

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PETITION NO. OF 2022.

BETWEEN

1. OKIYA OMTATAH OKOITI
2. NYAKINA WYCLIFE GISEBE
3. VICTOR OKUNA
4. JOHN MAINA Suing AS EXECUTIVE DIRECTOR FOR CENTER FOR
DIASPORA AFFAIRS PETITIONERS

VS.

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
2. WAFULA W. CHEBUKATI (CHAIRMAN)
3. JULIANA CHERERA (VICE CHAIRMAN)
4. FRANCIS WANDERI (COMMISSIONER)
5. JUSTUS NYANG'AYA (COMMISSIONER)
6. IRENE MASIT (COMMISSIONER)
7. ABDI YAKUB GULIYE (COMMISSIONER)
8. BOYA MOLU (COMMISSIONER)
9. THE HON. ATTORNEY GENERAL RESPONDENTS

AND

1. ODINGA RAILA
2. RUTO WILLIAM SAMOEI
3. WAIHIGA DAVID MWAURE
4. WAJACKOYAH GEORGE LUCHIRI INTERESTED PARTIES

PETITION

TO: THE SUPREME COURT OF KENYA

NAIROBI.

**THE HUMBLE PETITION OF OKIYA OMTATAH
OKOITI, NYAKINA WYCLIFE GISEBE, VICTOR
OKUNA & JOHN MAINA (CENTER FOR DIASPORA
AFFAIRS)
IS AS FOLLOWS:**

A. THE PETITIONERS

1. The Petitioners – **OKIYA OMTATAH OKOITI, NYAKINA WYCLIFE GISEBE & VICTOR OKUNA** – are citizens of Kenya and registered voters who voted at the presidential elections held on 9th August 2022. Their addresses of service for purposes of this petition will be:

a. **Okiya Omtatah Okoiti Room 4, Floor B1, Block A, Western Wing, NSSF Building, Bishops Road, P. O. Box 60286-00200, NAIROBI. Phone: 0722 684 777. Email: okiyaomtatah@gmail.com.**

b. **Nyakina Wyclife Gisebe, 4th Floor, Lotus House, Haile Selasie Avenue, P. O. Box 1087 – 00200, Nairobi. Phone: 0722 916397. Email: wyclife2002@yahoo.com.**

c. **Victor Okuna, C/O Prof. Tom Ojienda**

d. **John Maina (CENTER FOR DIASPORA AFFAIRS), 11 Kirichwa Road, Kilimani Naironi Kenya.**

B. THE RESPONDENTS

2. The 1st Respondent - **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** – (hereinafter the IEBC), is established under Article 88 of the Constitution of Kenya, 2010, and the Independent Electoral and Boundaries Commission Act 2011 for the registration of voters; 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; and for

conducting or supervising accurate, verifiable, secure, accountable and transparent elections and referenda in the Republic of Kenya. The IEBC's address of service for purposes of this Petition is care of **6TH FLOOR, ANNIVERSARY TOWERS, UNIVERSITY WAY, P. O. BOX 45371 – 00100, GPO, NAIROBI. Phone: (254) 020 – 2877000. Email: info@iebc.or.ke.**

