

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

BETWEEN

DAVID KARIUKI NGARIPETITIONER

AND

THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION1ST RESPONDENT
WAFULA CHEBUKATI2ND RESPONDENT
JULIANA CHERERA3RD RESPONDENT
FRANCIS WANDERI4TH RESPONDENT
JUSTUS NYANG'AYA5TH RESPONDENT
IRENE MASIT6TH RESPONDENT
ABDI YAKUB GULIYE7TH RESPONDENT
BOYA MOLU8TH RESPONDENT
WILLIAM SAMOEI RUTO9TH RESPONDENT
RAILA AMOLLO ODINGA10TH RESPONDENT

PRESIDENTIAL ELECTION PETITION

THE HUMBLE PETITION OF DAVID KARIUKI NGARI WHOSE
ADDRESS OF SERVICE FOR THE PURPOSE OF THIS PETITION
IS CARE OF MITUGA & COMPANY ADVOCATES View Park
Towers, Utalii Lane, 3rd Floor, Wing C, P. O. Box 35253-00100 Nairobi,
Email Address: omituga@yahoo.com is as follows :-

A. THE PARTIES

1. The Petitioner is an adult male of sound mind, a patriotic and public affairs spirited citizen of the Republic of Kenya and a duly registered voter. The Petitioner exercised his civic duty to vote in the presidential elections held on 9th August 2022.
2. The 1st Respondent is the Independent Electoral and Boundaries Commission (*hereinafter referred as "the IEBC"*). It is established as an independent commission under Article 88 as read together with Articles 248, 249, and 250 of the Constitution of Kenya and the IEBC Act No. 9 of 2011 with the responsibility to conduct and/or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by the Elections Act.
3. The 2nd Respondent is the Chairperson of the IEBC appointed as such under the provisions of the IEBC Act.
4. The 3rd Respondent is the Vice Chairperson of the 1st Respondent herein so appointed under the provisions of the IEBC Act.
5. The 4th, 5th, 6th, 7th and 8th Respondents are members of the IEBC appointed as such under the IEBC Act.

6. The 9th Respondent was a candidate in the presidential elections held on 9th August, 2022 under the United Democratic Alliance Party and Kenya Kwanza Coalition.
7. The 10th Respondent was a presidential candidate in the presidential elections held on 9th August, 2022 under the Azimio la Umoja Coalition.

B. BACKGROUND OF THE PETITION, SUMMARY OF THE LAW AND GROUNDS OF THE PETITION

The Background

8. On 9th August 2022, a total of 14,213,137 Kenyans across the entire Republic voted in an election for the President of the Republic of Kenya according to the declaration of results form posted on the IEBC Website.
9. As at 20th August 2022, 1227 Hours, the IEBC forms portal (*hereinafter referred to as "the Portal"*), which the 1st Respondent was and is still running on its website indicated that 46,201 out of 46,229 forms had been uploaded on its portal aggregating to 99.94% of all the polling stations in Kenya.
10. As at 20th August 2022, 1229 Hours, the IEBC Portal indicated that 291 out of 291 Forms 34B had been uploaded on the Portal

amounting to 100.00% of all the constituencies in the Republic of Kenya.

11. The 1st Respondent's Portal also contains a Form 34C representing 100.00% of the votes tallied which was last updated on 16th August 2022 at 20.23Hrs.

Legal Foundation of the Petition

12. Article 138 (3)(c) 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"*.
13. By virtue of section 39 (1D) of the Elections Act, 2011, the IEBC is required to verify if the results transmitted constitute an accurate record of the results tallied, verified and declared at the respective polling stations.
14. The process of tallying, verification and declaration of presidential election results at the National Tallying Centre at the Bomas of Kenya was a corporate function vested in the Commission, and not in the Chairman of the IEBC as an individual.

