

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
**PRESIDENTIAL ELECTION PETITION NO. \_\_\_\_\_ OF 2017**

**BETWEEN**

**NJONJO MUE.....1<sup>ST</sup> PETITIONER**  
**KHELEF KHALIFA.....2<sup>ND</sup> PETITIONER**

**AND**

**THE CHAIRPERSON OF INDEPENDENT  
ELECTORAL AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**  
**H. E. UHURU MUIGAI KENYATTA.....3<sup>RD</sup> RESPONDENT**  
**NATIONAL SUPER ALLIANCE COALITION (NASA).....4<sup>TH</sup> RESPONDENT**

**PETITION**

The HUMBLE PETITION of NJONJO MUE AND KHELEF KHALIFA whose address of service for the purpose of this petition is care of SOWETO & COMPANY ADVOCATES, Biblica (1<sup>st</sup> Fl), (Opp. KNEC, Caledonia), Denis Pritt Road, P. O. Box 44287 – 00100, Email [sc@sca.co.ke](mailto:sc@sca.co.ke), Nairobi is as FOLLOWS:–

**A. THE PARTIES**

1. The Petitioners are adult Kenyan Citizens of sound mind duly registered as voters.
  - i. The 1<sup>st</sup> Petitioner is a registered voter in Lang’ata Constituency in Nairobi County;
  - ii. The 2<sup>nd</sup> Petitioner is a registered voter in Nyali Constituency in Mombasa County.
2. The Petitioners institute this Petition in their own interest and in the interest of the public pursuant to Article 258 as read with Article 22 of the Constitution of Kenya.
3. The 1<sup>st</sup> Respondent is the Chairperson of the 2<sup>nd</sup> Respondent herein. The 1<sup>st</sup> Respondent is constitutionally mandated under Article 138(10) of the Constitution

of Kenya 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.

4. The 2<sup>nd</sup> Respondent is the Independent Electoral and Boundaries Commission (IEBC) an independent commission established under Article 88 as read together with Articles 248 and 249 of the Constitution of Kenya and the IEBC Act No. 9 of 2011. The 2<sup>nd</sup> Respondent is constitutionally charged with the mandate and 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.
5. The 3<sup>rd</sup> Respondent was declared the President-elect and was the presidential candidate of the Jubilee Party in the presidential elections conducted on 26 October 2017 (fresh Election) following the decision of this Honourable Court in Supreme Court of Kenya Presidential Election Petition No. 1 of 2017 *Raila Amolo Odinga & Another vs The Independent Electoral and Boundaries Commission & 2 Others* (hereinafter “*Raila Odinga 2017*”). The 3<sup>rd</sup> Respondent was declared the winner of the said election by the 1<sup>st</sup> Respondent on 30 October 2017.
6. The 4<sup>th</sup> Respondent is the National Super Alliance; a coalition of political parties who sponsored Hon Raila Amolo Odinga and Hon Stephen Kalonzo Musyoka as president and deputy presidential candidates respectively in the presidential election conducted on 08 August 2017. Raila Amolo Odinga and Stephen Kalonzo Musyoka successfully challenged the conduct of the 08 August 2017 presidential election as the Petitioners in *Raila Odinga 2017* and were legitimately expected to be among the main challengers in the 26 October 2017 fresh election.

## **B. SUMMARY OF FACTS AND BACKGROUND INFORMATION**

7. Following the General Election that was conducted on 08 August 2017, and the declaration of the 3<sup>rd</sup> Respondent herein as the president-elect on 11 August 2017, Raila Amolo Odinga and Stephen Kalonzo Musyoka successfully challenged the presidential election in Supreme Court of Kenya Presidential Election Petition No. 1 of 2017 *Raila Amolo Odinga & Another vs The Independent Electoral and Boundaries Commission & 2 Others*.
8. In a definitive and landmark decision rendered on 01 September 2017 this Honourable Court nullified the presidential election and directed the 2<sup>nd</sup> Respondent to organise and conduct a fresh presidential election in strict conformity with the Constitution and the applicable election laws within sixty (60) days of the determination.
9. The main and essential reasons behind the Court’s determination were that:
  - a. The 2<sup>nd</sup> Respondent had failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the

Constitution and *inter alia* the Elections Act, Chapter 7 of the Laws of Kenya 2017;

- b. The 2<sup>nd</sup> Respondent committed irregularities and illegalities *inter alia*, in the transmission of results, particulars and the substance of which were given in the detailed and reasoned Judgment of the court;
  - c. The irregularities and illegalities affected and consequently impugned the integrity of the entire Presidential Election.
10. In its reasoned Judgement delivered on 21 September 2017 this Honourable Court sagaciously and poignantly made the following remarks:
- “[T]hat the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution.”
11. Citing Soli J Sorabjee, a former Attorney General of India who once wrote, the rule of law “*is the heritage of all mankind*” and “*a salutary reminder that ‘wherever law ends, tyranny begins’*”; and Lutisone Salevao’s observation - “cast the rule of law to the dogs and government becomes a euphemistic government of men” this Court gravely warned that “[t]he moment we ignore our Constitution the Kenyans fought for decades, we lose it”.
12. This Court was alive to and pointed us to Lutisone Salevao’s observation that,
- “History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.”
13. Further, this Honourable Court pointed out-
- “that elections world over are competitive ‘features.’ Presidents in many parts of the world, and especially in Africa, wield a lot of power. ‘The influence that comes with the office makes its very attractive.’ That influence cascades down through all elective positions to the lowest. Candidates and political parties often do anything to be elected. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally agitated. All these factors make elections at every level extremely ‘*high-pressure* events.’

If they are mismanaged or candidates do not respect the rule of law; if the average citizen, political parties and even candidates themselves do not perceive them as free and fair, elections can, and have led to instability in some countries. Examples of such an eventuality abound. However, we do not need to look far for examples. As we have stated, the flawed presidential elections in Kenya in December 2007 led to post-election skirmishes that left over 1,000 people dead, about 50,000 others displaced and drove the country to the brink of precipice not to mention the economic crisis that was thereby wrought.”

14. On the road to the conduct of a fresh presidential election as ordered by this Court, the foregoing remarks were both a beacon and a yardstick for the conduct of the fresh presidential election by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
15. The Petitioners contend that in spite of the decision of this Court and the clear direction they had been given the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued to act and operate outside the law and as though it is a law and institution unto itself.
16. The Petitioners contend that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents so mismanaged the fresh Election that what was conducted on 26 October 2017 cannot by any standards be deemed to have been an election and/or a proper and valid election conducted in “*strict* conformity with the Constitution and the applicable law.”
17. In the preparation and conduct of the 26 October 2017 election, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have demonstrated serious lack of independence and neutrality, have exhibited incompetence, unpredictability, capriciousness, arbitrariness, dishonesty and contumacious disregard for the Constitution, the law and the lawful authority of the Court.
18. Following is a timeline and critical junctures leading up to the election conducted on 26 October 2017:
  - a. Following the decision by this Honourable Court on 01 September 2017, the 1<sup>st</sup> Respondent issues a press statement on behalf of the 2<sup>nd</sup> Respondent calling on the Director of Public Prosecutions to investigate and prosecute any member of the Commission found culpable of election malpractices and that the 2<sup>nd</sup> Respondent would make internal changes to their staff ahead of a fresh presidential election”.
  - b. Internally, the 2<sup>nd</sup> Respondent’s CEO/Secretary (hereinafter CEO) issues a Memo dated 01<sup>st</sup> September 2017 Ref: IEBC/CEO/1/1/09/2017 to the 2<sup>nd</sup> Respondent’s staff countermanding/contradicting the position taken above and publicly communicated by the 1<sup>st</sup> Respondent to the world;
  - c. On 05 September 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issue Gazette Notice No. 8751 of 2017 in which they gazette Uhuru Muigai Kenyatta and Raila Amolo Odinga as the only two candidates eligible to participate in a fresh

presidential election. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents decision to gazette only those two candidates was purportedly based on the decision by this Court in *Raila Amolo Odinga & 5 Others vs Independent Electoral And Boundaries Commission & 3 Others* Supreme Court Presidential Election Petition No. 5 of 2013 (hereinafter “*Raila Odinga 2013*”);