3. The 2nd Respondent – **WAFULA W. CHEBUKATI (CHAIRMAN)** – is the Chairman of the IEBC. His address of service for purposes of this Petition is care of **6TH FLOOR, ANNIVERSARY TOWERS, UNIVERSITY WAY, P. O. BOX 45371 – 00100, GPO, NAIROBI. Phone: (254) 020 – 2877000. Email: info@iebc.or.ke.**
4. The 3rd to 8th Respondents - **JULIANA CHERERA (VICE CHAIRMAN), FRANCIS WANDERI (COMMISSIONER), JUSTUS NYANG'AYA (COMMISSIONER), IRENE MASIT (COMMISSIONER), ABDI YAKUB GULIYE (COMMISSIONER), & BOYA MOLU (COMMISSIONER)** – are commissioners of IEBC. Their address of service for purposes of this Petition is care of **6TH FLOOR, ANNIVERSARY TOWERS, UNIVERSITY WAY, P. O. BOX 45371 – 00100, GPO, NAIROBI. Phone: (254) 020 – 2877000. Email: info@iebc.or.ke.**
5. The 9th Respondent - **THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA** - is appointed by virtue of Article 156(4)(a) of the Constitution. He is the proper and competent defendant in any case challenging the constitutionality of any actions or omissions by the National Government. The Respondent is also authorized by Article 156(4)(b) of the Constitution to represent the national government in any legal proceedings. He is an officer of government under duty to promote, protect, and uphold the rule of law and the public interest. The Attorney General's address of service for purposes of this petition is care of **HON. ATTORNEY GENERAL'S CHAMBERS, SHERIA HOUSE, HARAMBEE AVENUE, P. O. BOX 40112, NAIROBI. EMAIL: communications@ag.go.ke**

C. THE INTERESTED PARTIES

6. The 1st to 4th Interested Parties - **ODINGA RAILA, RUTO WILLIAM SAMOEL, WAIHIGA DAVID MWAURE, & WAJACKOYAH GEORGE LUCHIRI** – were candidates at the presidential election held on 9th August 2022. They have been joined

to these proceedings as entities having a legitimate stake and identifiable interest and a duty in this petition pursuant to Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. They will be served through their official offices or advocates on record.

BACKGROUND

1. The petitioners are aggrieved and aver that the presidential election was **DELIBERATELY** not handled strictly in compliance with the Constitution of Kenya 2010, the Elections Act, 2011, and the Election (General) Regulations 2012 (as amended by The Elections (General) (Amendment) Regulations, 2017).

THE FACTS

2. The Constitution of Kenya, 2010 (the Constitution) mandates the Independent Electoral and Boundaries Commission (hereinafter, the IEBC or the Commission) to conduct or supervise referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament.
3. At every election, the IEBC has the constitutional mandate and obligation to supervise and ensure that the results from polling stations are openly and accurately collated and promptly announced by the returning officer. The Chairman of the Commission is the returning officer for the election of the President of the Republic of Kenya.
4. The Constitution also requires that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. And that the

Commission puts in place appropriate structures and mechanisms to eliminate electoral malpractice.

5. The President of Kenya is elected using a modified version of the two-round system: to win in the first round, a candidate must receive more than 50% of the vote cast nationally and at least 25% of the vote cast in at least 24 of Kenya's 47 counties. If not, a second round is held between the top two candidates, in which the candidate with the most votes wins.
6. On 9th August 2022, the IEBC held six elections, including for the election of the 5th President of the aforesaid republic.
7. On 15th August, 2022, four (majority) of the Commissioners of the 1st Respondent alleged that the Chairperson (2nd Respondent) disappeared during the final tallying stage only to appear with form 34C that he sought endorsement of the rest of the Commissioners declaration before they had had a chance to tally and verify forms 34A and 34B of the last batch of 20-30 constituents; and form 34C itself. They tried in vain to have the Chairperson allow them tally and verify those results and thus dissociated themselves from the final tally and declaration terming it Mr. Chebukati's tally and declaration;
8. The 2nd Respondent himself, responded to the foregoing allegation by issuing to the Media a letter to the effect that the constitution and election Regulations mandate him as the Chairperson to tally, verify and declare results the rest of the Commissioners being superfluous.

9. However, Article 138 (3) (c) of the Constitution clearly supports the four Commissioners contention that it is the Commission that mandated, just as it does to the Chairperson, to undertake tallying and verification of the vote/results and which Article provides as follows:

after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result

10. This honourable court, in its Ruling delivered on 17th October, 2017, at paragraphs 64 in the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another [2017]eKLR*, inter alia held that;

