

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PRESIDENTIAL ELECTION PETITION NO. E005 OF 2022

BETWEEN

RAILA ODINGA..... 1ST PETITIONER
MARTHA WANGARI KARUA..... 2ND PETITIONER

AND

INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION 1ST RESPONDENT
WANYONYI WAFULA CHEBUKATI..... 2ND RESPONDENT - 10
BOYA MOLU..... 3RD RESPONDENT
PROF. ABDI YAKUB GULIYE..... 4TH RESPONDENT
JULIANA WHONGE CHERERA..... 5TH RESPONDENT
JUSTUS NYANG'AYA..... 6TH RESPONDENT
FRANCIS WANDERI..... 7TH RESPONDENT
IRENE MASIT..... 8TH RESPONDENT
WILLIAM SAMOEI RUTO..... 9TH RESPONDENT

AFFIDAVIT OF PROF. ABDI YAKUB GULIYE
(In support of the 1st and 2nd Respondents' Case)

-20

I, **PROF. ABDI YAKUB GULIYE**, a resident of Nairobi County within the Republic of Kenya and of P.O. Box 45371-00100 Nairobi, do hereby make oath and solemnly state as follows:

1. **THAT** I am one of the Commissioners of the Independent Electoral and Boundaries Commission (the "1st Respondent" or "Commission"). I was appointed vide gazette Notice No. 400 dated 18th January, 2017 and sworn into office on 20th January, 2017.
2. **THAT** I am conversant with the matters deponed to herein hence competent to swear this affidavit.
3. **THAT** I am long serving public officer having served as a lecturer in a public university for close to 30 years. In the course of my career I have also served in managerial roles and Boards of various institutions. -30

4. THAT while I note that the Petitioners have named me as the 4th Respondent in this Petition, I verily believe that I have been wrongly joined in the matter for the reasons that:
- a) the issues raised in the Petition relate to events, acts or omissions which purportedly arose while I was executing my official duties as a Commissioner of the 1st Respondent;
 - b) the Petitioner's case as pleaded does not disclose any cause of action whatsoever against me in my personal capacity;
 - c) even if the Petitioners were to raise any grievances against me, I verily believe that a Presidential Election Petition under Article 140 of the Constitution is not the appropriate forum and form for seeking redress; and — 10
 - d) the decision by the Petitioners to join Commissioners of the 1st Respondent as substantive Respondents in the matter is diversionary and a manifest abuse of the Court process which should not be countenanced.
5. THAT I swear this affidavit in support of the responses by the 1st and 2nd Respondents.
6. THAT I have read and understood, and where necessary had explained to me, the Petition dated 21st August, 2022 and filed in court on 22nd August, 2022 together with the Supporting Affidavits sworn by Raila Odinga, Martha Wangari Karua, Saitabao Kanchory, John Mark Githongo, Arnold Ochieng Oginga, Dr. Edgar Ouko — 20
Otumba, Bernard Adongo, Dr. Nyangasi Oduwo, Cellestine Anyango Opiyo, Susan Wambugu, Benson Wesonga, Ezra Sunguti, Benjamin Agina, Nathan Githinji Mwangi, Prof. Walter Richard Mebane, Arnold Kakenyi Lenny Muteti and Martin E. Papa as well as the annexures thereto (together "**the Petition**"). I oppose the Petition.
7. THAT I have read the Affidavit of Wafula Wanyonyi Chebukati, the Chairperson of the 1st Respondent, filed in response to the Petition and I reiterate and adopt its contents. I further reiterate and adopt the contents of the Answers to the Petition presented on behalf of the 1st and 2nd Respondent and lodged in Court pursuant to Rule 11 of the Supreme Court (Presidential Election Petition) Rules, 2017. I wish to — 30
state as follows in addition to the responses outlined in the said Answers to the Petition:

8. THAT as a Commissioner with the 1st Respondent, I was designated to chair the Commission's Committee that oversees elections operations, which is responsible for, among others, synthesizing all operational issues relating to any upcoming elections and making recommendations to the full Commission for consideration and approval if merited.
9. THAT in addition to the foregoing, and in relation to the general elections held on 9th August, 2022, I was nominated to be in charge of the presidential elections tallying centre, a responsibility which was confirmed by the Chairman in writing. *(Attached and marked "AYG-1" is a copy of the letter addressed to me by the Chairman in that respect).* -10
10. THAT for brevity, I adopt the contents of the affidavit of Wafula Wanyonyi Chebukati fully in relation to the following headings of his Affidavit, namely:
- a) Pre-poll preparations and issues arising.
 - b) The election day.
 - c) Transmission of results.
 - d) Procedures at the National Tallying Centre.
 - e) Declaration of results.
 - f) Responses to allegations arising from the declared results.
 - g) Responses to cross-cutting allegations contained in various Affidavits.
11. THAT I reaffirm the contents of the Part 4 of the affidavit of the Chairman titled "Procedures at the National Tallying Centre" and in particular the portion relating to the concerted but unsuccessful attempts by the named actors to subvert the will of the people, to which I wish to make the following further depositions: -20
12. THAT as a Commissioner and a State Officer I understood my role which required diligent service and fidelity to the Constitution. It was at all times my desire to oversee the conduct of a free fair and credible elections which met the threshold of the Constitution and the law.
13. THAT it is my earnest belief that the Commission conducted a free and fair election and that the Commission lived up to the expectation in Article 81 (e) which requires it to remain independent and that the election was conducted in the most transparent, impartial, neutral, efficient, accurate and accountable manner. -30

14. THAT regrettably, while the election was conducted in a free and fair manner, it has been held at a heavy cost to the Commission's staff and service providers who have had to endure incessant harassment, intimidation, abductions, threats to life and even loss of life in the course of duty. I verily believe that in a democracy, the sovereign will of the people should always prevail and that the Commission's role is limited to conducting a legally compliant electoral process and declare the choice of the people.

15. THAT while the Commission was still tallying and verifying the presidential election results, I was shocked to learn that some people were willing to sabotage the will of the people and had the audacity to request the Commission to come to their aid to achieve such reprehensible desires. I set out here below those incidences: -10

16. THAT I was informed by the Chairperson that on 13th August, 2022, while the verification process was ongoing, Hon. Raphael Tuju and Governor Charity Ngilu sought audience with him to protest about the fast-tracking of the verification process as agreed with agents of the presidential candidates. It is unclear why a faster conclusion of the process seemed to bother them.

17. THAT at about 3am on the morning of 15th August, 2022, the Chairperson was visited by Hon. Raphael Tuju, Senator Amos Wako and Advocate Kyalo Mbobu. The Chairperson called all the Commissioners to join him to engage the visitors. When all the Commissioners arrived, the meeting was commenced by the Chairperson by -20 inviting the visitors to state their issue. Senator Wako indicated that they had come to ask the Commission not to operate '*in a vacuum*' and that it must consider the link between the election results to be declared and stability of the country which he described as "*the bigger picture*". Senator Wako proceeded to indicate that in his term as Attorney General he also served as the election supervisor and in that capacity he would moderate results guided by the need to achieve law and stability in the country.

18. THAT Hon. Raphael Tuju spoke after Senator Wako. He indicated that it was necessary for the results to be '*moderated in favour of baba*' and that any contrary declaration of results would '*plunge the country into chaos*'. As an alternative, he -30 suggested that in the event that it was not possible to declare '*baba*' as the President-Elect, then the Commission should force a run-off. He indicated that should his request be granted, it would be adequately rewarded.

19. THAT having heard the sentiments of Hon. Tuju and Senator Wako, the Chairperson invited the Commissioners to comment. Commissioners Juliana Cherera, Justus Nyang'aya, Irene Masit and Francis Wanderi agreed with the remarks of both Senator Wako and Hon. Tuju.
20. THAT I informed the meeting that I did not know the outcome of the elections at that point and that any such discussion was unwelcome. Commissioner Molu similarly refused to entertain the discussion, a view that was also shared by the CEO.
21. THAT the Chairman took the view that he would respect the will of the people and announce the results as per the final tally from all the polling stations. As regards the proposed incentive, we were all categorical that we would not entertain such requests. -10
22. THAT later the same morning, the Deputy Inspector General of Police, Mr. Noor Gabow came to the holding room who informed me that a team from the National Security Advisory Committee ("NSAC") had arrived at the national tallying centre and wanted to meet the Chairperson. I notified the Chairperson who, at the time, was busy with his duties and indicated that he would convene a briefing meeting with the Commissioners at 2 pm regarding the final results and to listen to the visiting team.
23. THAT shortly after 2pm, the meeting with the NSAC delegation commenced with a round of introductions. The delegation was led by Mr. Kennedy Kihara (Principal Administrative Secretary at the Office of the President). The other participants were Mr. Kennedy Ogeto (Solicitor General); Mr. Hillary Mutyambai (Inspector General of Police); and Lieutenant General Francis Omondi Ogolla (Vice Chief of Defence Forces). -20
24. THAT after introductions, Mr. Kennedy Kihara indicated that the team was visiting on behalf of the entire NSAC and that the composition of the members in attendance had been deliberately chosen considering the magnitude of the message to be passed to us.
25. THAT after drawing our attention to their level and rank, Mr. Kennedy Kihara proceeded to relay the message. The message was that if the Commission declared Hon. William Samoei Ruto as the President-Elect, '*the country is going to burn*' (sic). He proceeded to indicate that skirmishes between the Kikuyu and Luo communities -30

