
REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION NO. _____ OF 2013

RAILA ODINGAPETITIONER

AND

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....FIRST RESPONDENT
AHMED ISSACK HASSAN.....SECOND RESPONDENT
HON. UHURU KENYATTA.....THIRD RESPONDENT
WILLIAM SAMOEI RUTO.....FOURTH RESPONDENT**

PETITIONER’S SUPPORTING AFFIDAVIT

I **RAILA ODINGA** a resident of Nairobi and whose address for purposes of this Petition is care of **Oraro And Company Advocates, ACK Garden House- Wing C, First Ngong Avenue, P O Box 51236-00200, Nairobi** Do Solemnly make oath and state as follows;

- 1) I am the Petitioner herein and therefore competent to swear this affidavit in support of my Petition herein.
- 2) I have read and understood the Petition which I have presented herein under the Constitution of Kenya 2010, specifically Articles 38, 138 and 140 (1), the Election's Act 2011, the Elections (General) Regulations 2012 and the Independent Electoral Boundaries Commission Act in relation to the management and conduct of presidential or general elections in the Republic of Kenya and I wish to adopt the contents of the same as if the same were herein set out seriatim.
- 3) I further wish to state that the Independent Electoral and Boundaries Commission (**hereinafter referred to as the First Respondent**) has a Constitutional and Statutory obligation to establish and conduct an electoral system to comply *inter alia* with the principle of free and fair elections, which are administered in **an impartial, neutral, efficient, accurate and accountable** manner under Article 81 of the Constitution.
- 4) The right to free, fair and regular elections is a right that is guaranteed to every Kenyan voter under Article 138 (2) of the Constitution.
- 5) I wish to state that prior to the General and Presidential election held in the Republic of Kenya on 4 of March 2013, the First and Second Respondents, with the aim of assuring all stakeholders of the transparency and integrity of the process by which it decided to adopt an electronic process on the basis of which it registered the voters, identified them at polling stations and thereafter transmitting the results in many

different occasions assured Kenyans, and the Petitioner, that the forthcoming elections through the said means would be transparent and free from any manipulation and that not only would there be no unauthorized persons voting or incidences of double or multiple voting but that the transmission of results thereafter would be simple, fair and insulated from manipulation by any person, party or entity.

- 6) I wish to state that during the 4th of March 2013 elections, the First Respondent not only abandoned the process of electronic voter identification at the polling stations but released results based not on the safeguarded, agreed, determined and credible electoral process it had promised and committed to, but adopted a process that failed so significantly, substantially and endemically, that it effectively vitiated whatever the proposed will of the Kenyan people might be or would have been in the aforesaid election.
- 7) That every last check, rule and balance put in place to ensure the integrity of the electoral process was observed, was egregiously violated by the First and Second Respondents herein, and each of them, and thus nullified by the alternate *ad hoc* process that appears to have been devised by them in a manner not countenanced by the Constitution and laws of the Republic of Kenya.
- 8) I verily believe that the First Respondent, in its undertakings to establish and conduct the 2013 elections, failed the people of Kenya, failed Kenya in the international arena, failed the statutory and constitutional imperatives that the First Respondent was obliged to uphold with vigor and transparency, cannot rationally or fairly be held to have achieved one of its fundamental objectives which is to uphold the rule of law, and thus failed basic and universal principles of fair and free elections in a democratic society, all of which the harsh and painful lessons of the 2007 election we intended to avoid and overcome. **I annex hereto a copy of entire Report of the Independent Review Commission on the General Elections held in Kenya on December 2007 in a bundle of documents “RO 1 page 1-174 ”.**
- 9) The First Respondent having chosen and identified the electoral process using the Biometric Voter Registration (**BVR**), and other electronic mechanisms (all of which was intended to replace the inherent uncertainties and difficulties in the manual system) it could not, at very least without full open and constructive engagement with all political parties participating in the process, revert to a manual or any other system, which it chose in the midst of the electoral process.
- 10) The Kenyan people who entered election day expecting a new electoral dispensation were faced in the midst of the process, with a reversion to the discredited system of the past.

- 11 The First Respondent, having chosen and appointed the use of the Electronic Voter Identification and Biometric Voter Registration (**EVID** and/or **BVR**), and other electronic mechanisms (all of which were intended to replace the inherent uncertainties, difficulties and susceptibility to abuse and corruption of the manual system), in the 4th March, 2013 Presidential Election, could not, at the very least without full open and constructive engagement with all political parties and candidates in the said election, change, alter or revert to a manual or any other system, as it did, midstream or in the midst of the electoral process, thereby effectively introducing a completely different electoral environment with different demands for checks and balances and rules, all of which would require the political parties and the candidates thereat to mobilize personnel to oversee the new *ad hoc* process.

Arising from the acts and omissions of the First and Second Respondents' under challenge herein, the Petitioner, and indeed the people of Kenya, were deprived of their legitimate expectation, on 4th March, 2013 to a new electoral dispensation, devoid of opportunities for manipulation, thereby irreparably undermining the entire process and result as declared on 9th March, 2013.

- 11) I wish to state that arising out of the First and Second Respondents' acts and omissions, the electoral process and the outcome thereof under challenge herein were rampant and flawed in so fundamental and grave a sense, taken together or viewed separately as to completely obliterate the possibility of discerning therefrom whether the said results were the true, lawful and proper expression of the Kenyan people's will in that they so substantially and materially went to the root and purpose for which the new electoral dispensation had been created and Constitutionally promulgated that this Honourable Court ought to do no less than nullify and declare invalid the alleged declaration, on 9th March, 2013, of the Third and Fourth Respondent as President-elect and Deputy President-elect respectively, by the First and Second Respondents.
- 12) I now wish to demonstrate under the different headings below that a number of fundamental failures and contraventions of the Constitution and the statute occurred or were permitted to occur as hereunder:
- a) The **EVID** and **BVR** system adopted by the First Respondent was so poorly selected, designed and implemented that it was destined to fail at inception, to the knowledge of the First and Second Respondent;
 - b) I annex hereto a copy of an affidavit of Oduor Ongwen in evidence in a bundle of documents marked RO 2 in Volume 2.

It is evident from the affidavit of Mr. Oduor Ongwen in evidence in a bundle of documents RO 2 that sometime on or about 1st June 2012, and as the 4th March, 2013 elections neared, the First Respondent issued a tender (IEBC/14/2011-2012) for the procurement of a Biometric Voter Registration (**BVR**) kit. This was published in both the Daily Nation and the East African Standard newspapers and widely publicized.

- c) The objects of the tender for BVR kits were detailed in a technical evaluation report dated 29th September 2012 or thereabouts and expressly stated that the same was to provide clear identification through fingerprint authentication technology, reduce human errors, log all voter activities and provide an efficient and effective means of reconciling the numbers of voters in comparison with the number of votes cast and to provide the highest voting safety levels and prevent election fraud such as double and multiple voting.
- d) The said tender was awarded to Face Technologies Pty Ltd (**Face Technologies**) who were engaged for the supply, delivery, installation, training, testing and commissioning of the devices.
- e) During the procurement process appeals by the unsuccessful bidders to the Public Procurement Administrative Review Board (**Review Board**) it was found as a fact and held that the devices as proposed by Face Technologies had failed 3 of the 6 component requirements, were inconsistent models, would only be available on election day (and not before) and had no "specifications that could be pinned down".
- f) In a Review on 20th November 2012 the Review Board found the First Respondent to be in breach of public procurement regulations as regards the said tender for "Allowing the successful bidder to participate in the second demonstration of Proof of Concept having failed in the first demonstration, and further allowing it to introduce a device that was different from the one it had submitted with its tender".
- g) Notwithstanding the aforesaid fundamental flaws, the Review Board at the instance and request of the First Respondent on or about 11th December 2012 approved the BVR kits procurement from Face Technologies, stating that it was in the public interest, an aspect that was later adopted by the High Court, to continue with such procurement as had been urged by the First Respondent given that the elections were nearing and should not be jeopardized, but required that amendments for compatibility be made where possible.

