

Alleged Omission of 27 Constituencies⁹

20 My agents have informed me that:

(a) the IEBC (including the disaffected Commissioners and the Secretariat) **tallied and verified** election results for **the** allegedly omitted **27 Constituencies** under the full glare of local and international press/media and **in the presence of candidates' agents**, accredited observers, foreign dignitaries and other persons lawfully present at the National Tallying Centre;

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(b) the entries in Form 34C in respect of the 27 Constituencies accurately depict the result of the election as recorded in **original Forms 34A** (from polling stations) and **original Forms 34B** (from Constituency Tallying Centres);

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(c) some of the disaffected Commissioners **announced the verified results of some of the 27 Constituencies** at the National Tallying Centre under the full glare of local and international Press/media and **in the presence of candidates' agents**, accredited observers, foreign

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⁹ See (*inter alia*) paras 16, 23, 25-28 and 40 of the Petition.

dignitaries and other persons lawfully present at the National Tallying Centre. Video clips of recordings of the disaffected commissioners in this regard, which were published and broadcast on several national and international media platforms, are annexed in the Witness Affidavit of **SAMUEL GITHAË MUMBURA** as part of my response to the Petition and the surrogate Petitions. Documents signed by the Petitioners' agents on the tallying and verification of the result of the 27 constituencies are also annexed hereto and marked "**WSR-8**;

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(d) on the floor of the National Tallying Centre, the Petitioners' agents and supporters **engaged in violent and rowdy behaviour** that disrupted the announcement of verified results of some of the **27 Constituencies** after the completion of the tallying and verification **revealed the winner** of the election. Video clips of recordings of the Petitioners' agents' violent and rowdy conduct, which were published and broadcast on several national and international media platforms, are annexed in the Witness Affidavit of **SAMUEL GITHAË**

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MUMBURA as part of my response to the Petition and the surrogate Petitions. A press statement issued by the 2nd Respondent is also annexed hereto and marked "**WSR-9.**"

(e) the disaffected Commissioners, **who were likely working in concert with or at the behest of the Petitioners, walked out** of the National Tallying Centre and proceeded to issue **a press conference** at the Serena Hotel after the tallying and verification of the results of the 27 Constituencies (which were the last to be tallied and verified) **revealed the winner** of the election;

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(f) on **17th August 2022**, the 2nd Respondent issued a press statement explaining the circumstances surrounding the disaffected Commissioners' bizarre position and conduct. Specifically, the 2nd Respondent informed the country that **the disaffected Commissioners demanded a moderation of the result of the election to force a re-run**, which would effectively have subverted the Constitution and the people's sovereign will. A copy of the press statement is annexed hereto and marked "**WSR-10**"; and

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(g) annulling the election result on account of the Petitioners' allegations in respect of the 27 Constituencies **would create a dangerous precedent** (by encouraging losing candidates and their agents and supporters to **benefit from the mischief** of violently disrupting electoral processes and later upsetting the winning candidate's victory through an election Petition). My advocates have advised me that nullifying the election result in these circumstances would offend the immutable legal principle commonly expressed as **ex turpi causa non oritur actio**, which forbids litigants from founding a cause of action on their own illegal or immoral conduct.

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Rejected Votes and the 50%+1 Constitutional Threshold¹⁰

21 My advocates have advised me that this Court finally settled the issue of inclusion of rejected votes in computing the 50%+1 constitutional threshold in 2013 and 2017 in cases filed by the 1st Petitioner.¹¹

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¹⁰ See (*inter alia*) **paras 30 and 44-48** of the Petition.

¹¹ See the Judgment of this Honourable Court in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 4 others* (Petition 5, 3 & 4

22 I earnestly believe that **perusal of the original Forms 34A, original Forms 34B and the original Form 34C** will easily and quickly confirm that **I attained the 50%+1** threshold set out in Article 138 (4) (a) of the Constitution

Deletion, Alteration and Replacement of Forms¹²

23 **I am unaware** of the alleged deletion, alteration and replacement of Forms 34A, Forms 34B and Form 34C posted on the IEBC website on **15th August 2022** and **18th August 2022**. I earnestly urge this Honourable Court to note that:

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(a) the evidence presented by the Petitioners through the Witness Affidavits of Benson Wesonga (see **page 6**) and John Mark Githongo (see **page 15**) demonstrates that **the Petitioners have falsified documents under oath**:

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(b) all the Presidential candidates should have in their possession copies of the Forms 34A that were issued to Party Agents by the Constituency Returning Officers

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of 2013 (Consolidated)) [2013] KESC 6 (KLR) at **para 285**. See also the decision of this Honourable Court in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (Petition No. 5 of 2017) at **paras 182, 189 and 192**.