- d. On 05 September 2017, thoughtlessly and without proper and/or adequate consultations, the 2<sup>nd</sup> Respondent fixes the date for the fresh presidential election on 17 October 2017. In deciding upon this date, the 2<sup>nd</sup> Respondent seems to have been influenced and/or directed only by representations made by the Cabinet Secretary for Education;
- e. Following public outcry and objections; and upon realisation that the KIEMS Kits could not be reconfigured in time for an election on 17 October 2017, the 2<sup>nd</sup> Respondent changes the date of the election to 26 October 2017;
- f. On 05 September 2017, the 1<sup>st</sup> Respondent formally writes to the CEO a detailed, widely shared and publicized 12-point Memo Ref: IEBC/CP/CON/1/2/VOL1(51) in which he raises and demands answers to various issues that had transpired and affected the conduct of the 08 August 2017 Election;
- g. On 10 October 2017, citing among other issues bad faith and failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to meaningfully engage and implement reforms and changes they deemed necessary to create a level playing field for all the contestants in the fresh election, the 4<sup>th</sup> Respondent publicly gives notice to the 2<sup>nd</sup> Respondent of the withdrawal of its candidate Raila Amolo Odinga from the 26 October 2017 election;
- h. Simultaneously, on 10 September 2017, Raila Amolo Odinga and Stephen Kalonzo Musyoka formally give notice of their withdrawal from the fresh Election to the 1<sup>st</sup> Respondent.
- i. Contrary to law and legitimate expectation, the 2<sup>nd</sup> Respondent disregards the withdrawal of the 4<sup>th</sup> Respondent’s candidate and decides to proceed with the conduct of the election on 26 October 2017 with the name of Raila Amolo Odinga on the ballot;
- j. Meanwhile, Dr Ekuru Aukot, one of the presidential candidates in the 08 August 2017 Election, challenges the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to limit the fresh election to only two candidates in Nairobi High Court Petition No. 471 of 2017 *Dr Ekuru Aukot vs Independent Electoral and Boundaries Commission & Others*. On 11 October 2017 the High Court finds in favour of Dr Ekuru Aukot and orders the inclusion of his name as a candidate to vie in the fresh Election.

- k. On or about 05 October 2017 the 1<sup>st</sup> Respondent goes to Court seeking “clarifications” of the Court’s decision in Raila Odinga 2017.
- l. On 13 October 2017, on a whim, without any apparent reasonable or justifiable basis the 2<sup>nd</sup> Respondent on its own motion decides to include 5 other candidates to participate in the 26 October 2017 Election. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents publish a corrigenda modifying the previous Gazette Notice 8751 of 2017 to include: John Longoggy Ekuru Aukot, Mohamed Abduba Dida, Japheth Kavinga Kaluyu, Michael Wainaina Mwaura and Joseph William Nthiga Nyagah. Shakhalaga Khwa Jirongo is excluded from the list.
- m. In the meantime the 4<sup>th</sup> Respondent and their supporters launch petitions and commence public demonstrations and picketing against the 2<sup>nd</sup> Respondent and against the conduct of the 26 October 2017 Election.
- n. CEO issues an Internal Memo *Ref: IEBC/CEO/10/2017, Re: Revised Results Transmission Workflow*, dated 14<sup>th</sup> October, 2017 intimating how the Commission intended to conduct the 26<sup>th</sup> October, 2017 elections.
- o. During this period, the 4<sup>th</sup> Respondent writes to the Office of the Director of Public Prosecutions demanding investigation of a number of the 2<sup>nd</sup> Respondent’s officers who they deem culpable and responsible for the impugned 08 August 2017 Election.
- p. The Director of Public Prosecutions issues a formal directive for the investigation of the 2<sup>nd</sup> Respondent’s officers.
- q. On 18 October 2017, once again on its own motion the 2<sup>nd</sup> Respondent decides to add the name of Shakhalaga Khwa Jirongo who had hitherto been excluded as a candidate to the list of candidates to participate in the 26 October 2017 Election. The decision to include Shakhalaga Khwa Jirongo was disclosed by Commissioner Abdi Guliye in an interview he conducted while on a trip to Dubai on 18 October 2017 and published in the print media on 23 October 2017. Commissioner Abdi Guliye admitted that Shakhalaga Khwa Jirongo had not been gazetted. As at 25 October 2017 Shakhalaga Khwa Jirongo was yet to be gazetted as a candidate in the Election.
- r. On 17 October 2017, Commissioner Roselyn Akombe one of the Commissioners of the 2<sup>nd</sup> Respondent publicly resigns from the 2<sup>nd</sup> Respondent and issues a public statement from New York exposing and giving insight to the issues and challenges bedevilling the 2<sup>nd</sup> Respondent and the conduct of the 26 October 2017 Election. Commissioner Roselyn Akombe’s resignation and her statements about the goings on at the 2<sup>nd</sup> Respondent are covered widely and keenly by international, local, electronic, social and print news media;

- s. Immediately following Commissioner Roselyn Akombe’s resignation, the 1<sup>st</sup> Respondent publicly acknowledges the challenges and issues bedevilling the 2<sup>nd</sup> Respondent and the conduct of the 26 October 2017 Election; and publicly admits that he could not guarantee free, fair and credible elections on 26 October 2017.
- t. On 23 October 2017 OT-Morpho issues a Press Release stating that in light of the High Court decision of 11 October 2017 and the 2<sup>nd</sup> Respondent’s decision to include all the 8 candidates, they proposed that the fresh election be held on 31 October 2017. OT-Morpho indicates that they cannot reconfigure the 45,000 KIEMS Kits to include all 8 candidates.
- u. On 24 October 2017, the 2<sup>nd</sup> Petitioner together with two other voters institute Supreme Court Petition No. 17 of 2017 *Khelef Khalifa & 2 Others v Independent Electoral & Boundaries Commission & Another* seeking the following substantive orders:
  - I. “A Declaration, that by “operation of law” the 26<sup>th</sup> October 2017 scheduled Fresh presidential election date was vacated by the withdrawal of the candidature the ODM Party/ NASA Coalition candidate Rt. Hon Raila Odinga and his running mate Stephen Kalonzo Musyoka vide the withdrawal letter dated 10<sup>th</sup> October 2017;
  - II. A Declaration, that the scheduled Fresh presidential election date as contained Kenya Gazette Notice Number 8751 (Special Issue), dated 5<sup>th</sup> September 2017 as read with Kenya Gazette Notice Number 10152 (Special Issue), Dated 13<sup>th</sup> October 2017 stands cancelled by operation of law pursuant to Article 138(8).
  - III. A Declaration, which the omission by the Respondents to notify the voters in the official gazette of a participating candidate contravenes the law, hampers the exercise of the sovereign will and fatally affects the elections.
  - IV. That the evidence tendered in this Petition, and especially that generated by the Respondents, establishes that that there is a real and eminent threat that the Scheduled Fresh presidential Election on the 26<sup>th</sup> October 2017 shall not comply with the Order of the Court dated 1<sup>st</sup> September 2017 and the constitution and will result into imprudent use of public resources.
  - V. An Order, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents forthwith proceeds to conduct fresh nominations and issue Notice of a new election date in the official Gazette within Ninety (90) days of the

pronouncement herein ,in strict conformity with the Constitution and the Elections Act;

- VI. An Order, compelling the Respondents to ensure strict compliance to the parameters of a free, fair and credible election under the Constitution, statute law and regulations”;
- v. On 24 October 2017, without any legal basis the 1<sup>st</sup> Respondent appoints Consolata N B Maina as a Deputy National Returning Officer, a position unknown to law. The notice of appointment is published in Gazette Notice No. 10563 on 24 October 2017.
- w. Hours to the fresh Election, on 25 October 2017, the 1<sup>st</sup> Respondent gives a public address “On the State of Preparedness in Respect of the Fresh Presidential Election Scheduled for Tomorrow the 26<sup>th</sup> of October, 2017”. From the address it is notably remarkable that:
- Hours to the election the 2<sup>nd</sup> Respondent is still grappling with critical issues affecting the election such as the validity of the appointment of Returning Officers;
  - The 1<sup>st</sup> Respondent made a significant change to the transmission of results – whilst the KIEMS had been reconfigured to transmit both text and images in the results management process, the 1<sup>st</sup> Respondent arbitrarily and capriciously decided that only the scanned images of the relevant results forms, without accompanying text, will be projected to the public through a dedicated portal.
  - The 1<sup>st</sup> Respondent publicly acknowledged that one day/hours to the Election everyone was still questioning whether there was going to be an election. This shows the palpable degree of uncertainty and unpredictability prevailing in the conduct of the election.
- vi. Despite the foregoing events, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents go ahead and conduct a travesty of an election on 26 October 2017 and subsequently, on 30 October 2017 declared the 3<sup>rd</sup> Respondent herein as the president-elect.
- vii. On the Election date i.e. 26 October 2017 the 2<sup>nd</sup> Respondent is unable to conduct elections in at least 27 constituencies and postpones the election in those constituencies to 28 October 2017.
- viii. On 27 October 2017 the 1<sup>st</sup> Respondent announces that the election in the above 27 constituencies are rescheduled by the 2<sup>nd</sup> Respondent until further notice.

- ix. On 30 October 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents decide that no elections shall be held in those constituencies altogether.
19. The Petitioners contend that there were clear and objective indicators that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents could not hold a free fair, impartial, neutral and credible election on 26 October 2017; and that the environment was not conducive to the conduct of a free fair and credible election.