*[64] So where does the need to clarify such a pronouncement by this Court emanate from? We reiterate that the responsibility to verify results is not a creation of this Court but an imperative of the Constitution and Section 39(1C) (b) of the Elections Act. The verification required of the 1st (IEBC) and 2nd respondents is meant to ensure accuracy or prevent fraud and also to confirmation that the candidate to be declared president elect has met the threshold set under Article 138(4) of the Constitution..... The institution vested with the mandate to make a determination of the effect of the inaccuracies is an election Court, a matter clearly settled by both the Court of Appeal in the **Maina Kiai decision** and in this Court's Judgment.*

11. The 2nd Respondent's (Chairperson of IEBC) blatant breach of the foregoing plain and clear provision of the constitution and the holding-clarification of this honourable court

by denying his colleagues a chance to participate in the final tallying and verification of the Results was mischievous and the mischief is clearly manifested as follows;

12. The National Voters Register of Kenya, which was used at the 9th August 2022 general elections, including for the presidential election, had **22,120,458** total registered voters.

13. On 15th August, 2022, the Chairman of the IEBC announced the following results:

Candidate	Votes	%
Raila Odinga	6,942,930	48.85
William Ruto	7,176,141	50.49
David Waihiga	31,987	0.23
George Wajackoyah	61,969	0.44
TOTALS	14,213,027	100.01%

Valid Votes	14,213,027	99.21%
Invalid/Rejected votes	113,614	0.79%
Total votes cast	14,326,641	100.00%

Registered voters	22,120,458	100%
Voter turnout	14,326,641	64.77%

14. After the official closure of voting on 9th August 2022, at the Third Press Briefing of the day, the IEBC Chairperson announced that the voter turnout stood at **65.4%, based on the verification of the KIEMS kits which were functional during the process of voting.**

15. **It follows that the declared turnout of 64.77% (i.e., 14,326,641) the registered voters is untenable since it is below the 65.4% of voters who were electronically confirmed to have voted.**
16. The Chairperson further noted that the 65.4% voter turnout was minus the voter turnout from polling stations where KIEMS kits had malfunctioned and the Commission had authorised the use of the manual register for voting.
17. As the Chairman announced during the First Briefing on polling day, the Commission had authorized the use of the manual register to vote in Makueni County (Kibwezi West Constituency) for 84 polling stations, Kakamega County (Malava, Matungu, Mumias West and Mumias East constituencies) for 154 polling stations.
18. Hence, the **at least 65.4%** voter turnout from verified KIEMS kits, the minimum number of votes cast was at least **14,466,779**. **This number could only increase by the number of people who voted manually; it could not decrease by any amount.**
19. Contrary to the above, and unbelievably so, for the presidential election, the Chairman published the Form 34C which only accounted for **14,326,641** votes (being, **14,213,027** total valid votes plus **113,614** rejected ballots). Subsequently, he issued Form 34D to the purported winner of the presidential elections and, vide Gazette Notice No. 9773 dated 15th August 2022 and published in Nairobi on 16th August 2022 in a Special Issue of the Kenya Gazette Vol. CXXIV—No. 163, the Chairman made a declaration of persons elected as president-elect and deputy president-elect.

20. This means that, because the Chairman did not factor in those who voted manually, there are **at least 140,028** untallied votes (being 14,466,779 minimum cast votes minus 14,326,751 declared votes cast).

21. Untallied votes are those which were not taken into account when the returning officer for the presidential election, the IEBC Chairman, tabulated and announced the national results of the presidential election.

22. **When the figure of 113,614 spoiled ballots is added to 14,213,027 valid votes (being the correct sum of the alleged results of each of the four presidential candidates) to get a total voter turnout of 14,326,641, the untallied votes are 140,138.**

