

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

BETWEEN

YOUTH ADVOCACY AFRICA (YAA).....1<sup>ST</sup> PETITIONER

PETER KIRIKA.....2<sup>ND</sup> PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT

WAFULA CHEBUKATI .....2<sup>ND</sup> RESPONDENT

JULIANA CHERERA.....3<sup>RD</sup> RESPONDENT

JUSTUS NYANG'AYA.....4<sup>TH</sup> RESPONDENT

IRENE MASIT.....5<sup>TH</sup> RESPONDENT

FRANCIS WANDERI.....6<sup>TH</sup> RESPONDENT

PROF. ABDI YAKUB GULIYE.....7<sup>TH</sup> RESPONDENT

BOYA MOLU.....8<sup>TH</sup> RESPONDENT

RUTO WILLIAM SAMOEI.....9<sup>TH</sup> RESPONDENT

GACHAGUA RIGATHI.....10<sup>TH</sup> RESPONDENT

ODINGA RAILA.....11<sup>TH</sup> RESPONDENT

MARTHA WANGARI KARUA.....12<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL OF KENYA.....13<sup>TH</sup> RESPONDENT

**PETITION**

**THE HUMBLE PETITION OF YOUTH ADVOCACY AFRICA (YAA) & PETER**

**KIRIKA** whose address for service shall be care of M/S Njoki Mboce & Company

**Advocates, Utumishi Co-Operative House, Mamlaka Road, 2<sup>nd</sup> Floor, Wing B,**

Mamlaka Road, P.O. Box 44015-00100, Nairobi email address:  
[partners@njokimboce.com](mailto:partners@njokimboce.com) & [mgmdvocates@gmail.com](mailto:mgmdvocates@gmail.com) is as follows: -

#### A. DESCRIPTION OF THE PARTIES

1. The 1<sup>st</sup> Petitioner is a Non-Governmental Organization duly registered under **Section 10 of the Non-Governmental Organizations Co-Ordination Act**. Its address for the purposes of this Petition shall be care of **M/S Njoki Mboce & Company Advocates, Utumishi Co-Operative House, Mamlaka Road, 2<sup>nd</sup> Floor, Wing B, Mamlaka Road, P.O. Box 44015-00100, Nairobi email address: [partners@njokimboce.com](mailto:partners@njokimboce.com) & [mgmdvocates@gmail.com](mailto:mgmdvocates@gmail.com).**
2. The 2<sup>nd</sup> Petitioner is a male adult of sound mind, a citizen and registered voter in the Republic of Kenya. He brings this Petition in his own behalf and in exercise of his rights enshrined in **Article 22 (1) and 258 of the Constitution**. His address for the purposes of this Petition shall be care of **M/S Njoki Mboce & Company Advocates, Utumishi Co-Operative House, Mamlaka Road, 2<sup>nd</sup> Floor, Wing B, Mamlaka Road, P.O. Box 44015-00100, Nairobi email nd address: [partners@njokimboce.com](mailto:partners@njokimboce.com) & [mgmdvocates@gmail.com](mailto:mgmdvocates@gmail.com).** - 10
3. The 1<sup>st</sup> Respondent is a constitutional commission established pursuant to **Article 88 of the Constitution** and whose constitutional mandate includes, *inter alia*, 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 an Act of Parliament. - 20
4. The 2<sup>nd</sup> Respondent is the Chairperson of the 1<sup>st</sup> Respondent appointed pursuant to **Article 250(2) of the Constitution** as read with **Sections 5 (2), 6(1) & 7 of the**

**Independent Electoral and Boundaries Commission Act** mandated under **Article 138(10) of the Constitution** 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 3<sup>rd</sup> Respondent is the Vice Chairperson & Member of the 1<sup>st</sup> Respondent appointed pursuant to **Articles 88(1)&(2) and 250 of the Constitution** as read with **Sections 5(1) & (2), 6(2) & 7 of the Independent Electoral and Boundaries Commission Act**.
6. The 4<sup>th</sup> Respondent is a Member of the 1<sup>st</sup> Respondent appointed pursuant to **Articles 88(1)&(2) and 250 of the Constitution** as read with **Sections 5(1) & (2), 6(2) & 7 of the Independent Electoral and Boundaries Commission Act**.
7. The 5<sup>th</sup> Respondent is a Member of the 1<sup>st</sup> Respondent appointed pursuant to **Articles 88(1)&(2) and 250 of the Constitution** as read with **Sections 5(1) & (2), 6(2) & 7 of the Independent Electoral and Boundaries Commission Act**.
8. The 6<sup>th</sup> Respondent is a Member of the 1<sup>st</sup> Respondent appointed pursuant to **Articles 88(1)&(2) and 250 of the Constitution** as read with **Sections 5(1) & (2), 6(2) & 7 of the Independent Electoral and Boundaries Commission Act**.
9. The 7<sup>th</sup> Respondent is a Member of the 1<sup>st</sup> Respondent appointed pursuant to **Articles 88(1)&(2) and 250 of the Constitution** as read with **Sections 5(1) & (2), 6(2) & 7 of the Independent Electoral and Boundaries Commission Act**.

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10. The 8<sup>th</sup> Respondent is a Member of the 1<sup>st</sup> Respondent appointed pursuant to **Articles 88(1)&(2) and 250 of the Constitution** as read with **Sections 5(1) & (2), 6(2) & 7 of the Independent Electoral and Boundaries Commission Act.**
11. The 9<sup>th</sup> Respondent was the Presidential candidate of the United Democratic Alliance Party (UDA Party) in the presidential elections held on 9<sup>th</sup> August, 2022 and was declared President-Elect by the 2<sup>nd</sup> Respondent on 15<sup>th</sup> August, 2022.
12. The 10<sup>th</sup> Respondent was the Deputy Presidential candidate of the United Democratic Alliance Party (UDA Party) in the presidential elections held on 9<sup>th</sup> August, 2022 and was declared Deputy President-Elect by the 2<sup>nd</sup> Respondent on 15<sup>th</sup> August, 2022.
13. The 11<sup>th</sup> Respondent was the Presidential candidate of the Azimio One Kenya Political Party (Azimio Party) in the presidential elections held by the 1<sup>st</sup> Respondent on 9<sup>th</sup> August, 2022. — 10
14. The 12<sup>th</sup> Respondent was the Deputy Presidential candidate of the Azimio One Kenya Political Party (Azimio Party) in the presidential elections held by the 1<sup>st</sup> Respondent on 9<sup>th</sup> August, 2022.
15. The 13<sup>th</sup> Respondent is the principal legal adviser to the Government of the Republic of Kenya, sued in his capacity as the representative of the National Government in all legal proceedings pursuant to the provisions of **Article 156 of the Constitution.**

## **B. POINTS OF LAW RAISED IN THE PETITION**

### **a. Audit of the Voters Register.**

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16. **Article 1 of the Constitution** provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. By **Article 1 (2) of the Constitution**, the people may exercise their sovereign power either directly or through their democratically elected representatives.
17. **Article 2 (1) of the Constitution** ordains the Constitution as the supreme law of the Republic and binds all persons and all state organs at both levels of government.
18. **Article 3 (1) of the Constitution** vests an obligation on every person to respect, uphold and defend the Constitution. In interpreting the Constitution, this Honourable Court is enjoined to endeavor to respect, uphold and defend the Constitution.
19. **Article 10 (1) & (2) of the Constitution** provides the national values and principles — 10  
of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies and interprets any law or makes or implements public policy decisions. Such national values and principles of governance include the rule of law, democracy and participation of the people, inclusiveness, human rights, good governance, integrity, transparency and accountability.
20. **Article 81 of the Constitution** sets out the general principles for the electoral system which includes the freedom of citizens to exercise their political rights under **Article 38 of the Constitution**. As the body established to facilitate the conduct of elections, the 1<sup>st</sup> Respondent is enjoined by **Article 81(e) of the Constitution** as read with — 20  
**Section 25 of the Independent Electoral and Boundaries Commission Act** to facilitate free and fair elections, which are —

- (i) by secret ballot;
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

21. At every election, the 1<sup>st</sup> – 8<sup>th</sup> Respondents are obligated by **Article 86 of the Constitution** to ensure –

- (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.