**Summary of the grounds of the Petition**

20. The Petition is filed broadly under Rules 8(a), (d) and (e) of the Supreme Court (Presidential Election Petition) Rules, 2017 and can be summarised as follows herein below.
21. The primary and overarching ground is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not conduct the fresh Election in strict conformity with the Constitution and the applicable laws, and as directed by this Court on 01 September 2017. More specifically,
- (i) The 2<sup>nd</sup> Respondent did not conduct any nominations of presidential candidates in accordance with the Constitution and the Law; ergo the 3<sup>rd</sup> Respondent was not validly, procedurally and/or lawfully nominated as a presidential candidate.
  - (ii) The election conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 26 October 2017 failed to meet the general principle stipulated under Article 81(d) of the Constitution of Kenya of universal suffrage based on the aspiration for fair representation and equality of vote.
  - (iii) The election conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 26 October 2017 failed to meet the general principles stipulated under Article 81(e) of the Constitution of Kenya of a free and fair election, which is:
    - a. The election was not free from violence, intimidation, improper influence or corruption;
    - b. The fresh Election was not conducted by an independent body;
    - c. The fresh Election was not transparent; and
    - d. The fresh Election was not administered in an impartial, neutral, efficient, accurate and accountable manner.
  - (iv) The fresh Election was further marred by illegalities and irregularities;

- (v) Given the prevailing conditions and circumstances, 1<sup>st</sup> and 2<sup>nd</sup> Respondents could not and should not have proceeded with the conduct of the fresh Election on 26 October 2017.

**C. THE RESULTS:**

22. Following are the results declared on 30 October 2017 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents after the 26 October 2017 presidential election and as recorded in Form 34C:

<b>Name of Candidate</b>	<b>Votes Garnered</b>
JOHN LONGOGGY EKURU AUKOT:	21,333
MOHAMED ABDUBA DIDA:	14,107
SHAKHALAGA KHWA JIRONGO:	3,832
JAPETH KAVINGA KALUYU:	8,261
UHURU MUIGAI KENYATTA:	7,483,895
MICHAEL WAINAINA MWAURA:	6,007
JOSEPH WILLIAM NTHIGA NYAGAH:	5,554
RAILA AMOLO ODINGA:	73,228
TOTAL VALID VOTES:	7,616,217
REJECTED BALLOTS:	37,713
TOTAL NUMBER OF REGISTERED VOTERS	19,611,423

23. From these figures the 1<sup>st</sup> Respondent alleged that the overall Voter Turnout was 38.8%.

**D. SUMMARY OF THE RELEVANT AND APPLICABLE LAW**

24. Article 4 of the Constitution establishes a republican system of governance, which is founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives. Article 4 states,

- (1) “Kenya is a sovereign Republic.
- (2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.”

25. Article 10 of the Constitution sets out the national values and principles of governance that the Kenyan people have established for themselves. Article 10 provides that

- (1) “The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
    - (a) applies or interprets this Constitution;
    - (b) enacts, applies or interprets any law; or
    - (c) makes or implements public policy decisions.
  - (2) The national values and principles of governance include—
    - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
    - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
    - (c) good governance, integrity, transparency and accountability; and
    - (d) sustainable development.”
26. Article 12(1) guarantees every citizen
- (a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution”.
27. Article 38 of the Constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution. Article 38 provides that,
- (1) “Every citizen is free to make political choices, which includes the right—
    - (a) to form, or participate in forming, a political party;
    - (b) to participate in the activities of, or recruit members for, a political party; or
    - (c) to campaign for a political party or cause.
  - (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
    - (a) any elective public body or office established under this

Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

28. Article 81 sets out the general principles that the electoral system must meet under the Constitution. It stipulates that the electoral system shall comply with the following principles—

(a) “freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are—

ii. by secret ballot;

iii. free from violence, intimidation, improper influence or corruption;

iv. conducted by an independent body;

v. transparent; and

vi. administered in an impartial, neutral, efficient, accurate and accountable manner.”

29. Article 88 sets out the parameters of voting to guide the 1<sup>st</sup> Respondent.

“At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (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.”

30. Article 131(1)(e) of the Constitution recognises that the President “is a symbol of national unity.”

31. Article 131(2) stipulates that:

“The President shall-

- (a) Respect, uphold and safeguard this Constitution;
- (b) Safeguard the sovereignty of the Republic;
- (c) Promote and enhance the unity of the nation;
- (d) Promote respect for the diversity of the people and communities of Kenya; and
- (e) Ensure the protection of human rights and fundamental freedoms and the rule of law.”

32. Article 136(1) stipulates by who and where a president is to be elected. It says,

- (1) 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.

33. Article 138 of the Constitution lays down the procedure to be followed at presidential election as follows:

- (1) “If only one candidate for President is nominated, that candidate shall be declared elected.

- (2) If two or more candidates for President are nominated, an election shall be held in each constituency.
- (3) 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
  - (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.
- (4) 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.
- (5) If no candidate is elected, a fresh election shall be held within thirty days after the previous election and in that fresh election the only candidates shall be—
  - (a) the candidate, or the candidates, who received the greatest number of votes; and
  - (b) the candidate, or the candidates, who received the second greatest number of votes.
  - (6) If more than one candidate receives the greatest number of votes, clause (5)(b) shall not apply and the only candidates in the fresh election shall be those contemplated in clause (5)(a).
- (7) The candidate who receives the most votes in the fresh election shall be declared elected as President.
- (8) A presidential election shall be cancelled and a new election held if—
  - (a) no person has been nominated as a candidate before the expiry of the period set for the delivery of nominations;

- (b) a candidate for election as President or Deputy President dies on or before the scheduled election date; or
  - (c) a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President.
- (9) A new presidential election under clause (8) shall be held within sixty days after the date set for the previous presidential election.
- (10) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall— (a) declare the result of the election; and (b) deliver a written notification of the result to the Chief Justice and the incumbent President.”
34. The centrality of nomination of candidates in the election process or cycles is underscored by the fact that under Article 88(4)(k) of the Constitution it is one of the key responsibilities of the 1<sup>st</sup> Respondent.

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

...

- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

...

- x. the monitoring of compliance with the legislation required by Article 82 (1)(b) relating to nomination of candidates by parties.”

35. Jurisdiction of the Court. Article 163 at relevant provides that

- (1) There is established the Supreme Court, which shall consist of—  
...
- (2) The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges.

- (3) The Supreme Court shall have—
  - (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and
  - (b) ...
- (4) ...
- (5) ...
- (6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.
- (7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

36. Article 21 of the Universal Declaration of Human Rights 1948 (UDHR) provides that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right to equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

37. Article 25 of the United Nations Covenant on Civil and Political Rights, 1966 (UNCCPR) provides that:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

- (c) To have access, on general terms of equality, to public service in his country.

38. Article 13 of the African Charter on Human and Peoples' Rights:

- 1. "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- 2. Every citizen shall have the right of equal access to the public service of the country.
- 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

39. Kenya is a state party to the Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections whose Articles 1 and 2 provide:

1. "Free and Fair Elections

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

2. Voting and Elections Rights

- (1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis.
- (2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.
- (3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.
- (4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.
- (5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.

- (6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.
  - (7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.”
40. Article 6(d) of the Treaty for the Establishment of the East African Community outlines the fundamental principles of the Community to be:
- “good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”.
41. These international treaties and covenants form part of the laws of Kenya by virtue of Article 2(6) of the Constitution and the effect is that every citizen is entitled to genuine periodic elections by universal suffrage by secret ballot guaranteeing the free expression and will of the people who are the electorate.
42. Section 14 of the Elections Act – Initiation of presidential election.
- (1) Whenever a presidential election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in electronic and print media of national circulation—
    - (a) in the case of a general election, at least sixty days before the date of the election; or
    - (b) in the case of an election under Article 138(5) of the Constitution, at least twenty-one days before the date of the election;
    - (c) in any other case, upon the office of the President becoming vacant.
  - (2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify—
    - (a) the nomination day for the presidential election; and
    - (b) the day or days on which the poll shall be taken for the presidential election, which shall not be less than twenty-one days after the day specified for nomination.

43. Section 83 of the Elections Act contemplates that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even so, although the Petitioners aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners position is that the non-compliance with the Constitution, the written laws and the Rule of Law is sufficient to invalidate the Presidential Election.
44. Article 88(5) of the Constitution categorically stipulates that the 2<sup>nd</sup> Respondent “shall exercise its powers and perform its functions in accordance with [the] Constitution and national legislation.”
45. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are by their conduct fomenting anarchy in the Country, weakening constitutionalism, balkanizing the Country and marginalizing regions and communities in Kenya.