- h) The **EVID** system failed and collapsed and by the First and second respondents own admission, on a catastrophic scale, on the polling day, so fundamentally changed the system of polling and the number of votes cast, owing to inordinate and inexplicable delays at the polling stations affected thereby reverting Kenya to the discredited manual system, with all the attendant risks and opportunities for abuse and manipulation which in fact took place;
- 13) In relation to the general election held on 4th March, 2013 and the process leading thereto, including the purported declaration by the Second Respondent herein, on 9th March, 2013 of the Third and Fourth Respondent as President-elect and Deputy President-elect respectively, the First and Second Respondents, and each of them, were bound by and were obliged to uphold and observe the national values and principles of governance enshrined in the said Article 10 of the Constitution when:
- (a) Applying the Constitution, as they were required to do by Articles 86 and 88 of the Constitution as read with Section 4 of the Independent Electoral and Boundaries Commissions Act, 2011 and the Regulations thereunder;
 - (b) Applying the said Independent Electoral and Boundaries Commissions Act, 2011 and the Regulations thereunder and the Elections Act, 2011;
 - (c) Making and implementing public policy decisions as they were and did in all matters relating to the said election particularly the following national values and principles of governance:
 - i. -the rule of law;
 - ii. -democracy;
 - iii. participation of the people;
 - iv. -inclusiveness;
 - v. -equality;
 - vi. -human rights;
 - vii. -non-discrimination;
 - viii. -good governance;
 - ix. -integrity;
 - x. -transparency; and
 - xi. -accountability.
- 14) The First and Second Respondents herein contravened or failed to observe each and all of the aforesaid national values and principles which were binding upon them as regards the said election and the whole electoral process leading up to the declaration made on 9th

March, 2013 under challenge herein thereby rendering the same null, void and of no legal effect.

- 15) The First and Second Respondents' purported official tally of registered voters inexplicably and mysteriously grew overnight by a large proportion on the eve of the election, notwithstanding that registration had closed some two weeks prior and was by law not permitted to be opened or change.
- 16) The results as declared and recorded by the First and Second Respondents contained wide spread instances of over-voting in flagrant breach of the Fundamental Constitutional principle of universal adult suffrage, *to wit*, one man one vote;
- 17) Although a common register was to be and indeed was compiled for all the six levels of elections in the general elections of 4th March, 2013, it turned out, from the results declared by the First and Second Respondents that the total number of votes cast in respect of the Presidential Elections in some instances exceeded that of the registered voters and those cast for the gubernatorial and parliamentary elections after taking due account of any spoilt or rejected or disputed votes in the said election to the detriment of Your Petitioner.
- 18) These grave errors constituted fundamental contraventions of the letter, spirit and objects of the Constitution of Kenya and the statutory framework in place to operationalize the same that they failed to ensure or secure a free or fair election and no Government could lawfully be formed by or from the purported declaration, on 9th March, 2013, of the Third and Fourth Respondent as President-elect and Deputy President-elect respectively, by the First and Second Respondents to the dishonor of the Kenyan people.
- 19) I verily believe that, the First and Second Respondents were and are obliged to act in the public trust and interest, in a manner consistent with the Constitution, with dignity and whilst promoting the integrity of their office as required by Article 73 thereof. In particular, they were obliged to ensure, as regards the 4th March, 2013 elections that: -
 - a) the electoral process leading up to the declaration made on 9th March, 2013 was and remained consistent with the purposes and objects of the Constitution;
 - b) it demonstrated respect for the will of the people of Kenya;
 - c) brought honour to the nation and dignity to the office in the conduct of elections;
 - d) promoted public confidence in the integrity of the office and the system and results of the said elections;

- e) the guiding principles as regards the conduct of the said election were competence, objectivity and impartiality in decision making, and in ensuring that their decisions were not influenced by favouritism, other improper motives or corrupt practices, 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, accountability to the public for decisions and actions; and discipline and commitment in service to the people.
- 20) I verily believe that by virtue of Article 38(2) of the Constitution, the Petitioner herein, and every Kenyan citizen, has a right to free and fair elections based on universal suffrage and the free expression of the will of the electors which right the First and Second Defendants herein were bound and required to protect and secure for them in the general election of 4th March, 2013 but which they so grossly, recklessly and negligently violated and abrogated as detailed herein as to completely take away the essence thereof.
- 21) In particular the First and Second Respondents herein mis conducted themselves and materially undermined, contravened or abrogated the mandatory requirement enshrined in Article 81 of the Constitution that Kenya's electoral system, including the process leading up to, and the, presidential election of 4th March, 2013, which mandated them to comply with the following: -
- (a) freedom of citizens to exercise their political rights under Article 38;
 - (b) universal suffrage based on the aspiration for fair representation and equality of vote; and
 - (c) free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.
- 22) I am aware that Article 82(1)(d) required Parliament to enact legislation, which it did, for—

- (a) the conduct of elections and referendum and the regulation and efficient supervision of elections and referendums, including the nomination of candidates for elections;
 - (b) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote;
- 23) I am aware that the context of such legislation was to ensure that voting at every election is—
- (a) simple;
 - (b) transparent; and
 - (c) takes into account the special needs of—
 - (i) persons with disabilities; and
 - (ii) other persons or groups with special needs.
- 24) I am aware Article 86 of the Constitution requires the First and Second Respondents at every election, including the general election held on 4th March, 2013, to 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.
- 25) I believe that First and Second Respondents in breach of the Constitution, failed to establish systems which are accurate, secure, verifiable, accountable and/or transparent and indeed declared results which in many instances had no relation to votes cast at the polling station, developed methods which were opaque and intended to manipulate the results in the course of which the Petitioners' representatives were altogether excluded from the process.
- 26) I am aware of the fact that by virtue of Articles 2 and 3 as read together with Articles 259 and 260 of the Constitution, the First and Second Respondents herein are and were bound by and obliged to respect, uphold and defend the Constitution of the Republic of Kenya as regards the entire electoral process leading up to and the general election of 4th March, 2013. Instead they abrogated their obligations and duties under

the Constitution and decided to adopt an evasive and flagrant disregard of its provisions.