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22. The 1<sup>st</sup> Respondent is established by **Article 88 of the Constitution** and is thus a Commission and a 'State Office' as defined by **Article 260 as read with Articles 248 and 249 of the Constitution**. Its objects include to protect the sovereignty of the people and to promote constitutionalism.

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23. **Section 8A (1) of the Elections Act** requires the 1<sup>st</sup> Respondent to, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

- a. verifying the accuracy of the Register.
- b. recommending mechanisms of enhancing the accuracy of the Register; and
- c. updating the register.

24. At paragraph 3.3.1 and page 39 of the Elections Operations Plan, the 1<sup>st</sup> Respondent, committed itself to conducting the said audit by 31<sup>st</sup> March 2022 so as to meaningfully respond to the integrity, transparency, accuracy, and accountability objectives set out at **Articles 81 and 86 of the Constitution and Sections 8A (1) and 8A (6) of the Elections Act.**

**b. Refusal To Fully Comply With Regulation 69(1)(D) Of The Elections (General) Regulations, 2012.**

25. As an electoral process accountability measure, **Regulation 69(1)(d) of the Elections (General) Regulations, 2012** requires election officials to cross out the name of every voter from the printed copy register once the image of the voter has been identified in the KIEMS kit. — 10

26. By virtue of the provisions of **Regulations 69(2) of the Elections (General) Regulations, 2012**, a voter at a polling station is issued with the 6 ballot papers in respect of all elections therein at the same time and cannot leave the polling station with a ballot paper since, by virtue of the provisions of **Regulation 69(3) of the Elections (General) Regulations, 2012**, any person who knowingly fails to place a ballot paper issued to him or her (not being a spoilt ballot paper) into a ballot box before leaving the place where the box is situated commits an offence under the Act. — 20

**c. Integrity of Technology Deployed in the Presidential Election.**

27. **Section 44 of the Elections Act** requires the 1<sup>st</sup> Respondent to establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The system is known as the Kenya Integrated Electronic Management System (“KIEMS”).
28. **Section 39 (1C) of the Elections Act** further requires the 1<sup>st</sup> Respondent to:
- a. electronically transmit 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. Publish the polling result forms on an online public portal maintained by the Commission. — 10
29. By virtue of the provisions of **Regulation 69(1)(d) of the Elections (General) Regulations, 2012**, before any voter can cast his or her vote, the voter must be identified by the fingerprint scanner that forms part of the KIEMS kit.
30. The integrity of all technology systems deployed in the election, are thus a key component of the free and fair elections envisaged by principles for the electoral system set out in **Articles 81 and 86 of the Constitution**.
31. To safeguard the said integrity of the technology systems deployed in the election, **Regulation 11 of the Elections (Technology) Regulations, 2017** requires the Commission to conduct annual audits of the election technology so as to — 20
- a. guarantee data integrity.
  - b. ensure that the technology functions effectively as specified; and



- c. ensure that the internal controls of the technology are effective.

32. **Regulation 12 of the Elections (Technology) Regulations, 2017** further requires the 1<sup>st</sup> Respondent to engage a professional reputable firm to conduct a systems audit of the election technology annually and conduct the systems audit to evaluate the confidentiality, integrity, and availability of the election technology by assessing—

- (a) the security access to the system.
- (b) the vulnerability of the system configurations.
- (c) the accuracy and the completeness of the data; and
- (d) any other mechanisms that may be determined by the Commission.

**d. The Right to Vote in a Free and Fair Election.**

33. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural practices. In accordance with **Article 19 of the Constitution**, the rights and freedoms on the Bill of Rights belong to each individual and are subject only to the limitations contemplated in the Constitution. The Bill of Rights applies to all law and binds State organs and all persons. It is a fundamental duty enshrined in **Article 21(1) of the Constitution** for the State and every State Organ to observe, respect, protect, promote and fulfil the right and fundamental freedoms in the Bill of Rights.

34. Every Citizen is therefore entitled to the rights, privileges and benefits of citizenship, subject to the **limits provided or permitted by the Constitution** in accordance with **Article 12 (1) of the Constitution**. Therefore, a right or fundamental freedom in the Bill of Rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on

human dignity, equality and freedom, taking into account all relevant factors as proscribed by **Article 24 of the Constitution**.

35. Political rights are enshrined in **Article 38 of the Constitution** which grants every citizen the right to make political choices which includes the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution. Every adult citizen has the right, without unreasonable restrictions, to vote by secret ballot in any election.

36. The right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors set out in **Article 38 of the Constitution**, includes the right to participate in the election of the President as proscribed in **Article 136 of the Constitution**. The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections. — 10

37. In line with **Article 136(2)(a) of the Constitution**, an election of the President shall be held on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year. By **Articles 136(2)(a), 180(1), 101(1) and 177(1)(a) of the Constitution**, the election of President, Governors, Members of Parliament and Members of County Assemblies take place in a general election conducted on the same day, that is, the second Tuesday in August in every fifth year. — 20

38. It is therefore a legitimate expectation that on the second Tuesday in August in every fifth year, a voter will exercise their right to vote for six elective positions in a general

election: President, Governor, Member of National Assembly, County Women Representative, Senator & Member of County Assembly Ward.

39. **Article 81 of the Constitution** sets out the general principles for the electoral system which includes the freedom of citizens to exercise their political rights under **Article 38 of the Constitution**. As the body established to facilitate the conduct of elections, the 1<sup>st</sup> Respondent is enjoined by **Article 81(e) of the Constitution** as read with **Section 25 of the Independent Electoral and Boundaries Commission Act** to facilitate free and fair elections, which are –

- (i) by secret ballot;
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

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40. The 1<sup>st</sup> Respondent is established by **Article 88 of the Constitution** and is thus a Commission and a 'State Office' as defined by **Article 260 as read with Articles 248 and 249 of the Constitution**. Its objects include to protect the sovereignty of the people and to promote constitutionalism.

41. **Article 249 (1) of the Constitution** sets out the objects of the Commissions such as the 1<sup>st</sup> Respondent which includes to –

- (a) protect the sovereignty of the people;
- (b) secure the observance by all State organs of democratic values and principles; and

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(c) promote constitutionalism.

42. In applying the Bill of Rights, **Article 20 (3)(b) & (4) of the Constitution** enjoins this Honourable Court to adopt the interpretation that most favors the enforcement of a right or fundamental freedom. In so doing, the Court shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

**e. The procedure of tallying, verifying and declaring the Presidential Election results**

43. **Article 81 of the Constitution** sets out the general principles for the electoral system, which include free and fair elections which are –

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- (i) by secret ballot;
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

44. At every election, the 1<sup>st</sup> – 8<sup>th</sup> Respondents are obligated by **Article 86 of the Constitution** to ensure –

- (a) whatever voting method is used, the system is simple, accurate, verifiable, – 20  
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.

45. **Article 138(4)(a) of the Constitution** provides that –

*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*

46. The procedure at a Presidential election set out in **Article 138(3)(c) of the** — 10

**Constitution** provides that after counting the votes in the polling station, the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) shall tally and verify the count and declare the result. In accordance with **Article 138(10) of the Constitution** within seven days after the Presidential election, the Chairperson of the Independent Electoral and Boundaries Commission (the 2<sup>nd</sup> Respondent) shall declare the result of the election and deliver a written notification of the result to the Chief Justice and the incumbent President.

47. **Section 39 (1C) of the Elections Act, 2011** sets out the procedure for the determination and declaration of Presidential election results wherein the 1<sup>st</sup> Respondent shall – — 20

- a. 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 1<sup>st</sup> Respondent.

48. **Sections 39 (1D) & (1E) of the Elections Act, 2011** mandate the 1<sup>st</sup> – 8<sup>th</sup> Respondents to verify that the results transmitted are an accurate record of the results tallied, verified and declared at the respective polling stations. Where there is a discrepancy between the electronically transmitted and the physically delivered results, the 1<sup>st</sup> – 8<sup>th</sup> Respondents 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. — 10

49. Tallying, verification and declaration of Presidential Election results is a core constitutional function of the 1<sup>st</sup> – 8<sup>th</sup> Respondents. These constitutional functions must be executed by the members of the 1<sup>st</sup> Respondent, which, by dint of **Article 88 (1) of the Constitution** and **Section 5(1) of the Independent Elections and Boundaries Commission Act**, consists of the 2<sup>nd</sup> – 8<sup>th</sup> Respondents appointed in accordance with **Article 250 of the Constitution**.

