, 2017 a majority of the Supreme Court invalidated the results of the presidential election vide the following orders:-
 - i. *A declaration is hereby issued that the Presidential Election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;*

- ii. A declaration is hereby issued that the 3rdRespondent was not validly declared as the President elect and that the declaration is invalid, null and void;*
 - iii. An order is hereby issued directing the 1stRespondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of this determination under Article 140(3) of the Constitution.*
 - iv. Regarding costs, each party shall bear its own costs.*
9. Following the nullification of the presidential election, the Respondents, on 5th September 2017, issued a Gazette Notice Gazette Notice No. 8751 of 2017 in which they gazette Uhuru Muigai Kenyatta and Raila Amolo Odinga as the only two candidates eligible to participate in a fresh presidential election. The Respondents relied on the holding of this Court at Paragraph 286 of the Supreme Court decision in the case of **RAILA ODINGA & 5 OTHERS vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS, PETITION NO. 5 OF 2013** (RAILA ODINGA 2013), in determining that only the two candidates were eligible to run in the fresh presidential election.
10. The Respondents fixed the date for the fresh presidential election as October 17, 2017. However, the Respondents had to later vacate that date because the timeline was not sufficient to adequately prepare for the fresh presidential election.
11. Following the said Judgment of the Supreme Court, the presidential candidate of the Orange Democratic Movement (ODM), the Rt. Hon. Raila Amolo Odinga and his running mate Hon. Stephen Kalonzo Musyoka sought to secure various legal, administrative and operational

reforms within the 2nd Respondent before the fresh presidential elections ordered by the Supreme Court is held.

12. Specifically by a public notice titled NASA POSITION PAPER ON IRREDEEMABLE MINIMUM BEFORE THE FRESH ELECTIONS ARE HELD dated September 12, 2017 Hon Musalia Mudavadi, Chair, National Campaign Committee states the reforms that must be implemented before the fresh presidential elections are conducted.

13. That The 2nd Respondent by admission by Dr. Roselyn Akombe in an *Internal Memo Ref: IEBC/RA/01/2017 to the 1st Respondent, titled, Re: Planning for the Fresh Presidential Election, dated October 9th, 2017* indicates serious strife and concerns within the 2nd Respondent and its capacity to effectively conduct a free, fair and credible elections which includes;

- a) There exist active sabotage and frustrations of the Election TOC thereby jeopardizing the 2nd Respondent's ability and capacity to conduct a free, fair and credible elections;
- b) There exists within the 2nd Respondent active decision making and reversal of critical decisions in secrecy by four unnamed commissioners further hampering preparations.
- c) That she and members of her family have received death threats with active intimidation by political actors intended to force her to resign.
- d) That a commissioner of the 2nd Respondent physically threatened her on the 18th September 2017 plenary meeting in the boardroom.
- e) That the 2nd Respondent appear unable to take administrative action against its errant staff members whose actions contributed to the invalidation and nullification of the presidential elections and monetary loss running into billions of Kenya shillings.

- f) That despite approving the Audit of the ICT system used in August Elections, the same has not been undertaken;
- g) That despite approving the conducting of the quality assurance of the ICT system to be used in 26th October 2017 Elections, the same has not been undertaken; and
- h) There exists active machinations to delay and or stall measures aimed at restoring public confidence as had happened on the 28th and 29th August 2017 following the Orders by the Supreme Court relating to opening up of the Servers;
- i) That in as much as the 2nd Respondent might technically, logistically and operationally be prepared for the Fresh Elections, the elections is more that Logistics and operations and that political environment and confidence by Kenyan is key.

14. That on the ODM candidate Rt. Hon Raila Odinga and his running mate Stephen Kalonzo Musyoka delivered a letter dated 10th October 2017 to the 2nd Respondent indicating that they had decided to withdraw from the fresh Presidential Election owing to the failure by the 2nd Respondent to implement a raft of reforms as demanded earlier.

15. On October 11, 2017, the High Court ordered the inclusion of Thirdway Alliance candidate Dr. Ekuru Aukot in the fresh presidential election. Following the High Court Order the Respondents decided to include all the presidential candidates that had participated in the August 8, 2017 presidential election.

16. On October 13, 2017, the Respondents pursuant to the High Court Petition No 471 of 2017 between Dr. Ekuro Aukot vs IEBC & 3 others issued an addendum modifying the Gazette

Notice 8751 of 2017, Vol. CXIX-No.130 thereby including five (5) other candidates and omitting one Mr. Shakhhalaga Kwa Jirongo for being constitutionally disqualified.