- 27) I verily believe that the First and Second Respondents herein could not claim or exercise State authority as regards the said elections except as authorised under the Constitution.
- 28) I have in my petition sought declarations that any acts or omissions of the First and Second Respondents herein in contravention of the Constitution as regards the said election be declared void and invalid.
- 29) Pursuant to Article 82 of the Constitution, Parliament enacted the Elections Act, 2011, which operationalized and was among the statutes intended to operationalize the electoral system.
 - a. The Act in terms of Section 58(f) does not permit the taking out of a polling station any ballot paper or being found in possession of any ballot paper outside a polling station or anyone who is not an election official and not being authorized to do so, to remove election material from a polling station before, during or after an election.
 - b. Accordingly, the Petitioner contends that for purposes of the Presidential election held on 4th March, 2013, the total number of votes cast, ought to equal, after tallying, those cast in the other five (5) elections after taking due account for any spoilt, rejected or returned ballot papers in the said general election and the huge discrepancies that have appeared or which occurred in relation thereto are proof of electoral malpractice, including, but not limited to ballot stuffing and multiple voting.
 - c. The Second Respondent herein, and members of the First Respondent, staff or other persons having any duties to perform in the presidential election held on 4th March, 2013 were prohibited by Section 59(1)(j)(k), (l) and (m) from doing any of the following which are criminal offences under the Act:-
 - i. without reasonable cause doing or omitting to do anything in breach of his official duty;
 - ii. colluding with any political party or candidate for purposes of giving an undue advantage to the political party or candidate;
 - iii. willfully contravening the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations; or

- iv. failing to prevent or report to the First Respondent and any other relevant authority, the commission of an electoral malpractice or offence committed under the Act.
- 30) I am aware that the Registration of voters is provided for under Section 5 of the Elections Act, 2011 and the said provision requires that the registration of voters and revision of the Register of Voters shall be carried out at all times except *inter alia*, between the date of commencement of the sixty (60) period immediately before the election and the date such election.
- 31) I am aware that for the purposes of the 4th March elections the registration of voters was carried for the period between 19th November, 2012 to 18th December, 2012. At the end of which exercise the First and Second Respondents announced that 14,337,399 persons had registered as voters.
- 32) On or about February, 2013, the First and Second Respondents announced that they had discovered approximately 20,000 persons who had double registered and required the persons who had registered to examine the register. By Gazette Notice dated 18th February, 2013, the First Respondent proclaimed the Register for purposes of the 4th March, 2013 elections and finale and containing 14,267,572 as was displayed on its website.
- 33) In breach of the said mandatory legal requirement, the First Respondent has falsely, unlawfully and illegally in flagrant disregard of the law and its declaration of the result of the presidential election held on the 4th March, 2013 reflected the total number of registered voters as 14,352,533 well above the total number of the initial number of registered voters as the date of closing of 18th December, 2013.
- 34) I annex hereto a copy of an affidavit of Lilian R. Omondi in evidence in a bundle of documents **“RO 4”**.
- 35) The above damning conduct of First Respondent is corroborated by the affidavit of Janet Ongera in evidence a bundle of documents **“RO 3”**.
- a) Upon commencing preparations for the 4th March, 2013 presidential elections, the Second Respondent on or about 16th November 2012 on behalf of the First Respondent gave notice *vide* Gazette Notice no 16727 that the First Respondent would begin compilation of a new register of voters in respect of the Counties, Constituencies and Wards.
- b) On or about 22nd December 2013, the First Respondent uploaded onto its website ***iebc.or.ke*** the provisional register of voters as at 18 December 2012 which stood at a total of 14,337.339.

- c) During February 2013 the First Respondent informed the National Liaison committee of the Petitioner's Coalition that it intended to "clean up" the provisional voters register. On or about 13 February 2013 the Second Respondent in both print and electronic media on the progress towards "cleaning up" of the voters register issued a media briefing on the same process.
- d) On or about 20th February 2013 the First Respondent published a notice informing the public that the compilation of the Principal Register of Voters was complete and had closed. The First and Second Respondents gave the total number of registered voters as at that date to be 14, 267,572.
- e) On or about 24th February 2013, the First Respondent published another version of the Principal Register of Voters which had changed to 14,352 545.
- f) Sometime after the commencement of polling at the presidential elections held on 4th March, 2013, or immediately thereafter, the First and Second Respondents removed or failed to prevent the removal, from its website of Principal Register of Voters which had hitherto been downloadable therefrom.
- g) The First Respondent thereafter issued a new Principal Register of Voters on its website or a document to that effect which again was subsequently removed. The figure indicated for the total number of registered voters in the said document was materially different from the "final" figure as submitted on 24 February 2013.
- h) On or about 15th March 2013, the First and Second Respondents caused to be published in the **Daily Nation** and other dailies with national circulation within the Republic what purported to be a Summary of 2013 Presidential Results Declared on 9th March, 2013 following the Presidential Election held on 4th March, 2013 in which the final of registered voters was given as 14,352, 533.
- i) The said number given for registered voters in the said election differed materially from that which was contained in the Principal Register of Voters as at the statutory closing period of the said Register for purposes of the 4th March, 2013 general election.
- 36) I verily believe that the altering and tinkering with the number of registered voters was intended to permit the First and Second Respondent to manipulate the presidential election held on 4th March, 2013.

- 37) I am aware that by virtue of Regulation 59(1) of the Elections (General) Regulations 2012;
- a. Regulates every election, including that of the presidential election held on 4th March, 2013 and requires such election to be by secret ballot and be held in accordance with the provisions of the Constitution, the Elections Act and the said Regulations.
 - b. In particular, a voter casts his or her vote by use of a ballot paper and no person is permitted to cast more than one vote at any particular election or allowed to vote in a polling station other than that in respect of which that person is registered to vote.
 - c. Accordingly, the numerous instances of huge discrepancies in the total numbers of votes declared by the First and Second Respondent in the presidential election held on 4th March, 2013 is inexplicable upon any reasonable hypothesis but the existence of actual ballot stuffing, multiple voting or gerrymandering or inflating of the numbers of votes in the tallying thereof by the First and Second Respondents herein or their officers or their condoning of or connivance in the same to the advantage of the Third and Fourth Respondents thereby rendering their alleged win invalid, illegal, null and void.
 - d. By dint of Regulation 79, the First Respondent's Presiding Officer was required to ensure that the candidates in the presidential elections held on 4th March, 2013 or their agents signs Form 34 set out in the Schedule and:
 - i. immediately announce the results of the voting at that polling station before communicating the results to the returning officer;
 - ii. request each of the candidates or agent then present to append his or her signature;
 - iii. provide each political party, candidate, or their agent with a copy of the declaration of the results; and
 - iv. affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station;
 - v. Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign;

- vi. Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form;
 - vii. Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.
 - viii. The refusal or failure of a candidate or an agent to sign a declaration form or to record the reasons for their refusal to sign as required would not by itself invalidate the results announced;
 - ix. The absence of a candidate or an agent at the signing of a declaration form or the announcement of results would not by itself invalidate the results announced;
- 38) After complying with the aforesaid provisions the Presiding Officer was required, as soon as practicable, to deliver the ballot boxes, and the tamper proof envelopes to the Returning Officer who was to take charge thereof an exercise which the First and Second Respondents herein failed to ensure in several material instances.
- 39) In breach of Regulation 82 as regards the electronic transmission of results, the First Respondent's Presiding Officers in several instances failed, as they were required, to submit to the returning officer the results in electronic form, in the manner the First Respondent had directed before 4th March, 2013, before ferrying the actual results of the election to the Returning Officer at the tallying venue which was the Bomas of Kenya in Nairobi.
- 40) In further breach of Regulation 83 thereof, there were several instances where the following did not take place:
- (a) Immediately after the results of the poll from all polling stations in a constituency had been received by the returning officer, the Returning Officer did not, in the presence of candidates or agents and observers;
 - (b) Tallying of the results from the polling stations in respect of each candidate.
 - (c) publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election;
 - (d) complete Form 34 and 35 set out in the Schedule in which the Returning Officer was to declare, as the case may be, the—
 - (i) name of the respective electoral area;

- (ii) total number of registered voters;
 - (iii) votes cast for each candidate or referendum side in each polling station;
 - (iv) number of rejected votes for each candidate in each polling station;
 - (v) aggregate number of votes cast in the respective electoral area; and
 - (vi) aggregate number of rejected votes; and
- (d) sign and date the form and—
- (i) give to any candidate, or agent present a copy of the form; and
 - (ii) deliver to the First Respondent the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.