50. The authority assigned to the 2<sup>nd</sup> Respondent pursuant to **Article 138(10) of the Constitution** in his capacity as the Chairperson of the 1<sup>st</sup> Respondent is a public trust to be exercised in the manner set out in **Article 73 of the Constitution**. The 2<sup>nd</sup> Respondent is mandated to exercise this authority in a manner that – — 20

- (i) is consistent with the purposes and objects of the Constitution;
- (ii) demonstrates respect for the people;

- (iii) brings honour to the nation and dignity to the office; and
- (iv) promotes public confidence in the integrity of the office; and
- (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them

51. In executing his functions as a State Officer, the 2<sup>nd</sup> Respondent is bound by the guiding principles of leadership and integrity encapsulated in **Article 73(2) of the Constitution** which includes objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; accountability to the public for decisions and actions; and discipline and commitment in service to the people.

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52. **Section 3 of the Leadership and Integrity Act, No. 19 of 2012** provides that the primary purpose of the Act is to ensure that State officers respect the values, principles and requirements of the Constitution. **Section 11(a) of the Act** that a State officer shall carry out duties of the office in a manner that maintains public confidence in the integrity of the office.

53. Moreover, the 2<sup>nd</sup> Respondent is enjoined by **Article 249 (1)(a) & (c) of the Constitution** to protect the sovereignty of the people and promote constitutionalism.

54. **Article 259 of the Constitution** provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

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**f. The Role of the 2<sup>nd</sup> Respondent in Presidential Elections.**

55. **Article 138(2) of the Constitution** provides that if two or more candidates for President are nominated, an election shall be held in each constituency.
56. A Constituency Returning Officer and a Deputy Returning Officer are appointed in accordance with **Regulation 3(1) of the Elections (General) Regulations**. The functions of the Constituency Returning Officer at **Regulation 3(3) of the Elections (General) Regulations** include conducting elections at the constituency level.
57. **Regulation 83(1)(d) & (1) of the Elections (General) Regulations** provides that the Constituency Returning Officer shall collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President and deliver to the Chairperson of the Commission the collated results for the election of the president to the national tallying centre. — 10
58. By **Regulation 83 (2) of the Elections (General) Regulations**, the Chairperson of the Commission shall tally and verify the results received at the national tallying centre.
59. Tallying, verification and declaration of Presidential Election results is a preserve of the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) by dint of **Article 138(3)(c) of the Constitution**.



60. By Gazette Notice No. 4956 of 2022 dated 28<sup>th</sup> April, 2022, the 2<sup>nd</sup> Respondent appointed himself as the Presidential Returning Officer for the Presidential Election of 9<sup>th</sup> August, 2022.

**C. FACTS NECESSARY TO ENABLE THE COURT PROPERLY DECIDE UPON  
THE POINTS OF LAW RAISED**

**a. Audit of the Voters Register.**

61. Section 8A (1) of the Elections Act requires the 1<sup>st</sup> Respondent to, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

- a. verifying the accuracy of the Register.
- b. recommending mechanisms of enhancing the accuracy of the Register; and
- c. updating the register.

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62. At paragraph 3.3.1 and page 39 of the Elections Operations Plan, the 1<sup>st</sup> Respondent, committed itself to conducting the audit of the Register of Voters by 31<sup>st</sup> March 2022 so as to meaningfully respond to the integrity, transparency, accuracy, and accountability objectives set out at **Articles 81 and 86 of the Constitution of Kenya** and **Sections 8A (1) and 8A (6) of the Elections Act**.

63. By acts of commission, omission and dilatoriness on its part, the 1<sup>st</sup> Respondent delayed in commissioning the said audit and only publicly availed the said audit report on its website 7 days to the election on 2<sup>nd</sup> August 2022 by when it was too late to meaningfully respond to or take any steps regarding the integrity,

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transparency, accuracy and accountability objectives set out at **Articles 81 and 86 of the Constitution and Sections 8A(1) and 8A(6) of the Elections Act.**

64. A perusal of the report indicates that the auditors established serious gaps and risks to the electoral process with respect to the register of voters including the following:

- a) There were many claims raised across various counties who discovered that the electoral areas in which they had registered had been changed without their knowledge or approval.
- b) IEBC registered officers had elevated privileges in IEBC IDMS and a large number of generic user accounts which reduced the accountability of user activities in the register of voters. — 10
- c) 14 accounts unrelated to voter registration officers had been granted voter update privileges in IDMS
- d) There were eleven (11) active generic accounts on the ABIS application and two ABIS users with the same login identification.
- e) There was a risk that system users who were not authorized by law could process transfers, change of particulars or deactivate voters in the system. The risk was further elevated because IEBC had not set up an access re-certification and user activity review process.
- f) KPMG sought to test the databases hosting the register of voters with a view to determining the effectiveness of the design and implementation of controls — 20  
around authorization and provision of access, authentication and privileges access since users with direct access to the database are privileged users and pose the highest risk to the integrity of the register of voters. KPMG made several information requests for the audit of the databases hosting the register of voters, but the commission did not provide the requested information in a

timely manner. IEBC only shared some information on the eve of the reporting date. KPMG subsequently requested a meeting with the 1st Respondent and Smartmatic (the system vendor) to obtain clarification on the information provided but the meeting was not facilitated before issuance of the final report.

**b. Refusal To Fully Comply With Regulation 69(1)(D) Of The Elections (General) Regulations, 2012.**

65. The General Elections held on 9<sup>th</sup> August, 2022 reveal very significant differences and discrepancies in certain regions of the country regarding the number of voters who cast ballots for the President but did not cast votes in the Governor, Senator, Member of National Assembly, County Women Representative or Member of County Assembly elections per the following analysis:

	President	Governor	Senator	Women Rep	MP	MCA
Nyeri	326,880	328,300	340,626	305,255	327,864	336,425
Nyandarua	240,616	239,584	240,852	237,451	237,433	223,421
Muranga	420,343	237,839	264,707	237,839	375,278	390,650
Kirinyaga	260,900	259,248	258,698	258,782	259,802	259,712
Kiambu	825,191	822,397	820,509	818,565	819,979	818,985

Laikipia	169,084	164,952	167,408	212,231	169,197	163,351
Tharaka Nithi	161,578	160,850	160,897	161,601	161,945	
Embu	221,048	219,886	220,860	218,900	222,422	219,639
Nakuru	686,170	682,438	683,137	685,479	629,569	682,879
Lamu	50,070	50,911	51,571	50,801	50,715	43,334
Kajiado	308,624	306,575	304,416	303,005	307,465	305,170
Nairobi	1,339,367	1,326,176	1,324,524	1,335,038	1,350,036	1,225,502
TOTALS	5,009,871	4,799,156	4,838,205	4,824,947	4,911,705	4,669,068

66. From the above analysis, a total of 5,009,871 votes were cast for the Presidential election in the 12 counties sampled while only 4,669,068 votes were cast in the Member of County Assembly election in the same 12 counties. A total of 340,803 people therefore voted in the presidential election in the 12 counties but did not vote, within the same polling stations, for the Member of County Assembly election.

67. By virtue of the provisions of **Regulations 69(2) of the Elections (General) Regulations, 2012**, a voter at a polling station is issued with the ballot papers for all



elections therein at the same time and cannot leave the polling station with a ballot paper since, by virtue of the provisions of **Regulation 69(3) of the Elections (General) Regulations, 2012** , any person who knowingly fails to place a ballot paper issued to him or her (not being a spoilt ballot paper) into a ballot box before leaving the place where the box is situated commits an offence under the Act.

68. The aforesaid data would thus indicate that a total of 340,803 people in the said counties either committed an election offence or that 340,803 incidents of ballot stuffing occurred which would materially affect the outcome of the presidential election.

