

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

RAILA ODINGA1ST PETITIONER

MARTHA WANGARI KARUA2ND PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

WANYONYI WAFULA CHEBUKATI 2ND RESPONDENT

BOYA MOLU3RD RESPONDENT

PROF. ABDI YAKUB GULIYE4TH RESPONDENT

JULIANA WHONGE CHERERA5TH RESPONDENT

JUSTUS NYANGAYA6TH RESPONDENT

FRANCIS WANDERI7TH RESPONDENT

IRENE MASSIT8TH RESPONDENT

WILLIAM SAMOEI RUTO.....9TH RESPONDENT

THE PETITION

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BETWEEN

RAILA ODINGA.....1ST PETITIONER
MARTHA WANGARI KARUA.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
WAFULA WANYONYI CHEBUKATL.....2ND RESPONDENT
BOYA MOLU.....3RD RESPONDENT
PROF. ABDI YAKUB GULIYE.....4TH RESPONDENT
JULIANA WHONGE CHERERA.....5TH RESPONDENT
JUSTUS NYANGAYA.....6TH RESPONDENT
FRANCIS WANDERI.....7TH RESPONDENT
IRENE MASSIT.....8TH RESPONDENT
WILLIAM SAMOEI RUTO.....9TH RESPONDENT

PETITION

THE HUMBLE PETITION of RAILA ODINGA and MARTHA WANGARI KARUA whose address for service for purposes of this Presidential Petition shall be of c/o PAUL MWANGI & COMPANY ADVOCATES, Vision Plaza, 3rd Floor - Room 16, Mombasa Road, P. O. BOX 55903-00200, Nairobi; **Telephone:** +254 722 518 733; **Email:** pmlawchambers12@gmail.com; paulmwangi12@gmail.com; awele@awelejackson.co.ke; maumoadvocates@gmail.com; and ochiengogingaadvocates@gmail.com; IS AS FOLLOWS:

A. THE PARTIES

1. The 1st and 2nd Petitioners are adult citizens of the Republic of Kenya. The Petitioners were the Presidential candidate and Deputy Presidential candidate respectively, of the Azimio La Umoja One Kenya Coalition Party, in the General Elections held on 09th August 2022.
2. The 1st Respondent is the Independent Electoral and Boundaries Commission (IEBC). The 1st Respondent is an independent commission established under Article 88 as read together with Articles 248 and 249 of **The Constitution of Kenya** and the **Independent Electoral and Boundaries Commission Act No. 9 of 2011**.
3. The 1st Respondent is an independent commission established pursuant to Article 88 of **The Constitution of Kenya, 2010**; and 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**. Pursuant to Article 138(3) of **The Constitution**, in a presidential election, the 1st Respondent “shall tally and verify the count and declare the result”.
4. The 2nd Respondent has been gazetted as the Chairperson of the Independent Electoral and Boundaries Commission (IEBC); and as the National Returning Officer for the purposes of the presidential election held on 09th August 2022. The 2nd 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.

5. The 3rd, 4th, 5th, 6th, 7th and 8th Respondents are Commissioners of the 1st Respondent. The 6th Respondent is also the Vice Chairperson of the 1st Respondent.
6. The 9th Respondent is the Presidential candidate of the United Democratic Alliance Party. On 15th August 2022, following the General Elections held on 09th August 2022, the 1st Respondent declared the 9th Respondent elected as President.
7. The results of the presidential election declared by the 2nd Respondent on 15th August 2022, which are contested in this Petition, are as follows (hereinafter “the result” or “final outcome” or “outcome”):

a)	ODINGA RAILA	6,942,930	48.85%
b)	RUTO WILLIAM SAMOEI	7,176,141	50.49%
c)	WAIHIGA DAVID MWAURE	31,987	0.23%
d)	WAJACKOYAH GEORGE LUCHIRI	61,969	0.44%