23. The petitioner posits that the total votes cast must be equal to the voter turnout thus:

$$65.4\% \text{ KIEMS kits voters} + X = \text{Total voter turnout.}$$

$$65.4\% \text{ of } 22,120,458 = 14,466,779.$$

$$X = \text{Undeclared (untallied) total manual voters.}$$

$$\text{Hence, Total voter turnout} = 14,466,779 + X.$$

$$\text{Untallied votes} = \text{Total voter turnout} - \text{Declared voter turnout.}$$

$$\text{That is: } (65.4\% \text{ voter turnout} + X) - \text{Declared votes}$$

$$= (14,466,779 - 14,326,641) + X$$

$$= 140,138 + X.$$

24. Further to that, an analysis of Form 34C versus announced voter turnout goes as follows:

From the Chairman's announcement:

$$\% \text{ voter turnout} = 65.4\%$$

$$\begin{aligned}\text{Registered voters} &= 22,120,458 \text{ votes. Hence, } 65.4\% \text{ will be} \\ &= 65.4/100 \times 22,120,458 \\ &= 14,466,799 \text{ votes.}\end{aligned}$$

From Form 34C, the tallies are:

$$\text{Raila} = 6,942,193$$

$$\text{Ruto} = 7,176,141$$

$$\text{Waihiga} = 31,987$$

$$\text{Wajackoya} = 61,969$$

$$\text{Rejected Votes} = 113,614.$$

$$\text{Total votes cast} = 14,326,641.$$

Untallied votes = voter turnout – votes cast

$$= 14,466,799 - 14,326,641$$

$$= 140,138 \text{ votes.}$$

Total valid votes = votes received by each candidate + untallied votes

$$= 14,213,027 + 140,138$$

$$= 14,353,165.$$

Percentage of each candidate

$$\text{Ruto} = (7,176,141/14,353,165) \times 100$$

$$= 49.999692402\%$$

$$\text{Raila} = (6,942,193/14,353,165) \times 100$$

$$= 48.37211862\%$$

$$\text{Waihiga} = 31,987 / 14,353,165 * 100$$

$$= 0.222856771\%$$

$$\text{Wajackoya} = 61,969 / 14,353,165 * 100$$

$$= 0.431744497\%$$

ITEM	NO. OF VOTES	PERCENTAGES
Odinga	6,942,930	48.37211862%
Ruto	7,176,141	49.99692402%
Waihiga	31,987	0.222856771%
Wajackoya	61,969	0.431744497%
Untallied Votes	140,138	0.976356086%
TOTALS	14,353,165	100.00%

25. From the workings above, it is clear that no candidate garnered 50% plus one vote as required by Article 138(4)(a) of the Constitution. Hence, there was no basis for the IEBC Chairman, as the returning officer, to declare any candidate as duly elected President of the Republic of Kenya as stated in Form 34C.

26. The 140,138 untallied votes plus the undeclared voters who voted manually, is not an insignificant figure in circumstances where the candidate who allegedly gets the 50% + 1 vote crosses constitutional threshold by 0.49% of declared valid votes, which is equivalent to 69,644 votes.

27. As demonstrated in the table above, when the **at least 140,138** untallied votes (which are more than the 93,956 total votes received by Waihiga and Wajackoya) are factored into the total valid votes, none of the four presidential candidates got more than half of all the votes cast in the election (or secured the 50%+1 constitutional threshold) required to win the presidential election.

28. When dealing with statistical figures, it is not mathematically tenable to round off numbers to two decimal places as was done by the IEBC.

If we have 2 candidates in a presidential election;

Candidate A =7, 176,140

Candidate B =7,176,141

Total Votes = 7, 176,140 +7,176,141

=14,352,281

Candidate B got 1 more vote than other candidates combined, therefore in percentage

= (7,176,141/14,352,281)*100

= 50.0000035%

Candidate A got 1 Vote less, therefore in percentage,

= (7, 176,140/14,352,281)*100

= 49.9999965%.

It is clearly shown that one extra vote translates to 0.0000035%.

29. The petitioners posit that it was a gross error for the IEBC to round off the presidential tally owing to weight of that 1 vote that surpass the 50% plus 1 as outlined in the Constitution.