17. That on October 18, 2017 the 2nd Respondent's Commissioner, Prof. Abdi Guliye notified the public in an interview of the 2nd Respondent having included the name of Mr. Shakhhalaga Kwa Jirongo on the ballot papers being printed despite not having been gazetted.
18. That the Respondents have nonetheless proceeded with preparation of conducting the fresh presidential election with the inclusion of ODM candidate Rt. Hon. Raila Odinga and his running mate Stephen Kalonzo Musyoka arguing that such a withdrawal is invalid for want of submission of the statutory Form 24A relating to nomination.
19. The Petitioners aver that the withdrawal by the ODM candidate Rt. Honorable Raila Odinga and his running mate Stephen Kalonzo Musyoka on the 10th of October 2017 triggered the vacation of the Fresh Presidential Election date of 26th October 2017 by operation of law.
20. That on their part the ODM Candidate has engaged in a campaign against the conduct of the Fresh Presidential Election on the 26th October 2017 insisting on their withdrawal on the 10th October 2017 until certain administrative and logistical measures are put in place by the 2nd Respondent.
21. In the light of the foregoing the Petitioners states that for purposes of Article 138(2) of the Constitution the fresh presidential elections has been construed to mean a contest for the presidency between all candidates that participated in the annulled presidential elections of August 2017. Consequently, in practical terms unless the candidates aforementioned take

part in the fresh presidential elections the order of the Supreme Court pursuant to Article 140(3) of the Constitution will not be complied with.

22. Under Article 138 of the Constitution the procedure of presidential election includes the following elements:-

- a. If two or more candidates for president are nominated, an election shall be held in each of Kenya's 290 Constituencies.
- b. Besides the requirement of receiving more than half of all the votes cast in the election, a successful presidential candidate must receive at least 25 per cent of the votes cast in each of more than half of the Counties. In other words in at least 24 out of the 47 Counties.

23. In declaring the result of the election the 1st Respondent is required by law to indicate the votes cast for each candidate in all the 47 Counties.

24. There are serious concerns about the Respondents preparedness to conduct free and fair elections. The content of the following documents from the Respondents indicate the existence of an imminent threat to their ability to conduct a free and fair presidential election.

- a. The 1st Respondent's internal Memo **Ref: IEBC/CP/CON/1/2/VOL1 (51), titled, SC Election Pet 1 of 2017, Raila Odinga & Another Vs IEBC & 2 Others**, Dated 5th September 2017.
- b. Dr. Roselyne Akombe's Internal Memo **Ref: IEBC/RA/01/2017**, titled, **Re: Planning for the Fresh Presidential Election**, dated October 9th, 2017.

- c. The 2nd Respondent’s CEO’s Internal Memo **Ref: IEBC/CEO/10/2017, Re: *Revised Results Transmission Workflow***, dated October 14th, 2017.
- d. Dr. Roselyne Akombe’s **Press Statement** issued in New York on 17th October 2017
- e. The 1st Respondent’s document titled, —***Chairman’s Address on Status of Preparedness for the Elections*** – 18th October 2017

D. BRIEF OVERVIEW OF THE LAW

25. Article 1 of the Constitution sets out the foundation and framework of the Nation of Kenya and the social contract between the people and their elected representatives. Article 1 of the Constitution states that:

- (1) “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
- (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
 - (a) Parliament and the legislative assemblies in the county governments;
 - (b) the national executive and the executive structures in the county governments; and
 - (c) the Judiciary and independent tribunals.
- (4) The sovereign power of the people is exercised at—

- (a) the national level; and
- (b) the county level.”

26. Article 4 of the Constitution establishes a republican system of governance, which is founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives.

27. Article 4 states,

- (5) “Kenya is a sovereign Republic.
- (6) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.”

28. Article 38 of the Constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution.

Article 38 provides that,

- (7) “Every citizen is free to make political choices, which includes the right—
 - (a) to form, or participate in forming, a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; or
 - (c) to campaign for a political party or cause.
- (8) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
 - (a) any elective public body or office established under this Constitution;
 - or
 - (b) any office of any political party of which the citizen is a member.
- (9) Every adult citizen has the right, without unreasonable restrictions—
 - (a) to be registered as a voter;

- (b) to vote by secret ballot in any election or referendum; and
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

29. The 2nd Respondent is an institution established under the Constitution by the Kenyan people in exercise of their sovereign will in accordance with Articles 1, 4 and 38 of the Constitution. The following are the objectives the Kenyan people set out under Article 88(4) and (5) of the Constitution for the 1st Respondent:

30. “The 2nd Respondent is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- a) the continuous registration of citizens as voters;
- b) the regular revision of the voters’ roll;
- c) the delimitation of constituencies and wards;
- d) the regulation of the process by which parties nominate candidates for elections;
- e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- f) the registration of candidates for election;
- g) voter education;
- h) the facilitation of the observation, monitoring and evaluation of elections;
- i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

- j) the development of a code of conduct for candidates and parties contesting elections; and
- k) the monitoring of compliance with the legislation required by Article 82 (1)(b) relating to nomination of candidates by parties.”