B. SUMMARY OF FACTS AND BACKGROUND INFORMATION

**“Any attempt to establish a government otherwise than in compliance with
this Constitution is unlawful.”**

Article 3(2) of The Constitution of Kenya, 2010

8. In Presidential Election Petition No. 1 of 2017 Raila Odinga & Another v Independent Electoral and Boundaries & 2 Others [2017] eKLR, this Court refused to validate, and held that the presidential election conducted on 08th August 2017 was so badly conducted that:

“...the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.” [Emphasis supplied]

9. In 2017, this Court was shy to, and spared the 2nd Respondent herein who was also the Chairperson of the IEBC then, from direct responsibility and culpability for the bungled and impugned election. That decision, as this Petition will show emboldened a rogue public officer, who with wilful, fraudulent and criminal intent, set out to subvert the sovereign will of the people of Kenya and the constitutional order in the conduct of the 09th August 2022 presidential election.

10. The manner in which the 09th August 2022 presidential election was conducted, graduated beyond contumacious disregard for **The Constitution**, the rule of law, the national values and principles of good governance, and the lawful authority of the Court; to premeditated unlawful and criminal subversion of the integrity and constitutionality of the electoral process in order to assist and secure a fraudulent result.
11. In the conduct of the 09th August 2022 presidential election, the 2nd Respondent with wilful intent set out to subvert the sovereign will of the people of Kenya and overthrow the constitutional order.
12. Any attempt to overthrow the constitutional order and the sovereign will of the people of Kenya must be called out for what it is – treason. This is the import of Article 3(2) of **The Constitution** which states that an attempt to establish a government otherwise than in compliance with the Constitution is unlawful.
13. Martin Luther King Jr said “our lives begin to end the day we become silent about things that matter.” The life of this Country and **The Constitution of Kenya 2010**, will begin to end unless and until this Court stands firmly and decisively against any attempt to subvert the will and sovereignty of the people of Kenya.
14. The Petitioners contend that in spite of the decision of this Court in 2017, the 2nd Respondent has not only continued to act and operate outside the law; his conduct has

escalated to blatant and wilful subversion of **The Constitution** and the sovereign will of the people of Kenya, and what is simply a criminal enterprise.

15. Throughout the tenure of the 2nd Respondent at the IEBC, a clear pattern has emerged around the 2nd Respondent that shows inability to run the Commission in accordance with constitutional principles including observance of democratic values and principles; inability to operate within the collegiate framework as required under Article 138 of **The Constitution** and the **Independent Electoral and Boundaries Commission Act No. 9 of 2011**.

16. Throughout his tenure as the Chairperson of the 1st Respondent, the 2nd Respondent has had acrimonious public disagreements with critical members of the Commission including Commissioner Rosslyn Akombe who resigned in 2017 in the middle of an election; Commissioners Connie Maina, Margaret Mwachanya and Paul Kurgat who resigned from the Commission in 2018; Ezra Chiloba the CEO/Secretary; and now, the 5th, 6th, 7th and 8th Commissioners.

C. **BRIEF OVERVIEW OF THE LAW AND THE GROUNDS OF THE PETITION**

17. In **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another** (supra), the Court held:

[371] “Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.”

18. The hallowed principles referred to by the Court in the passage above are established in Article 81 of **The Constitution** as follows:

“The electoral system shall comply with the following principles—

- (a) “freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are—

ii. by secret ballot;

iii. free from violence, intimidation, improper influence or corruption;

iv. conducted by an independent body;

v. transparent; and

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

19. Article 88 goes further to elaborate:

“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.”

20. In **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another** (supra), the Court also held:

“It is in this spirit, that one must read Article 38 of the Constitution, for it provides *inter alia*, that every citizen is free to make political choices, which include the right to “free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors...”. This “mother principle” must be read and applied together with Articles 81 and 86 of the Constitution, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to

elections, is to nurture a mirage, an illusion of “free will”, hence a still-born democracy. Of such an enterprise, this Court must be wary.”

21. Article 10 of **The Constitution** sets out the national values and principles of governance that the Kenyan people have established for themselves. Article 10 provides that

(a) “The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- a. applies or interprets this Constitution;
- b. enacts, applies or interprets any law; or
- c. makes or implements public policy decisions.