This is demonstrated in the table below, for two imaginary candidates:

ITEM	NO. OF VOTES	EXACT PERCENTAGES	ROUNDED OF PERCENTAGES
Candidate A	7,176,140	49.99999652%	50.00%
Candidate B	7,176,141	50.00000348%	50.00%
TOTALS	14,352,281	100.00%	100.00%

30. Whereas from the table above, the one extra vote which Candidate B has over and above Candidate A translates to more than half the votes cast, that is lost when the figures are rounded off as both parties end up with 50.00%. Therefore, it was wrong for the Chairman to have rounded of the percentages each party to two decimal points.
31. The petitioners posit that by providing that the candidate who gets more than half (or 50%+1) of all the votes cast wins the presidential election, the Constitution leaves no room for any margin of error. The presidential election has to be accurate to the last vote.
32. By not factoring in the untallied votes, the impugned results of the presidential election are unconstitutional, null and void to the extent that the final tally used was not accurately collated contrary to Article 86(c) of the Constitution.
33. At the national tallying centre, the Commission failed to ensure that the results from the polling stations are openly and accurately collated by the returning officer. Further and in particular:
- (a) The Commission failed to ensure that the transmitted images of results Form 34As were openly and accurately verified against their respective original Form 34As.

(b) The Commission failed to ensure that the constituencies Form 34Bs were openly and accurately verified against their respective original Form 34As.

(c) The Commission failed to ensure that the confirmation of the constitutional threshold of fifty percent plus one vote (50% + 1) and of twenty-five percent (25%) of the majority counties were openly and accurately verified against the original Form 34As.

(d) The Commission failed to ensure that the correct results of the presidential election.

34. The petitioners are also aggrieved that contrary to Article 86(a) & (c) of the Constitution, the results from the polling stations were NOT openly collated in an accountable and transparent manner. Further and in particular:

(i) The returning officer for the presidential election, the Commission Chairman, did not allow the IEBC to supervise how he collated the results.

(ii) The returning officer for the presidential election, the Commission Chairman, did not collate the results from polling stations publicly, even though the Commission had set up systems for doing so as publicly stated by the Chairman in the Press Statement.

(iii) Without demonstrating that their results were insignificant and could not alter the final results as regards the victor, the returning officer for the presidential election, the Commission Chairman, did not announce results for some constituencies.

35. The petitioners are also aggrieved further that, contrary to Article 86(a) of the Constitution, the incomplete results announced by the Chairman are not verifiable. There is absolutely no way the declared results can be verified where the final total cast votes are not disclosed.
36. The total cast votes could only be derived by adding the total voter turnout in the KIEMS kits to the total number of voters who voted using the manual register. However, up to date, this number (of persons who voted using the manual register) is unknown yet the Chairman purported to have declared final results.
37. The 1st Petitioner wrote to the IBC but failed to get an official communication on the number of those who voted manually.
38. Without the absolute total of the number of cast votes (voter turnout) being known, it is impossible to determine the percentages of tallied results in accordance with Article 186(4), which decrees that a candidate is declared elected as President where the candidate receives—
- (a) more than half of all the votes cast in the election; and
 - (b) at least twenty-five per cent of the votes cast in each of more than half of the counties.
39. The petitioners are also aggrieved that even the tabulation of the impugned presidential election results announced by the Chairman vide Form 34C dated 15th August, 2022, are mathematically incorrect to the extent that the total number of alleged valid votes published is given as **14,213,137** yet the correct total is **14,213,027** (being, Odinga 6,942,930 + Ruto 7,176,141 + Waihiga 31,987 + Wajackoya 61,969).

40. The petitioners are aggrieved that, contrary to section 39(1D) of the Elections Act, 2011, the Commission did NOT verify that the results transmitted were an accurate record of the results tallied, verified and declared at the respective polling stations.
41. The petitioners are aggrieved that, contrary to section 39(1G) of the Elections Act, 2011, the Chairman relied on polling stations results uploaded on the IEBC's public portal for purposes of public information only as the basis for his declaration of the national results.
42. The petitioners posit that Regulation 87(3) of the Election (General) Regulations 2012 (as amended by The Elections (General) (Amendment) Regulations, 2017), cannot be read in isolation from Article 86 of the Constitution and section 39(1D) of the Elections Act, 2011 so as to exclude the Commission from ensuring that the results from the polling stations are openly and accurately collated by the returning officer.
43. Finally, the petitioners posit that pursuant to the powers vested in this election court by Section 80(4) of the Elections Act, 2012, the Court should by Order direct the IEBC and/or its Chairman to issue a certificate of election to the person who was duly elected as the President of the Republic of Kenya.

