

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

**JOHN NJOROGI KAMAU..... PETITIONER**

**BETWEEN**

**WAFULA CHEBUKATI..... 1<sup>ST</sup> RESPONDENT**

**WILLIAM SAMOEI RUTO.....2<sup>ND</sup> RESPONDENT**

**RIGATHI GACHAGUA.....3<sup>RD</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION .....4<sup>TH</sup> RESPONDENT      - 10**

**AND**

**RAILA AMOLO ODINGA.....1<sup>ST</sup> INTERESTED PARTY**

**MARTHA WANGARI KARUA.....2<sup>ND</sup> INTERESTED PARTY**

**JULIANA CHERERA.....3<sup>RD</sup> INTERESTED PARTY**

**IRENE MASIT.....4<sup>TH</sup> INTERESTED PARTY**

**JUSTUS NYANGAYA.....5<sup>TH</sup> INTERESTED PARTY**

**FRANCIS WANDERL.....6<sup>TH</sup> INTERESTED PARTY**

**PROFESSOR ABDI YAKUB GULIYE.....7<sup>TH</sup> INTERESTED PARTY**

**BOYA MOLU .....8<sup>TH</sup> INTERESTED PARTY**

**AFFIDAVIT IN SUPPORT OF PETITION**

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I, **JOHN NJOROGI KAMAU** a resident of Nairobi and of Post Office Box 60063 – 00200 City Square, Nairobi do hereby make oath and state as follows:

1. **THAT** I am a citizen of Kenya and holder of National Identity Card No. 10905275 and the Petitioner in this Presidential Petition. I am also a registered voter and a public-spirited individual, committed to the promotion of good governance and democracy in Kenya, including through free, fair and credible elections. Annexed hereto and marked "JNK1" is a copy of my National Identity Card.
2. **THAT** I swear this affidavit in support of and verification of the grounds and facts set out in the Presidential Petition herein.

## A. BACKGROUND

3. THAT on Tuesday, 9<sup>th</sup> August, 2022, Kenya held its third general election under the Constitution of 2010 (hereinafter, the Constitution). The general election was meant to give Kenyan voters the opportunity to elect Members of the County Assembly, Members of National Assembly, Members of Senate, County Governors and the President of the Republic of Kenya.
4. THAT the general election was to be conducted under a legal framework comprising, the Constitution, the Elections Act, No. 24 of 2011, The Election Offences Act, No. 37 of 2016, the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 ("the IEBC Act"), amongst other applicable laws.
5. THAT it is a well-known fact that the current legal framework on elections has been developed over the years in a bid to correct the weaknesses that resulted in the 2007/2008 post-election violence. The Independent Review Commission (the Kriegler Commission) hereinafter referred to as IREC, provides a historical account of the weaknesses that had characterised Kenya's electoral system by that time in the following words:

"Concerns about the counting, tallying, transmission and announcement of results are not new in Kenya. In 1992, on the occasion of the first multiparty elections, an International Republican Institute (IRI) pre-election report noted that: *"... the electoral law does not stipulate the mechanism for transmittal of constituency results to the ECK in Nairobi [and] urges that this information be transmitted in ... a timely way"*.

The Report of the Commonwealth Observer Group was more drastic in its evaluation: *"given ... the poor communication between the ECK and the returning officers and between returning officers and presiding officers, the lack of coordination and inconsistencies in dealing with clear-cut problems, we can only conclude that neither the polling day arrangements nor... the counting processes were adequately designed or carried out to meet the specific situations and needs which the Kenyan electoral environment required"*. The situation had not much improved by the 1997 general elections.

A joint report of the Institute for Education in Democracy (IED), Catholic Justice and Peace Commission and the National Council of Churches in Kenya recommended that: *"... it is vital to have a speedy counting exercise, with results*

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*verified by all parties and announced immediately after the count is completed. This is the only way in which public confidence in the result can be ensured. Unfortunately, this was not the case in 1997".*

6. **THAT** regarding the 2007 general election that led to the post-election violence, IREC observed as follows:

*"IREC's analysis of nineteen sample constituencies - which we have no hesitation in using for drawing conclusions about the entire operation - has led it to the irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level. IREC has only sporadically concerned itself with the civic elections, but we believe that the situation is not much different at that level. If one – be it a voter, a candidate, a media representative, a party leader, an election observer – cannot trust the accuracy of the election results published by an EMB (Election Management Body), then nothing is left and the political system loses credibility as well as legitimacy."* [Emphasis supplied] — 10

7. **THAT** in order to avert the violence and chaos that had characterised Kenya's elections, especially in 2007, and to assure the conduct of free, fair and credible elections, IREC made the following pertinent recommendations:

- *IREC recommends that the ECK integrate the various descriptions of the entire counting and tallying procedure into one document - and one document only - which will then be the principal description and must be adhered to. The need for such descriptive regulations does not depend on possible changes in the counting and tallying system.* — 20
- *IREC recommends that without delay ECK start having developed an integrated and secure tallying and data transmission system, which will allow computerised data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election results announcement system.* — 30

- *IREC recommends that the media must have full access to this new system, which will not be a problem if it is properly constructed. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the ECK in the driver's seat in relation to providing the media with fast and reliable data.*
- *IREC recommends that ample time be allowed for verifying provisional results so that they are declared final/official only once there is no risk that errors may still be found or non-frivolous objections raised. Most countries allow one or two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been — 10 considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinised and checked.*

8. **THAT** the foregoing recommendations were largely implemented through the enactment of the Constitution and supporting legislation, including the Elections Act, 2011 amongst other Acts. However, allegations of illegalities, irregularities and malpractices have still characterised general elections in Kenya.

9. **THAT** indeed, in 2017, the Supreme Court, in the case of **Raila Amolo Odinga & another — 20 v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, declared, *inter alia*, that the presidential election held on 8<sup>th</sup> August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void, and that the irregularities and illegalities in the said election were substantial and significant that they affected the integrity of the election, the results notwithstanding.

10. **THAT** the Supreme Court then proceeded to set down the unequivocal legal position as to how a general election should be conducted in accordance with the principles outlined in the Constitution and in the law.

11. **THAT** the 2022 presidential election was not conducted in accordance with the Constitution, the applicable law and established jurisprudence, thereby rendering the declared result invalid, null and void.

#### **B. THE FACTS**

12. **THAT** following the general election held on 9<sup>th</sup> August, 2022, the 1<sup>st</sup> Respondent made a public announcement on 15<sup>th</sup> August, 2022, and declared the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the President-elect and Deputy President-elect, having garnered 7,176,141 votes (50.49%) of the total votes cast.
13. **THAT** the final results declared by the 1<sup>st</sup> Respondent were as follows:

	CANDIDATE	VOTES CAST	PERCENTAGE
1.	Odinga Raila	6,942,930	48.85%
2.	Ruto William Samoei	7,176,141	50.49%
3.	Waihiga David Mwaure	31,987	0.23%
4.	Wajackoyah George Luchiri	61,969	0.44%

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Annexed hereto and marked “JNK2” is a copy of the declaration of results.

14. **THAT** by a Gazette Notice No. 9773 dated 15<sup>th</sup> August 2022, and published as a special issue namely, Volume CXXIV No. 163 on 16<sup>th</sup> August, 2022, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were declared by the 1<sup>st</sup> Respondent as having been elected as President and Deputy President.

*A copy of Gazette Notice No. 9773 published on 16<sup>th</sup> August 2022 is annexed herewith marked “JNK3”*

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15. **THAT** on the said 15<sup>th</sup> August, 2022, prior to the declaration of the Presidential election results by the 1<sup>st</sup> Respondent, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties made a public announcement disowning the presidential election result, on the basis that the process leading to the said results had been opaque.

16. **THAT** on the 16<sup>th</sup> August, 2022, the said Interested Parties issued a press statement providing reasons for disowning the election result as had been declared by the 1<sup>st</sup> Respondent. In part, the subject Interested Parties stated as follows:

*"The Commission chairperson has conducted the election as though he is the National Returning Officer, a non-existent role, and his role in declaring results that were not approved at plenary by all 7 commissioners renders the results unconstitutional to the extent that these are Chebukati's results as opposed to those of the IEBC. In keeping with Article 138(2) of the Constitution, there is no national presidential election in Kenya but rather the presidential election is held in each constituency."* [Emphasis supplied]

17. **THAT** by a press release issued on 17<sup>th</sup> August, 2022 and signed by the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent stated, in part, as follows:

*"There have been public discussions on the role of the Chairperson and Commissioners in verification, tallying and declaration of Presidential results. For avoidance of doubt, the law provides that the Chairperson of the Commission is the Returning Officer of Presidential Election...*

*...*

*This constitutional mandate falls squarely on the Chairman of the Commission, who is the National Returning Officer as gazetted in Notice No. 4956 of 28<sup>th</sup> April 2022. The role of National Returning Officer for Presidential Election is not a shared responsibility and not subject to Plenary decisions of the Commission."*

*A copy of the 1<sup>st</sup> Respondent's Press Statement is annexed herewith marked "JNK4"*