(b) The national values and principles of governance include—

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- c. good governance, integrity, transparency and accountability; and
- d. sustainable development.”

22. The Petitioners contend, and shall prove at the hearing of the Petition, that the conduct of the presidential election on 09th August 2022, until the declaration of the result on 15th August 2022, materially failed to, and did not, comply with the following cardinal principles for the electoral system and process, stipulated in Article 81(c)(iii), (iv) & (v) as read together with Articles 10(1) and (2)(a) & (c) of **The Constitution of Kenya**:

- (i) conducted by an independent body;
- (ii) transparent; and
- (iii) administered in an impartial, neutral, efficient, accurate and accountable manner.

23. The material failure and non-compliance with the cardinal principles set out above, were made manifest in *inter alia*, public displays of a dysfunctional, disunited and non-

compliant Independent Electoral and Boundaries Commission (1st Respondent) at odds and loggerheads with itself and with the 2nd Respondent.

24. Article 138(3)(c) of **The Constitution** mandatorily provides:

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

25. In contravention of the mandatory provision of the aforesaid Article 138(3)(c) of **The Constitution**, the 1st Respondent did not tally and verify the count before declaring the ‘result’.

26. Immediately before the declaration of the ‘result’ of the presidential election, four (4) out of the total seven (7) Commissioners of the 1st Respondent, publicly and categorically disowned the result declared by the 2nd Respondent.

27. Articles 138(10)(a) of **The Constitution** stipulates that,

“(10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—

(a) declare the result of the election; and

(b) deliver a written notification of the result to the Chief Justice and the incumbent President.

28. Further, in complete and deliberate disregard of the separate and discrete role and functions of the 1st and 2nd Respondents; and in violation of Article 10(1) and (2)(a) and (c) of **The Constitution**; the 2nd Respondent proceeded to unilaterally declare the final result of the presidential election without the tallying and verification by the 1st Respondent of the results from twenty seven (27) constituencies; and whose outcome or count had an effect on the final result and outcome of the presidential election.
29. The 'result' declared by the 2nd Respondent in the presidential election was not arrived at in accordance with the constitutional requirements of *inter alia* Article 138(3)(c) as read together with Articles 138(10)(a), 81(e)(iii), (iv) & (v) and Article 10(1) and (2)(a) & (c) of **The Constitution**, and are therefore unconstitutional, invalid, null and void.
30. Furthermore, the Petitioners contend and shall prove that the said result declared by the 2nd Respondent is fraudulent, thus further invalid, and null and void because the 9th Respondent did not meet and/or attain the constitutional threshold of 50% plus 1 of all the votes cast in the election.
31. Most significantly, the Petitioners contend and shall prove that there was an elaborate and fraudulent premeditated scheme to interfere with and undermine and defeat the integrity,

credibility and security of the presidential election in violation and/or contravention of Article 86(a) and (e) and other provisions of **The Constitution**.

32. The Petitioners contend that there was in fact, interference with the integrity, credibility and security of the presidential election in violation and/or contravention of Article 86(a) and (e) of **The Constitution**, with the direct knowledge and participation of the 2nd Respondent.
33. The Petitioners further contend that the deliberate interference with the integrity, credibility and security of the presidential election was intended to alter and did in fact alter the outcome of the true results of the presidential election.
34. The Petitioners contend that the 2nd Respondent deliberately did not prevent or remove the setting up of, and thereby compromised the security of the electoral process and system in order to fraudulently manipulate the presidential election results; and that he did in fact fraudulently manipulate and distort the presidential election results to declare an inaccurate and invalid outcome.
35. Section 83 of the **Elections Act No 24 of 2011** 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.

The declared results and outcome of the presidential election conducted on 09th August 2022 were by extension of all the foregoing affected and thus rendered invalid. Further, at the time of arriving at the 'decision' and making the declaration, there was lack of consensus among the Commissioners of the 1st Respondent as to who won the presidential election. Whereas the Commission has seven (7) Commissioners, they were prevented by the 2nd Respondent from arriving at any collective and collegiate decisions, and did not arrive at any decision in compliance with the several applicable articles of **The Constitution**.