## **E. GROUNDS AND ARGUMENTS SUPPORTING THE PETITION**

**“Our lives begin to end the day we become silent about things that matter.”**

**Martin Luther King Jr**

- a. *The 2<sup>nd</sup> Respondent did not conduct any nominations of presidential candidates in accordance with the Constitution and the Law; ergo the 3<sup>d</sup> Respondent was not validly, procedurally and/or lawfully nominated as a presidential candidate*
46. Section 14 of the Elections Act, which deals with the initiation of presidential election unequivocally states that:
  - (1) *Whenever* a presidential election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in electronic and print media of national circulation—
    - (a) in the case of a general election, at least sixty days before the date of the election; or
    - (b) in the case of an election under Article 138(5) of the Constitution, at least twenty-one days before the date of the election;
    - (c) in any other case, upon the office of the President becoming vacant.
  - (2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify—

- (a) the *nomination day* for the presidential election; and
  - (b) the day or days on which the poll shall be taken for the presidential election, which shall not be less than twenty-one days after the day specified for nomination.
47. Pursuant to the determination of this Court in *Raila Odinga 2017* on 01 September 2017, what this Honourable Court ordered was a fresh election.
  48. The 2<sup>nd</sup> Respondent should have moved with utmost diligence and promptitude and immediately organised and called for a fresh nomination to initiate the fresh election.
  49. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents primary shortcomings were:
    - a. Failing and/or refusing to appreciate the law governing its own procedure;
    - b. Lack of foresight;
    - c. Failing to anticipate the decision of this Honourable Court and planning itself for any eventuality as any diligent, prudent and cautious institution would;
    - d. Failing to act in accordance with the law.
  50. The determination of this Court was made before noon on 01 September 2017 therefore the 2<sup>nd</sup> Respondent had ample time to publish a notice within the same day in order to meet the strict requirements of the law. While the timeframes set by the law may be stringent, they are not insurmountable. Until changed, the law must be applied as it stands.
  51. Without conducting a nomination there was no basis for the fresh election on 26 October 2017 because the process for the election had not been initiated. The 2<sup>nd</sup> Respondent was operating outside the law and therefore the election was rendered invalid ab initio.
  52. The 3<sup>rd</sup> Respondent was elected without a nomination certificate therefore his election is invalid.
  53. A nomination certificate issued to a candidate under Section 14 of the Elections Act is valid only for *the* election for which it is issued.
  54. The following particulars demonstrate or show the 2<sup>nd</sup> Respondent's intransigence toward the law, incompetence and/or basic refusal to be subject to lawful authority.
    - a. Making irrational, capricious, inconsistent and unpredictable decisions;

- b. Without any basis or legal authority, limiting the fresh election to only two candidates in the first instance;
  - c. Following the decision of the High Court in Nairobi High Court Petition No. 471 of 2017 *Dr Ekuru Aukot vs Independent Electoral and Boundaries Commission & Others* in which the Court gave specific directions for the inclusion of the name of Dr Ekuru Aukot, including without any legal basis or authority 5 other candidates (excluding Khwa Shakhhalaga Jirongo);
  - d. Amending on a whim the earlier notice and including the name of Khwa Shakhhalaga Jirongo; and without gazettelement;
  - e. Arbitrary management of the campaign period which included providing different campaign periods for different candidates and extending the period beyond the period legally permissible which is discriminatory;
  - f. Failing to appreciate and take into account the effect of the 2<sup>nd</sup> Respondent's actions on the rights of the candidates eg their right to campaign.
55. Notwithstanding and without prejudice to the foregoing, the 4<sup>th</sup> Respondent withdrew its presidential candidate on 10 October 2017 while there were only two candidates on the ballot.
56. The withdrawal of the 4<sup>th</sup> Respondent's candidate automatically triggered a vacation of the scheduled election as held in *Raila Odinga* 2013, which the 2<sup>nd</sup> Respondent relied on in determining the candidates originally.
57. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to consider and/or appreciate the legal effect of the withdrawal of the candidate; and where in doubt, to act diligently and in good faith by seeking the opinion or clarification of this Court in accordance with Article 163(3)(a).

Particulars of dishonesty, ignorance of the law and incompetence

- a. Making inconsistent decisions e.g relying on *Raila Odinga* 2013 when convenient and abandoning it when it did not suit them;
- b. The 2<sup>nd</sup> Respondent purported to ignore the withdrawal of the 4<sup>th</sup> Respondent's candidate by invoking the requirement that the candidate ought to have submitted Form 24A when the same was inapplicable because no nomination had been conducted;
- c. Failing to acknowledge and realise that a dead election ie an election that stood vacated, could not be revived;

- d. Consistently admitting/acknowledging that the 4<sup>th</sup> Respondent’s candidate had withdrawn from the election, yet failing to act upon it by maintaining his name on the ballot;
- e. In totality, the 2<sup>nd</sup> Respondent unnecessarily created a legal lacuna by running an election with candidates whose nomination was not apparent;
- f. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents promised to honour this Honourable Court’s Order to open up their servers yet failing to do so which is a continuing violation of the law.

***b. The election conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 26 October 2017 failed to meet the general principle stipulated under Article 81(d) of the Constitution of Kenya of universal suffrage based on the aspiration for fair representation and equality of vote.***

- 58. Article 38(2) guarantees “every citizen the right to free, fair and regular elections based on universal suffrage and the expression of the will of the electors”;
- 59. Article 38(3) guarantees “every adult citizen” “the right to vote, without unreasonable restrictions”;
- 60. Article (81)(d) demands that as a general principle the electoral system must “comply with the principle of universal suffrage based on the aspiration for fair representation and equality of vote”.
- 61. Universal suffrage denotes the right of every adult citizen to vote and Article 81(d) places a positive obligation on the 2<sup>nd</sup> Respondent to ensure that there is universal suffrage and to ensure that everyone is fairly represented. The 2<sup>nd</sup> Respondent was irresponsibly casual in fulfilling its positive obligation to ensure universal suffrage.
- 62. Article 138(2) provides that at a presidential election “if two or more candidates for President are nominated, an election shall be held in *each* constituency”;
- 63. During the 26 October 2017 Election it was very clear and present that some people could not participate in the Election and others simply did not vote.
  - a. In at least the following 27 constituencies it was clear they did not and could not participate in the Election: Alego Usonga, Awendo, Bondo, Gem, Ugenya, Homabay Town, Kabondo Kasipul, Karachuonyo, Kasipul, Kisumu Central, Kisumu East, Kisumu West, Muhoroni, Ndhiwa, Nyakach, Nyando, Nyatike, Rangwe, Rarieda, Rongo, Seme, Suba North, Suba South, Suna East, Suna West, Ugunja and Uriri.

- b. In spite of no election being held in these constituencies contrary to Article 138(2) which stipulates that elections shall be held in all constituencies, the 1<sup>st</sup> & 2<sup>nd</sup> Respondent purported to declare the result of the Election.
  - c. Without any legal basis and authority, and without any reasons contrary to Article 47(1) and (2), the 1<sup>st</sup> & 2<sup>nd</sup> Respondents arbitrarily and unilaterally decided no election shall be conducted in parts of the Country and that the votes in those parts do not count;
  - d. The 1<sup>st</sup>/2<sup>nd</sup> Respondents by their own admissions noted that there were places where the opportunity to vote did not exist meaning universal suffrage was not achieved;
  - e. In Turkana Central and Fafi the election was conducted on 28 October 2017 while counting was ongoing. This degrades and undermines the quality of the vote in these areas.
64. In contravention of a fundamental principle of the ballot, which is that every vote counts, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted contrary to this principle by:
- a. Actively and constructively fomenting an environment in which it could not hold or deliver a free fair and credible election with their inconsistent decisions, infighting, lack of neutrality and partiality;
  - b. Presiding over an Election in which 27 constituencies did not and could not vote;
  - c. Degrading the value of the vote in those constituencies;
  - d. By counting votes while other areas such as Turkana Central and Fafi Constituencies had not even had an opportunity to cast their vote the 1<sup>st</sup> and 2<sup>nd</sup> Respondents degraded the election in those places. The subliminal message communicated is that their votes do not count or matter further creating a bandwagon effect.
65. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents constructively and actively fomented the balkanisation and marginalisation of parts and peoples of this Country by insisting on holding an election that had a dubious legal basis and was already marred by continuing violence and threats.
- c. ***The election conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 26 October 2017 failed to meet the general principles stipulated under Article 81(e) of the Constitution of Kenya of a free and fair election, which is:***
    - i. ***The election was not free from violence, intimidation, improper influence or corruption;***