31. The sole and only purpose for which the 2nd Respondent was established by the people of Kenya was to give effect to the sovereignty and the exercise of the sovereign will of the people of Kenya. Article 88(5) of the Constitution categorically stipulates that the 2nd Respondent “shall exercise its powers and perform its functions in accordance with the Constitution and national legislation.”

32. Political parties are the bedrock of Kenyan democracy and they are bound by Article 91(1)(f)

– (h) to, inter-alia:-

f) respect and promote human rights and fundamental freedoms, and gender equality and equity;

g) promote the objects and principles of this Constitution and the rule of law; and

h) subscribe to and observe the code of conduct for political parties.

33. The Constitution delegates to the Courts the sovereign power of the people to adjudicate over all legal disputes, ensure justice is done to all and to protect and promote the purpose and principles of the Constitution.

34. Under Article 38 of the Constitution Kenyan citizens have a right to make political choices, right to free, fair and regular elections and the right to be a candidate for public office and, if elected, to hold office.

35. Under Article 88 of the Constitution 2nd Respondent is established with responsibility for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament.

36. Article 88(5) provides as follows:-

The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

37. Further to the foregoing, the 2nd Respondent is one of the independent commissions under Articles 248 of the Constitution and therefore Articles 249(1) and (2) that provides as follows apply:

249. (1) The objects of the commissions and the independent offices are to—

- (a) protect the sovereignty of the people;
- (b) secure the observance by all State organs of democratic values and principles;
- and
- (c) promote constitutionalism.

(2) The commissions and the holders of independent offices—

- (a) are subject only to this Constitution and the law; and
- (b) are independent and not subject to direction or control by any person or authority

38. Under Article 82 of the Constitution, Parliament is enjoined to enact legislation to provide, inter-alia, for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections. Significantly Article 82(2) requires such legislation to ensure that voting at every election is simple and transparent.

39. The Petitioner avers that following decision of the Supreme Court aforementioned the 1st and 2nd Respondents have proceeded with preparation of the Fresh General elections amid shocking internal strife, with the 1st Respondent and a just resigned commissioner of the 2nd Respondent publicly but separately indicating the inability of both the 1st and 2nd Respondent to guarantee and conduct, a free fair and credible fresh presidential election in compliance of the Court Order.

C. THE GROUNDS OF THE PETITION

40. Taking into account the foregoing, the Petitioners are apprehensive that there is an eminent risk that the fresh presidential election will not be held as scheduled and may actually materialize in a significant number of Constituencies and Counties thereby putting Kenya's constitutional order into jeopardy.

41. It is important for this Honourable Court to uphold the Rule of Law and prevent the spectre of a constitutional crisis in Kenya by ensuring that the fresh presidential elections are conducted in strict conformity with the Constitution and applicable laws of Kenya to conduct the fresh presidential elections.

42. The Petitioners aver that the Fresh Presidential Election being conducted pursuant to the Supreme Court Order in Petition No. 1 of 2017 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others and as contained Kenya Gazette Notice Number 8751 (Special Issue), dated 5th September 2017 as read with Kenya Gazette Notice Number 10152 (Special Issue), Dated 13th October 2017 shall not comply with the governing

principles established under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution of Kenya; the Elections Act (as specifically set out herein below) and the Regulations made there under.

43. The deliberate non-compliance with the Constitution and the Law, Political interference, lack of independence, intimidation of the 2nd Respondent and its senior staff, prevailing political partisan conduct and as will be shown and proved by the Petitioners:

- a) goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya;
- b) undermines the foundation of the Kenyan system as a sovereign republic where the people are sovereign under Article 4 of the Constitution; and severely undermines the very rubric and framework of Kenya as a nation State.

44. One of the Petitioners' fundamental grounds herein is that in the preparedness of the fresh Presidential Election the 1st and 2nd Respondents falls short of their role and duty to exercise, protect and safeguard the sovereign will of the people of Kenya.

45. Section 83 of the Elections Act contemplates that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even so, although the Petitioners aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners position is that the non-compliance with the Constitution and the written law is by itself sufficient to invalidate the Presidential Election.

C. GROUNDS AND ARGUMENTS SUPPORTING THE PETITION

a) Violation of the principles of a free and fair election and electoral process

46. The scheduled Fresh Presidential Election risks contravening the principles of a free and fair election under Article 81(e) of the Constitution as read together with Sections 39 of the Elections Act and the Regulations there under.

36.1.1. Article 81 of the Constitution stipulates that the electoral system shall comply with the following principles—

“freedom of citizens to exercise their political rights under Article 38;

(e) free and fair elections, which are—

by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

conducted by an independent body;

transparent; and

administered in an impartial, neutral, efficient, accurate and accountable manner.