15. Under section 5 of the Independent Electoral Commission Act No 9 of 2011, (the “IEBC”) the Commission shall comprise of a chairperson and six other members, that is, a total of seven (7) members. This too, is significant.
16. Clause 5 of the 2nd schedule to the IEBC Act provides that the quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission.
17. The intendment of Article 138(3) (c) of the Constitution is that the members of the Commission shall collectively tally and verify results in a Presidential election.
18. The result of the election shall be declared by the Chairperson of the Commission as provided for under Article 138 (10) of the Constitution within seven days after the presidential election.
19. Under the provisions of Clause 5 of the 2nd schedule to the IEBC Act, the declaration of the results is a collective decision of the Commission as a corporate entity.
20. The Chairperson does the actual declaration on behalf of the Commission.

21. The results to be declared by the Chairperson must emanate from the collective tallying and verification of the commission.
22. In **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others** [2017] eKLR [Nairobi, Civil Appeal No. 105 of 2017], the Court of Appeal held at page 38 that the Commission, as opposed to its Chairperson, upon receipt of the prescribed forms containing tabulated results for election of president from all polling stations, is required to tally and verify the results received at the national tallying centre.
23. The presiding officers of the IEBC were supposed to deliver original manual copies of Forms 34A to the Constituency Returning Officers of the IEBC who in turn were to generate Forms 34B for all the 290 constituencies of the Republic of Kenya and 1 diaspora constituency.
24. After generating the Forms 34B, the Constituency Returning Officers were supposed to deliver the forms together with the bundle of all Forms 34A of their respective constituencies to the IEBC National Tallying Centre at the Bomas of Kenya in Nairobi.
25. After receiving the Forms 34B together with the bundle of all Forms 34A of their respective constituencies, the IEBC, acting as a body corporate were required under the provisions of the Article

138(3)(c) to tally, verify and declare the results of the presidential elections.

26. The Chairman of the IEBC, acting as an agent of the Commission, was required to declare the results of the presidential elections after the IEBC had tallied and verified the count in accordance with article 138(10) of the Constitution.
27. On diverse dates, after generating the Forms 34B, the Constituency Returning Officers delivered the forms at the IEBC's National Tallying Centre at Bomas of Kenya in Nairobi.
28. Initially, as the Constituency Returning Officers delivered their respective forms, the commissioners of the IEBC would receive the forms collectively, tally and verify the count and then announce the results of every constituency in the order in which the Constituency Returning Officers had arrived at the national tallying centre.
29. The IEBC, after announcing the results of a constituency would then update the results of that particular constituency on its on-line portal displayed on large screens in the National Tallying Centre Auditorium at Bomas which results were also contemporaneously being broadcast by various media stations that were, at the time, permanently stationed inside the Auditorium and the Media Centre at Bomas of Kenya.

30. The announcement of results of the various constituencies would be announced by the Commissioners of the IEBC in turns.

The Chairperson's departure from the constitutional and legal and settled practical process of verifying and tallying results

31. Midway into the exercise of tallying, verification and announcement of results from constituencies, the Chairman of the IEBC, Mr. Wafula Chebukati, unilaterally, and in contravention of the express provisions of Article 138(3)(c) changed and abandoned the above stated order at the National Tallying Centre and started receiving, tallying and verifying results from Constituency Returning Officers alone.
32. The Chairman of the IEBC also stopped the announcement of constituency results and the update of the IEBC on-line portal and the screens accessible to the public at the National Tallying Centre.
33. On the morning of 15th August 2022, the Chairman of the Commission was absent from the National Tallying Centre and he returned at around 5pm.
34. At around 1810 Hours on 15th August 2022, the Chairman of the IEBC, in controversial and acrimonious circumstances, in the

absence of other Commissioners of the IEBC, declared the result of the presidential election at the National Tallying Centre.

35. In utter consternation of the public, four (4) commissioners of the IEBC, the 3rd to 6th Respondents herein made a joint public statement just before the announcement of the presidential election result disowning the result that was going to be announced by the Chairman of the Commission on grounds that the final result was procured through an “opaque process” and was not tallied and verified by the Commission as required by the Constitution and the law on elections.
36. The said four commissioners followed the above stated presser with a written joint statement issued on 16th August 2022 in which they explained the reasons why they could not own the result announced by the Chairman of the Commission. The reasons preferred by the commissioners were, *inter alia*, as follows:
 - (a) *The presidential result was declared by the Chairman of the Commission when certain constituency results had not been tallied, verified and announced by the commission;*
 - (b) *The Chairman of the Commission declared a result that had not been fully tallied and verified by the Commission;*
 - (c) *The declared result was a unilateral act by the Chairman and not a product of tallying and verification of the Commission; and*