18. **THAT** on 19<sup>th</sup> August 2022, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties issued a further press statement in response to the 1<sup>st</sup> Respondent's Press Release of 17<sup>th</sup> August 2022. A copy of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties' Press Statement is annexed herewith marked "JNK5"

19. **THAT** in view of the contradictory Press Statements by the 1<sup>st</sup> Respondent on the one hand, and the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties, on the other hand, it is evident that the process leading to the declaration of the result of the presidential elections held on 9<sup>th</sup> August, 2022,

was not in accordance with clear constitutional and statutory provisions which require the 4<sup>th</sup> Respondent, and not the chairperson, to tally and verify the result before the declaration is made by the 1<sup>st</sup> Respondent. This position has been affirmed in a number of decisions.

20. **THAT** from the foregoing, it becomes apparent that the presidential election held on 9<sup>th</sup> August, 2022 was not conducted in accordance with the Constitution, the law and binding determinations of the Supreme Court and the Court of Appeal.

21. **THAT** this is compounded by other irregularities and illegalities by the 1<sup>st</sup> Respondent in the period preceding the election of 9<sup>th</sup> August, 2022. The 1<sup>st</sup> Respondent, on 8<sup>th</sup> August, 2022, abruptly announced that certain gubernatorial, parliamentary and Member of County Assembly elections had been postponed, ostensibly on account of a mix-up in the printing of ballot papers despite the fact that the 1<sup>st</sup> Respondent was aware of the names of the candidates for all positions at the end of the nomination period. The postponement was extended indefinitely by the 1<sup>st</sup> Respondent in his press release of 17<sup>th</sup> August, 2022 as shown in annexure JNK4 hereinabove in the regions indicated below: — 10

Position	Name of Constituency/County
Gubernatorial positions	Mombasa County, Kakamega County
Member of National Assembly	Kacheliba Constituency (West Pokot County), Pokot South Constituency (West Pokot County), Rongai Constituency (Nakuru County) and Kitui Rural Constituency (Kitui County)

22. **THAT** Article 101 of the Constitution provides that a general election of members of Parliament shall be held on the second Tuesday in August in every fifth year. Article 136(2)(a), Article 177(1)(a) and Article 180(1) of the Constitution are clear that the date for the conduct of elections for President, County Governor and Member of County Assembly shall be as set out in Article 101 of the Constitution. Article 138 of the Constitution entitles registered voters to vote, by secret ballot, on the constitutionally specified day. — 20

23. **THAT** the postponement of the elections in the said areas was, therefore, done without jurisdiction on the part of the 1<sup>st</sup> Respondent and/or the 4<sup>th</sup> Respondent. The said postponement contravenes the clear stipulation of the Constitution as to the date of a general election. With specific reference to the presidential election, the sudden and abrupt postponement of the aforementioned election undermined the conduct of free, fair and credible elections as it had the obvious effect of depriving voters the opportunity to vote for all the candidates on the **date stipulated by the Constitution** and suppressing turnout in the affected areas, to the extent that campaign mobilizations and voting were predicated on uniformity in voting for party/coalition candidates across the board.

24. **THAT** the 1<sup>st</sup> Respondent further proceeded to order the printing of the ballot papers before gazettement of the candidates as required by the law. Annexed hereto and marked "JNK6" is a copy of the 1<sup>st</sup> Respondent's press release dated 7<sup>th</sup> July 2022. — 10

25. **THAT** indeed, the ballot papers were printed and delivered into the country in controversial circumstances. In particular, it was apparent that the Commissioners of the 4<sup>th</sup> Respondent were not aware of either the finalization of the printing of ballot papers or the scheduled delivery thereof, further underscoring the opaque nature in which the 1<sup>st</sup> Respondent had sought to single handedly conduct the general elections, including the presidential election. Annexed hereto and marked "JNK7A & B" is a copy of the Press Articles.

26. **THAT** I am aware that Article 138(3) of the Constitution provides that *after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.* Paragraph 7 of the Second Schedule to the IEBC Act provides that *"unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting."* — 20

27. **THAT** the public announcement of 15<sup>th</sup> August 2022 of **untallied and unverified presidential 'results'** and Gazette Notice No. 9773 dated 16<sup>th</sup> August, 2022, declaring the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as having been elected as President and Deputy President are both a product of the 1<sup>st</sup> Respondent's unconstitutional acts and are not constitutionally valid.



28. **THAT** only results tallied and verified as required by law can lead to the declaration of a candidate as a President Elect and Deputy President Elect.