(b) Impartiality, neutrality, efficiency, accuracy, accountability and Preparedness and/or lack of preparedness by the 2nd Respondent

36.2. The scheduled Fresh Presidential Election shall not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to Article 81(e)(v) as read together with sections 39, 44 and 44A of the Elections Act, the Regulations made there under, and section 25 of the IEBC Act.

Lack and failure of operational transparency, Intimidation and improper influence

36.3. The Petitioners aver that, the just resigned commissioner Roslyn Akombe (PHD) on her own admission (10) ten days to the Scheduled Fresh Presidential Election that;

- a) Her resignation has been occasioned by lack of independence amongst the commissioners.
- b) There being extreme security concerns amongst the 2nd Respondent's Commissioners and staff thereby hampering their ability to discharge their duty effectively;
- c) There being last minute instructions to the 2nd Respondent staff on changes in technology and electronic transmission of results that may adversely affect compliance with the Court order;
- d) There being ongoing intimidation upon the 2nd Respondent Commissioners by Political actors and protestors;
- e) There being Senior Secretariat staff and commissioners of the 2nd Respondents serving partisan political interests; and
- f) The 2nd Respondent receiving skewed legal advice that serves partisan political interests.

47. The Petitioners aver that by the 1st Respondent's own admission in his "*address on the status of preparedness for the election*" that;

- a) The country faces a dilemma between the status of operational preparedness and the prevailing political environment that is not conducive for a credible election;
- b) The dilemma of risking disenfranchising more than six (6) million voters of a leading candidate that has withdrawn from the race and consequential crisis;
- c) The constant frustration and opposition by commissioners in his quest to make critical changes.

- d) His inability to guarantee a free fair and credible elections;
- e) The continued interference of the “Fresh Presidential Elections Implementation Team” overseeing the management of the scheduled elections by Key secretariat staff;
- f) The Continued Political interference, intimidation, threats and pressure of the Commissioners and staff of the 2nd Respondent;
- g) A polarized and divided 2nd Respondent accepting legal opinion(s) that serve partisan interests and are not grounded in the Constitution or the law;
- h) The need for national political dialogue to restore the dignity, genuine independence and respect of the 2nd Respondent as a prerequisite of guaranteeing non-partisanship, independence and ability to deliver a free, fair and credible elections;

48. Article 86 of the Constitution stipulates that: “At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (d) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (e) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (f) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (g) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

c) Prudent Use of State Resources

49. The Petitioners aver that the continued undertaking of the scheduled fresh presidential elections in the prevailing circumstances by 2nd Respondent runs risk of contravening Article 232 1(b) as read together with Public Service (Values And Principles) Act NO. 1A OF 2015 section 6, exposing the exchequer and tax payers to a further loss of over 12 billion shillings should the same fail to meet the legal threshold.

D. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:

50. The following are the questions or issues for determination as considered by the Petitioners:

- a) Whether a withdrawal of a candidate before the election would, by operation of law – and particularly paragraph 290 of the Raila Odinga 2013 Supreme Court Presidential Election Petition Judgment - automatically trigger cancellation of election and commencement of fresh presidential election.
- b) Whether a withdrawal of a presidential candidate nominated by a political party/coalition of political parties, during the process leading to a fresh election, automatically triggers the invitation of the political party/coalition nominating such a candidate to submit a substitution of presidential candidate.
- c) Whether lack of Notification and Gazettement of a candidate in the official to an election contravenes the constitution the Election Act and enabling regulations, thereby hampering the sovereign will and fatally affecting the credibility of the elections;

- d) Whether it is prudent and legal for the 2nd Respondent to proceed to implement the conduct of a fresh presidential election at the risk of exposing a significant population of voters to disenfranchisement;
- e) Whether it is prudent and legal for the 2nd Respondent to proceed to implement the conduct of a fresh presidential election at the risk of exposing the exchequer and tax payers to a further loss of over 12 billion Kenya shillings should such elections fall short of the constitutional standard;
- f) Whether the scheduled Fresh Presidential Election shall be conducted in accordance with and in compliance with the Constitution even after public admission of inability to guarantee the same by the 1st Respondent;
- g) What are the appropriate orders to be made by the Court?

E. RELIEFS SOUGHT IN THE PETITION

- I. A Declaration, that by “operation of law” the 26th October 2017 scheduled Fresh presidential election date was vacated by the withdrawal of the candidature the ODM Party/ NASA Coalition candidate Rt. Hon Raila Odinga and his running mate Stephen Kalonzo Musyoka vide the withdrawal letter dated 10th October 2017;
- II. A Declaration, that the scheduled Fresh presidential election date as contained Kenya Gazette Notice Number 8751 (Special Issue), dated 5th September 2017 as read with Kenya Gazette Notice Number 10152 (Special Issue), Dated 13th October 2017 stands cancelled by operation of law pursuant to Article 138(8).