36. This Court in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others (2014) eKLR** held as follows in relation to Section 83 of the Elections Act:

"It is clear to us that an election should be conducted substantially in accordance with the principles of **The Constitution**, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The **Elections Act**, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was conducted substantially in accordance with the principles of **The Constitution** and the **Election Act**, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough,

by and of themselves, to vitiate an election...Where an election is conducted in such a manner as demonstrably violates the principles of **The Constitution** and the law, such an election stands to be invalidated.”

37. The Petitioners contend and will prove that the irregularities and errors in the 2022 presidential election were not minor or administrative or occasioned by human imperfection; the Petitioners will demonstrate that the presidential election was conducted from beginning to ‘end’ by a rogue chairperson, with the premeditated intent and objective of subverting and undermining the integrity of the electoral process in order to secure a fraudulent result.
38. The Petitioners aver that the 2nd Respondent was culpable of grave misconduct in his decision in 2017 which emboldened him to graduate the acts of misconduct to blatant criminality and subversion. At the conclusion of the Petition, the Petitioners pray that the Court should give appropriate orders.

D. GROUND AND SUPPORTING ARGUMENTS FOR THE PETITION

- (i) **Violation of and/or lack of an electoral system and process that is conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner**

39. The declaration of the false 'outcome' of the presidential election contravened the cardinal principles of Article 81(e)(iii), (iv) and (v) of **The Constitution** as read together with Sections 39 of the Elections Act and the Regulations there under.

(i) Article 81(e)(iii), (iv) and (v) of **The Constitution** stipulates that the electoral system shall comply with the following principles—

(e) “free and fair elections, which are—

(ii) free from ... improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

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

(ii) Section 39 of the Elections Act provides that

(a) ...

(b) Before determining and declaring the final results of an election

under subsection (1), the Commission may announce the provisional results of an election.

- (c) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

- (iii) Following the holding in **Presidential Election Petition No. 1 of 2017 Raila Odinga & Another v Independent Electoral and Boundaries & 2 Others** (supra) that elections are a process and not an event, it follows that the declaration of the false final result, exposed and confirmed a simmering Tower of Babel built on a process that had been waiting to crumble together with everything built on it.

- (iv) Moments before the declaration of the final 'result', four (4) of the seven (7) Commissioners of the 1st Respondent comprising the majority, unprecedentedly and publicly came out and disowned the final result declared by the 2nd Respondent, exposing the underlying and/or behind closed door and clandestine interference and suppression of the deliberations and conduct of the electoral process in the 1st Respondent.

- (v) The declaration of the 'outcome' of the presidential result – the public accusations and counter-accusations emanating from the Commissioners of the 1st Respondent exposed the more critical fact that the electoral process had not been transparent, impartial, neutral, efficient, accurate and accountable; and the actions of the 1st

Respondent had in reality often been only the actions of the 2nd Respondent, Chairperson alone, and were as such, wholly unconstitutional.

Usurpation of the constitutional mandate of the IEBC by the 2nd Respondent

40. The Petitioners aver that the electoral process and system, and the presidential election result was marred by the following factors:

- i) The 2nd Respondent usurped the role and functions of the 1st Respondent in contravention of Article 138(3)(c) of **The Constitution** and purported to declare a result that had not been tallied and/or verified by the 1st Respondent.
- ii) The 2nd Respondent usurped the role and functions of the 1st Respondent in contravention of Article 138(3)(c) of **The Constitution** and purported to declare a result that had not been tallied and/or verified in the following 27 constituencies:

- 1) Mvita
- 2) Matuga
- 3) Kilifi North
- 4) Bura
- 5) Fafi
- 6) Wajir North
- 7) Eldas

- 8) Mandera West
- 9) Tigania east
- 10) Mbeere north
- 11) Ndaragua
- 12) Kapenguria
- 13) Kacheliba
- 14) Narok north
- 15) Narok South
- 16) Narok West
- 17) Kajiado East
- 18) Kandunyi
- 19) Nyakach
- 20) Rangwe
- 21) Ndhiwa
- 22) Suba North
- 23) Kuria East
- 24) Bomachoge
- 25) Borabu
- 26) Kitutu Chache North
- 27) West Mugirango

- iii) Immediately before the declaration of the result of the presidential election, four (4) out of the total seven (7) Commissioners of the 1st Respondent comprising the

majority, publicly and categorically disowned the result declared by the 2nd Respondent.