- (d) *the Commission did not verify whether the person intended to be declared by the Chairman as president-elect had met the thresholds set by Article 138(4) of the Constitution, that is, whether he had received more than half of the votes cast in the election and at least 25% of the votes cast in each of more than half of the 47 counties of the Republic of Kenya.*

Unilateral actions by the Chairperson and Incomplete Verification and Tallying of the Votes

37. Article 138(3)(c) 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".
38. The function of tallying, verification and declaration of presidential election results at the National Tallying Centre at the Bomas of Kenya is a corporate function vested in the Commission, and not in an individual.
39. The intendment of Article 138(3) (c) of the Constitution is that the members of Commission shall collectively tally and verify results in a Presidential election.
40. Clause 5 of the 2nd schedule to the IEBC Act provides that the quorum for the conduct of business at a meeting of the

Commission shall be at least half of the existing members of the Commission.

41. The results of the election shall be declared by the Chairperson of the Commission as provided for under Article 138 (10) of the Constitution within seven days after the presidential election.
42. By the provision of Clause 5 of the 2nd schedule to the IEBC Act, the declaration of the results is collective decision of the Commission.
43. The Chairperson does the actual declaration on behalf of the Commission.
44. The results to be declared by the Chairperson must emanate from the IEBC commissioners' collective tallying and verification.

Declaration of the Results Ccontrary to the Provisions of the Constitution and the Law on Elections

45. On 15th August 2022, the 2nd Respondent purported to declare a result of the presidential election determined without the input of the 3rd -6th Respondents in the tallying and verification of results of all constituencies.

46. In excluding the four members of the Commission in the tallying and verification, the 2nd Respondent acted contrary to Article 138(3)(c) of the Constitution.
47. The four members made joint public statement on 15th and 16th August, 2022 confirming that indeed the 2nd Respondent purported to table before a meeting of the Commission results which were not a product of the tallying and verification exercise envisaged under Article 138(3)(c) for their concurrence, which they declined.
48. The 2nd Respondent in his mistaken belief that the process of verification of the results and tallying thereof solely rested on his shoulders excluded the other members of the Commission from the process which was taking place in Bomas of Kenya, Nairobi.
49. At the time of declaration of the result, the 1st Respondent did not have 28 Forms 34B nor did it publicly display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.
50. Without results from the remaining constituencies and by extension results from all polling stations and without involvement of other commissioners in the tallying and verification of results from all constituencies, the result declared

by the Chairperson cannot be said to be accurate, verifiable and transparent.

51. By all accounts, presidential election results from 28 Constituencies were not verified and tallied at the IEBC's national tally centre at Bomas of Kenya. If they found their way into the final tally in Form 34C, they are alien and they should be struck out. Either way the Chairperson, out of his unilateralism, would have disenfranchised a substantial number of voters. Disenfranchising even one voter is bad enough
52. The total valid votes cast provided in the IEBC portal for the 26 out of the 28 constituencies in which tallying and verification was not done by the commission is 1,166,690. It represents 8.21 % of the total valid votes cast countrywide (14, 213,137) according to the IEBC chairman.

No	Name of Constituency	No. of Registered Voters	Total Valid Votes Cast
1	Mathare	123,163	66,346
2	Kilifi North	No record in IEBC portal	No record in IEBC portal
3	Mvita	119,008	47,216
4	Kilifi South	97,696	43,977

5	Malindi	94,605	41,932
6	Dadaab	38,185	22,820
7	Lagdera	26,949	14,886
8	Fafi	27,335	13,662
9	Narok South	76,065	57,823
10	Narok West	66,596	53,603
11	Kajiado East	116,336	69,563
12	Kanduyi	118,347	70,046
13	Nyakach	77,934	56,005
14	Karachuonyo	94,181	68,746
15	Suba North	60,674	45,424
16	South Mugirango	79,004	52,154
17	Borabu	64,065	57,144
18	Ruaraka	124,482	73,948
19	Starehe		Lagdera form in the IEBC portal
20	Kilgoris	76,895	57,144
21	Sabatia	70,743	42,399
22	Embakasi South	167,953	82,382
23	Kisauni	Form illegible	Form illegible
24	Voi	61,606	35,389
25	Budalangi	46,032	20,180
26	Webuye	48,950	30,491
27	Samburu East	26,794	17,333