- III. A Declaration, which the omission by the Respondents to notify the voters in the official gazette of a participating candidate contravenes the law, hampers the exercise of the sovereign will and fatally affects the elections.
- IV. That the evidence tendered in this Petition, and especially that generated by the Respondents, establishes that that there is a real and eminent threat that the Scheduled Fresh presidential Election on the 26th October 2017 shall not comply with the Order of the Court dated 1st September 2017 and the constitution and will result into imprudent use of public resources.
- V. An Order, that the 1st and 2nd Respondents forthwith proceeds to conduct fresh nominations and issue Notice of a new election date in the official Gazzette within Ninety (90) days of the pronouncement herein ,in strict conformity with the Constitution and the Elections Act;
- VI. An Order, compelling the Respondents to ensure strict compliance to the parameters of a free, fair and credible election under the Constitution, statute law and regulations;
- VII. Costs of the Petition; and
- VIII. Any other orders that the Honourable Court may deem just and fit to grant.

DATED at **NAIROBI** this 22nd day of October 2017.

**HARUN M. NDUBI ADVOCATE
FOR THE PETITIONER**

DRAWN & FILED BY:

HARUN M. NDUBI ADVOCATE

C/O

HAKI FOCUS-SIGNAGE, KWAME & ASSOCIATES
DIAMOND PLAZA, MAIN BUILDING DOOR NO A4
MASARA ROAD, PARKLANDS

EMAIL: ndubi@gmail.com

TEL: +254717168467

NAIROBI

To:

THE SUPREME COURT OF KENYA

NAIROBI

COPIES TO BE SERVED UPON:

1. THE CHAIRPERSON,
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION
ANNIVERSARY TOWERS
6TH FLOOR, UNIVERSITY WAY
P. O. BOX 45371 – 00100

NAIROBI

2. INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION
ANNIVERSARY TOWERS
6TH FLOOR, UNIVERSITY WAY
P. O. BOX 45371 – 00100

NAIROBI

LODGED in the Registry at Nairobi on the 22nd day of October 2017.

.....
REGISTRAR

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NUMBER OF 2017

-BETWEEN-

KHELEF KHALIFA.....1ST PETITIONER

SAMWEL M. MOHOCHI.....2ND PETITIONER

**NAHASHON G.
KAMAU.....3RD PETITIONER**

-VERSUS-

**THE CHAIRPERSON OF
INDEPENDENT ELECTORAL
AND BOUNDARIES
COMMISSION.....1ST RESPONDENT**

**INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....2ND RESPONDENT**

AFFIDAVIT IN SUPPORT OF THE PETITION

I, NAHASHON GACHIHI KAMAU Care of Haron M. Ndubi Advocate C/O HAKI FOCUS-SIGNAGE, KWAME & ASSOCIATES, DIAMOND PLAZA, MAIN BUILDING DOOR NO A4 MASARA ROAD, PARKLANDS EMAIL: haron.ndubi@gmail.com, TEL: +254717168467 within the Republic of Kenya do hereby make oath and state as follows:

1. **THAT**, I am a Kenyan Citizen, voter and adult of sound mind, residing and working for gain in the Republic of Kenya and therefore well versed with the facts and circumstances relating to the Petition. I am duly authorized by all the Petitioners to swear this affidavit on their behalf verifying the facts relied on and in support of this Petition.

*Annexed hereto and marked as **Exhibit “NG-1” and “NG-2”**, is Are copies of signed consent dated 22nd October 2017 by the 1st and 2nd Petitioners respectively*

2. **THAT**, Kenya’s General Election were held on August 8, 2017. Following the election, the 1st Respondent declared that Hon. Uhuru Muigai Kenyatta had won the presidential election.
3. **THAT**, consequent to the aforesaid Declaration the Orange Democratic Movement Party (ODM)/ National Super Alliance (NASA) presidential candidate, the Right Hon. Raila Amolo Odinga and his running mate Hon. Stephen Kalonzo Musyoka successfully challenged the Election in the Supreme Court of Kenya resulting to its invalidation and nullification of the same on the 1st September 2017.
4. **THAT**, following the invalidation and nullification of the Presidential elections the Supreme Court further ordered the conducting of a Fresh presidential Elections within sixty (60) days as provided for by law.
5. **THAT**, Following the nullification of the presidential election, the Respondents, on 5th September 2017, issued a Gazette Notice Gazette Notice No. 8751 of 2017 in which they listed Uhuru Muigai Kenyatta and Raila Amolo Odinga as the only two candidates eligible to participate in a fresh presidential election notified to take place on the 17th October 2017.

*Annexed hereto and marked as **Exhibit “NG – 3”**, is a copy of the **Kenya Gazette Vol CXIX- NO.130, Gazette No. 8751 Dated 5th September 2017 (Special Issue)**.*

6. **THAT** the said Notice referred to in Paragraph 4 above inter alia provided for the official campaign period commencing on the 6th September 2017 and ending on the 15th October 2017 a cumulative official campaign period of Forty (40) days.