- iv) The tally and count in the aforesaid 27 constituencies would have affected the outcome of the presidential election.
- v) Before declaring the final result the 2nd Respondent did not state or claim that the result was provisional in contravention of section 39 of the Elections Act, if at all the results were provisional.
- vi) At the time of declaring the final result of the presidential election, the 1st Respondent had not received, uploaded and made publicly available for scrutiny on the public IEBC portal, Forms 34A in the 27 constituencies.
- vii) The final result declared by the 1st Respondent was therefore not complete, accurate, verifiable or accountable and cannot be the basis for a valid and legitimate declaration.
- viii) The 2nd Respondent without reason or justification, wilfully refused to share and circulate the final presidential results with the presidential candidates' Chief Agents, Observers, Media or even his fellow members of the Commission before declaring the decision of the 1st Respondent (IEBC), on tallying and verification

making the final announcement and declaration of the 'result' unverifiable, unaccountable and unconstitutional.

- ix) The public declaration by the Commissioners of the 1st Respondent whose further duty was to tally and verify the result before declaration, admitted and declared that the process was opaque and they disowned the result.
- x) The final 'result' declared by the 2nd Respondent did not comply with **The Constitution** and the law and was therefore illegal, invalid, null and void ab initio.
- xi) The 2nd Respondent in isolation and by himself in contravention of Article 138(c) purported to tally and verify the results leading to the final result declared. Such tallying and verification, if any, was a nullity ab initio and did not constitute compliance with **The Constitution's** mandatory requirements.
- xii) The unilateral action by the 2nd Respondent removed all checks and balances and destroyed the "appropriate structures and mechanism to eliminate electoral malpractices" in violation of Article 86(d) as read with Articles 10(2)(a) & (c), 88(4) and (5); 138(3)(c) of **The Constitution**; together with Sections 5(1) and 8 and 2nd Schedule (Paras 5 & 7) of the **IEBC Act, 2011**.

41. The Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** while interpreting the role of the 1st Respondent in the tallying and verification of results of a presidential election held that:

“Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in Sub Article (3)(c) is not to be construed to mean the chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, is required to tally and “verify” the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in Article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President.”

Lack of transparency and accountability at the National Tallying Centre

42. The Petitioners contend that the 1st Respondent’s Commissioners’ collapsed Tower of Babel was the final outcome of the following preceding facts that further demonstrate the

lack of transparency, accountability, verifiability, and efficiency which are complained of and which preceded the impugned declaration by the 2nd Respondent:

- i) The unexplained and suspicious stoppage of the public display of running results at the National Tallying Centre at Bomas of Kenya on 13th August 2022 at or about 1500hrs.
- ii) At the said stoppage time, the following were the publicly displayed results which the Petitioner's Chief Agent was closely monitoring:

<u>Candidate</u>	<u>Counties with +25%</u>	<u>Total Votes</u>	<u>%</u>
Odinga Raila	20	2,061,909	54.30%
Ruto William Samoei	28	1,708,801	45.00
Wajackoyah George Luchiri	0	17,770	0.46%
Waihiga David Mwaure	0	8,725	0.22%

Valid Votes: - 3,797,205

Rejected Votes: - 31,978

Electronically Received Forms 34A:-46,205 of 46,229 (99.94%)

Verified Forms 34A:- 12,204 of 46,229

Registered Voters Reported:- 5,762,180

Turnout in Reported Polling Stations:-66.45%