66. Article 38(2) of the Constitution provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors.
67. Article 38(3) of the Constitution provides that every citizen adult citizen has the right, without unreasonable restrictions to vote by secret ballot in any election or referendum.
68. Article 81(e)(ii) of the Constitution provides that the electoral system must secure free and fair elections which are free from violence, intimidation, improper influence or corruption.
69. Section 7 of the Code of Conduct for Political Parties provides that a political party shall not engage and encourage violence, intimidation, use public resources, establish or maintain a para-military force, militia and use state resources for partisan campaigns. This provision is reiterated in Regulations 3 and 6 of the Electoral Code of Conduct.
70. The Petitioners aver that the fresh Election was marred with widespread violence, intimidation, improper influence and corruption, in flagrant violation of the Constitution, the Elections Laws and Regulations as particularized in the following paragraphs:
71. On 1<sup>st</sup> September 2017 immediately following the decision of this Court in *Raila Odinga 2017* the 3<sup>rd</sup> Respondent addressed a public rally in Nairobi in which he threatened “*to deal with*” and “*sort*” the judiciary saying: “*si Maraga na watu yake wakora wamesema uchaguzi upotee ... Maraga ajue yakwamba sasa anadeal na rais ambaye amekalia kiti.*”
72. On 2<sup>nd</sup> September 2017, the 3<sup>rd</sup> Respondent had a meeting with Jubilee Members of Parliament at State House Nairobi during which he repeated his threat to the Supreme Court Judges stating “*we have a problem with our Judiciary...we shall revisit*”.
73. The threats made by the 3<sup>rd</sup> Respondent “to revisit”, “deal with” and “sort” the Supreme Court Judges was intended to intimidate the Supreme Court judges; sent a tacit message to the voters that the 3<sup>rd</sup> Respondent would not allow the Supreme Court to independently determine disputes arising from the fresh presidential election; and, to disable the Supreme Court in their free exercise of their jurisdictions to determine future presidential elections disputes, even if such elections were unconstitutional, unlawful, irregular and shambolic. This was intended to and had the certain consequence of keeping off voters who believe a presidential election is a process ending with dispute resolution(s) by the Supreme Court.
74. In September, 2017 Members of Parliament of the Jubilee Party led by the 3<sup>rd</sup> Respondent, caused to be published the *Elections Laws (Amendments) Bill 2017* vide

which they not only sought to undertake “Parliamentary Review” of the Supreme Court decision in *Raila Odinga 2017* but also proposed to repeal or amend all provisions of the Electoral laws and Regulations the Supreme Court interpreted and relied upon to render its determination. The impact of this legislative proposal was to diminish the role of technology in the elections, open election results to manipulation and to signal to the voters that it would not be possible to successfully challenge the results of the fresh presidential elections even if the same were to be unconstitutional, unlawful or irregular as previously found in *Raila Odinga 2017*. This was intended to and had the effect of making voters keep off the process.

75. The Bill aforementioned has since become law with the overt approval of the 3<sup>rd</sup> Respondent and has been gazetted as Elections Laws (Amendments) Act, Number 34 of 2017.
76. On 2<sup>nd</sup> October 2017, the 3<sup>rd</sup> Respondent met 10,000 women supporters at State House, Nairobi and officially launched “*Jubilee Women Brigade*”. The said Jubilee Women Brigade were dressed in military and police uniforms, saluted and used designations and descriptions reserved for the military and the police. This was a public posture intended to intimidate and instil fear.
77. After the launch, the said *Jubilee Women Brigade* addressed subsequent rallies and public meetings for the Jubilee Party led by the 3<sup>rd</sup> Respondent dressed in military and police uniforms recruiting members and administering oaths on new members. This happened in West Pokot, Nakuru, Mombasa and Nairobi, among other places. This was intended to and had the intimidating effect upon voters not supporting Jubilee Party as it was clear that the election was being “militarised”.
78. Several men supporting Jubilee Party were later seen in Nairobi and other parts of the country dressed in military and police uniforms, there was noted insurrection of militia groups, increased administration and taking of oaths, prayers and practices previously associated with the *Mungiki* sect mainly in Nairobi. Violence, killings, rape and other atrocities committed in areas deemed to be strongholds of the 4<sup>th</sup> Respondent have been attributed to persons dressed in military and police uniforms and carrying both guns and machetes. This was intended to and had the effect of intimidating and swaying the voters not to vote.
79. On diverse dates leading up to the Election the police and persons dressed in police uniforms forcefully broke into houses in areas deemed to be stronghold of the 4<sup>th</sup> Respondent, beat up, maimed men and raped women. It is now confirmed through reports by the mandated constitutional commission and other organizations that over sixty (60) individuals lost their lives to excessive and brute force by the police. It is further confirmed through the aforementioned Constitutional Commissions that there were over sixty (60) confirmed rapes and gender based violence and cases in strongholds of the 4<sup>th</sup> Respondent.

80. This use of excessive and brute force by the police by the state in strongholds of the 4<sup>th</sup> Respondent was intended to and had the effect of provoking the voters in those regions to resent voting in the fresh presidential elections. It was intended to and had the impact of making the voters to keep off polling.
81. That sometime in October 2017, a Toyota Land Cruiser ploughed into and injured supporters of the 4<sup>th</sup> Respondent while engaged in peaceful demonstrations within Nairobi Central Business District. To date, no legal action has been taken against the driver/owner of the vehicle by the State.
82. On or about 20 October 2017 the 3<sup>rd</sup> Respondent's running-mate and the CS Interior Dr. Fred Matiangi took the 3<sup>rd</sup> Respondent's campaign to South Mugirango Constituency. In that public rally Dr. Fred Matiangi asserted his position as the Cabinet Secretary in charge of security and stated that he is a stated he is a member of *Echinkororo* a proscribed militia group, who according to him always beat the *Maasai* at the border, asked the people to vote for the 4<sup>th</sup> Respondent and encouraged violence on election day saying he would direct the police not to act to restrain the same.
83. In October 2017, during the campaigns, the State headed by the 3<sup>rd</sup> Respondent withdrew police security personnel attached to the 4<sup>th</sup> Respondent's presidential candidate, his running-mate and other principals of the 4<sup>th</sup> Respondent.
84. In October 2017, the Police openly superintended and aided the disruption of the 4<sup>th</sup> Respondent's rally in Meru by supporters of the 3<sup>rd</sup> Respondent's Jubilee Party.
85. The 3<sup>rd</sup> Respondent also used and abused public resources including State House facilities and facilities, state vehicles and other resources of the State in his political campaigns and political activities.
86. The 3<sup>rd</sup> Respondent abused the public resources and violated the law by enjoining Cabinet Secretaries and other senior state officers in his campaigns. During campaigns the State/ Public Officers supervised the provision of services and promised the voters more government services and development if they voted for the 3<sup>rd</sup> Respondent. The most brazen faces of this impunity included: *Mwangi Kinjuri, Cecil Kariuki, Eugene Wamahwa, Fred Matiangi and Najib Balala*.
87. Following the nullification of the 8<sup>th</sup> August 2017 election and throughout the campaign period, the 3<sup>rd</sup> Respondent caused to be published advertisement of the achievements of the Jubilee Government in the electronic media and the Government delivery portal to exert improper influence on upon the voters to support the 3<sup>rd</sup> Respondents re-election bid, contrary to law.
88. Meanwhile, the 4<sup>th</sup> Respondent also engaged in what it termed "*No Reforms, No Elections campaigns*" and later on encouraged its supporters to boycott the fresh presidential elections. The campaigns mostly took the form of demonstrations which included some violent demonstrators and which were invariably violently

and brutally dispersed by the Police. This also had the effect of undermining free voting.

89. On the whole, the voting environment was not conducive for the conduct of the fresh election in constituencies in most parts of the country including: Nairobi, Mombasa, Kilifi, Tana River, Taita Taveta, Samburu, Narok, Kajiado, Mandera, Wajir, Marsabit, Garissa, Kwale, Kisumu, Siaya, Migori, Homa Bay, Kisii, Nyamira, Machakos, Makueni, Kitui, Bungoma, Trans Nzoia, Busia, Vihiga, Meru and Kakamega Counties.
90. That despite this, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents went ahead and purported to conduct the fresh presidential elections, despite confirmations by a Commissioner who resigned and the 1<sup>st</sup> Respondent that it was not possible to guarantee “free, fair and credible elections’ in these circumstances.
91. The aforesaid violations and contraventions taken singly and/or cumulatively affected the conduct, result and outcome of the fresh Election and rendered it void and a nullity. What transpired on 26 October 2017 cannot be said to have been an election.

*ii. The fresh Election was not conducted by an independent body;*

*iii. The fresh Election was not administered in an impartial, neutral, efficient, accurate and accountable manner.*

92. The Petitioners aver that the election was not conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents independently, nor was it administered in an impartial and neutral manner, in so far as administrative decisions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were directed and made at the behest and control of the 3<sup>rd</sup> Respondent and/or his political party, in contravention of the provisions of Article 81(e)(iii) and (v) of the Constitution of Kenya.
93. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents decisions have been unpredictable and capricious, not based on or backed by law or lawful authority.