5. **THAT** Following the said Judgment of the Supreme Court invalidating and nullifying the presidential elections, the Orange Democratic Movement Party (ODM)/ National Super Alliance (NASA) presidential candidate, the Right Hon. Raila Amolo Odinga and his running mate Hon. Stephen Kalonzo Musyoka sought by issuing a demand letter titled NASA POSITION PAPER ON IRREDEEMABLE MINIMUM BEFORE THE FRESH ELECTIONS ARE HELD to the Respondents to secure various legal, administrative and operational reforms within the 2nd Respondent before the fresh presidential elections ordered by the Supreme Court is held.

*Annexed hereto and marked as **Exhibit “NG – 4”**, is a copy of the a public notice titled **NASA POSITION PAPER ON IRREDEEMABLE MINIMUM BEFORE THE FRESH ELECTIONS ARE HELD dated September 12, 2017**.*

6. **THAT,** the ODM candidate Rt. Hon Raila Odinga and his running mate Stephen Kalonzo Musyoka delivered a letter dated 10th October 2017 to the 2nd Respondent indicating that they had decided to withdraw from the fresh Presidential Election owing to the failure by the 2nd Respondent to implement a raft of reforms as demanded earlier.

*Annexed hereto and marked as **Exhibit “NG – 5”**, is a copy of the **withdrawal letter Dated 10th October 2017, by ODM/NASA Party**.*

7. **THAT**, the Thirdway Alliance candidate Dr. Ekuru Aukot On October 11, 2017 successfully petitioned the High Court culminating to an order the inclusion of in the fresh presidential election.

8. **THAT** Following the High Court Order the Respondents in October 13, 2017, decided to include all the presidential candidates that had participated in the August 8, 2017 presidential election by issuing an addendum modifying the Gazette Notice 8751 of 2017, Vol. CXIX-No.130 thereby including five (5) other candidates and omitting one Mr. Shakhhalaga Kwa Jirongo for being constitutionally disqualified.

*Annexed hereto and marked as **Exhibit “NG – 6”**, is a copy of the **Kenya Gazette Vol CXIX-NO.153, Gazette No. 10152 Dated 13th October 2017 (Special Issue)***

9. **THAT** I am advised in relation to the Notification referred to in paragraphs 4 and 8 above, by my advocate on record which advice I verily believe to be true that;

A. The Respondents action are arbitrary,

B. That the Respondents action is manifestly discriminatory of the candidates.

C. That the notice creates an official campaign period of Forty (40) days lapsing on the 15th of October 2017 clearly depriving most of the candidates an opportunity to campaign.

D. That the omission of one candidate from the Gazette Notice and subsequent inclusion in the ballot paper manifestly offends the law and deprives the candidate an opportunity to campaign while depriving the Kenyan voters the critical knowledge to enable them exercise their choice in relation to this candidate.

E. That the omission of one candidate from the Gazette Notice fatally compromises the fresh presidential elections.

F. That the import, spirit and letter of the legal requirement upon the Respondents to issue a notice of an election serves notice to the voters to exercise their sovereign will while ushering an official campaign period with consequential legal effects.

10. **THAT**, I am advised by my advocate on record which advice I verily believe to be true that, the withdrawal by the ODM/NASA candidate Rt. Honorable Raila Odinga and his running mate Stephen Kalonzo Musyoka on the 10th of October 2017, triggered the vacation of the Fresh Presidential Election date of 26th October 2017 by operation of law.

14. **THAT**, the ODM/NASA candidate Rt. Honorable Raila Odinga and his running mate Stephen Kalonzo Musyoka have publicly opposed the conduct of the fresh presidential election on the 26th October 2017 urging all their supporters not to participate.

15. **THAT**, the Jubilee Party and its candidate have publicly insisted that the fresh presidential election on the 26th October 2017 should proceed with or without the participation of ODM/NASA Party and its candidate.

16. **THAT**, on the 9th October 2017 vide Internal Memo **Ref: IEBC/RA/01/2017**, titled, ***Re: Planning for the Fresh Presidential Election***, by the 2nd Respondent's Commissioner Dr. Roslyn Akombe to the 1st Respondent raises critical internal constraints affecting the 2nd Respondent to conduct an election that fully satisfies the legal and constitutional threshold.