41) The results of the presidential election in a constituency shown in Form 34 would be subject to confirmation by the First Respondent after a tally of all the votes cast in the election.

42) In breach of Regulation 85 thereof which provides that accredited persons to be allowed to be present in tallying centres, *to wit* ,:

- (a) the presiding officers and other election officials on duty;
- (b) a candidate;
- (c) a person nominated as a deputy to the candidate, where applicable;
- (d) a member of the Commission;
- (e) authorized agents;
- (f) a police officer on duty;
- (g) duly accredited election observers.

43) I wish to state my parties duly authorized agents were refused entry into several tallying centres by the First and Second Respondents herein or their servants or agents or employees despite repeated requests to be so allowed to my detriment.

I will to this end rely on the affidavits of Janet Ongera **“RO 3”** and the affidavit of Professor Larry Gumbe **“RO 5”**

44) I am aware that Section 4 of the IEBC Act, the First and Second Respondents herein are charged with the responsibility for conducting general elections, including the presidential election held on 4th March, 2013 and are required to do so in accordance with Article 88(4) of the Constitution and to particularly to facilitate the observation, monitoring and evaluation of elections.

45) Further for purposes of the said presidential election, the First and Second Respondents herein were bound and required by Section 25 of

the IEBC Act to observe, *inter alia*, the following principles, in accordance with the Constitution of Kenya:

- (a) freedom of citizens to exercise their political rights under Article 38 of the Constitution;
 - (b) universal and equal suffrage based on the aspiration for fair representation and equality of votes;
 - (c) free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted independently;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner;
 - (d) ethical conduct; and
 - (e) fairness.
- 46) In relation to the voting process the First Respondent by its own admission in the media delayed the commencement of voting by inordinately long periods of time during the 4th March, 2013 elections in several polling stations owing mainly to its officers' negligence, errors and omissions.
- 47) I verily believe that the First Respondent failed to secure or ensure the provision of sufficient security in several polling stations especially in the Petitioner's strongholds. In Kilifi County for example, several polling stations opened late and closed very early thereby disenfranchising several of the Petitioner's supporters.
- 48) I verily believe the reasons given by the First Respondent for the aforesaid delays were that the **EVID** kits were not functioning, officials and clerks had forgotten passwords, batteries were flat and kits were unable to charge among other impermissible reasons all of which could have been prevented by a reasonably prudent and impartial electoral overseer.
- 49) In other instances, the First Respondent wholly failed to provide BVR kits to some polling stations resorted to the dreaded manual system of

identification of voters notwithstanding the overwhelming desire of the people of Kenya to avoid the same, following the tragic events of 2007/2008 following the elections of 2007 which led to the expenditure of the large amount of taxpayers' money that was used to procure the BVR kits as herein above detailed.

- 50) The First and Second Respondents failed to ensure that not more than one presidential ballot paper was provided or issued to each voter in several polling stations or permitted ballot box stuffing therein as evidenced by the huge discrepancies between the total numbers of votes declared by the Second Respondent herein and those of registered votes in such areas as per the current and valid Principal Register of Voters for purposes of the subject election.
- 51) In the final tally, the total number of votes cast in the Presidential Elections differed materially from those declared by the First and Second Respondents for purposes of the Gubernatorial and Parliamentary elections which took place on the same date clearly attesting to my belief that massive electoral fraud and malpractice occurred or permitted to occur by the First and Second Respondents in contravention of the requirements of the Constitution and the legislative framework in place as regards the 4th March, 2013 presidential election.
- 52) Despite my party agents regularly updating and complaining to the First and Second Respondents about the incidences of electoral frauds, malpractices and irregularities that it discovered on the said date, the First and Second Respondents neglected, refused and/or failed to act thereon or to stop the occurrence of the same.
- 53) Later, on the election day of 4th March, 2013, the First Respondent alleged that its server had collapsed.
- 54) In the course of the polling day, it came to the notice of some members of the public, that the officers of a company by the name Kencall EPZ Limited, a call centre, was receiving the results of the general elections and specifically the Presidential ones.
- 55) A curious and very concerning feature of the First Respondent's conduct was that it allowed Kencall to co-host both its server and that of the TNA, which of course may compromise the integrity of the electoral process but at very least gives the very real impression that the TNA had access to the sort of information which is at the very least initially confidential to the First Respondent.
- 56) This clandestine arrangement of co-hosting databases is not permissible by law and indeed was not disclosed to the public or to the Petitioner and his political party or the CORD Coalition.

- 57) I verily believe that this clandestine arrangement of co-hosting databases compromised the independence and the integrity of the First Respondent and that of its databases.
- 58) I verily believe that this clandestine arrangement provided an opportunity for tampering with the results of the presidential elections.
- 59) Regulation 82 of the Elections (General) Regulations, 2012 required the Presiding Officer, in the 4th March, 2013, before ferrying the actual results of the election to the Second Respondent at the tallying centre, to submit to him the said results in electronic form, in the manner that had been directed by the First Respondent before the said election and as detailed in the Presiding Officer's user manual and diary.
- 60) Such results were to be provisional and would provide the requisite checks and balances required to prevent electoral fraud and the practice adopted in the 2007 of election of delaying transmission of results and then altering, in the interim, the total numbers of votes cast in favour of a given candidate.
- 61) The First Respondent as required by paragraph 82 of the Election Regulations, established an electronic results transmission system which was intended to help in electronically transmitting election results from the Polling Centers directly to the National Tallying Centre at the Bomas of Kenya.
- 62) The First Respondent as means of assuring the public of the efficacy of the electronic transmission system issued public invitations to preview the voting procedure and results transmission simulation on or about Sunday 24th February 2013 in different selected polling stations.
- 63) Regulation 82 of the Elections (General) Regulations, 2012 required the Presiding Officer in the 4th March, 2013, before ferrying the actual results of the election to the Second Respondent at the tallying centre, to submit to him the said results in electronic form, in the manner that had been directed by the First Respondent before the said election. Such results were to be provisional and would provide the requisite checks and balances required to prevent electoral fraud and the practice adopted in the 2007 election of delaying transmission of results and then altering, in the interim, the total numbers of votes cast in favour of a given candidate.
- 64) An internal IEBC Memorandum from the Director of ICT to the DCS Support Services sets out clear concerns about the BVI devices proffered by Face Technologies.