¹² See (*inter alia*) **paras 45-46** of the Petition.

during the verification exercise at the National Tallying Centre; and

(c) the tallying, verification and declaration of the election result **were based on physically delivered original Forms 34A, original Forms 34B, and the original Form 34C** prepared in the presence of and signed by candidates' agents.

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24 My advocates have advised me that the tallying, verification and declaration of the election result **are based on original Forms 34A, original Forms 34B and the original Form 34C** prepared in the presence of and signed by candidates' agents.

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Staging, Alteration and Dumping of 11,000 Forms 34A¹³

25 I am unaware of the alleged "**interception,**" "**staging,**" "**alteration**"; and "**dumping**" of more than **11,000 Forms 34A** on **11th August 2022** between 1101 and 1109 Hours (notably, within 8 minutes). I urge this Honourable Court to peruse the Affidavits by **Raymond Kiprotich Bett** and **Koech Geoffrey Kipngosos** in support of my Response to the Petition on the technical merits

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¹³ See paragraphs 70-71 of the Petition.

and demerits of the Petitioners' allegations. Further, as stated in the preceding paragraphs of this Affidavit, I urge this Honorable Court to focus on the falsified evidence introduced by the Petitioners in the Affidavits of John Mark Githongo and Benson Wesonga.

26 My witnesses, **Raymond Kiprotich Bett** and **Koech Geoffrey Kipngosos**, have advised me that:

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(a) **it is humanly impossible** to stage, alter and dump "**over 11,000 Forms 34A**" within 8 minutes as alleged in the Petition or at all; and

(b) the Petitioners have produced **falsified logs** in support of their claims on the alleged external IP address `forms.iebc.co.ke/login` and the alleged hacking/infiltration of IEBC systems. The falsity of the logs is evidenced by (*inter alia*) the fact that on **page 15** of the Further Affidavit by JOHN MARK GITHONGO and **page 6** of the Further Affidavit by BENSON WESONGA (in Volume III), there appears a log dated "**8/2/2017**." Additionally, the falsified logs **resemble the logs that the 1st Petitioner submitted before this Honourable Court in the 2017 presidential election petition**. The inevitable inference

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from falsifying the logs is that **the 1st Petitioner may have misled this Honourable Court** to nullify the 2017 presidential election based on falsified evidence.

27 My advocates have advised me that the allegations relating to "**interception,**" "**staging,**" "**alteration**", and "**dumping**" of more than **11,000 Forms 34A** are **frivolous, scandalous and vexatious** to the extent that the Petitioners have not provided particulars of the relevant polling stations. I urge this Honourable Court to peruse the Affidavits by **Raymond Kiprotich Bett** and **Koech Geoffrey Kipngosos** on the technical merits and demerits of the Petitioners' allegations.

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Failure of KIEMS Kits¹⁴

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28 I earnestly believe that **the failure of technology, without more,** would not vitiate the result of the election declared by the 2nd Respondent.¹⁵

29 My advocates have advised me that:

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¹⁴ See (*inter alia*) paragraphs 107 to 112 of the Petition.

¹⁵ See *inter alia* the decision of this Honourable Court in the Judgment of this Honourable Court in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 4 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) at **para 233**.

(a) the IEBC had established **complementary mechanisms** to facilitate the identification of voters upon the failure of some KIEMS Kits (as guided by the Court of Appeal in Civil Application No. E288 of 2022: United Democratic Alliance Party v Kenya Human Rights Commission & 12 Others);

(b) the Petitioners' attribution of the low voter turnout in Kakamega and Makueni Counties to the failure of some KIEMS Kits is **self-serving, speculative and hypothetical** to the extent that—

(c) counties near or contiguous to Mombasa and Makueni (such as Kilifi and Vihiga), in which there was no failure of KIEMS kits, had comparable voter turnouts. An analysis of the voter turnout in the relevant counties is annexed hereto and marked "**WSR-11**"; and

(d) as is evident from the mentioned annexure, most (if not all) Counties had a much lower voter turnout in this election than in the 2017 general election.

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Infiltration of IEBC Systems and Manipulation of Results¹⁶

30 **I am unaware** of the alleged hacking/infiltration of the IEBC systems and manipulation of the election result.

31 My advocates have advised me that:

(a) he is also **unaware** of the existence of an "**external address not belonging to the IEBC**" allegedly used to intercept and manipulate Forms 34A.