#### Particulars

- a. Following the decision of this Court in *Raila Odinga* 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents notified the public that they would investigate election offences arising out of the decision of the Court and to that end invited the Director of Public Prosecutions to investigate and prosecute culpable staff;
- b. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents publicly announced that they would make internal changes on personnel in particular the Secretariat and in its processes, to protect the integrity of the sovereign power and will of Kenyans in respect to the fresh election;

- c. On 03 September 2017, in an effort to explain away publicized claims that Commissioners of the 2<sup>nd</sup> Respondent and its Chief Executive Officer (CEO) were divided on culpability for the invalidated election and how best to conduct the fresh election, the 2<sup>nd</sup> Respondent notified the public that there were no scuffles or crisis;
- d. On 04 September 2017, the Cabinet Secretary for Education and Acting Cabinet Secretary for Interior and Coordination of National Government (hereinafter “ CS Interior”) proposed to and directed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to hold the fresh election on or before 17 October 2017, in order not to interfere with the Primary and Secondary Schools Examinations’ Calendar;
- e. On 04 September 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relying upon the directive of the Cabinet Secretary aforesaid gave notice that the fresh election would be held on 17 October 2007 and, on 05 September 2017 published a gazette notice in that regard;
- f. On 05 September 2017, the 1<sup>st</sup> Respondent wrote to the CEO demanding answers on 12 issues, whose resolution the 1<sup>st</sup> Respondent stated were necessary to guarantee a free and fair fresh election;
- g. On 05 September 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents notified the public of their appointment of a seven (7) member Project Team to oversee the fresh election. The team excluded the CEO and several staff in the Secretariat suspected of election malpractices that affected the 08 August 2017 Election;
- h. On 06 September 2017, the 3<sup>rd</sup> Respondent’s party wrote to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, directing the exclusion of seven (7) staff members of the 2<sup>nd</sup> Respondent from participating in the fresh election, on the claim that the said staff were partisan;
- i. On 06 September 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents notified the public of their communication to the 3<sup>rd</sup> Respondent’s party that the 2<sup>nd</sup> Respondent shall “not be subject to direction or control by any person or authority” and that it was unacceptable of the 3<sup>rd</sup> Respondent’s party to direct which staff should be included in the fresh election team. A similar letter was dispatched to the 4<sup>th</sup> Respondent, with the assurance that the Project Team would oversee the fresh election;
- j. Subsequent to the issuance of the 12 point memo by the 1<sup>st</sup> Respondent to the CEO, the 3<sup>rd</sup> Respondent’s running mate and Jubilee political party publicly defended the CEO; and further demanded that the 12 point memo should not be responded to or acted upon;

- k. On 07 September 2017 the 2<sup>nd</sup> Respondent's Vice Chairperson Consolata Nkatha Maina, Commissioners Prof Yakub Guliye, Paul Kurgat, Boya Molu and Margaret Mwachanya issued a separate Press Release alleging that the 1<sup>st</sup> Respondent's 12 point Memo CEO was not sanctioned by the 2<sup>nd</sup> Respondent. This exposed the confusion, disharmony and partisan interests within the 2<sup>nd</sup> Respondent.
- l. Meanwhile, the issues raised in the 1<sup>st</sup> Respondent's 12 point Memo have never been addressed publicly;
- m. In a press release made on 08 September 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents notified the public that they were confident that the fresh election could be held on 17 October, 2017 and that the decision on only 2 participating candidates was guided by this Court's decision made in *Raila Odinga* 2013 on the issue;
- n. On 11 September 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in total departure from representations made to the public on 06 September 2017 in respect to the Project Team, stated that it had "agreed to review and streamline the operationalization of the project team for purposes of efficient and effective delivery of the fresh election" and that the CEO would lead the Project Team. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further stated that they had resolved to review the CEO's response to the 1<sup>st</sup> Respondent's 12 point memo and communicate the same to the public;
- o. No communication to the public on the 12 point memo was ever made; the seven (7) member Project Team was capriciously abandoned and the CEO proceeded to oversee preparations for the fresh election in the manner demanded by the 3<sup>rd</sup> Respondent's political party;
- p. On 19 September 2017, the 2<sup>nd</sup> Respondent notified the public that the issues resolved to be discussed in terms of its communication of 11 September 2017 had not been addressed and that information conveyed to the public of the resolution of the issues was not correct;
- q. On 21 September 2017, the 2<sup>nd</sup> Respondent notified the public that it was studying the detailed decision made by this Court on the same day, that it would communicate how the recommendations therein would be implemented and changed the date of the fresh election to 26 October, 2017. No communication was ever made in respect to the implementation of the recommendations of this Court;
- r. As at 10 October 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not put in place any changes to enable the conduct of a free and fair fresh election, resulting in the withdrawal from the race of the 4<sup>th</sup> Respondent's presidential candidate and running mate an action that vitiated the fresh election. The 3<sup>rd</sup> Respondent demanded that the election goes on;

- s. Notwithstanding the withdrawal by the 4<sup>th</sup> Respondent's candidates from the fresh election and the vacation thereof, on 12 October 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents included them in the Gazette Notice for participating candidates, claiming that they had not been completed and submitted Form 24A, which is only relevant after a nomination has been done;
  - t. The CEO against who impropriety had been alleged by the 1<sup>st</sup> Respondent in the 12 point memo continued to oversee the process toward the conduct of the fresh election on 26 October 2017. On 14 October 2017 the CEO issued a controversial statement on the transmission of results;
  - u. On 20 October 2017, 6 days to the Election the CEO purported to take leave of absence in a dishonest attempt to hoodwink the public/4<sup>th</sup> Respondent that he had given in to their demands.
  - v. On 25 October 2017, the 1<sup>st</sup> Respondent gave a public address "On the State of Preparedness in Respect of the Fresh Presidential Election Scheduled for Tomorrow the 26<sup>th</sup> of October, 2017". From the address it is remarkably notable that:
    - i. Hours to the election the 2<sup>nd</sup> Respondent was still grappling with critical issues affecting the election such as the validity of the appointment of Returning Officers;
    - ii. The 1<sup>st</sup> Respondent made a significant change to the transmission of results – whilst the KIEMS had been reconfigured to transmit both text and images in the results management process, the 1<sup>st</sup> Respondent arbitrarily and capriciously decided that only the scanned images of the relevant results forms, without accompanying text, will be projected to the public through a dedicated portal.
    - iii. The 1<sup>st</sup> Respondent publicly acknowledged that one day/hours to the Election everyone was still questioning whether there was going to be an election. This shows the palpable degree of uncertainty and unpredictability prevailing in the conduct of the election.
94. The 1<sup>st</sup> Respondent and all Commissioners of the 2<sup>nd</sup> Respondent as well as the 3<sup>rd</sup> Respondent are State Officers bound by the provisions of Article 73 of the Constitution of Kenya on leadership and integrity.
95. As State Officers, the 1<sup>st</sup> Respondent and all Commissioners of the 2<sup>nd</sup> Respondent together with the 3<sup>rd</sup> Respondent are obligated to exercise authority in a manner consistent with the purposes of and objects of the Constitution, that demonstrates respect for the people, brings honour to the nation and dignity to their offices and promotes public confidence in the integrity of their offices.

96. As State Officers, the 1<sup>st</sup> Respondent and all Commissioners of the 2<sup>nd</sup> Respondent together with the 3<sup>rd</sup> Respondent are required to ensure that their decisions are not influenced by favouritism, improper motives or corrupt practices and must render selfless service based solely on the public interest demonstrated by honesty in the execution of public duties and the declaration of any personal interest that may conflict with public duties. The actions outlined above are contrary to these constitutional requirements.
97. The Petitioners invite the Court to take judicial notice that at no time have the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ever disagreed with the 3<sup>rd</sup> Respondent and the Jubilee Party even in legal disputes. They are always on the same side.
98. At all material times, Evans Monari Advocate was a known personal Advocate of the 3<sup>rd</sup> Respondent as well as of the 3<sup>rd</sup> Respondent's political party. On 10 October 2016 Evans Monari was appointed by the 3<sup>rd</sup> Respondent as a member of the Selection Panel that appointed the 1<sup>st</sup> Respondent and Commissioners of the 2<sup>nd</sup> Respondent.
99. The Petitioners aver that the election was not conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents independently, nor was it administered in an impartial and neutral manner, in so far as legal decisions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were directed by or made at the behest and control of the 3<sup>rd</sup> Respondent and/or his political party, in contravention of the provisions of Articles 73 and 81(e)(iii) and (v) of the Constitution.