- 65) Most notably the Memorandum expresses that the First Respondent will not be left with sufficient time to carry out the necessary configurations with the BVI technology, and coupled with the lack of local technical support would pose risky.
- 66) The Director of ICT further demonstrates that Face Technologies had since confirmed that they would not provide 3G modules for data transmission and would thus require the IEBC to source a third different technology to run the electronic voting system.
- 67) Ultimately the Director of ICT's concerns over the clash of using three such different technologies together, he recommended clearly that BVI technology not be pursued and to simply work on improving the BVI kits.
- 68) Safaricom (which was the telecommunications company hired to handle the transmission of electoral vote results from the polling stations to the tallying centres on a constituency, county and national level) informed the Second Respondent on 21 February 2013 that the system could possibly fail unless certain actions were taken.
- 69) Such actions were to alleviate any coverage gap due to the location of the polling stations, test website security, and to carry out a series of technical tests including stress loading and tests on devices. Critically Safaricom also expressly state that the site "has not been adequately prepared nor equipped" in case of disaster recovery.
- 70) None of the actions identified by Safaricom were rectified by First Respondent. Accordingly it could not have come as a surprise to First Respondent that the various system failures identified internally and by Safaricom collapsed. The BVR/BVI system catastrophically failed after approximately 2 hours on polling day.
- 71) Whether by design negligence or mere incompetence the failure of the BVR/BVI transmission prevented millions of voters of the ability to have their votes counted accurately.
- 72) When the First Respondent resorted to manual tallying, the results of which as aforesaid were being released without the participation of the Petitioner or his agents, the number of spoilt votes dropped drastically. The explanation of the Second Respondent was that the earlier numbers of rejected votes had been the result of a bug which applied to all rejected figures by a factor of eight. The Petitioner contents that should that have been the case the total number of rejected votes should have reflected even numbers which it did not.

- 73) The effect of the failures, however, has been the inability of the First Respondent and Second Respondents to comply with the requirements of the law.
- 74) Presidential party agents were excluded from the verification of presidential election forms as transmitted to the national tallying center by constituency Returning Officers
- 75) I am aware that within hours of closure of the polling on the election day of 4th March, 2013, the First Respondent started broadcasting provisional results of the Presidential elections, indeed well before some polling stations which had started late closed.
- 76) The said results indicated the votes garnered by each candidate and the number of rejected votes and the number of spoilt ballots.
- 77) I am aware that on the early morning of 5th March 2013, officials of the First Respondent informed the public through a television broadcast that the electronic results transmission system had failed and they had taken various measures to correct the failure.
- 78) At some point, the First Respondent reported via a press briefing aired live on national television, that a **'bug'** had been discovered in the electronic transmission and tallying system which was causing the numbers of votes reported as spoilt in the election to increase by multiples of 8 at each entry.
- 79) No details were given of the nature or source of the **'bug'** and how or whether it was removed and indeed whether there existed other bugs in the entire system which would have affected the integrity of the other results relayed via the system.
- 80) The First Respondent subsequently reported that the failure of the electronic system had persisted forcing the First Respondent to eventually abandon the electronic tallying on 6th March 2013.
- 81) I have been informed by one Professor Larry Gumbe and One Janet Ongera that upon the alleged system failure, the First Respondent adopted a manual tallying and transmission system in relation to the voting that had largely also been manually conducted.
- 82) The First and Second Respondents resorted to manual tallying which was a discredit and abused system which resulted in the violence in 2007 arising out of its lack of transparency, accountability and been subject to manipulation by the First Respondent's officers. Hence the necessity to introduce the electronic registration and transmission of results.

- 83) That among the glaring anomalies which were observed in the process of manual tallying from which the First Respondent excluded the Petitioner's agents were that (a) the result were declared on the basis of unsigned Form 36, (b) multiplicity of Form 36, and variants of entries in some constituencies (c) alterations on files and (d) brazen disregard by the First and Second Respondent of the entries on the files of constituencies which were eventually reflected in the final tally of Presidential election results and which were announced without signed verification Form 34s. In many polling stations the valid votes cast exceeded the number of registered voters, including Tiaty, Laisamis, Igembe Central, Buri, Chuka, Iburi Igamba Ngombe, Lari, Kapenguria, Saboti, Turbo, Marakwet West, Kajiado West, Bomet East, Mt Elgon, Langata and Aldai.
- 84) In specific instances, the results in Form 36 disclosed by the First Respondent were materially different from the results that were posted in the final tally of the presidential results published by the First Respondent. This included in Webuye East, Webuye West and Igembe Constituencies.
- 85) There were several instances where registered voter numbers in polling stations were inflated in Form 34 contrary to what was contained in Form 36. These included Kaproi Nursery School, Metipso Primary School, Maina Primary School, asaibul Primary School, Sewerwa Nursery School, Liter Secondary School, Chesongoch Catholic Church, Mungiwa Primary School, Chawich Primary School and Lemeuywo Primary School. In most of those circumstances, more votes were cast than the total number of registered voters.
- 86) In quite a number of circumstances there were more than two Form 36 reflecting different returns. These included Kikuyu Constituency, Juja Constituency, Chuka Constituency, Thika Constituency.
- 87) In yet other there were alterations in Form 36 without acknowledgment including Kiambaa and Limuru Constituencies.
- 88) A further analysis of the forms revealed that in certain constituencies there were more valid votes reflected in Forms 36 than in Form 34 including in Chesumei, Emngwen and Ainamoi.
- 89) In yet other stations, there were different entries in two Forms 36 submitted in respect of the same constituency for example in Mathira Constituency.
- 90) In yet another, the final published results were materially different from the results reflected in the County tallying for example in Nakuru not to mention the material variation between the verbal declaration made by the various Commissioners of the First Respondent at the national

tallying centre allegedly after verification of results and the final figures which are set out by the First Respondent including those of South Imenti, Igembe South, Lagdera, North Imenti, Central Imenti, Boment East and Sigor.

- 91) The above are but a few samples of the many anomalies which obtained as a result of the purported manual tallying.
- 92) I verily believe that the failure of the First Respondent to use the electronic transmission of results compounded the credibility of the result transmission process having regard to the earlier reported failure of the electronic identification and verification system at the various polling stations in the said election.
- 93) The First and Second Respondents have failed to give reasons and or explain the cause and nature of the alleged serious systematic and systemic failures as regards the election held on 4th March, 2013.
- 94) The effect of the failures, however, has been the inability of the First Respondents to comply with the requirements of the law.
- 95) I have been informed by one Professor Larry Gumbe and one Janet Ongera that Presidential party agents were excluded from the verification of Presidential election forms as transmitted to the national tallying center by constituency Returning Officers after they discovered several anomalies in the exercise.
- 96) I verily believe that the manual collation of results is not, and cannot be, a substitute for the intended electronic transmission of results system and the mischief it was intended overcome.
- 97) The Presiding Officers in the 4th March, 2013 Presidential election were required to complete Form 34, which contains the results from each individual polling station and which was and is a primary document for purposes of the said Presidential election.
- 98) The Second Respondent was thereafter required to complete Form 36, which is derived from Form 34 and which therefore could not have been and was not a primary document for purposes of the said Presidential election.
- 99) The First and Second Respondents totally disregarded its Constitutional and legal responsibilities and duties and the Election (General) Regulations and embarked on the novel practice by which they regarded the Form 36 as a primary document for purposes of tallying the results of the election without requiring the production of Form 34 or affording interested parties and the Petitioner's agents the chance to scrutinize the basis on which the said Forms 36 had been made.