had already started 'in several slums including Kibera and Mathare' on the basis of alleged 'betrayal by the Kikuyus'.

26. THAT Mr. Kihara proceeded to caution that if we proceeded with declaration of the results with Hon. Ruto as the President-Elect and chaos erupts, 'then the blood of the dead Kenyans' will be on our hands, and that the seven of us (Commissioners) will be held responsible.
27. THAT the second part of the message from the NSAC delegation was that if we cannot announce Hon. Raila Amolo Odinga as the outright winner, then we must ensure that there is a run-off.
28. THAT only Mr. Kennedy Kihara spoke at the meeting and as he concluded his remarks, he indicated that they wanted from us a message that they could take back to the National Security Advisory Committee. -10
29. THAT after Mr. Kihara concluded his remarks, the Chairperson invited us to share their views. Commissioners Nyang'aya, Masit, Wanderi and Vice Chairperson Cherera were first to comment and said that the message warrants serious consideration and that they supported adoption of the communication by the NSAC 'before taking a decision as to the results to be announced'.
30. THAT after the remarks of the first four Commissioners, I spoke. I stated that the Commission has a Constitutional mandate to fulfill and that in declaring the results it will be guided by the same Constitution and applicable law. -20
31. THAT the Chairperson indicated that we had all an oath of office which required fidelity to the Constitution. The NSAC delegation left shortly after, at about 3pm.
32. THAT after the NSAC team had left, the Commission Secretary/Chief Executive Officer Mr. Marjan Hussein Marjan walked into the boardroom with the final results and handed over a copy of the results to each Commissioner. A debate ensued. Four Commissioners (Vice Chair Juliana Cherera and Commissioners Justus Nyang'aya, Irene Masit and Francis Wanderi) protested and insisted that the results should be changed in the light of the NSAC delegation's communication.
33. THAT Commissioners Masit and Wanderi were of the view that the results should be pushed towards a re-run, which in their view would be a 'win-win' situation to which I exclaimed "how?". Vice Chair Cherera suggested that the margin is not too -30

big and could be manipulated by moving 233,211 votes from Hon. Ruto to the rejected ballots category. When my turn to speak came I told the Commissioners that I would not be a party to a scheme to sabotage the will of the people.

34. THAT having heard the views of all the Commissioners, the Chairman indicated that he would not discuss subversion of the will of the people, and that he would announce and declare the final results in accordance with the verified tallies.
35. THAT we walked out of the meeting room and headed towards the auditorium where I was to announce the results of the remaining 27 constituencies before the Chairman could make the final declaration. The results of those constituencies had already been verified in the presence of agents of the candidates and included in the final tally in Form 34C. - 10
36. THAT before I could read the results from the remaining Constituencies, some fracas ensued. In the circumstances, I would not be able to announce the results of the remaining 27 results and neither would the Chairman be able to declare the final results. We went back to the holding room. I was injured in the melee. When calm was restored, the Chairman declared the final results in the midst of chaos and consequently could not go through all the County summations but nonetheless indicated the availability of the forms. *Annexed hereto and marked AYG-2 are copies of the Incident Report under OB No. 29/15/08/2022 together with my statement as recorded by the police for further investigations.* - 20
37. THAT I verily believe that the aggressors at Bomas should be apprehended and charged for many crimes under the Election Offences Act, the Independent Electoral and Boundaries Commission Act, the Penal Code amongst others.
38. THAT I verily believe that the Honourable Court has power to direct that an order be transmitted to the Director of Public Prosecutions to direct an investigation to be carried out by any such state agency as he considers appropriate and based on the outcome of such investigations commence prosecution under section 87 of the Elections Act.
39. THAT the presidential election was conducted in accordance with the Constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome of the presidential election made. - 30
40. THAT I swear this affidavit in opposition to the Petition filed herein.

