

THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PRESIDENTIAL ELECTION PETITION NO. 008 OF 2022

BETWEEN

JULIAH NYOKABI CHEGE.....1ST PETITIONER
JOSEPH MUTUA NDONGA.....2ND PETITIONER
SIMON MWAURA NJENGA3RD PETITIONER

AND

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION1ST RESPONDENT
CHAIRPERSON, INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION2ND RESPONDENT
HON. WILLIAM SAMOEI RUTO3RD RESPONDENT
HON. RIGATHI GACHAGUA4TH RESPONDENT

3RD AND 4TH RESPONDENTS' RESPONSE TO PETITION

DATED at NAIROBI this26TH.....day of.....August.....2022


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Kithure Kindiki & Associates
ADVOCATES FOR THE 3RD AND 4TH RESPONDENTS

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INTRODUCTION

In response to the Petition, the 3rd and 4th Respondents state as follows; -20

1. The address for service for purposes of this Petition shall be care of
**KITHURE KINDIKI & ASSOCIATES, MUTHAIGA SQUARE, THIKA SUPERHIGHWAY, SUITE
8, 2ND FLOOR, P.O. Box 38077-00100 NAIROBI. E-mail
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2. Following the general elections held on 9th August 2022, the 3rd
and 4th Respondents were duly declared President elect and
Deputy President Elect respectively. -30
3. The 3rd and 4th Respondents have perused the Petition filed herein
and respond and follows.

4. In response to paragraph 3 and 4, the 3rd and 4th Respondents state that the Presidential Election was conducted in substantial compliance with the Constitution and all relevant statutes.
5. The 3rd and 4th Respondents in answer to the allegations set out in paragraph 5 state that as far as they are aware, all the voters who presented themselves in the polling station were accorded every opportunity to exercise their civic duty.
6. In response to paragraph 6, the 3rd and 4th Respondents, as candidates in the said general election, are aware that the 1st Respondent in substantial compliance with Article 86 of the Constitution, ensured that;
 - a. The voting method employed by the 1st Respondent was simple, accurate, verifiable, secure, accountable and transparent.
 - b. Indeed, the votes cast were counted, tabulated and announced by the respective Presiding Officers in each of the 46, 229 polling stations.
 - c. Their agents confirm that the results from the referenced polling stations were openly and accurately collated and promptly announced by the Presiding Officers, and NOT the returning officers as alleged.
 - d. To the satisfaction of all the Presidential Candidates, the 1st Respondent put in place appropriate structures and mechanisms to eliminate electoral fraud, including but not limited to safe keeping of the materials.

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7. In response to paragraph 7, the 3rd and 4th Respondents contend that 1st Respondent substantially complied with the Constitution and all relevant statutes.
8. In response to paragraph 8, the 3rd and 4th Respondents aver as follows;
 - a. The results of the valid votes cast, were tabulated and announced at the Polling Station.
 - b. As a matter of fact, upon the announcement of the results at the polling stations, the respective candidate's agents were entitled to append their signatures at the designated space in the Form 34A. -10
 - c. Subsequently, the said form was scanned using the KIEMS kit device and uploaded on the 1st Respondent's public portal.
 - d. Subsequently, the original form 34A was delivered to the National Tallying Centre for tallying. -20
 - e. The results at the respective polling stations were final and they were not subject to any alteration.
 - f. The results of the 46, 229 polling station were verified, tallied, announced and the winner declared in compliance with the Constitution and the relevant statute.
9. The 3rd and 4th Respondents, in reply to paragraph 9, aver that the 1st Respondent publicly uploaded all the Forms 34A's, verified the originals of the said forms at the National Tallying Centre and confirmed against the required constitutional threshold before -30

declaring the 3rd and 4th the President Elect, and Deputy President Elect, respectively.

10. The 3rd and 4th Respondents state that in response to paragraph 10, there was no special categories of voters who were denied the opportunity to vote as alleged or otherwise.
11. In response paragraph 11, the 1st and 2nd Respondents openly and transparently conducted the elections in compliance with the Constitution, the relevant statute and the regulations.

The 3rd and 4th Respondents, in answer to the allegations set out in paragraphs 12, 13 and 14 state that the averments therein are conjectures and irrational. The presumptive position is that the 3rd and 4th Respondents were declared the President Elect and Deputy President Elect.

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12. In response to paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23; the 3rd and 4th Respondents state that the 1st and 2nd Respondents;
 - a. Discharged their mandate in compliance with Article 38 of the Constitution, Section 86 of the Elections Act, Regulation 90 of the Elections (General) Regulations 2012.
 - b. The 1st Respondent ensured that the elections and declaration of the 3rd and 4th Respondents complied with the general principles of electoral system.
 - c. The 1st Respondent exercised its powers and performed its functions in accordance with the constitution and the elections act.