LEGAL BASIS

44. The Constitution of Kenya 2010 is the fountainhead from which all our laws and State actions derive their authority and force.

45. In the Preamble to the Constitution, the people of Kenya have aspirations for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.
46. Under Article 1, the People are sovereign.
47. Under Article 2, the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. The Supremacy of the Constitution basically means the supremacy of the rule of law. Article 2(4) state categorically that *“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”*
48. Under Article 3, every person has an obligation to respect, uphold and defend the Constitution, and **any attempt to establish a government, otherwise than in compliance with the Constitution is unlawful**. Further and specifically:
- (a) Kenya is a constitutional state: all state authorities are ultimately subject to judicial control vide the sovereign people’s authority vested in the Judiciary as the final arbiter of disputes, and as the institution with exclusive authority and power to make binding interpretations of the Constitution and the law.
 - (b) The primacy of the basic rights in the Bill of Rights, the definition of the principles of a democratic and open State, and the foundation of an independent Judiciary which watches over and ensure adherence to the Constitution are the basic cornerstones of Kenyan democracy.

- (c) Among other things, the basic rights guarantee the accountability of all, freedom to act within the law, equality before the law, including access to justice.
- (d) The Petitioners have a reasonable and legitimate expectation by dint of articles 2(3) and 2(4) that public officials can only act legitimately if they act in compliance with the Constitution and don't contravene it in any way.
- (e) Under Article 4(2), the Republic of Kenya is a multi-party democratic State *founded on the national values and principles of governance referred to in Article 10.*
- (f) Article 10 of the Constitution sets out national values and principles of governance that bind all state officers, state organs, and public officers. All persons are required to apply the national values and principles of governance, including *inter alia* patriotism, the rule of law, participation of the people, social justice, equity, non-discrimination, protection of the marginalised, good governance, integrity, transparency, accountability and sustainable development.
- (g) Article 10 binds the Respondent to uphold the national values and principles of governance therein.
- (h) Article 12(1) (a) declares that every citizen is entitled to the rights, privileges and benefits of citizenship, subject only to the limits provided or permitted by the Constitution.

49. Under Chapter Four of the Constitution, various fundamental rights have been declared to belong to all persons in Kenya (Article 19, 20), including *inter alia* the following:

(a) Article 19(1) makes the Bill of Rights an integral part of Kenya's democratic state and the framework for social, economic and cultural policies.

(b) Article 19(3)(a) provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.

(c) Article 20(2) provides that every individual shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(d) Article 20(4)(a) provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

(e) Article 22 vests the *locus standi* for the enforcement of the Bill of Rights in, *inter alia*, the Petitioner herein.

(f) Article 38(2) declares that 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.

(g) Article 41(1) decrees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(h) Article 48 enshrines the right to access justice.

(i) Article 50(1) decrees that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

50. **Article 86** of the Constitution declares that:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

51. **Article 88(4)** of the Constitution decrees that:

(4) The Commission 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.

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

52. **Article 138 (3) (c)** decrees that in a presidential election—*after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.*

53. **Article 138(4)** of the Constitution decrees that:

- (4) *A candidate shall be declared elected as President if the candidate receives—*
- (a) *more than half of all the votes cast in the election; and*
 - (b) *at least twenty-five per cent of the votes cast in each of more than half of the counties.*

54. **Article 249(1) & (2)** of the Constitution decrees that:

- (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.*

55. **Article 253** of the Constitution decrees that:

Each commission and each independent office—

- (a) is a body corporate with perpetual succession and a seal; and*
- (b) is capable of suing and being sued in its corporate name.*

56. **Article 258** of the Constitution decrees that:

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*
 - (a) a person acting on behalf of another person who cannot act in their own name;*
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;*
 - (c) a person acting in the public interest; or*
 - (d) an association acting in the interest of one or more of its members.*

57. **Article 259 (1) & (11)** of the Constitution decrees that:

- (1) This Constitution shall be interpreted in a manner that—*
 - (a) promotes its purposes, values and principles;*
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
 - (c) permits the development of the law; and*
 - (d) contributes to good governance.*
- (11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent*

of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.