41. THAT the facts deponed to herein are true to the best of my knowledge, save for facts deposed to on information and belief, sources and grounds whereof I have disclosed.

SWORN at NAIROBI

This ...26th day of...August 2022

By the said

PROF. ABDI YAKUB GULIYE

Guliye
.....
DEPONENT

BEFORE ME

CHRISPINE OUMAH MIGELE
ADVOCATE - COMMISSIONER FOR OATHS
P.O. Box 24193 - 00100, NAIROBI
P105 / 15260 / 18

COMMISSIONER FOR OATHS

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-10

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

This is the exhibit marked AYG-1
referred to in the annexed affidavit of
Prof. Abdi Yakub Guliye declaration
sworn before me on the 28th
declared day of August 2022 at NAIROBI
C/O: M
COMMISSIONER FOR OATHS



REF: No. IEBC/ CO/CORR/GEN/VOL. I (11)

22nd July, 2022

Commissioner Prof. Abdi Guliye
Mr. Marjan Hussein Marjan

RE: **APPOINTMENT TO THE RESULTS MANAGEMENT TEAM AT THE PRESIDENTIAL TALLYING CENTRE – BOMAS OF KENYA**

Reference is made to the above-stated subject matter.

Pursuant to Section 39 of the Elections Act and Regulations 83 and 84 (1) and 2(a) the Commission has designated Bomas of Kenya as the Presidential Election Tallying Centre for the 9th August 2022 General Election.

Consequently, You are hereby appointed to manage the Presidential Election Results Path as follows;

Commissioner Prof. Abdi Guliye	- Team Leader
Mr. Marjan Hussein Marjan	- Alternate Team Leader

The broad Terms of Reference of the Team are:

1. Undertaking quality Assurance of results forms received from the Presidential Returning Officer desk.
2. Tallying and processing of election results.
3. Assist the Presidential Returning in managing a record of the election results.

Copies of letters of appointment of the team are attached herein for your information, record and further necessary action.

The Appointment takes effect immediately.

W. W. CHEBUKATI
CHAIRMAN

address: Anniversary Towers, 6th Floor, off University Way, P.O Box 45371-00100 Nairobi, Kenya
phone: +254 (0) 2769000, fax: +254 (0) 20 2219185, email: info@iebc.or.ke, website: www.iebc.or.ke

OB EXTRACT.

OB NO. 29/15/08/2022

AT 2000 HRS

AT LANGATA POLICE STATION.

This is the exhibit marked **AYG-2**
referred to in the annexed affidavit of
Prof. Abdi Yakub Gulye declaration
sworn before me on the 26th
declared August 2022 at 11th MTRP/2021
day of August at 11th MTRP/2021
COMMISSIONER FOR OATHS

INCIDENT REPORT: Today the 15th day of August, 2022 at around ~~1700~~ 1715 hrs in Uhaguzi Hall, Bomas of Kenya Auditorium which had capacity of 2000 persons mainly members of public, IEBC officials, observers, 10 diplomats as well as Azimio ad Kenya Kwana elected leaders and supporters who were gathered to witness the declaration of presidential results, when the following Azimio Agents; Ledama Oletina, Saitabao Ole Kauduri and Gladys Wangari among others jumped over the barriers and entered into the auditorium stage where the IEBC Chairman Mr. Wafu Chibukali was preparing to announce the -20 presidential results. The above agents advanced menacingly toward the IEBC Chairman and Commissioners with an intention of grabbing documents which were in possession of the IEBC Chairman in order to disrupt the process. During the commotion, several people were injured among them; IEBC CEO Marjan Hussein Marjan sustained an injury on the head, Prof. Abdi Yakub Gulye sustained injury on both legs. Chairs and tables were also -30 damaged and value to follow. Police officers intervened and order was restored. The function proceeded to the end without any incident ending at 1830 hrs. Signed *[Signature]*

were in attendance ① Prof. George Masakoy
② Maurice Wainiga and ③ Dr. William Lowe
Ruto was declared President-Elect. During
the event, over two thousand people were in
attendance. The event started at about 1630hrs
and ended at about 1830 hrs.

Signed: 



Statement Form 13

DATE 24/8/2022
 TIME 1743 hrs
 PLACE SERENA HOTEL.