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(b) the purported "**onsite forensic image**" from the Director of Criminal Investigations concerning the black Lenovo laptop belonging to KOECH GEOFFREY KIPNGOSOS constitutes **fabricated, inadmissible and unreliable illegally obtained evidence by a politically biased civil servant** who has made no effort to conceal his—

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(i) favouritism towards the Petitioners' campaign;

(ii) bias against my candidature and the candidatures of Kenya Kwanza candidates in general; and

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¹⁶ See (*inter alia*) paragraphs 34, 47, 50-52, 62-69 and 81-92 of the Petition.

(c) the affidavit by John Mark Githongo is **inadmissible** to the extent that **it comprises entirely of hearsay and calumny**, contrary to law on affidavit evidence.¹⁷

Reduction of Petitioners' Votes and Variance in Forms 34A¹⁸

32 I earnestly believe, given the acclaim and commendation that the IEBC has received from numerous independent actors, that **there is no variance or discrepancies** between the Forms 34A issued to candidates' agents and those electronically transmitted by KIEMS Kits and published on the IEBC's public portal. Specifically, there **is no variance or discrepancies** between Forms 34A issued to my agents and those posted on IEBC's public portal.

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33 I earnestly believe, given the acclaim and commendation that the IEBC has received from various independent actors and given the Petitioners' reliance on falsified logs, that **the authenticity of the Forms 34A alluded to in paragraph 84 of the Petition** is questionable.

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¹⁷ See (*inter alia*) Order 19 Rule 3 (2) of the Civil Procedure Rules, 2010.

¹⁸ See (*inter alia*) paragraphs 83-91 of the Petition.

34 **I am unaware** of the alleged reduction of the 1st Petitioner's votes and the other irregularities alleged in paragraphs 84 to 92 of the Petition.

Postponement of Gubernatorial Elections in some Counties¹⁹

35 My advocates have advised me that **this Honourable Court has no original jurisdiction** (within the ambit of Article 140 of the Constitution) to entertain grievances relating to postponement or any other aspect of gubernatorial elections. —10

36 **I did not collude or connive** with the 2nd Respondent to arbitrarily postpone or stagger the gubernatorial elections for Kakamega and Mombasa Counties. —20

37 My advocates have advised me that:

(a) the presidential election was conducted in all the Polling Stations across all the 47 Counties, including Kakamega and Mombasa Counties;

(b) given the matter raised in subparagraph (a) above, the allegation that the postponement of the gubernatorial elections in Kakamega and Mombasa Counties —30

¹⁹ See (*inter alia*) paragraphs 103-106 of the Petition.

disadvantaged the Petitioners has **no factual, legal or logical foundation** (as any voter who desired to vote for the Petitioners had the opportunity to do so);

(c) in any event, if it were to be taken that the two counties were the 1st Petitioner's strongholds as he alleges, it would then follow that his voters would have turned out to vote for him in large numbers, notwithstanding the postponement of the gubernatorial elections in those counties;

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(d) the allegation that the 1st Petitioner has "a strong base and support of the voters..." is **self-serving** and unsupported by evidence; and

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(e) the allegation that the postponement of the gubernatorial elections in Kakamega and Mombasa Counties was a "**strategic ploy**" to substantially affect the voter turnout is **hypothetical** and unsupported by evidence.

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Election Offences Attributable to the Petitioners

38 I earnestly believe that the Petitioners have not moved this Honourable Court with **clean hands** to the extent that their agents and supporters engaged in violence, intimidation, undue influence and other election offences throughout the campaign period and during the tallying and verification of the result of the election at the National Tallying Centre. I urge the Honourable Court to peruse the Affidavits of HON. MOSES KURIA and VERONICA WAHETI NDUATI on this matter.²⁰

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39 In summary, the election offences alluded to in the preceding paragraph of this Affidavit include:

(a) use of state resources in the Petitioners' campaign, the further and better particulars of which are elaborated in the 9th Respondent's Witness Affidavits;

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(b) involvement of civil servants and public officers in the Petitioners' campaign, the further and better particulars of which are elaborated in the 9th Respondent's Witness Affidavits; and

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²⁰ See **Rahman v Erlam and Others** [2015] EWHC 1215 (Comm) on attribution of election offences committed by a candidate's agents and supporters to the candidate.