29. **THAT** what is not in doubt from the foregoing is that the presidential election held on 9<sup>th</sup> August, 2022 was not credible, verifiable, and the impugned actions of the 1<sup>st</sup> Respondent relating to the results announced on 15<sup>th</sup> August 2022 were a continuation of his disregard for the Constitution and the law governing the conduct of elections.

30. **THAT** indeed, the conduct of the 1<sup>st</sup> Respondent falls short of the requirements of the Constitution and the law governing elections in Kenya and in particular, resulted in a serious violation of the Constitution, applicable laws and binding judicial pronouncements, namely:

- a. Postponing the general elections as set out in paragraph 21 hereinabove contrary to Article 136(2)(a), 177(1), 180(1) as read together with Article 101 of the Constitution;
- b. Failing to ensure that the results of the Presidential elections were tallied and verified by the 4<sup>th</sup> Respondent pursuant to section 39(1D) and 39(1E) of the Elections Act;
- c. Usurping the mandate of the 4<sup>th</sup> Respondent by unilaterally declaring the Presidential election results without the 4<sup>th</sup> Respondent tallying and verification of the same;
- d. Disregarding the binding judicial authorities in the conduct of the Presidential election;
- e. Subverting the purposes and objects of the Constitution in regard to the conduct of the Presidential election;
- f. Bringing dishonor and indignity to the nation and public office he holds;
- g. Failing to provide public confidence in the integrity of the electoral process;
- h. Violating his oath of office.

31. **THAT** the conduct of the 1<sup>st</sup> Respondent amounts to an election offence pursuant to section 6 of the Election Offences Act and therefore is liable to be sanctioned by this Honourable Court.

### C. RELIEFS SOUGHT

32. THAT I invite the Supreme Court to make a determination on the following questions:

- (a) Whether the elections for President held on 9th August, 2022 was conducted in accordance with the requirements of the Constitution and the law?
- (b) Whether the 1st Respondent can, alone and to the exclusion of the other Commissioners of the 4th Respondent, tally and verify the results of a presidential election?
- (c) Whether the result of the presidential election held on 9th August, 2022 as declared by the 1st Respondent is valid?
- (d) Whether the 1st Respondent and/or the 4th Respondent can, on its own motion, — 10  
postpone the constitutionally set date of the general election in any part of Kenya?
- (e) Whether the purported postponement of the date of the general election in Mombasa County, Kakamega County, Kacheliba Constituency (West Pokot County), Pokot South Constituency (West Pokot County), Rongai Constituency (Nakuru County) and Kitui Rural Constituency (Kitui County) by the 1st Respondent and/or the 4th Respondent was valid?

33. THAT after determination of the foregoing question, the Supreme Court is respectively requested to grant the following reliefs:

- (a) A declaration that the constitutional mandate for tallying and verifying election — 20  
results as received from the polling stations by the National Tallying Centre has to be undertaken by all the Commissioners of the 4<sup>th</sup> Respondent and not the 1<sup>st</sup> Respondent unilaterally;
- (b) A declaration that the presidential election held on 9<sup>th</sup> August, 2022 was not conducted in accordance with the Constitution and the applicable law, rendering the declared result invalid, null and void;
- (c) A declaration that the 1<sup>st</sup> Respondent and/or the 4<sup>th</sup> Respondent does not have the power to postpone the date of the general election;
- (d) A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not validly declared as the President and Deputy President, respectively; — 30
- (e) A declaration that the Gazette Notice No. 9773 is invalid and is hereby quashed;
- (f) An order directing the 4<sup>th</sup> Respondent to organize and conduct a fresh presidential election in strict conformity with the Constitution and the Elections Act;

- (g) A declaration that the 1<sup>st</sup> Respondent has violated Article 10 and 73 of the Constitution;
- (h) A declaration that the 1<sup>st</sup> Respondent committed election irregularities and illegalities and should therefore be investigated for possible criminal culpability;
- (i) The 1<sup>st</sup> Respondent be and is hereby prohibited from acting as a returning officer of any subsequent Presidential election and be barred from holding any public office;
- (m) Costs of the petition; and
- (n) Any other Orders that the Honourable Court may deem just and fit to grant.

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34. **THAT** what I have stated hereinabove is true to the best of my personal knowledge, save as to matters deposed to on information and belief the sources and grounds whereof I have respectively set out and stated.

SWORN at NAIROBI by the said )

JOHN NJOROGI KAMAU )

This 21<sup>st</sup> day of August 2022 )

BEFORE ME )



DEPONENT

COMMISSIONER FOR OATHS )

COMMISSIONER FOR OATHS )  
P.O. Box 9301-00300 NAIROBI )

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