#### Particulars

- a. Evans Monari was one of the Advocates who acted for the 3<sup>rd</sup> Respondent in Supreme Court Petition No. 1 of 2017;
- b. On 17 October 2017, in her resignation statement Dr Roselyn Akombe stated that the fresh election as planned could not meet the basic expectations of a credible election for the reason amongst others that the Commission was saddled with endless cases which it was losing on account on legal advice skewed to fit partisan political interests;
- c. On 18 October, 2017, the 1<sup>st</sup> Respondent publicly acknowledged and reiterated the complaint by Roselyn Akombe, stating that he could not be pushed by majority Commissioners "to accept legal opinions that serve partisan interests and are not grounded in the Constitution or the law";
- d. The fact of Evans Monari's interference in the legal decision making processes of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was confirmed by his appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in Nairobi High Court Petition No. 514 of 2017 *John Harun Mwan vs Independent Electoral and Boundaries Commission & Others*; and,

- e. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision to go on with the fresh election on 26<sup>th</sup> October 2017 notwithstanding the legal necessity to call the same off upon the withdrawal of the 4<sup>th</sup> Respondent's candidates, without fresh nominations, was made on the basis of partisan legal advice.
100. The 3<sup>rd</sup> Respondent and his CS Interior have misused their positions to interfere with the mechanism set under the Constitution for judicial determination to frustrate the hearing of several cases filed to challenge the fresh election in further contravention of the provisions of Articles 73 and 81(e)(iii) and (v) of the Constitution of Kenya thereby hindering a free and fair election.
101. The events highlighted below demonstrate underhand dealings and tactics to circumvent the process of administration of justice by State actors and give a clear perception of intermeddling and the overweening influence of partisan interests/state actors:

#### Particulars

- a. The 3<sup>rd</sup> Respondent and his Jubilee party subsequent to the hearing and determination of *Raila Odinga 2017* threatened to "fix" the Judiciary and in particular the Supreme Court on the claim that decisions made by the Court, including the one of 1<sup>st</sup> September 2017 amounted to a "judicial coup";
- b. Supreme Court Petition No. 17 of 2017 *Khelef Khalifa & Others vs Independent Electoral and Boundaries Commission & Others* had been fixed for hearing on 25 October 2017;
- c. Civil Appeal No. 359 of 2017 *Orange Democratic Movement vs Ekuru Aukot & Others* filed by one of the 4<sup>th</sup> Respondent's affiliate parties to challenge the inclusion of Raila Amolo Odinga as a presidential candidate in the fresh election was also, fixed for hearing on 25 October 2017;
- d. On 24 October 2017, the CS Interior arbitrarily and capriciously declared and gazetted 25 October 2017 as a public holiday;
- e. The Petitioners contend that the declaration of a public holiday on 25 October 2017 was malicious and deliberately intended to hamstring the hearing of Petition No. 17 of 2017 above;
- f. The Supreme Court was closed, barricaded by armed policemen and tanks, to prevent and regulate access despite a directive by the Chief Justice that the Courts shall sit on 25 October 2017 to urgently hear and determine matters relating to the fresh election;

- g. Several Judges of this Court were absent and could not sit for the hearing of Petition No. 17 of 2017 on 25 October 2017;
  - h. The Court of Appeal did not sit for the hearing of Civil Appeal No. 359 of 2017;
  - i. In a strange turn of events, the Court of Appeal was assembled in the evening of 25 October 2017, and the Court sat and issued unprecedented ex parte orders in Civil Application No. 246 of 2017 *Independent Electoral and Boundaries Commission vs Kbelef Khalifa & Another*, which set aside a decision of the High Court made earlier on the same day and constructively determined the intended appeal. In its decision, the High Court had declared the 2<sup>nd</sup> Respondent's appointment of Returning Officers and Presiding Officers illegal; and,
  - j. The fresh election proceeded on 26 October 2017 notwithstanding the invalidity thereof and before the determination of the cases on the same.
102. The actions and decisions referred to hereinabove were intended and did indeed facilitate the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' conduct of an invalid election at the behest, control, direction and unlawful benefit of the 3<sup>rd</sup> Respondent who controls the CS Interior.
103. The 3<sup>rd</sup> Respondent's running mate William Ruto and his political party, Jubilee are the fiercest defenders of the 2<sup>nd</sup> Respondent even when a Court has found it guilty of wrongdoing.
104. In view of the matters pleaded hereinabove, and in light of the prevailing environment the Petitioners aver that no free and fair election was or could have been conducted by an independent body and administered in an impartial and neutral manner on 26 October 2017 and the outcome thereof was invalid.
105. There were unmistakable and clear signs and indicators that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could not deliver on their mandate to ensure a free and fair election.
- d. ***The fresh Election was further marred by illegalities and irregularities;***
- a. *Failure to conduct nominations*
106. The Petitioners reiterate the grounds and particulars in paragraphs 42 – 53 hereinabove.
107. Failure by the 2<sup>nd</sup> Respondent to conduct nominations before the election on the fresh election constituted a violation of the law rendering the fresh Election illegal.

108. The 2<sup>nd</sup> Respondent unnecessarily created a legal lacuna by running an election with candidates whose nomination is not apparent.
- b. Ungazetted and undesignated returning and presiding officers and/or illegally appointed returning and presiding officers*
109. In a number of constituencies and polling stations the Returning and Presiding Officers resigned and/or did not show up for duty on the date of the election.
110. The Petitioners contend that the election was presided over by officials who had been illegally and unlawfully appointed.
111. The High Court in Nairobi High Court Judicial Review Application No. 628 of 2017 *Khelef Khalifa & Hassan Abdi vs Independent Electoral and Boundaries Commission*, ruled and found that the appointment of Returning Officers and Deputy Returning Officers was illegal.
112. Any returns prepared by illegally and unlawfully officials are a nullity in law and in contravention of the Constitution.
- c. Ballot Papers with candidates whose names should not have appeared*
113. The inclusion and publishing of the name of Raila Amolo Odinga in the ballot paper, in disregard of his withdrawal from the fresh election was irregular and illegal owing to his earlier withdrawal.
- d. Arbitrary relocation of polling stations on Election Day without notice*
114. On 26 October 2017 the 2<sup>nd</sup> Respondent arbitrarily relocated/ changed the location of the following polling stations/centres in Kibra Constituency without notice, warning or further direction to the voters who were registered in those polling stations:
- a. KIBRA (1390), SARANGOMBE (Ward 023), KAG OLYMPIC EDUCATIONAL CENTER with 3789 registered voters;
- b. KIBRA (1390) SARANGOMBE (Ward 024) KIBERA PAG CHURCH SCHOOL with 2,957 registered voters
115. By so doing the 2<sup>nd</sup> Respondent disenfranchised about 6,746 voters;
116. Only 2 voters managed to vote yet the 2<sup>nd</sup> Respondent purported to declare that an election had been conducted in spite of the fact that there was no real opportunity to vote for the disenfranchised voters in those polling stations and constituencies;

117. The 2<sup>nd</sup> Respondent exercised its duty without taking into account relevant factors, without due care for the rights of the voters.
118. The 2<sup>nd</sup> Respondent also purported to set up temporary, informal and/or alternative polling stations/areas in Kaloleni and Changamwe Constituencies within Mombasa County ignoring the fact that polling stations must be gazetted, in order to ensure voters are informed beforehand so they can participate fully if they so desire.
119. The 2<sup>nd</sup> Respondent dishonestly claimed that an election had taken place in areas such as St Mary's Polling Station within Mombasa County when the voters did not have a real opportunity to vote;
120. The dishonesty is in the fact that the 2<sup>nd</sup> Respondent has tried to create the image that an election took place when in fact majority of voters were disenfranchised therefore it cannot be claimed that a real, true and fair election took place in the affected parts.

*e. Failure to conduct a legitimate, credible and transparent process*

121. Contrary to representations made by the 2<sup>nd</sup> Respondent that they would put in place a biometric register that is secure and accurate in order to prevent electoral fraud including multiple voting and impersonation, the evidence that at least 28% of the people that turned out to vote in the fresh election could not be identified biometrically raises doubt concerning the number of people who actually turned out to vote in the fresh Election.
122. There are discrepancies between voter turnout as recorded in Forms 34A and as captured/recorded in OT-Morpho's KIEMS Kits records/logs.
  - a. In a sample of about 100 polling stations in Garissa and Murang'a Counties the Petitioner can demonstrate these discrepancies;
  - b. In some polling stations the turnout gap between Form 34A and the KIEMS Kit is more than half of the total number of registered voters in that station;
123. The Petitioners aver that the 2<sup>nd</sup> Respondent failed to use the biometric system of voter identification in order to misrepresent the voter turnout;
124. There have been unexplained changes in the total number of registered voters between 30 June 2017 (the date when the Register was gazetted for purposes of the General Election) and 26 October 2017.