**c. Integrity of Technology Deployed in the Presidential Election.**

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69. Despite the identified and statutory need to assure itself and the public regarding the integrity of the technology systems deployed in the election, the 1<sup>st</sup> Respondent failed to conduct the audit required by **Regulations 11 and 12 of the Elections (Technology) Regulations, 2017** with the consequence that the technology used in the Presidential election lacked:

- a. Integrity
- b. Accountability
- c. accuracy and the completeness of the data
- d. data integrity

**d. Violation of the Right to Vote in a Free and Fair Election.**

70. Vide a **Gazette Notice No. 7995 published on the 1<sup>st</sup> July 2022**, the 1<sup>st</sup> Respondent duly declared and Gazetted the following persons as validly nominated to contest for General Election to be held on the 9<sup>th</sup> August, 2022 in the Presidential election:

<b>Surname</b>	<b>Other Names</b>	<b>Running Mate Surname</b>	<b>Running Mate Other Names</b>	<b>Political Party Name</b>
Odinga	Raila	Karua	Martha Wangari	Azimio la Umoja One Kenya Coalition Party
Ruto	William Samoei	Gachagua	Rigathi	United Democratic Alliance
Waihiga	David Mwaure	Mucheru	Ruth Wambui	Agano Party
Wajackoyah	George Luchiri	Wamae	Justina Wangui	Roots Party of Kenya

71. The 1<sup>st</sup> Respondent gazetted polling stations for the 9<sup>th</sup> August, 2022 General Election vide **Gazette Notice No. 7996** published on 1<sup>st</sup> July, 2022, as amended by **Gazette Notice No. 8784** published on 26<sup>th</sup> July, 2022.

72. The 1<sup>st</sup> Respondent is enjoined by **Articles 81(e)(iv) & (v) of the Constitution** to facilitate free and fair elections, which are transparent and administered in an

impartial, neutral, efficient, accurate and accountable manner. Moreover, **Article 86(d) of the Constitution** enjoins the 1<sup>st</sup> Respondent to ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

73. On 8<sup>th</sup> August, 2022, in a press release issued barely 24 hours to the date of the General Elections scheduled for 9<sup>th</sup> August, 2022, the 2<sup>nd</sup> Respondent announced the postponement of elections in various electoral areas citing court orders and mismatch of material content. These include the Mombasa County Governor Elections and Kakamega County Governor Elections, perceived strongholds of His Excellency Raila Odinga, the Azimio Party candidate in the Presidential Election. The voters in those areas voted in favour of His Excellency Raila Odinga. — 10

74. As a result of the postponement of the elections for Governor Mombasa County, the voter turnout in Mombasa County in respect of the Presidential Election was 44% against an average voter turnout of 56% in Mombasa County in previous General Elections. The low voter turnout is attributable to the postponement of the gubernatorial elections as there was no mobilization of voters by the gubernatorial candidates. The net effect therefore is that the main contenders of the Presidential Election held on 9<sup>th</sup> August, 2022; Raila Amolo Odinga lost 47,858 votes and William Samoei Ruto lost 33,795 votes in Mombasa County.

75. Similarly, as a result of the postponement of the elections for Governor Kakamega County, the voter turnout in Kakamega County in respect of the Presidential Election was 60% against an average turn-out of 72% in Kakamega County in the previous General Elections. The low voter turnout is attributable to the postponement of the — 20

gubernatorial elections as there was no mobilization of voters by the gubernatorial candidates. The net effect therefore is that the main contenders of the Presidential Election held on 9<sup>th</sup> August, 2022; Raila Amolo Odinga lost 74,219 votes and William Samoei Ruto lost 29,277 votes in Kakamega County.

76. In light of the apparent low voter turnout in the aforementioned areas, the decision to postpone the elections was detrimental to the voters' exercise of their right to vote in a Presidential Election in the subject electoral areas enshrined in **Article 38 of the Constitution**. It was in effect a limitation of the citizens right to vote executed in a manner that offends **Articles 12(1) and 24 of the Constitution**.

77. The 2<sup>nd</sup> Respondent arrived at the decision to postpone these elections without conducting public participation and consulting the relevant stakeholders in those electoral areas, including the candidates, the voters & the County Returning Officers.

78. Whereas the voters in Mombasa County and Kakamega County had a legitimate expectation that they would be voting for 6 election position at the General Elections held on 9<sup>th</sup> August, 2022, the exercise of their right to vote in the manner envisaged by the Constitution was curtailed by the 2<sup>nd</sup> Respondent.

79. Vide Gazette Notice No. 9617 of 2022, the 2<sup>nd</sup> Respondent announced that the postponed elections which were scheduled to be held on 9<sup>th</sup> August, 2022 General Election would be held on Tuesday 23<sup>rd</sup> August, 2022.

80. In a curious turn of events, the 2<sup>nd</sup> Respondent issued a press release on 17<sup>th</sup> August, 2022 wherein the 2<sup>nd</sup> Respondent once again, unilaterally, postponed the elections scheduled for Tuesday 23<sup>rd</sup> August, 2022 indefinitely.

**e. The unconstitutional tallying, verification and declaration of the Presidential Election results.**

81. Following the counting of votes in a Presidential Election at the polling station, the 1<sup>st</sup> Respondent is mandated by **Article 138(3)(c) of the Constitution** to **tally** and **verify** the count and **declare** the result. The tallying and verification envisaged by **Section 39 (1C) of the Elections Act, 2011** is of the Presidential Election results received at the Constituency Tallying Centre and the National Tallying Centre. - 10

82. The 1<sup>st</sup> Respondent must verify that the results transmitted are an accurate record of the results tallied, verified and declared at the respective polling stations. **Section 39 (1D) of the Elections Act** provides that where there is a discrepancy between the electronically transmitted and the physically delivered results, the 1<sup>st</sup> Respondent 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.

83. The tallying and verification of the Results of the Presidential Election held on 9<sup>th</sup> August, 2022 by the 1<sup>st</sup> Respondent purportedly took place between 9<sup>th</sup> August, 2022 – 15<sup>th</sup> August, 2022. However, the entire tallying and verification of the Presidential Election results was not conducted by the 1<sup>st</sup> Respondent but exclusively by the 2<sup>nd</sup> Respondent. - 20



84. On 15<sup>th</sup> August, 2022, the 2<sup>nd</sup> Respondent declared the following results of the Presidential Election contained in the Form 34C –

No.	Name Of Candidate	Valid Votes in Figures	Valid Votes In Words	Percentage Of Votes Cast	Number Of Counties The Candidate Has Attained At Least 25% Of The Total Valid Votes Cast
1.	Odinga Raila	6,942,930	Six Million Nine Hundred And Fourty Two Thousand Nine Hundred And Thirty	48.85%	34
2.	Ruto William Samoei	7,176,141	Seven Million One Hundred And Seventy Six Thousand One Hundred	50.49%	39

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			And Fourty One		
3.	Waihiga David Mwaure	31,987	Thirty-One Thousand Nine Hundred And Eighty Seven	0.23%	0
4.	Wajackoyah George Luchiri	61,969	Sixty-One Thousand Nine Hundredand Sixty Nine	0.44%	0

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85. Subsequently, the 2<sup>nd</sup> Respondent declared the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent as President-Elect and Deputy President-Elect respectively as mandated by **Article 138(10) of the Constitution** and issued a Declaration of Results Forms 34C & 34D.

86. Notably, at the time of declaration of the above results of the Presidential Election, the 2<sup>nd</sup> Respondent had not received and announced the results from all 290 constituencies. Results from the following constituencies had not been tallied, verified and announced – Mathare, Kilifi North, Mvita, Kilifi South, Malindi, Dadaab, Lagdera, Fafi, Narok South, Narok West, Kajiado East, Kanduyi, Nyakach, Karachuonyo, Suba North, South Mugirango, Borabu, Ruaraka, Starehe, Kilgoris,

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Sabatia, Embakasi South, Kisauni, Voi, Budalangi, Webuye East, Samburu East, Turkana North.