(c) engagement in acts of violence and hooliganism at the National Tallying Centre, the further and better particulars of which are elaborated in the 9th Respondent's Witness Affidavits. Copies of complaints by Kenya Kwanza on these issues are annexed hereto and marked "**WSR-12.**"

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40 My advocates have advised me that under section 80 (4) of the Elections Act, the Petitioners' engagement in election offences (through their agents and supporters) would have automatically disqualified them from being declared winners had they managed to meet the Constitutional threshold for a win in the election.

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The legality of the Reliefs Sought by the Petitioners

41 My advocates have advised me that most of the reliefs that the Petitioners seek are **ultra vires Article 140 (3)** of the Constitution as read with Rule 22 of the Supreme Court (Presidential Election Petition) Rules, 2017....

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42 My advocates have advised that this Honourable Court has **no jurisdiction** to grant the relief sought in **prayer (9)** of the Petition. My advocates have advised me that:

(a) the relief sought in **prayer (9)** of the Petition is *ultra vires* Article 140 (3) of the Constitution and Rule 22 of the Supreme Court (Presidential Election Petition) Rules, 2017;

(b) it is disingenuous for the Petitioners to pursue the relief sought in **prayer (9)** of the Petition while at the same time claiming that the election was not conducted following the principles set out in the Constitution and relevant election laws;

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(c) it is disingenuous for the Petitioners to pursue the relief sought in **prayer (9)** of the Petition while at the same time claiming that none of the candidates met the 50%+1 threshold; and

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(d) in any event, section 80 (4) of the Elections Act precludes this Honourable Court from granting prayer (9) of the Petition to the extent that the Petitioners committed election offences.

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43 My advocates have advised me that the grant of the reliefs sought in prayers (10), (20) and (21) of the Petition would plunge the country into **a constitutional crisis**. My advocates have advised me that:

(a) the 1st Petitioner has **a long history** of agitating for the reconstitution of the IEBC whenever he loses an election;

(b) given the matters set out in subparagraph (a) above, the reliefs sought in prayers (10), (20) and (21) of the Petition should be seen from the prism of **a sore loser** who always seeks a change of referee at the end of every match; and

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(c) the reliefs sought in prayers (10), (20) and (21) of the Petition cannot be granted before the exhaustion of constitutionally mandated procedures for the removal of members of the IEBC.

44 My advocates have advised me that:

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(a) this Honourable Court cannot give the relief sought in **prayer (3)** of the Petition without infringing on the functional and institutional integrity of the IEBC; and

(b) the grant of **prayer (3)** of the Petition **would reward the complicity of the current Director of Criminal Investigations** (and other State actors) in various election offences committed by or attributable to the Petitioners' campaign.

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45 My advocates have advised me that the reliefs sought in **prayers (6), (7) and (8)** of the Petition are inconsistent with the prevailing case law of this Honourable Court, which confines scrutiny and recount to **specific polling stations** as opposed to whole constituencies, counties or the entire Republic.

46 My advocates have advised me that **prayer (18)** of the Petition is *ultra vires* the provisions of **Article 138 (10)** of the Constitution. My advocates have specifically advised me that the grant of **prayer (18)** of the Petition would establish **a dangerous precedent** that would create **constitutional crises** by encouraging members of the IEBC to disown election results whenever their preferred candidates lose an election.

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47 My advocates have advised me that **prayer (19)** of the Petition is *ultra vires* the provisions of **section 87** of the Elections Act.

CONCLUSION

48 Given the matters deposed in the preceding paragraphs of this Affidavit, I earnestly urge this Honourable Court to:

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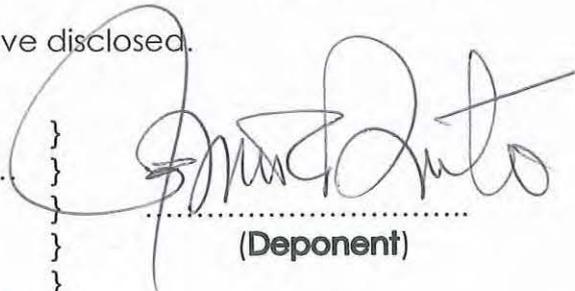
- (a) dismiss the Petition and the surrogate Petitions;
- (b) Award me the costs of and incidental to the Petition and the surrogate Petitions;
- (c) to find and hold that—

(i) the election was valid, and

(ii) I am the duly elected President of the Republic of Kenya.

49 The depositions in this Affidavit are accurate to the best of my knowledge and belief, save where I have relied on advice or information whose sources I have disclosed.

SWORN at **Nairobi** by the said
William Samoei Ruto on the...26th...
day of.....**August**.....2022


.....
(Deponent)

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Before Me:

A. M. MACHARIA
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