This is the exhibit marked AKG-2 referred to in the annexed affidavit of Prof. Abdi Gikub Guliyev declaration sworn before me on the 26th day of August 2022 at NAIROBI Kenya
 COMMISSIONER FOR OATHS

IDA No - 0218953
ABDI YAKUB GULIYE
Box- 45371 -
00100 NAIROBI
TEL- 0723-800242

HOME PARTICULARS

DIST- WASIR WEST
 DIV- BRIFTU
 LOC- BRIFTU
 SUB-LOC- BRIFTU

CURRENT ADDRESS
ARUNIVERSALY
LOWER- IEBC-10

STATES

I'm the above mentioned person aged 60 years and I work with Independent Electoral and Boundaries Commission (IEBC) as a commissioner. Am one of the longest serving IEBC Commissioners and I work to States as

that about I do remember very well that one month prior to Election-20 date which took place on 9/8/2022 we used to have several meetings with political parties, political Agent IEBC staff and we also did ICT testing in Bomas. My

LOC
~~AKG~~
 X
 Guliyev
 0218953



Statement Form 14

DATE 24/8/2022

TIME 17:30 HRS

PLACE SERENA HOTEL

Chair (1) Change of Election Operations

(2) Research Strategic and

boundary Demarcation

and on that place at Bommas I was the team leader for the tallying centre and I wish to state as follows:-

I do remember very well that on 15/8/2022 at around 10:40 pm we had a meeting in the CEO place at the Bommas with other commissioners. They are, the chairman IERC was chairing the meeting, ^{VICE} Deputy Chair and the other IERC Commissioners. After the meeting from the boardroom some minutes after ^{we} ^{walked} we ^{took} ^{over} ^{access} ~~access~~ the tally centre from the -20 basement and climb up for to the holding room for commissioners. At the holding room, the chairman Mr Chandras asked the presidential Agents to come to the holding room so that they can see...

LOC
~~M~~
X
Julija
0216953



III

Statement Form 15

DATE
24/8/2022TIME
17:30 hrsPLACE
SERENA
HOTEL

Copies of final results and also to sign ~~at~~ the results which have been bulged for the whole week. All the presidential Agents came and they were given copies of final results and then Azimio Agents started raising some ~~complaints~~ after realizing about ~~10~~ ¹⁰ ~~that~~ candidates lost the Elections.

At that point the chair man said that the agents who were in agreement with the results can ~~only~~ sign the results, which is a ~~provision~~ ^{rule}. At that point the Azimio Agent Mr. SATARAO OLE KAWETHUR Stormed out instead of signing ~~20~~ the final results. All the other Agents for presidential candidates signed and the chairman Mr. Chakravarti led us to the podium to do the declaration of final results. As we were actually sitting on the chair's

LOC

~~WA~~
X

 July 2
02/6953



IV

Statement Form 16

DATE 24/8/2022

TIME 17:31hrs

PLACE SERENA HOTEL

On the podium, we were actually surrounded by Azimio party group led by their chief agent Mr SATHABAO, in the company of one Mr JAMES ORENDO, OLEKINA, OTIENDE OMOLLO among other people. At that point, Mr ORENDO AND Mr OTIENDE engaged the chairman as to why he was declaring the final results - 10 and a commotion ensued and they proceeded to where we were seated on the chair and we could not access the microphone.

At that point, our security intervened to shield us while being assisted by other security officers and on that commotion, I was injured on both my legs between the knees and to the ankles using blunt objects and we were rescued to the holding room where we came from the stage of us. At this point I realized that I was

LOC
~~WA~~
X

Jubilee
0216953



Statement Form 17

DATE 24/8/2022

TIME 1743hrs

PLACE SILENA HOTEL

bleeding from where I was injured. The CEO Mr MARIANI was injured on his back of his head using blunt object. Commissioner MBIU was injured on his left leg between the knee and ankle. We stayed in the morning room until the normalcy was restored in the TALLYMAG CENTRE and on the podium.

-10

After that the chairman was escorted to the podium and he made the announcement. I was attended by St JOHN Ambulance who cleaned ^{the} ~~my~~ ^{wounds} legs and they bandaged the wounds. The result was announced by the chairman and issued the certificate to the Deputy president His Excellency Dr WILLIAM RUTO. From there I went into hiding for fear of my life.

THAT'S ALL I CAN STATE.

ROC

~~MAI~~

X

Jubye

0216953



Statement Form 18

DATE 24/3/022

TIME 17:23 HR

PLACE SERENA HOTEL

FURTHER STATEMENT

I wish to state that, among the people who came to surround us, I also saw GILBERT WANGA.

That's all I can state

Roc X
MM

Julija
0216953