- 100) I verily believe that in the absence of the electronic transmission system, the First Respondent did not have a transparent and accurate means of verifying results and transmitting them to the National Tallying Center.
- 101) I verily believe that as a result of the adoption of the manual system of results verification and transmission, the First and Second Respondent announced Presidential results showing a higher number of ballots than the total number of registered voters in certain constituencies. I annex hereto a countywide sample of the anomalies reported as result of the manual system
- a) I annex hereto in evidence and marked **“RO 5”** an affidavit of Prof. Larry Gumbo the National Chief Agent for ODM complaining of the happenings at Bomas of Kenya particularly the transmission and tallying of results.
 - b) I annex hereto in evidence and marked **“RO 6”** an affidavit of Johnson Nduya Muthama, Senator-Elect for Machakos County who complains of him and other CORD agents being ejected from the Tallying Centre on 6th March, 2013 before 5.00 pm. The IEBC continued the tallying and announcement of results without verification of the same by agents.
 - c) I annex hereto in evidence and marked **“RO 7”** the affidavit of John Simiyu Inyimili from Cherangany constituency complaining of difference in results announced at the Constituency Tallying Centre from those announced at the National Tallying Centre at Bomas of Kenya- Uhuru’s Kenyatta’s votes increased by 422 votes (See Para 4).
 - d) I annex hereto in evidence and marked **“RO 8”** an affidavit of Edward Aboki Begi from Bomachoge Chache constituency complains of the difference in results announced at the Constituency Tallying Centre from those announced at the National Tallying Centre at Bomas of Kenya-Uhuru Kenyatta’s votes increased by 3,800 votes (See Para 6).
 - e) I annex hereto in evidence and marked **“RO 9”** an affidavit of Patrick Meeme Lungé from Igembe North constituency complains of the alteration of the results announced at the Constituency Tallying Centre from those announced at the National Tallying Centre at Bomas of Kenya-Uhuru Kenyatta’s votes increased by 3,153 votes (See Para 3).
 - f) I annex hereto in evidence and marked **“RO 10”** an affidavit of Kennedy Otieno Okal from Endebess constituency complains that the Returning officer refused to give him a copy of Forms 34, 35 and 36 and /or sign the same. he also complains that the results announced at the Constituency Tallying Centre different from those announced at the National Tallying Centre at Bomas of Kenya-Raila Odinga’s votes less by 896 votes (See Para 13).

- g) I annex hereto in evidence and marked **“RO 11”** an affidavit of Jackson Ole Nkamasiai from Narok East complains of being denied Form 36 and the change of results at the county Tallying Hall.
- h) I annex hereto in evidence and marked **“RO 12”** an affidavit of David Njogu Mwai from Ol Jor Orok Constituency complains of stoppage of electronic verification of voters using the EVID by the Presiding officers who then resorted to manual voting. The same happened during tallying. He was also denied copies of form 34 and 35.
- i) I annex hereto in evidence and marked **“RO 13”** an affidavit of Danson Kangari Richu from Ol Kalou constituency complains of stoppage of electronic verification of voters using the EVID by the Presiding officers who then resorted to manual voting. The same happened during tallying. He was also denied copies of form 34 and 35 and informed that the same will be sent to Nairobi.
- j) I annex hereto in evidence and marked **“RO 14”** an affidavit of Elizabeth Wambui Rimui Kipipiri complains that the results announced at the Constituency Tallying Centre different from those announced at the National Tallying Centre at Bomas of Kenya-Uhuru Kenyatta are increased by 655 votes (See Para 3-5).
- k) I annex hereto in evidence and marked **“RO 15”** an affidavit of Boniface Njiru from South Imenti constituency complaints of bribery of voters by APK campaigners. He also complains of the failure by the IEBC Officials to tally the results in his presence. The returning officer denied him Form 36.
- l) I further rely on the evidence of Janet Ongera **“RO 3”** for ODM complaining of the happenings at Bomas of Kenya particularly the transmission and tallying of results.
- m) I further rely on the evidence of Andrew Mwambogo Mwavua contained in affidavit marked **“RO 16”**
- 102) I verily believe that the tallying process was shrouded in secrecy with no means for stakeholders to transparently monitor, account or verify the veracity of the results announced.
- 103) I annex hereto in evidence a Flash Disc marked **“RO 17”** a true record of the raw version or footage of the video recording of the televised announcement of the Presidential Election results that took place between the 5.00 pm, 4th day of March, 2013 to 9.00 pm, 9th day of March, 2013 at the Bomas of Kenya in Nairobi regarding the tallying and announcement by the Commissioners of the Independent Electoral and Boundaries Review Commission of the Presidential Election Results for the 2013 general elections and a Certificate Of Authentication of A Computer Output Under Section 106B(4) of the Evidence Act, Chapter 80 of the Laws of Kenya) by one **VICTOR GEORGE MULAMBE OWINO** of Post Office Box Number 1177-00502, Nairobi within the Republic of

Kenya being an adult male of sound mind and an officer employed as or in the capacity of a Director of **The Creative Hub Limited**.

- 104) The number of “rejected” ballots as displayed during the life of the electronic tallying significantly reduced during the manual tallying process without the Respondents offering any explanation therefor, thus raising questions as to the integrity of the manual tallying and the entire process.
- 105) From the foregoing it is evident that the First and Second Respondents are unable or unwilling to deliver a free, fair, transparent and credible election to the Kenyan people and did not do so in the just concluded general election held on 4th March, 2013.
- 106) I verily believe that the result of the non-transparent manual tallying system that was adopted and used by the First and Second Respondents was that there were and remain instances where ballots allegedly cast in some constituencies exceed the actual number of registered in those constituencies.
- 107) I am aware that the Presidential election held in the Republic of Kenya on the 4th of March 2013 and conducted by the First Respondent, the following were the candidates and the alleged total numbers of votes garnered as per the Second Respondent’s declaration given on 9th March, 2013:

a) James Legilisho Kiyiapi	40,998;
b) Martha Wangari Karua	43,88;
c) Mohammed Abduba Dida	52,848;
d) Musalia Mudavadi	483,98;
e) Paul Kibugi Muite	12,580
f) Peter Kenneth	72,786;
g) Raila Odinga	5,340,546;
h) Uhuru Kenyatta	<u>6,173,433;</u>

Total No of valid votes cast **12,221,053**

- 108) According to the First and Second Respondent’s above declaration, the Third Respondent garnered 50.07% of the votes cast in the presidential election held on 4th March, 2013 and was therefore declared the winner thereof.
- 109) When due account is taken of the Constitutional and statutory violations of the First and Second Respondents herein, and each of them, and of their servants and agents, as well as of the gross and widespread irregularities and malpractices that occurred in the 4th March, 2013 presidential election, and the necessary deductions effected from the votes wrongfully credited to the Third Respondent by

the First and Second Respondent and the nullification thereof as required by law of the results declared at the polling stations where these substantive infractions occurred, the Third Respondent did not obtain the total of more than fifty per cent (50%) of the valid votes cast as required by Article 138 (4)(a) of the Constitution in order to be duly elected President, and accordingly ought not to have been declared as such by the First and Second Respondents.