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- d. In conducting the elections openly and publicly, the 1st and 2nd Respondents ensured that there were appropriate structures to eliminate electoral malpractice.
13. In response to the allegations set out in paragraph 26, the 3rd and 4th Respondents state that the conduct of the elections on the 9th of August 2022 was devoid of material improprieties and complied with the law.
14. In response to paragraph 27, the results of the Presidential Election were physically transmitted in the original form 34A to the National Tallying Centre, while a scanned copy thereof was provided in the public portal by the 1st Respondent. -10
15. In response to paragraphs 28 and 29, the verification of the original forms 34A was undertaken at the National Tallying Centre for purposes of tallying and subsequent declaration.
16. In response to paragraphs 30, 31, 32, 33 and 34, the 3rd and 4th Respondents state that beginning 10th August 2022, the Commissioners together with the Candidate's agents, began the process of receiving and verifying original form 34As at the National Tallying Centre. -20
- a. The verification process continued throughout up to and including the 15th of August 2022 when the presidential results were announced by the 1st Respondent.
- b. That the results as were declared by the 2nd Respondent was a product of a rigorous process that included verification, collation and tallying of the original Form 34 A's as presented by the respective Constituency Returning -30

Officers in the presence and with the participation of the Candidate's agents.

17. In reply to paragraphs 35, 36, 37 and 38 the 3rd and 4th Respondents reiterate the contents of paragraphs 10, 11 and 12 respectively and further state as follows; -

- a. No category of eligible voters were denied to exercise their right to vote.
- b. There is demonstrated compliance with the general principles of electoral system.
- c. There was full compliance with Article 86(1) of the Constitution to the extent that the system deployed by the 1st Respondent ensured simple, accurate, verifiable, secure, accountable and transparent elections.
- d. The structures and mechanisms put in place by the 1st Respondent ensured that the electioneering process was devoid of malpractices as required by law.

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18. In response to paragraphs 39 and 40, 3rd and 4th Respondents state that the 1st Respondent performed its constitutional mandate and exercised powers in accordance and as required by the Constitution and the relevant statute.

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19. The 3rd and 4th Respondents firmly reiterate the contents of paragraph 8 above in response to paragraphs 41, 42, 43 and 44.

20. In response to paragraphs 45 and 46 the 3rd and 4th Respondents reiterate the contents of paragraph 9 above.

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21. In reply to paragraphs 47, 48 and 49 the 3rd and 4th Respondent wish to state that it is not true that their declaration and

gazettement was in contravention of Article 138(3)(c) of the Constitution.

22. In response to paragraph 50 the 3rd and 4th Respondent reiterate the contents of our paragraph 12 and 18 above.
23. The 3rd and 4th Respondent state that paragraphs 51, 52, 53, 54, 55 and 56 are re-statements of the Constitution, Legislations and International Instruments applicable to elections.
24. The 3rd and 4th Respondents the wish to state that it is untrue that the 1st and 2nd Respondents abdicated their roles or at all failed in ensuring that every eligible voter was facilitated to vote whether in the special category or otherwise as alleged paragraph 57. -10
25. The 3rd and 4th Respondents state that the averments in paragraph 58 and 59 are speculative, unverifiable and cannot sustain a cause of action.
26. In response to paragraph 60 the 3rd and 4th Respondents wish reiterate the contents of paragraph 24 above. -20
27. The 3rd and 4th Respondents state that paragraphs 61 and 62 are re-statements of the Constitution and Legislation applicable to elections.
28. As far as the 3rd and 4th respondents are aware the KEIMS kits were not used for the transmission of the results.
29. In response to paragraph 64, the 3rd and 4th Respondents state that the technology that was adopted was simple, accurate and verifiable and met the constitutional threshold set out under Article 84 of the Constitution. -30

- a. Further, that there was competent handling and operation of the KIEMS kit.
- b. The 3rd and 4th Respondents wish to state that all the Form 34 A's were uploaded and were available for examination in the 1st Respondent's public portal.

30. In response to paragraph 65, the 3rd and 4th Respondents state that it is not true and correct that the technology used by the 1st Respondent disenfranchised any of the voters.

31. The 3rd and 4th Respondents plead as follows; -

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- a. The Petition as drafted does not meet the threshold of an election petition under the Constitution and the Elections Act.
- b. The Petition comprises of general allegations of unsubstantiated improprieties by the Respondents and unnamed 3rd Parties.
- c. The prayers sought by the Petitioners are unavailable to the Petitioner as prayed.
- d. The Petitioners are undeserving of the reliefs sought.

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REASONS WHEREFORE, the 3rd and 4th Respondents pray that the Petition be dismissed with costs.

DATED at NAIROBI this26th ...day of**AUGUST**..... **2022**

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Kithure Kindiki & Associates
Advocates for the 3rd Respondent

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