58. The above provisions of the Constitution are supported by Section 39 of the Elections Act No. 24 of 2011, which decrees thus:

39. Determination and declaration of results

(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for—

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election, the Commission shall —

(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

(1D) The Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.

(1E) Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.

(1F) Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective

presiding and returning officers at the polling station and constituency tallying centre, respectively.

(1G) The Commission shall, to facilitate public information, establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission.

(1H) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

(2) The Chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.

(3) The Commission shall announce the final results in the order in which the tallying of the results is completed.

59. Section 80(4) of the Elections Act No. 24 of 2011 decrees thus:

(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—

(a) upon recount of the ballots cast, the winner is apparent; and

(b) that winner is found not to have committed an election offence.

60. Regulation 87 of the Election (General) Regulations 2012 (as amended by The Elections (General) (Amendment) Regulations, 2017), provides:

(3) Upon receipt of Form 34A from the constituency returning officers under sub regulation

(1), the Chairperson of the Commission shall—

(a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre;

(b) tally and complete Form 34C;

(c) announce the results for each of the presidential candidates for each County;

(d) sign and date the forms and make available a copy to any candidate or the national chief agent present;

(e) publicly declare the results of the election of the president in accordance with Articles 138(4) and 138(10) of the Constitution;

(f) issue a certificate to the person elected president in Form 34D set out in the Schedule; and

(g) deliver a written notification of the results to the Chief Justice and the incumbent President within seven days of the declaration;

Provided that the Chairperson of the Commission may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of Article 138(4)(a) and (b) of the Constitution; and

(h) in the case of the other elections, whether or not forming part of a multiple election, publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the person or persons elected.

VIOLATIONS OF THE CONSTITUTION AND STATUTE

61. Violation of Article 3.

(a) Article 3(a) of the Constitution was violated to the extent that, by announcing the impugned results, the Chairman, as the returning officer of the presidential election, failed in its obligation to respect, uphold and defend the Constitution.

(b) Article 3(b) of the Constitution was violated to the extent that, by announcing the impugned results, the Chairman, as the returning officer of the presidential election, attempted to establish a government otherwise than in compliance with this Constitution.

62. Violation of Article 86.

(c) Article 86(a) of the Constitution was violated to the extent that the presidential election was conducted through a system that was not simple, accurate, verifiable, secure, accountable and transparent.

(d) Article 86(c) of the Constitution, as read together with section 39(1D) of the Elections Act, 2011, was contravened to the extent that the Chairman, as the returning officer of the presidential election, excluded the Commission from ensuring that he openly and accurately collated and promptly announced the results from the polling stations.

(e) Article 86(c) of the Constitution was violated to the extent that the Chairman, as the returning officer of the presidential election, announced incomplete results.

63. Violation of Article 86.

(f) Article 86(a) of the Constitution was violated to the extent that the presidential election was conducted through a system that was not simple, accurate, verifiable, secure, accountable and transparent.

64. Violation of **Article 138 (3) (c)**

(a) **Article 138 (3) (c)** was violated to the extent that, after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission did not tally and verify the count and declare the result in the presidential election held on 9th August 2022.

65. The respondents also violated other Articles of the Constitution by failing to uphold the governing principles enshrined therein, including Articles 1, 2, 4, 10, 35, 38, 47(1), 249, 232(1)(e) & (f), 259(1) & (11).