- 110) That as consequence of these constitutional and statutory violations and infractions as well as the irregularities and malpractices, the results declared by First Respondent in favour of Second Respondent were far less than the fifty per cent (50%) of the votes cast as required by Article 138 (4)(a) of the Constitution thereby subverting the sovereign will of the electorate contrary to the preamble of the Constitution, Article 1 (1) and Articles 38 and 138 (4) of the Constitution, 2010.
- 111) I aver that at the conclusion of the election, the First Respondent herein, acting through the Second Respondent, who was at all material times the Returning Officer for the 4th of March 2013 Presidential elections, returned the Third Respondent herein, as having been validly elected President of the Republic of Kenya contrary to the provisions of the Constitution of Kenya.
- 112) In some instances, votes earned by the Petitioner were unlawfully reduced whilst at the same time, votes of the Third Respondent were illegally padded with the sole purpose of procuring victory for the Third Respondent in the 4th March 2013 Presidential Elections.
- 113) I verily believe that when due account is taken of the Constitutional and statutory violations of the First and Second Respondents herein, and each of them, and of their servants and agents, as well as of the gross and widespread irregularities and malpractices that occurred in the 4th March, 2013 Presidential election, and the necessary deductions effected from the votes wrongfully credited to the Third Respondent by the First and Second Respondent and the nullification thereof as required by law of the results declared at the polling stations where these substantive infractions occurred, the Third Respondent did not obtain the total of more than fifty per cent (50%) of the valid votes cast as required by Article 138 (4)(a) of the Constitution in order to be duly elected President, and accordingly ought not to have been declared as such by the First and Second Respondents.
- 114) I verily believe that the it is clear that the Third Respondent did not meet the Constitutional threshold of more than half of the votes cast in the presidential election held on 4th March, 2013 and the First and Second Respondents should not have declared or returned him and the Fourth Respondent as duly elected as President and Deputy President in that election respectively.

- 115) I verily believe that all of the irregularities and electoral malpractices captured above, were nothing but a deliberate, well-calculated and executed ploy or a contrivance on the part of the First and Second Respondents with the ultimate object of unconstitutionally and unlawfully assisting the Third Respondent to win the 4th March 2013 Presidential Elections.
- 116) I verily believe that as consequence of these constitutional and statutory violations and infractions as well as the irregularities and malpractices, the results declared by First Respondent in favour of Second Respondent were far less than the fifty per cent (50%) of the votes cast as required by Article 138 (4)(a) of the Constitution thereby subverting the sovereign will of the electorate contrary to the preamble of the Constitution, Article 1 (1) and Articles 38 and 138 (4) of the Constitution, 2010.
- 117) I verily believe that at the conclusion of the election, the First Respondent herein, acting through the Second Respondent, who was at all material times the Returning Officer for the 4th of March 2013 Presidential elections, returned the Third Respondent herein, as having been validly elected president of the Republic of Kenya contrary to the provisions of the Constitution of Kenya.
- 118) I verily believe that by virtue of Article 3(2) of the Constitution of Kenya therefore, any attempt by the Third and Fourth Respondents to establish a government in pursuance of the aforesaid unconstitutional declaration given on 9th March, 2013 is unlawful, null and void.
- 119) I now hereby provide a summary of my grounds of the Petition;

Ground 1: The conduct of the presidential election was invalid because

- i. The First and Second Respondent failed to carry out a proper and valid voter registration in accordance with Article 83 of the Constitution and Section 3(2) of the Elections Act 2011, whereby a citizen shall exercise the right to vote, namely if a citizen is registered in the principle register of voters.
- ii. The Presidential elections were not conducted in accordance with Article 81 and 86 of the Constitution setting out the framework for a proper electoral system and voting process,
- iii. The First Respondent failed to carry out a transparent, verifiable, accurate and accountable election as outlined in Articles 81, 83 and 88 of the Constitution,

- iv. The First Respondent failed to transmit the results of the elections to the returning officers before ferrying the actual results as required by Regulation 82.

The details whereof are fully enumerated above, and consequently the Third and Fourth Respondents were not validly elected, as required under Article 138(4) of the Constitution.

- 120) I now hereby provide a summary of my arguments in support of my Petition;
 - a) By virtue of Article 38 of the Constitution, Under Sections 5 and 3(2) of the Elections Act 2011, to which the First Responded is bound, a citizen has the right to vote, if registered in the principal register of voters. By Section 5 of the said Act, registration of voters and revision of the register of voters cannot be carried out 30 days before the election. In the circumstances of this petition the First Respondent concluded the voter registration for the purposes of the election, on 18th December 2012, and following corrections established a principal register, by a Gazette Notice dated 18th February 2013, the Second Respondent published a notice that the compilation of the register of voters had been completed. The Gazette notice further stated that the certified register of voters would be assessed either on the website or at the office of the returning officer. The registered voters in the said register were 14,267,572. By reflecting a return of 14,352,533 in the declaration of 9th March 2013, the First Respondent has subsequent to the compilation of the final register, increased registration by some 85,000 voters, in clear violation of the Constitution, the Elections Act and the IEBC Act. All and any votes cast under such circumstances are thus unconstitutional and invalid. The consequence is that the purity of the election was polluted and the result of the poll was materially affected.
 - b) The First and Second Respondents are and were under an obligation in the conduct and supervision of the presidential election held on 4th March, 2013 to respect, uphold and defend the Constitution of Kenya.
 - c) While so acting they were bound by the Constitution which is the supreme law of the Republic of Kenya.
 - d) They could therefore not validly claim to exercise their Constitutional and statutory mandate except as authorized under and by the Constitution.
 - e) If they acted or failed to act in a manner that contravened the Constitution in relation to the said election, such act or omission was and remains invalid, null and void.

- f) The First and Second Respondents and the agents, servants, employees and/or service providers were at all material times bound by Article 10 of the Constitution to observe, respect and uphold and defend the national values and principles of governance in relation to the said election.
- g) The First and Second Respondents were at all material times bound by the Bill of Rights, which applied to them, in terms of Article 20(1) of the Constitution.
- h) The First and Second Respondents therefore were bound to respect, uphold and defend the Petitioner's political rights and those of his supporters as protected and recognized by Article 38 of the Constitution including, but not limited to, securing that the presidential election held on 4th March, 2013 was based on universal suffrage and the represented the free expression of the will of Kenyan electors for the position of President.
- i) The First and Second Respondents failed to properly and correctly count, tally and verify the count of Presidential votes resulting from the presidential election held on 4th March, 2013 in breach of Article 138 of the Constitution of the Republic of Kenya.
- j) The votes garnered by the Third Respondent were less than fifty per cent (50%) of the votes cast as required by Article 138 (4)(a) of the Constitution.
- k) The First and Second Respondents unconstitutionally declared the Third Respondent, as the President-elect of the Republic of Kenya on 9th March 2013 following the said elections and the Third Respondent was therefore not validly elected as President or validly declared as so elected.
- l) That the election was also vitiated by gross and widespread irregularities and/or malpractices which fundamentally impugned the validity of the results in the election as declared by First Respondent.
- m) That the statutory violations and irregularities and/or malpractices described herein above, which were apparent on the Declaration Forms prepared by the First Respondent's Officers and relied upon by the Second Respondent, had the direct effect of invalidity, by way of example, in Webuye East Constituency as shown in Exhibit 10, the number of votes achieved by the Petitioner was 20,932 valid votes, whilst that announced at the Bomas of Kenya (the national tallying centre) was only 16,461 votes, while in Nakuru County the valid votes cast for the Third Respondent were inflated by in excess of 3,796 votes.

Reference is made to exhibits 10 and 6 and the Affidavit of Janet Ong'era.