Annexed hereto and marked as Exhibit “NG – 7”, is a copy of the Internal Memo Ref: IEBC/RA/01/2017, titled, Re: Planning for the Fresh Presidential Election, by Commissioner Dr. Roslyn Akombe to the 1st Respondent dated 9th October 2017

17. **THAT**, I am advised by my advocate on record which advice I verily believe to be true, that the Memo by Commissioner Dr. Roslyn Akombe refers to above in paragraph 16 above apparently reveals;
- a) The disclosure reveals brazen contravention of Article 81(e), ii, iii, iv and v.
 - b) There exist active sabotage and frustrations of the Election TOC thereby jeopardizing the 2nd Respondent’s ability and capacity to conduct a free, fair and credible elections;
 - c) There exists within the 2nd Respondent active decision making and reversal of critical decisions in secrecy by four unnamed commissioners further hampering preparations.
 - d) That she and members of her family have received death threats with active intimidation by political actors intended to force her to resign.
 - e) That a commissioner of the 2nd Respondent physically threatened her on the 18th September 2017 plenary meeting in the boardroom.
 - f) That the 2nd Respondent appear unable to take administrative action against its errant staff members whose actions contributed to the invalidation and nullification of the presidential elections and monetary loss running into billions of Kenya shillings.
 - g) That despite approving the Audit of the ICT system used in August Elections, the same has not been undertaken;
 - h) That despite approving the conducting of the quality assurance of the ICT system to be used in 26th October 2017 Elections, the same has not been undertaken; and

- i) There exists active machinations to delay and or stall measures aimed at restoring public confidence as had happened on the 28th and 29th August 2017 following the Orders by the Supreme Court relating to opening up of the Servers;
- j) That in as much as the 2nd Respondent might technically, logistically and operationally be prepared for the Fresh Elections, the elections is more that Logistics and operations and that political environment and confidence by Kenyan is key.

18. **THAT**, on the 17th October 2017 vide a press statement the 2nd Respondent's Commissioner tendered her resignation citing various reasons.

*Annexed hereto and marked as **Exhibit "NG – 8", is a copy of the press Release by Commissioner Dr. Roslyn Akombe Dated 17th October 2017)***

19. **THAT**, I am advised by my advocate on record which advice I verily believe to be true, that the resignation of Commissioner Dr. Roslyn Akombe, was occasioned by serious issues she raised that apparently indicate the eminent risk that the scheduled fresh presidential election might not satisfy the legal and constitutional standard of conducting elections including that;

- g) Her resignation has been occasioned by lack of independence amongst the commissioners.
- h) There being extreme security concerns amongst the 2nd Respondent's Commissioners and staff thereby hampering their ability to discharge their duty effectively;
- i) There being last minute instructions to the 2nd Respondent staff on changes in technology and electronic transmission of results that may adversely affect compliance with the Court order;
- j) There being ongoing intimidation upon the 2nd Respondent Commissioners by Political actors and protestors;

- k) There being Senior Secretariat staff and commissioners of the 2nd Respondents serving partisan political interests; and
- l) The 2nd Respondent receiving skewed legal advice that serves partisan political interests.

20. **THAT**, on October 18, 2017 the 2nd Respondent's Commissioner, Prof. Abdi Guliye notified the public in an interview of the 2nd Respondent having included the name of Mr. Shakhhalaga Kwa Jirongo on the ballot papers being printed despite not having been gazzeted.

21. **THAT**, I am advised by my advocate on record which advice I verily believe to be true, that;

- a) That the omission of one candidate from the Gazette Notice and subsequent inclusion in the ballot paper manifestly offends the law and deprives the candidate an opportunity to campaign while depriving the Kenyan voters the critical knowledge to enable them exercise their choice in relation to this candidate.
- b) That the omission of one candidate from the Gazette Notice fatally compromises the fresh presidential elections.

51. **THAT**, from 1st Respondent's own admission in his "*address on the status of preparedness for the election*" 18th October 2017 that;

- a) The country faces a dilemma between the status of operational preparedness and the prevailing political environment that is not conducive for a credible election;
- b) The dilemma of risking disenfranchising more than six (6)million voters of a leading candidate that has withdrawn from the race and consequential crisis;
- c) The constant frustration and opposition by commissioners in his quest to make critical changes.

- d) His inability to guarantee a free fair and credible elections;
- e) The continued interference of the “Fresh Presidential Elections Implementation Team” overseeing the management of the scheduled elections by Key secretariat staff;
- f) The Continued Political interference, intimidation, threats and pressure of the Commissioners and staff of the 2nd Respondent;
- g) A polarized and divided 2nd Respondent accepting legal opinion(s) that serve partisan interests and are not grounded in the Constitution or the law;
- h) The need for national political dialogue to restore the dignity, genuine independence and respect of the 2nd Respondent as a prerequisite of guaranteeing non-partisanship, independence and ability to deliver a free, fair and credible elections;

Annexed hereto and marked as Exhibit “NG – 9”, is a copy of the press release dated 18th October 2017, titled “address on the status of preparedness for the election”

22. **THAT**, I am advised by my advocate on record which advice I verily believe to be true, that;