87. The tallying, verification and declaration of the Presidential Election results was not conducted by the 1<sup>st</sup> Respondent but by the 2<sup>nd</sup> Respondent.
88. Consequently, the ensuing declaration of the Presidential Election results by the 2<sup>nd</sup> Respondent on 15<sup>th</sup> August, 2022 as contained in the Form 34C & Form 34D of even date was not the decision of the 1<sup>st</sup> Respondent, but the sole decision of the 2<sup>nd</sup> Respondent. The results are a product of a process unknown to the Constitution.
89. In acting as he did and unilaterally declaring the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as President-Elect and Deputy President-Elect respectively, the 2<sup>nd</sup> Respondent deliberately and willfully violated the Constitution. — 10
90. As a State Officer and in his capacity as the Chairperson of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent acted in violation of the public trust bestowed upon him and contrary to the high standards of integrity required of State Officers by the Constitution.
91. In a media briefing by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> August 2022 at 2.44PM, the public was informed that the voter turnout transmitted from the functional KIEMS Kits was 65.4% and that such percentage was to go higher once verification of the turn-out in areas that voters were manually identified was computed. This translates to a voter turnout of 14,466,779.532 people who were identified through KIEMS Kit and voted on 9<sup>th</sup> August, 2022. This figure is arrived at by multiplying 65.4% with the total number of registered voters being 22,120,458. — 20

92. To calculate the total valid votes cast for purposes of computing the 50% plus one threshold in line with **Article 138(4) of the Constitution** and as interpreted by the *Supreme Court of Kenya in Raila Amolo Odinga & 5 Others v Independent Electoral and Boundaries Commission & 4 Others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment)* Neutral citation: [2013] KESC 6 (KLR), the rejected ballots are deducted from the number of people who came out to vote.
93. On the strength of the 2<sup>nd</sup> Respondent's aforesaid media briefing and pegged on the turn-out of 65.4% transmitted from functional KIEMS Kit, the total valid votes cast would be 14,353,165.532 arrived at by deducting 113,614 rejected ballots from — 10 14,466,779.532. The 50% plus 1 threshold would therefore be 7,176,583.766 arrived at by multiplying 14,353,165.532 by 50% and then adding 1.
94. The 9<sup>th</sup> Respondent announced as the President-Elect by the 2<sup>nd</sup> Respondent attained 7,176,141 valid votes which was short of the 7,176,583.766 votes by 442.766 valid votes. Consequently, the 9<sup>th</sup> Respondent failed to meet the Constitutional threshold of 50% plus 1 required under **Article 138(4) of the Constitution** and should have never been declared as the President elect.
95. The 2<sup>nd</sup> Respondent signed a Form 34C which was uploaded on the IEBC portal showing total valid votes as 14,213,137 and rejected ballots as 113,614 which meant the number of people who turned out to vote were 14,326,751 arrived at by adding — 20 the total valid votes and the rejected ballots. This translates to a voter turn-out of 64.77% arrived at dividing the total number of people who turned out to vote

(14,326,751) by the total number of people registered as voters (22,120,458) and multiplying by 100.

96. In the circumstances, it is not scientifically possible to have a lower turnout at the close of polling stations and after tallying the presidential votes than before the close of polling stations. This confirms that the electoral process was not transparent, accurate, verifiable and accountable contrary to **Article 81 and 86 of the Constitution** leading to major irregularities that affected the final outcome.

97. The results announced by the 2<sup>nd</sup> Respondent did not therefore meet the threshold laid down under **Articles 81 and 86 of the Constitution**.

**f. The Role of the 2<sup>nd</sup> Respondent in Presidential Elections.**

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98. By **Gazette Notice No. 4956 of 2022** dated 28<sup>th</sup> April, 2022, the 2<sup>nd</sup> Respondent appointed himself as the Presidential Returning Officer for the Presidential Election of 9<sup>th</sup> August, 2022.

99. **Article 138(2) of the Constitution** provides that if two or more candidates for President are nominated, an election shall be held in each constituency.

100. A Constituency Returning Officer and a Deputy Returning Officer are appointed in accordance with **Regulation 3(1) of the Elections (General) Regulations**. The functions of the Constituency Returning Officer at **Regulation 3(3) of the Elections (General) Regulations** include conducting elections at the constituency level.



101. The Constitution envisages that a Constituency Returning Officer to be in charge of the election of President. The position of Presidential Returning Officer created by the 2<sup>nd</sup> Respondent contained in **Gazette Notice No. 4956 of 2022** is unknown in law and therefore unconstitutional.
102. **Regulation 83(1)(d) & (1) of the Elections (General) Regulations** is unconstitutional to the extent that it requires the Constituency Returning Officer to deliver to the 2<sup>nd</sup> Respondent rather than the 1<sup>st</sup> Respondent, the collated results for the election of the President.
103. Equally, **Regulation 83 (2) of the Elections (General) Regulations**, is unconstitutional in so far as it exclusively confers the 2<sup>nd</sup> Respondent the power to tally and verify the results received at the national tallying centre in a manner contrary to **Article 138(3)(c) of the Constitution**. — 10
104. Tallying, verification and declaration of Presidential Election results is a preserve of the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) by dint of **Article 138(3)(c) of the Constitution** and not the 2<sup>nd</sup> Respondent, acting unilaterally.
105. The totality of the above facts is that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents have failed in their constitutional and statutory duties from:
- a. The preparations of the impugned election; to
  - b. The conduct of the voting process on 19<sup>th</sup> August 2022, to — 20
  - c. The declaration of the impugned results on 15<sup>th</sup> August 2022; and
  - d. The ongoing handling of election material.

## **D. GROUNDS OF THE PETITION**

### **a. Audit of the Voters Register.**

106. The delay by the 1<sup>st</sup> Respondent to commission an audit of the Register of Voters as required by **Section 8A (1) and 8A(6) of the Elections Act** was a dereliction of duty by the 1<sup>st</sup> – 8<sup>th</sup> Respondents and a violation of **Articles 81 and 86 of the Constitution and Sections 8A (1) and 8A (6) of the Elections Act.**

107. The failure of the 1<sup>st</sup> Respondent to conduct and publish the audit of the Register of Voters by 31<sup>st</sup> March 2022 violated the integrity, transparency, accuracy, and accountability objectives set out at **Articles 81 and 86 of the Constitution and Sections 8A (1) and 8A (6) of the Elections Act.**

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### **b. Refusal To Fully Comply With Regulation 69(1)(D) Of The Elections (General) Regulations, 2012.**

108. The failure of election officials to cross out the name of every voter from the printed copy register once the image of the voter has been identified in the KIEMS kit. **Regulation 69(1)(d) of the Elections (General) Regulations, 2012** violated **Articles 81 (e)(iv) & (v) of the Constitution** to the extent that the voting system was neither transparent nor administered in an impartial, neutral, efficient, accurate and accountable manner.

109. The significant differences and discrepancies in certain regions of the country regarding the number of voters who cast ballots for the President but did not cast votes in the Governor, Senator, Member of National Assembly, County Women Representative or Member of County Assembly elections leads to the conclusion that on account of the fact that a voter's name was not crossed out from the printed

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copy register once identified, the 1<sup>st</sup> Respondent is unable to account for all six ballot papers issued to the voter on the strength of **Regulations 69(2) & (3) of the Elections (General) Regulations, 2012.**

110. The discrepancy in the fact that a total of 314,596 people in the aforementioned counties either committed an election offence or that 314,596 incidents of ballot stuffing occurred which would materially affect the outcome of the presidential election.

**c. Integrity of Technology Deployed in the Presidential Election.**

111. Despite the identified and statutory need to assure itself and the public regarding the integrity of the technology systems deployed in the election, the 1<sup>st</sup> Respondent — 10 failed to conduct the audit required by **Regulations 11 and 12 of the Elections (Technology) Regulations, 2017** with the consequence that the technology used in the Presidential election lacked:

- a. Integrity
- b. Accountability
- c. accuracy and the completeness of the data
- d. data integrity

**d. Voter Suppression and violation of the Right to Vote in a Free and Fair Election.**

112. The unilateral decision of the 2<sup>nd</sup> Respondent to postpone the election of Governor in Kakamega and Mombasa Counties contravenes **Article 10(2)(a) &(c) of the** — 20

**Constitution** in so far as the decision lacks transparency & accountability, public participation and stakeholder engagement.

113. The decision of the 2<sup>nd</sup> Respondent to postpone the election of Governor in Kakamega and Mombasa Counties, was, in the context of the low voter turnout in the Presidential Election in the aforementioned areas, a deliberate scheme orchestrated by the 2<sup>nd</sup> Respondent aimed at suppressing the voters from exercising their right to vote in a General Election, in contravention of **Article 38(2)(a) & (3)(b) of the Constitution**.