28	Turkana North	42,994	26,077
	Total	1,946,592	1,166,690

53. A staggering 8. 21 % of valid votes cast was not tallied, verified and announced or declared in accordance with Article 138 (3) (c) of the Constitution.
54. Failure to tally, verify and announce the results from the 28 Constituencies which represents about 10 % of all constituencies in Kenya should be seen more critically in juxtaposition to the rights of the individual voters thus violating their sovereign and political rights under Articles 1, 4 and 38 of the Constitution. Their right to equality and freedom from discrimination under Article 27 was violated. They were disenfranchised. Their voice was never heard.
55. By virtue of the provisions of Article 2 of the Constitution, the supremacy of the Constitution dictates that the entire membership of the Commission participates in the verification and tallying of the results of a presidential election under Article 138(3)(c). Statute and subsidiary legislation cannot supplant this position.
56. The 2nd Chairperson's unilateral actions violated the national values and principles of inclusiveness, good governance,

transparency and accountability provided for under Article 10 of the Constitution.

57. As a consequence, the results declared by the Chairperson without verification and tallying by the entire membership of the Commission, fall short of the requirements of Article 81 which lists the principles for our electoral system including transparency. Such a declaration is rail-roads a free and fair election. It undermines the independence of the electoral body. It is bereft of transparency. Its impartiality, neutrality, accuracy and accountability became adulterated. The Chairperson violated sections 39, 44 and 44A of the Elections Act with reckless abandon.
58. The Chairperson's conduct is a serious affront to constitutional guardrails.

D. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:

59. The following are the questions or issues for determination as considered by the Petitioner: -
 - (a) Whether tallying, verification and declaration of Kenya's presidential election carried out on 9th August 2022 and declared on 15th August 2022 was done in accordance with

and in compliance with the Constitution in particular article 138 of the Constitution of Kenya and the law on elections ;

- (b) Whether the Presidential Election result the Chairperson of the Independent Electoral and Boundaries Commission declared on 15th August, 2022 was valid results in accordance with and in compliance with the Constitution and the law;
- (c) Whether the 9th Respondent was validly declared as the president elect;
- (d) What are the appropriate orders to be made by the Court?

E. RELIEFS SOUGHT IN THE PETITION

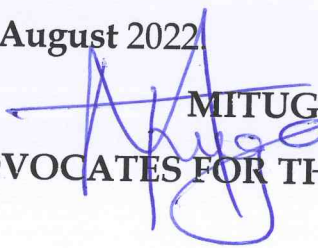
Your humble Petitioner prays for:

- (a) A declaration that under Article 138(3)(c) of the Constitution of Kenya, the process of verification and tallying of votes cast in a presidential election at every polling station is constitutionally vested in the collective membership of the Independent Electoral and Boundaries Commission, and not in the Chairperson alone.
- (b) A declaration that under Article 138(3)(c) of the Constitution of Kenya, the result of a presidential election must be determined by the Independent Electoral and Boundaries Commission after

tallying and verification of the count before being declared by the Chairperson.

- (c) The declaration that the presidential election carried out on 9th August 2022 and the result of the presidential election made by the 2nd Respondent on 15th August, 2022 contravened the Constitution and in particular the provisions of Article 138(3)(c) and the law on elections and is null and void.
- (d) The declaration of the 9th Respondent as the president elect pursuant to presidential elections conducted on 9th August, 2022, is null and void, and is hereby set aside.
- (e) Any other orders that the Honourable Court may deem just and fit to grant.
- (f) Costs of this Petition be granted to the Petitioner.

Dated at Nairobi this 22nd day of August 2022.


MITUGA & COMPANY
ADVOCATES FOR THE PETITIONER

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Lodged in the Registry at Nairobi on the.....day of August 2022

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Registrar

Lodged in the Registry at Nairobi on the.....day of August 2022

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Registrar