- a) Article 4 of the Constitution establishes a republican system of governance, which is founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives;
- b) The Role of political parties and their involvement in electoral contest is a constitutional predicate that should always be fostered in any democracy irrespective of actions by its individual members;
- c) Article 38 of the Constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution. Article 38 provides that,

- (a) “Every citizen is free to make political choices, which includes the right—
 - a. to form, or participate in forming, a political party;
 - b. to participate in the activities of, or recruit members for, a political party; or
 - c. to campaign for a political party or cause.
- (b) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
 - a. any elective public body or office established under this Constitution; or
 - b. any office of any political party of which the citizen is a member.
- (c) Every adult citizen has the right, without unreasonable restrictions—
 - a. to be registered as a voter;
 - b. to vote by secret ballot in any election or referendum; and
 - c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”
- d) The 2nd Respondent is an institution established under the Constitution by the Kenyan people in exercise of their sovereign will in accordance with Articles 1, 4 and 38 of the Constitution;
- e) “The 2nd Respondent is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament

- f) The sole and only purpose for which the 2nd Respondent was established by the people of Kenya was to give effect to the sovereignty and the exercise of the sovereign will of the people of Kenya;
- g) Political parties are the bedrock of Kenyan democracy and they are bound by Article 91(1)(f) – (h);
- h) The Constitution delegates to the Courts the sovereign power of the people to adjudicate over all legal disputes, ensure justice is done to all and to protect and promote the purpose and principles of the Constitution;
- i) Under Article 38 of the Constitution Kenyan citizens have a right to make political choices, right to free, fair and regular elections and the right to be a candidate for public office and, if elected, to hold office.
- j) Under Article 88 of the Constitution 2nd Respondent is established with responsibility for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament.
- k) The 2nd Respondent has not exercised its powers and perform its functions in accordance with this Constitution and national legislation.
- l) The 2nd Respondent is one of the independent commissions under Articles 248 of the Constitution and therefore Articles 249(1) and (2) that provides the objects of the commissions and the independent offices are to, protect the sovereignty of the people; secure

the observance by all State organs of democratic values and principles; and promote constitutionalism.

m) That in this instant the Respondents have offended the objects of article 248;

23. **THAT**, the 1st and 2nd Respondents have proceeded with preparation of the Fresh General elections amid shocking internal strife, with the 1st Respondent and a just resigned commissioner of the 2nd Respondent publicly but separately indicating the inability of both the 1st and 2nd Respondent to guarantee and conduct, a free fair and credible fresh presidential election in compliance of the Court Order.

24. **THAT**, there is grave and eminent risk that, should Respondents conduct the elections scheduled on the 26th October 2017 a significant number of members and supporters of the ODM/NASA stand to be disenfranchised.

25. **THAT**, there is grave and eminent risk that, should Respondents conduct the elections scheduled on the 26th October 2017, the same may be subject to judicial contest exposing the country and tax payers to monetary loss running into billions of Kenya shillings if such results fails to satisfy the minimum legal and constitutional threshold.

26. **THAT**, there is grave and eminent risk that, should Respondents conduct the elections scheduled on the 26th October 2017, the country may be plunged into a further constitutional and general security crisis.

27. **THAT**, I am advised by my advocate on record which advice I verily believe to be true that in The Matter of the Principle of Gender Representation in the **National Assembly and the Senate, Advisory Opinion No. 2 of 2012** the Supreme Court held that;

- a) A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages;. ...
- b) The Supreme Court was intended to adjudicate upon all such disputes as would arise from the Presidential election; and
- c) The Decision of the Court including obiter dicta has a binding effect.

28. **THAT**, I swear this affidavit in support of this petition and all prayers sought therein.

29. **THAT**, I further swear this affidavit in support of the averment that this is a matter of grave national importance necessitating the appropriate intervention by the Honorable Court.

30. **THAT** everything herein stated is true to the best of my knowledge, information and belief.

SWORN AT NAIROBI

By the said]

NAHASHON G. KAMAU] _____

On this **22nd** day of **October** 2017]

(Deponent)

BEFORE ME]

COMMISSIONER FOR OATHS]

DRAWN & FILED BY:

HARON M. NDUBI ADVOCATE

C/O

HAKI FOCUS-SIGNAGE, KWAME & ASSOCIATES
DIAMOND PLAZA, MAIN BUILDING DOOR NO A4
MASARA ROAD, PARKLANDS

EMAIL: haron.ndubi@gmail.com

TEL: +254717168467

NAIROBI

COPIES TO BE SERVED UPON:

1. THE CHAIRPERSON,
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION
ANNIVERSARY TOWERS
6TH FLOOR, UNIVERSITY WAY
P. O. BOX 45371 – 00100

NAIROBI

2. INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION
ANNIVERSARY TOWERS
6TH FLOOR, UNIVERSITY WAY
P. O. BOX 45371 – 00100

NAIROBI