114. The postponement of the elections of Governor in Kakamega and Mombasa Counties desecrated the voters legitimate expectation that on 9<sup>th</sup> August, 2022, they — 10 would exercise their right to vote for six elective positions in a general election: President, Governor, Member of National Assembly, County Women Representative, Senator & Member of County Assembly Ward.

115. To this end, the postponement of the elections of Governor in Kakamega and Mombasa Counties, violated the citizens' right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for the election of the President enshrined in **Article 38(2)(a) of the Constitution**.

116. The Presidential Elections held in Kakamega and Mombasa Counties violated **Article 81 (e)(iii), (iv) & (v) of the Constitution** which requires that the election be conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. — 20



**e. Violation of the principles of a Free and Fair election and electoral process**  
**by the 2<sup>nd</sup> Respondent**

117. The Presidential Election results contained in the Form 34C issued by the 2<sup>nd</sup> Respondent were an erroneous aggregation of the votes cast in favor of each of the Presidential Election candidates.
118. The voter turnout transmitted from the functional KIEMS Kits was 65.4%, that is, 14,466,779.532. The total valid votes cast would be 14,353,165.532 arrived at by deducting 113,614 rejected ballots from 14,466,779.532. The 50% plus 1 threshold would therefore be 7,176,583.766 arrived at by multiplying 14,353,165.532 by 50% and then adding 1. The 9<sup>th</sup> Respondent announced as the President-Elect by the 2<sup>nd</sup> Respondent attained 7,176,141 valid votes which was short of the 7,176,583.766 votes by 442.766 valid votes. Consequently, the 9<sup>th</sup> Respondent failed to meet the Constitutional threshold of 50% plus 1 required under **Article 138(4) of the Constitution** and should have never been declared as the President elect. - 10
119. The 2<sup>nd</sup> Respondent signed a Form 34C which was uploaded on the IEBC portal showing total valid votes as 14,213,137 and rejected ballots as 113,614 which meant the number of people who turned out to vote were 14,326,751 arrived at by adding the total valid votes and the rejected ballots. This translates to a voter turn-out of 64.77% arrived at dividing the total number of people who turned out to vote (14,326,751) by the total number of people registered as voters (22,120,458) and multiplying by 100. - 20
120. In the circumstances, it is not scientifically possible to have a lower turnout at the close of polling stations and after tallying the presidential votes than before the close



of polling stations. This confirms that the electoral process was not transparent, accurate, verifiable and accountable contrary to **Article 81 and 86 of the Constitution** leading to major irregularities that affected the final outcome.

121. The Presidential Election results declared by the 2<sup>nd</sup> Respondent were consequently not an accurate record of the results tallied, verified and declared at the respective polling stations, contrary to **Articles 138 (3)(c) of the Constitution** as read with **Section 39 (1C) & (1D) of the Elections Act**.

122. The Presidential Election results were not tallied, verified and declared by the 1<sup>st</sup> Respondent in a manner that complies with **Articles 81(e) & 138 (3)(c) of the Constitution** as read with **Section 39 (1C) & (1D) of the Elections Act** for the following reasons –

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- a. To the extent that the Presidential Election results declared by the 2<sup>nd</sup> Respondent are inaccurate, the tallying and verification of the Presidential Election results violated **Article 81 (e)(v) of the Constitution** which requires that the election be administered in an impartial, neutral, efficient, accurate and accountable manner.
- b. The tallying, verification and declaration of the Presidential Election results violated **Article 81 (e)(iv) of the Constitution** for lack of transparency, as the results were tabulated and declared by the 2<sup>nd</sup> Respondent in the absence of the majority membership of the 1<sup>st</sup> Respondent who were locked out of the last phase of the tallying, verification and declaration process.
- c. The tallying, verification and declaration of the Presidential Election results violated **Article 138 (3)(c) of the Constitution** to the extent that it was conducted exclusively by the 2<sup>nd</sup> Respondent.

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- d. The decision of the 2<sup>nd</sup> Respondent to declare the 3<sup>rd</sup> & 4<sup>th</sup> Respondents as President-elect and Deputy-President Elect respectively contravenes **Articles 81(e) and 138(3)(c) of the Constitution, Section 39 (1C) & (1D) of the Elections Act and Paragraphs 5 & 7 of the Second Schedule to the Independent Elections and Boundaries Commission Act.**
- e. The declaration of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as President-Elect and Deputy President-Elect respectively is therefore unconstitutional, null and void.

123. The declaration of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as President-Elect and Deputy President-Elect respectively by the 2<sup>nd</sup> Respondent was inconsistent with the purposes and object of the Constitution, violated **Article 73 of the Constitution** — 10 and consequently, the 2<sup>nd</sup> Respondent is unfit to hold office as the Chairperson of the 1<sup>st</sup> Respondent and to hold any public office.

**f. The Role of the 2<sup>nd</sup> Respondent in Presidential Elections.**

124. By dint of **Article 138(2) of the Constitution**, if two or more candidates for President are nominated, an election shall be held in each constituency. Elections at the Constituency level are conducted by Constituency Returning Officers appointed in accordance with **Regulation 3(1) of the Elections (General) Regulations.**

125. Tallying, verification and declaration of Presidential Election results is a preserve of the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) by dint of **Article 138(3)(c) of the Constitution** and not the 2<sup>nd</sup> Respondent, acting unilaterally. — 20

126. **Gazette Notice No. 4956 of 2022, Regulation 83(1)(d) & (1) of the Elections (General) Regulations, Regulation 83 (2) of the Elections (General) Regulations** are unconstitutional to the extent that they confer the mandate to receive, tally and verify the presidential election results in a manner contrary to **Article 138(3)(c) of the Constitution.**

**E. THE ARGUMENTS SUPPORTING EACH OF THE GROUNDS OF THE PETITION**

**a. Audit of the Voters Register.**

127. A Register of Voters is the foundation upon which an election is conducted and which a voter exercises their constitutional right to vote in a General Election. The centrality of the Register cannot therefore be gainsaid. -10

128. The failure of the 1<sup>st</sup> Respondent to conduct an audit at least six months before a general election violated **Sections 8A(1) and 8A(6) of the Elections Act.**

129. Further, the failure to publicly avail the results of the audit, until a week prior to the election contravened the Constitutional principles of integrity, transparency, accuracy and accountability and deprived the voters the opportunity to meaningfully interact with the audit of the register.

**b. Refusal To Fully Comply With Regulation 69(1)(d) Of The Elections (General) Regulations, 2012.**

130. Our electoral system is founded on, core principles including, in particular, free and fair elections that are conducted by an independent body, are transparent in character and administered in an impartial, neutral, efficient, accurate and -20

accountable manner. **Regulation 69(1)(d) of the Elections General Regulations** is a tool of electoral accountability aimed at protecting the sanctity of the vote and the giving effect to the will of the people.

131. In addition, ballot papers are election materials, which must be accounted for. In line with this principle, by dint of **Regulation 69(2) of the Elections (General) Regulations, 2012**, a voter at a polling station is issued with the ballot papers for all elections therein at the same time and cannot leave the polling station with a ballot paper.

132. Consequently, where there is a significant discrepancy in the total number of votes cast in each election, the palpable conclusion is that the results of that General Election are vitiated. The lack of accuracy and accountability means that the General Election did not give effect to the will of the people.

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**c. Integrity of Technology Deployed in the Presidential Election.**

133. A harmonized reading of **Article 86 and Article 138(3) (c) of the Constitution** prescribes systematic steps which must be accurate, verifiable, secure, accountable, and transparent.

134. An audit of the technology system conducted pursuant to **Regulations 11 and 12 of the Elections (Technology) Regulations, 2017** with the consequence that the technology used in the Presidential election lacked:

- a. Integrity
- b. Accountability

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- c. accuracy and the completeness of the data
- d. data integrity

135. The 1<sup>st</sup> Respondent's failure to conduct an audit of the elections technology tainted the Presidential Election Results that emanated from that technology.

136. This is so, in the context of the utility of technology in the electoral process during the General Elections conducted by the 1<sup>st</sup> Respondent on 9<sup>th</sup> August, 2022.