- n) There were many areas where the number of votes cast were in excess of those of the registered voters. See statistics referred to at paragraph 53 in the Affidavit of Janet Ong'era, showing an excess number of votes amounting to some 13,000 in favour of the Respondent. Regulation 83(1) of the Elections (General) Regulations 2012 provide that in tallying an announcement of election results from a polling station in respect of each candidate the returning officer shall disregard any polling station in which he finds that the valid votes exceeds the number of registered voters.
 - o) The First Respondent clearly and with calculate precision and by design adopted a procedure, policy and attitude that would ensure that the electronic voter registration, identification and results transmission in the presidential election held on 4th March, 2013 would fail and was bound to fail thereby ensuring that it could not and would not hold a free or fair or transparent presidential election, as it did.
- 122) I now hereby provide a summary of the questions and issues for the determination in this Petition.
- a) Whether or not the Respondents, or any of them, were in breach of or contravened the provisions of the Constitution of the Republic of Kenya in any manner fundamental in relation the Presidential election held on 4th March, 2013, and if so, what is the consequence of the same?
 - b) Whether or not the Respondents, or any of them, were in breach of or contravened the provisions of the IEBC Act or the Elections Act and the Regulations or Rules made thereunder in any manner fundamental in relation the Presidential election held on 4th March, 2013, and if so, what is the consequence of the same?
 - c) Whether or not the entire electoral process from the procurement of BVI kits to the declaration, on 9th March, 2013 of the Third Respondent as duly elected President of the Republic of Kenya in the presidential election held on 4th March, 2013 and the conduct and supervision of the said election by the First Respondent was invalid and so fundamentally and irreparably flawed, unconstitutional and unlawful that no valid or lawful declaration could be made as the Second Respondent purported to do, and if so what is the consequence of the same?
 - d) Whether or not the Respondents, or any of them, committed election offences?

- e) Was the Third Respondent validly elected as President of the Republic of Kenya?
- f) What should be the Order as to Costs?
- g) Whether or not the Honourable Court should issue any other or further Orders?

121) I now hereby set out the reliefs that I seek in this Petition **I** pray that

That the Honourable Court be pleased to declare;

- a) The First Respondent's process of procurement of Equipment, Registration of Voters, Conduct of the Presidential Election, Transmission and Tallying of the 4th of March 2013 Presidential election results was flawed and in breach of Articles 2, 10, 38, 73, 81(e), 86, 88 and 136 of the Constitution of the Republic of Kenya.
- b) The Presidential election held on the 4th of March 2013 is invalid.
- c) The First Respondent and Second Respondent are in breach of their Constitutional obligations under Articles 10, 81(e), 86 and 88 of the Constitution of the Republic of Kenya in relation to the 4th of March 2013 Presidential election.
- d) The First Respondent was in breach of its obligations under Rule 6, 9, 27 and 28 of the Election (Registration of Voters) Regulations 2012, Section 5 of the Elections Act and Articles 10, 81(e), 86, and 88 of the Constitution of the Republic of Kenya in relation to the Principal Register of voters.
- e) The First Respondent was in breach of its obligations under Sections 59, 60, 61, 62, 74, 79 and 82 of the Election (General) Regulations, 2012.
- f) The First Respondent and Second Respondent after the Presidential elections held on the 4th of March 2013 acted unconstitutionally and unlawfully in tallying the Presidential votes using erroneous Form 36 without counterchecking with the Form 34 in breach of Article 138(3)(c) of the Constitution of the Republic of Kenya.
- g) The First Respondent and Second Respondent failed to properly tally and verify the count of Presidential votes in breach of Article 138(3)(c) of the Constitution of the Republic of Kenya during the Presidential elections held on the 4th of March 2013.

- h) The Second Respondent is in breach of his Constitutional obligations under Article 75 of the Constitution of the Republic of Kenya in relation to the 4th of March 2013 Presidential election.
 - i) The First Respondent and Second Respondent are guilty of offences under the Election Act, 2011.
 - j) The Third Respondent was not validly elected as the President –elect of the Republic of Kenya at the concluded Presidential elections held on the 4th of March 2013.
 - k) The Third Respondent did not receive more than half of all the votes cast for the President-elect of the Republic of Kenya at the concluded Presidential elections held on the 4th of March 2013.
 - l) That the Third Respondent was not validly elected and declared as the President-elect of the Republic of Kenya at the concluded Presidential elections held on 4th day of March, 2013.
 - m) An Order of cancellation of the Certificate of Election as the President-elect of the Republic of Kenya issued by the First and Second Respondent to the Third Respondent at the just concluded Presidential elections held on the 4th day of March 2013, be issued.
 - n) The Petitioner’s fundamental rights under Articles 35, 38 and 47 of the Constitution of the Republic of Kenya were violated when the First Respondent and Second Respondent failed to properly tally and verify the count of Presidential votes in breach of Article 138(3)(c) of the Constitution of the Republic of Kenya during the Presidential elections held on the 4th of March 2013.
 - o) An Order that there be a fresh election for the President of the Republic of Kenya in strict compliance with Constitution.
 - p) An Order that the costs of this Petition be borne by the Respondents.
 - q) Such other or further relief at this Honourable Court may consider fit and proper in the circumstances.
- 122) There is now produced herewith the following documents in evidence.

- a) A copy of entire Report of the Independent Review Commission on the General Elections held in Kenya on December 2007 in a bundle of documents **“RO 1”**;
- b) A copy of an affidavit of Oduor Ongwen in evidence in a bundle of documents **“RO 2”**;
- c) A copy of an affidavit of Janet Ongera in evidence a bundle of documents **“RO 3”**;
- d) A copy of an affidavit of Lilian R. A. Omondi in evidence a bundle of documents **“RO 4”**;
- e) A copy of an affidavit of Professor Larry Gumbe in evidence a bundle of documents **“RO 5”** ;
- f) A copy of an affidavit of Johnson Nduya Muthama, Senator-Elect for Machakos County in a bundle of documents marked **“RO 6”**f
- g) A copy of an affidavit of John Simiyu Inyimili from Cherangany constituency in a bundle of documents marked **“RO 7”**;
- h) A copy of an affidavit of Edward Aboki Begi from Bomachoge Chache constituency in a bundle of documents marked **“RO 8”**;
- i) A copy of an affidavit of Patrick Meeme Lungé from Igembe North constituency in a bundle of documents marked **“RO 9”**;
- j) A copy of an affidavit of Kennedy Otieno Okal from Endebess constituency in a bundle of documents marked **“RO 10”**;
- k) A copy of an affidavit of Jackson Ole Nkamasiai from Narok East from constituency in a bundle of documents marked **“RO 11”**;
- l) A copy of an affidavit of David Njogu Mwai from Ol Jor Orok Constituency in a bundle of documents marked **“RO 12”**;
- m) A copy of an affidavit of Danson Kangari Richu from Ol Kalou constituency in a bundle of documents marked **“RO 13”**;
- n) A copy of an affidavit of Elizabeth Wambui Rimui from Kipipirii constituency in a bundle of documents marked **“RO 14”**
- o) A copy of an affidavit of Boniface Njiru from South Imenti constituency in a bundle of documents marked **“RO 15”**;
- p) A copy of an affidavit of Andrew Mwambogo Mwavua marked **“RO 16**

HON. UHURU KENYATTA
NAIROBI

WILLIAM SAMOEI RUTO
NAIROBI.