CASES RELATED TO ISSUES IN THE PETITION

66. There is no case pending in any court of competent jurisdiction between the parties over the subject matter herein.

RELIEFS SOUGHT

67. Your humble petitioners humbly seek the following **DECLARATIONS & ORDERS:**

- (a) Immediately the petition is filed, and within 48 hours of doing so, the 1st to 8th Respondents do avail to the petitioners all material pertaining to the 9th August 2022 presidential election, including data on voters who used the manual register to vote; and electronic documents and devices and the data therefrom.
- (b) A declaration that the results announced by the Chairman vide Form 34C dated 15th August 2022 are not based on the absolute total of the number of votes which were cast at the presidential election (voter turnout).
- (c) A declaration that **at least 140,028** number of untallied votes were not included in the results announced by the Chairman vide Form 34C dated 15th August 2022.
- (d) A declaration that **at least 140,028** number of untallied votes substantially affects the final results to the extent that none of the four candidates meets the 50% + 1 constitutional threshold.

- (e) A declaration that without the absolute total of number of cast votes (voter turnout) being known, it is impossible to determine the percentages of tallied results in accordance with Article 186(4) (a) & (b).
- (f) A declaration that the results of the presidential election announced by the Chairman vide Form 34C dated 15th August, 2022, were not openly and accurately collated, and are not verifiable.
- (g) A declaration that the tabulation of the presidential election results announced by the Chairman vide Form 34C dated 15th August, 2022, are mathematically incorrect to the extent that the total number of alleged valid votes published is given as 14,213,137 yet the correct total is 14,213,027.
- (h) A declaration that ***after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission failed to tally and verify the count and declare the result of the presidential election held on 9th August 2022.***
- (i) A declaration that contrary to section 39(1D) of the Elections Act, 2011, the Commission did NOT verify that the results transmitted were an accurate record of the results tallied, verified and declared at the respective polling stations.
- (j) A declaration that contrary to section 39(1G) of the Elections Act, 2011, the Chairman relied on polling stations results uploaded on the IEBC's public portal for purposes of public information only as the basis for his declaration of the national results.

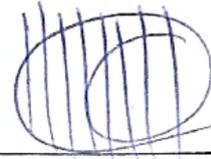
- (k) A declaration that that Regulation 87(3) of the Election (General) Regulations 2012 (as amended by The Elections (General) (Amendment) Regulations, 2017), does not exclude the Commission from ensuring that the results from the polling stations are openly and accurately collated by the returning officer of the presidential elections.
- (l) An Order quashing the results of the presidential elections announced by the Chairman vide Form 34C dated 15th August, 2022.
- (m) An Order quashing Form 34D (the election Certificate) issued to the purported President elect on 15th August, 2022.
- (n) An Order quashing the declaration of persons elected as president-elect and deputy president-elect announced by the Chairman vide Gazette Notice No. 9773 dated 15th August 2022 and published in Nairobi on 16th August 2022 in a Special Issue of the Kenya Gazette Vol. CXXIV—No. 163.
- (o) An Order permanently barring the Respondents and their agents, howsoever acting, from giving effect in any way to the results of the presidential elections announced by the Chairman vide Form 34C dated 15th August, 2022.
- (p) An Order directing the IEBC and/or its Chairman to issue a new certificate of election to the person who the Court establishes was duly elected as the President of the Republic of Kenya.
- (q) An Order compelling the Respondents to pay the petitioners' costs of this petition.

(i) Any other relief this Honourable Court may deem just to grant.

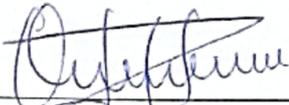
DATED at NAIROBI this 22ND day of AUGUST 2022.



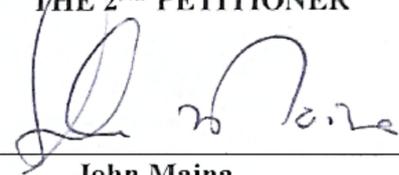
OKIYA OMTATAH OKOITI
THE 1ST PETITIONER



NYAKINA WYCLIFE GISEBE
THE 2ND PETITIONER



VICTOR OKUNA
THE 3RD PETITIONER



John Maina
(CENTER FOR DIASPORA AFFAIRS)
THE 4TH

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