137. The failure by the 1<sup>st</sup> Respondent to audit the technology deployed in the elections of the President was a violation of **Articles 81(e)(iv) & (v) & 86 of the Constitution**

**d. Voter Suppression and violation of the Right to Vote in a Free and Fair Election.**

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138. The right to vote is a fundamental right in a free and democratic society and should not be limited in a manner that contravenes the Constitution. A whollistic interpretation of the Constitution bares the intention of the framers of the Constitution for voters to participate in a General Election with the expectation that they would be voting for Six (6) elective positions.

139. It was the legitimate expectation of the voters in Kakamega and Mombasa Counties, that they would simultaneously vote for the six (6) elective positions on the 9<sup>th</sup> of August, 2022. Where the election is postponed in any one of the six elective



positions, the ability and/or desire of the voter to vote at the General Election is suppressed.

140. In view of the transparent, verifiable and elaborate process of ballot proofing conducted by the members and staff of the 1<sup>st</sup> Respondent, it is discernable that the errors that emerged on the eve of the election were either by design or an intentional dereliction of duty.
141. The postponement of so many elections is unprecedented in Kenya's electoral history and was occasioned by errors of commission and omission in the printing of ballot papers which was a consequence of inefficient, sloppy, and inadequate supervision and oversight of the ballot paper printing exercise by the 1<sup>st</sup> Respondent in violation of the provisions of **Article 81(e)(v) of the Constitution**. -10
142. The low voter turnout in the subject electoral areas where elections to various elective seats was postponed is empirical evidence of a deliberate decision by the 2<sup>nd</sup> Respondent whose sole purpose was to suppress the Presidential Election votes in the subject electoral areas in violation of **Article 86(a) of the Constitution**.
143. The postponement of the elections in areas that are perceived as strongholds of H.E. Raila Odinga, a Presidential Election candidate by the 2<sup>nd</sup> Respondent was intentional and targeted, with the sole objective of suppressing the voter turnout in those areas, to the benefit of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who were candidates in the Presidential Election. -20

144. The decision was capricious, discriminatory and concocted by the 2<sup>nd</sup> Respondent who acted *ultra vires* his mandate as he was not the Returning Officer appointed by the 1<sup>st</sup> Respondent to supervise the conduct of the elections in the subject areas.
145. Consequently, the low voter turnout in the presidential elections in Mombasa and Kakamega Counties was a demonstrable and disproportionate effect of the postponement of the election of Governors on the voters' right to vote in a free and fair election of the President as there was no mobilization of voters by the gubernatorial candidates.
146. The decision to postpone these elections offends the principle of participation of the people which holds that those who are affected by a decision have a right to be involved in the decision-making process. The decision was unilaterally taken by the 2<sup>nd</sup> Respondent without conducting public participation and stakeholder engagement including the candidates, the County Returning Officers and the Voters in the election on the effect of the decision. - 10
147. Additionally, the decision contravenes **Article 10 (2) (c) of the Constitution** on good governance, integrity, transparency and accountability to the extent that the 2<sup>nd</sup> Respondent's decision-making process in this context was neither honest, transparent nor accountable.
148. The Presidential Elections held in Kakamega and Mombasa Counties violated **Article 81 (e)(iii), (iv) & (v) of the Constitution** which requires that the election be conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. - 20

149. In view of the totality of the foregoing, the postponement of the elections in the subject areas was a concerted scheme by the 2<sup>nd</sup> Respondent to tilt the election in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

**e. The unconstitutional tallying, verification and declaration of the Presidential Election results.**

150. On the basis of the numbers contained in Form 34C, the voter turnout of 64.77% arrived at the end of polling was lower than the voter turnout of 65.4% announced by the 2<sup>nd</sup> Respondent during the polling day. The fact that the percentage voter turnout reduced at the end of polling is a scientific impossibility. It is therefore apparent that the electoral process was not transparent, accurate, verifiable and accountable contrary to **Article 81 and 86 of the Constitution.**

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151. By dint of **Section 5(1) of the Independent Elections and Boundaries Commission Act**, the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) consists of the 2<sup>nd</sup> Respondent and six other members appointed in accordance with **Article 250 (4) of the Constitution.**

152. **Article 138 of the Constitution** provides for the procedure at a presidential election. **Article 138(3) of the Constitution** provides as follows:

*"In a presidential election—*

- (a) all persons registered as voters for the purposes of parliamentary elections are entitled to vote;*
- (b) the poll shall be taken by secret ballot on the day specified in Article 101(1) at the time, in the places and in the manner prescribed under an Act of Parliament; and*

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- (c) *after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.*”  
[Emphasis supplied]

153. The above provision of the Constitution anticipates collegiality by the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) in the tallying, verification and declaration of the results of a Presidential Election.
154. The requirement for collegiality on the part of the members of the 1<sup>st</sup> Respondent is further reflected in **Section 39(1C) (b) and (c) of the Elections Act** which provide that for purposes of a presidential election, the 1<sup>st</sup> Respondent shall tally and verify the results received at the constituency tallying centre and the national tallying centre; and publish the polling result forms on an online public portal maintained by the Commission. In addition, **Section 39 (ID) of the Elections Act** provides that the 1<sup>st</sup> Respondent shall verify that the results transmitted are an accurate record of the results tallied, verified and declared at the respective polling stations. - 10
155. Tallying, verification and declaration of Presidential Election results is a decision of the 1<sup>st</sup> Respondent which, in accordance with **Paragraphs 5 & 7 of the Second Schedule to the Independent Elections and Boundaries Commission Act** must be either unanimous or by a majority of the members of the 1<sup>st</sup> Respondent present and voting. - 20
156. The import of the foregoing provisions is that the collation, transmission, tallying, and verification of Presidential Election results, are functions of the 1<sup>st</sup> Respondent



that are essential precedents to the declaration of the Presidential Election results by the 2<sup>nd</sup> Respondent.

157. Instructively, the tallying, verification and declaration of the Presidential Election results by the 2<sup>nd</sup> Respondent was undertaken unilaterally to the exclusion of a majority of the members of the 1<sup>st</sup> Respondent who were excluded from these critical elements of the electoral process.

158. To the extent that the Presidential Election results declared by the 2<sup>nd</sup> Respondent are inaccurate, the tallying and verification of the Presidential Election results violated **Article 81 (e)(v) of the Constitution** which requires that the election be administered in an impartial, neutral, efficient, accurate and accountable manner. -10

159. The process of tallying and verification was therefore compromised and vitiates the expression of the will of the people.

**f. The Role of the 2<sup>nd</sup> Respondent in Presidential Elections.**

160. By dint of **Article 138(2) of the Constitution**, if two or more candidates for President are nominated, an election shall be held in each constituency. Elections at the Constituency level are conducted by Constituency Returning Officers appointed in accordance with **Regulation 3(1) of the Elections (General) Regulations**.

161. Tallying, verification and declaration of Presidential Election results is a preserve of the Independent Electoral and Boundaries Commission (the 1<sup>st</sup> Respondent) by dint of **Article 138(3)(c) of the Constitution** and not the 2<sup>nd</sup> Respondent, acting unilaterally. -20



162. By purporting to tally, verify and declare the Presidential Election results of the Presidential election held on 9<sup>th</sup> August, 2022 to the exclusion of all members of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent acted in a manner contrary to **Article 138(3)(c) of the Constitution**.

163. **Gazette Notice No. 4956 of 2022, Regulation 83(1)(d) & (1) of the Elections (General) Regulations, Regulation 83 (2) of the Elections (General) Regulations** are unconstitutional to the extent that they confer the mandate to receive, tally and verify the presidential election results in a manner contrary to **Article 138(3)(c) of the Constitution**.

#### **F. ISSUES FOR DETERMINATION BY THE COURT**

164. The Petitioner identifies the following issues for determination by this Honourable Court –

- i. Whether the failure of the 1<sup>st</sup> Respondent to conduct an audit of the Register of Voters in the manner prescribed by law and in a timely manner violated the integrity, transparency, accuracy, and accountability objectives set out at **Articles 81 and 86 of the Constitution and Sections 8A (1) and 8A (6) of the Elections Act**.
- ii. Whether the refusal of the 1<sup>st</sup> Respondent to fully comply with **Regulation 69(1)(D) Of The Elections (General) Regulations, 2012** violated **Articles 81 (e)(iv) & (v) & 86 of the Constitution** to the extent that the voting system was neither transparent nor administered in an impartial, neutral, efficient, accurate and accountable manner.