*Lack of Transparency*

125. Prior to 26 October 2017 the 2<sup>nd</sup> Respondent made public representations that they would make known the final voter turnout by close of voting at 1700hrs on polling day;
126. Contrary to this the 2<sup>nd</sup> Respondent failed to disclose the total number of voters who had turned out to vote on 26 October 2017;
127. Instead, at various times after the close of voting on 26 October 2017 and thereafter the 1<sup>st</sup> Respondent kept providing ever changing numbers of the alleged voter turnout. Strangely, the 1<sup>st</sup> Respondent initially declared the voter turnout as being 48% only for this to reduce to 34% thereafter and change again to 38%.
128. The Petitioners aver that the inconsistencies and apparent contradictions raise serious and fundamental issues about the integrity of the fresh Election.
129. In the audit conducted by KPMG of the Voter Register only about 5,000 voters were classified as having been registered without biometric records. In the fresh Election the 2<sup>nd</sup> Respondent has claimed that there were about 1.6million voters identified without biometrics. This is a huge anomaly in comparison with the KPMG audit and points to the existence of fraud.
130. The Petitioners had a legitimate expectation that the systems that had been put in place for the conduct of the 8<sup>th</sup> August, 2017 elections would still be put in place such as the back-up system and security guarantees for the guarantee of free, fair and credible election. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent had assured the public through the communication given in an interview by its ICT Manager the late Msando whereby each Constituency and/or County had extra KIEMS Kits in case of any failure; there were IT Officers of the 2<sup>nd</sup> Respondent on standby in every Constituency and/or County to foresee any such failures of the KIEMS kits.
131. That the foregoing notwithstanding, the Honourable Court of Appeal in the case of *National Super Alliance Coalition (Nasa) vs Independent Electoral And Boundaries Commission*, Civil Appeal No. 258 of 2017, the Court outlined and affirmed the procedure to be followed whenever the KIEMS kits fail and whereby the 1<sup>st</sup> and 2<sup>nd</sup> Respondents resort to the complementary mechanism. The elaborate procedure was set out in line with Section 44A of the Elections Act and the Court gave guidance and adopted the Memo issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.
132. That the Petitioners had, at all material times, the legitimate expectation that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents would adhere to the laid out procedure whenever any KIEMS kits fail and would duly notify the general public in light of transparency and accountability. In that regard therefore it is in the interest of justice that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent duly avail to the public and to this Honourable Court the list of the polling Stations with the failed KIEMS Kits, their GPRS location; the voter turn-out per the KIEMS kits; the audit log of the results transmission; the various

Form 32As used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in areas they alleged that the KIEMS kits failed.

133. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents illegally and without any justification tampered with the voters register and the figures therein from the actual figures in the voters register that was used for the August, 8<sup>th</sup> General Elections.

*e. Given the prevailing conditions and circumstances, 1<sup>st</sup> and 2<sup>nd</sup> Respondents could not and should not have proceeded with the conduct of the fresh Election on 26 October 2017.*

134. The totality of the foregoing grounds, evidence and factors clearly show that from the onset the 26 October 2017 election was illegal, null and void ab initio.
135. Further, the environment before and on the date of the election was so polluted, marred and tainted with violence, intimidation, partisan interests and influence that it was objectively foreseeable that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could not conduct a free and fair election.
136. The 1<sup>st</sup> Respondent publicly came out and admitted to the Nation a few critical days to the election that he had no control over the 2<sup>nd</sup> Respondent and that he could not guarantee a free and fair election. The 1<sup>st</sup> Respondent by his own conduct and admission gave the impression that whatever exercise it conducted on 26 October 2017 was a waste of time, money and resources. This reflected in the low voter turnout on the one hand and the failure to even hold the election in other parts of the Country.
137. The environment and circumstances in which the fresh Election was conducted produced an absurdity given the voter turnout of 38%. The Constitution envisages fair and equal representation of the people.
138. The 1<sup>st</sup> Respondent was criminally and irresponsibly casual in ensuring the conduct of a free fair and credible election.
139. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not make every diligent and reasonable effort to conduct a free, fair and credible election. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent were negligently oblivious to the solemnness of their duty and the impact of their conduct and decisions on the lives and liberties of citizens as well as the existence of Kenya as a Nation State.

#### **F. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:**

140. The following are the questions or issues for determination as considered by the Petitioners:

- (i) Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conduct the fresh Election in strict conformity with the Constitution and the applicable laws?
- (ii) Should the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have conducted a fresh nomination of candidates for the fresh Election;
- (iii) Were any of the presidential candidates who took part in the fresh Election validly or properly nominated?
- (iv) Did the fresh Election meet the test of universal suffrage based on the aspiration for fair representation and equality of vote;
- (v) Was the fresh Election free and fair?
  - a. Was the fresh election marred by violence, intimidation, improper influence or corruption?
  - b. Was the fresh Election conducted by an independent body?
  - c. Was the fresh election transparent?
  - d. Was the fresh election administered in an impartial, neutral, efficient, accurate and accountable manner?
- (vi) Was the fresh Election marred by illegalities and irregularities;
- (vii) Given the prevailing conditions and circumstances, could and should the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have proceeded with the conduct of the fresh Election on 26 October 2017?
- (viii) In light of the amendment of Section 83 of the Elections Act the by Election Laws (Amendment) Act 2017 after the conduct of the fresh Election, which law is applicable for purposes of determining the present dispute?
- (ix) Whether Section 83 of the Elections Act as amended is unconstitutional and invalid?
- (x) What are the appropriate orders to be made by the Court?

## **G. RELIEFS SOUGHT IN THE PETITION**

- a. Immediately upon the filing of the Petition, the 2<sup>nd</sup> Respondent do avail all the Election materials including polling day diaries, electronic documents, devices and

equipment for the Presidential Election and the Form 32As used in the complementary system within 48 hours;

- b. Immediately upon the filing of the Petition, the 2<sup>nd</sup> Respondent do avail and deposit with the Court all the Secure Digital (SD) Cards from the KIEMS Kits that were used, unused or expected to be used in the fresh Election, whether deployed or not;
- c. An order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents produce and give access to the Petitioners to the full and un-redacted KPMG Audit Report on the Voter Register including all sections of the Report that have not been made publicly available;
- d. A specific order for scrutiny of all the Forms 32A and the polling day diaries prepared by the Returning Officers;
- e. An order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C;
- f. A declaration that the non-compliance, irregularities and improprieties in the Presidential Election were substantial and significant that they affected the result thereof;
- g. A declaration that the fresh Election held on 26<sup>th</sup> October 2017 was not conducted in strict conformity with the Constitution and the applicable law rendering the declared result invalid, null and void;
- h. A declaration that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents were obliged to carry out fresh nomination of candidates in order to conduct a fresh Election under Article 140(3);
- i. A declaration that the 3<sup>rd</sup> Respondent was not validly declared as the president elect and that the declaration is invalid, null and void;
- j. A declaration that Section 83 of the Elections Act (as amended) is unconstitutional and invalid to the extent of its inconsistency with the Constitution of Kenya;
- k. An order directing the 2<sup>nd</sup> Respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the Elections Act and to commence the process by conducting fresh nominations;
- l. Following a declaration of invalidity and an order for the conduct of a fresh Presidential Election, and in light of the twice impugned conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, this Honourable Court do issue just, fit and appropriate orders as the circumstances warrant;
- m. In the interest of the public each party to bear its own costs of the Petition; and

n. Any other orders that the Honourable Court may deem just and fit to grant.

DATED at NAIROBI this 06<sup>th</sup> day of November 2017.

**SOWETO & COMPANY  
ADVOCATES FOR THE PETITIONERS**

**DRAWN & FILED BY:**

SOWETO & COMPANY ADVOCATES (LSK/2017/4157)

BIBLICA (1<sup>ST</sup> FL)

(Opp. KNEC)

DENIS PRITT ROAD, CALEDONIA

P. O. BOX 44287 – 00100

**NAIROBI**

**Email:** [sc@sca.co.ke](mailto:sc@sca.co.ke)

TO: THE SUPREME COURT OF KENYA

SUPREME COURT BUILDING

**NAIROBI**

**COPIES TO BE SERVED UPON:**

1. THE CHAIRPERSON  
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
ANNIVERSARY TOWERS (6<sup>TH</sup> FL)  
UNIVERSITY WAY  
P. O. BOX 45371 – 00100  
**NAIROBI**
2. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
ANNIVERSARY TOWERS (6<sup>TH</sup> FL)  
UNIVERSITY WAY  
P. O. BOX 45371 – 00100  
**NAIROBI**
3. H. E. UHURU MUIGAI KENYATTA  
**NAIROBI**
4. NATIONAL SUPER ALLIANCE  
CAPITOL HILL  
**NAIROBI**

LODGED in the Registry at Nairobi on the ..... day.....of 2017.

-----  
REGISTRAR