- iii. Whether the failure of the 1<sup>st</sup> Respondent to conduct the audit of the technology system required by **Regulations 11 and 12 of the Elections (Technology) Regulations, 2017** was in violation of **Articles 81 (e)(iv) & (v) & 86 of the Constitution** to the extent that the voting system was neither transparent nor administered in an impartial, neutral, efficient, accurate and accountable manner.
- iv. Whether the decision of the 2<sup>nd</sup> Respondent to postpone the elections of Governor in Mombasa and Kakamega Counties violated **Articles 136(2)(a), 180(1), 101(1) and 177(1)(a) of the Constitution**, that require the election of President, Governors, Members of Parliament and Members of County Assemblies take place in a general election conducted on the same day, that is, the second Tuesday in August in every fifth year. — 10
- v. Whether the decision of the 2<sup>nd</sup> Respondent to postpone the election of Governors in Kakamega and Mombasa Counties, contravened **Article 10(2)(a) & (c) of the Constitution** in so far as the decision lacked transparency & accountability and was devoid of public participation and stakeholder engagement.
- vi. Whether the decision of the 2<sup>nd</sup> Respondent to postpone the election of Governors in Kakamega and Mombasa Counties, was, in the context of the low voter turnout in the Presidential Election in the aforementioned areas, aimed at suppressing the voters from exercising their right to vote in a General Election, in contravention of **Article 38(2)(a) & (3)(b) of the Constitution**. — 20
- vii. Whether, as a consequence of (i), (ii) & (iii) above, the postponement of the elections of Governor in Kakamega and Mombasa Counties violated the citizens' right to free, fair and regular elections based on universal suffrage and

the free expression of the will of the electors for the election of the President enshrined in **Article 38(2)(a) of the Constitution**.

- viii. Whether the 9<sup>th</sup> Respondent failed to meet the Constitutional threshold of 50% plus 1 required under **Article 138(4)(a) of the Constitution**.
- ix. Whether the tallying and verification of the Presidential Election results in the General Election held on 9<sup>th</sup> August, 2022 was conducted in accordance with **Article 138(3)(c) of the Constitution as read with Section 39 (1C) & (1D) of the Elections Act**.
- x. Whether the 2<sup>nd</sup> Respondent had the ability to declare the Presidential Election results in the General Elections held on 9<sup>th</sup> August, 2022 that had not been tallied and verified by the 1<sup>st</sup> Respondent. — 10
- xi. Whether the decision of the 2<sup>nd</sup> Respondent to declare the 3<sup>rd</sup> & 4<sup>th</sup> Respondents as President-elect and Deputy-President Elect respectively contravenes **Articles 81(e) and 138(3)(c) of the Constitution, Section 39 (1C) & (1D) of the Elections Act** and is therefore unconstitutional, null and void.
- xii. Whether, in their totality, the actions of the 2<sup>nd</sup> Respondent set out hereinbefore were a deliberate scheme orchestrated by 2<sup>nd</sup> Respondent for the sole purpose of declaring the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as President-elect and Deputy-President Elect respectively.
- xiii. Whether **Regulation 83(1)(d) & (1) of the Elections (General) Regulations, Regulation 83 (2) of the Elections (General) Regulations and Gazette Notice No. 4956 of 2022**, are unconstitutional to the extent that they purport to confer to the 2<sup>nd</sup> Respondent, the mandate to receive, tally and verify the presidential election results in a manner contrary to **Article 138(3)(c) of the Constitution**. — 20

**G. RELIEFS SOUGHT BY THE PETITIONER: -**

- (a) A DECLARATION THAT the failure of the 1<sup>st</sup> Respondent to conduct an audit of the Register of Voters violated the integrity, transparency, accuracy, and accountability objectives set out at **Articles 81 and 86 of the Constitution and Sections 8A (1) and 8A (6) of the Elections Act.**
- (b) A DECLARATION THAT the refusal of the 1<sup>st</sup> Respondent to fully comply with **Regulation 69(1)(D) Of the Elections (General) Regulations, 2012** violated **Articles 81 (e)(iv) & (v) & 86 of the Constitution** to the extent that the voting system was neither transparent nor administered in an impartial, neutral, efficient, accurate and accountable manner.
- (c) A DECLARATION THAT the failure of the 1<sup>st</sup> Respondent to conduct the audit of the technology system required by **Regulations 11 and 12 of the Elections (Technology) Regulations, 2017** was in violation of **Articles 81 (e)(iv) & (v) & 86 of the Constitution** to the extent that the voting system was neither transparent nor administered in an impartial, neutral, efficient, accurate and accountable manner. - 10
- (d) A DECLARATION THAT the 9<sup>th</sup> Respondent did not meet the Constitutional threshold of 50% plus 1 required under **Article 138(4)(a) of the Constitution.**
- (e) A DECLARATION THAT the decision of the 2<sup>nd</sup> Respondent to postpone the election of Governor in Kakamega and Mombasa Counties contravened **Article 10(2)(a) & (c) of the Constitution** in so far as the decision lacked transparency & accountability and was devoid of public participation and stakeholder engagement. - 20
- (f) A DECLARATION THAT decision of the 2<sup>nd</sup> Respondent to postpone the election of Governor in Kakamega and Mombasa Counties, was, in the context of the low voter turnout in the Presidential Election aimed at suppressing the



voters from exercising their right to vote in a General Election, in contravention of **Article 38(2)(a) & (3)(b) of the Constitution.**

- (g) A DECLARATION THAT the suppression of voters in Mombasa and Kakamega Counties tainted the Presidential Election held on 9<sup>th</sup> August, 2022 and vitiated the Presidential Election results.
- (h) A DECLARATION THAT the 2<sup>nd</sup> Respondent has no constitutional ability to postpone any election in a General Election held pursuant to **Articles 136(2)(a), 180(1), 101(1) and 177(1)(a) of the Constitution.**
- (i) A DECLARATION THAT the postponement of the elections of Governor in Kakamega and Mombasa Counties violated the citizens' right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for the election of the President enshrined in **Article 38(2)(a) of the Constitution.** — (10)
- (j) A DECLARATION THAT the tallying and verification of the Presidential Election results in the General Election held on 9<sup>th</sup> August, 2022 was not conducted in compliance **Article 138(3)(c) of the Constitution as read with Section 39 (1C) & (1D) of the Elections Act.**
- (k) A DECLARATION THAT the Forms 34C and Form 34D issued by the 2<sup>nd</sup> Respondent in the General Elections conducted by the 1<sup>st</sup> Respondent on 9<sup>th</sup> August, 2022 are unconstitutional, null and void.
- (l) A DECLARATION THAT the decision of the 2<sup>nd</sup> Respondent to declare the 3<sup>rd</sup> & 4<sup>th</sup> Respondents as President-elect and Deputy-President Elect respectively contravenes **Articles 81(e), 138(3)(c) & 10(a) of the Constitution, Section 39 (1C) & (1D) of the Elections Act** and is therefore unconstitutional, null and void. — 20



(m) A DECLARATION THAT the 3<sup>rd</sup> & 4<sup>th</sup> Respondents were not validly elected as the President-Elect & Deputy President-Elect of the Republic of Kenya.

(n) A DECLARATION THAT **Regulation 83(1)(d) & (1) of the Elections (General) Regulations, Regulation 83 (2) of the Elections (General) Regulations and Gazette Notice No. 4956 of 2022**, are unconstitutional, null and void.

(o) A DECLARATION THAT the 2<sup>nd</sup> Respondent has violated **Articles 73, 138(3)(c) & 10(a) of the Constitution**.

(p) A NULLIFICATION of the Presidential Election conducted by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents on 9<sup>th</sup> August, 2022.

(q) Any other order that this Honorable Court deems fit and just in the circumstances.

DATED at NAIROBI this 21<sup>st</sup> day of August 2022



.....  
NJOKI MBOCE & COMPANY ADVOCATES

ADVOCATES FOR THE PETITIONERS

**DRAWN AND FILED BY:**

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To: THE SUPREME COURT OF KENYA

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**LODGED** in the Registry at Nairobi on the..... day ..... of **2022**.

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REGISTRAR