

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome CJ & P; Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PRESIDENTIAL PETITION NO. E007 OF 2022**

— BETWEEN —

**OKIYA OMTATAH OKOITI.....1<sup>ST</sup> PETITIONER**  
**NYAKINA WYCLIFF GISEBE.....2<sup>ND</sup> PETITIONER**  
**VICTOR OKUNA.....3<sup>RD</sup> PETITIONER**  
**JOHN MAINA, Suing as EXECUTIVE DIRECTOR FOR**  
**CENTRE FOR DIASPORA AFFAIRS.....4<sup>TH</sup> PETITIONER**

-AND-

**INDEPENDENT ELECTORAL &**  
**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**WAFULA CHEBUKATI (CHAIRMAN).....2<sup>ND</sup> RESPONDENT**  
**JULIANA CHERERA (VICE-CHAIR) .....3<sup>RD</sup> RESPONDENT**  
**FRANCIS WANDERI (COMMISSIONER).....4<sup>TH</sup> RESPONDENT**  
**JUSTUS NYANG'AYA (COMMISSIONER).....5<sup>TH</sup> RESPONDENT**  
**IRENE MASIT (COMMISSIONER).....6<sup>TH</sup> RESPONDENT**  
**ABDI YAKUB GULIYE (COMMISSIONER).....7<sup>TH</sup> RESPONDENT**  
**BOYA MOLU (COMMISSIONER).....8<sup>TH</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL.....9<sup>TH</sup> RESPONDENT**

-AND-

**ODINGA RAILA.....1<sup>ST</sup> INTERESTED PARTY**  
**DR. WILLIAM SAMOEI RUTO.....2<sup>ND</sup> INTERESTED PARTY**  
**WAIHIGA DAVID MWAURE.....3<sup>RD</sup> INTERESTED PARTY**  
**WAJACKOYAH GEORGE LUCHIRI.....4<sup>TH</sup> INTERESTED PARTY**

---

*(Being an Application to Strike out the Petition or in the alternative, strike out the names 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents for misjoinder)*

---

**RULING OF THE COURT**

**[1] UPON** considering the Notice of Motion dated 27<sup>th</sup> August, 2022 and filed on even date by the 2<sup>nd</sup> interested party (the applicant), and anchored on Rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 and all enabling provisions of the law seek orders that:

*i) This Court be pleased to strike out the entire Petition for being fatally defective.*

*iii) In the alternative to prayer (i) above, the Court be pleased to strike out the names of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents for misjoinder.*

*iv) As a consequence of granting either prayer (i) or (ii) above, any responses or submissions filed on the merits of the Petition by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents or any application and/or responses and submissions thereto, as the case may be, be expunged from the record.*

*v) Costs of this application be awarded to the applicant; and*

**[2] UPON** considering the grounds on the face of the application; the affidavit sworn on 27<sup>th</sup> August, 2022 by Hon. William Samoei Ruto, the applicant, in support of the Motion; and his submissions dated 27<sup>th</sup> August 2022, to the effect that, by dint of Rule 2 of the Supreme Court (Presidential Election Petition) Rules, 2017 in a petition to challenge the results of a presidential election, a “respondent” means the President-elect and includes the Deputy President-elect; that the President-elect has been joined in the Petition as an interested party as opposed to a respondent; and that the Deputy President-elect has not been sued as a

respondent or in any other capacity. To that extent, it is submitted that the Petition is defective as the President-elect and Deputy President-elect cannot defend the Petition in any other capacity than as respondents in terms of the Rules; and

**[3] FURTHER**, as an alternative relief, the applicant posits that the disputes or grievances between the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents as Commissioners of the IEBC on one hand and the 2<sup>nd</sup> respondent (the Chairperson) on the other, if any, are not within the contemplation of Article 140 of the Constitution and cannot form part of the disputes in a presidential petition; and

**[4] CONCERNED** with the joinder of the Attorney General as the 9<sup>th</sup> respondent, the applicant contends that the Attorney General has no role in this Petition unless with leave of the Court; that the Supreme Court (Presidential Election Petition) Rules, 2017 do not envisage the Attorney General as a respondent. That in any event, there are no allegations by way of acts of omission or commission levelled, or reliefs sought against the Attorney General to warrant his joinder as a respondent. Finally, that the joinder of the Attorney General is contrary to the principles of public finance as envisaged under Article 201 of the Constitution hence he ought to be struck out of the Petition; and

**[5] CONSIDERING** that the Petitioners have not filed a response to this application within the period stipulated by the Rules or at all; and

In view of the foregoing, **WE NOW OPINE** as follows:

- i. The applicant wishes to strike out the entire Petition or in the alternative, some of the respondents being the other six (6) Commissioners of IEBC other than the Chairperson, and the Attorney General who is the 9<sup>th</sup> respondent for misjoinder.

- ii. Contrary to averment by the applicant, Rule 2 of the Supreme Court (Presidential Election Petition) Rules, 2017 does not limit the definition of a respondent to mean the President-elect and the Deputy President-elect only. A respondent under that rule means “**the President-elect and includes the Deputy President-elect and any other person named in the petition as a respondent**”. We emphasize “**any other person named in the petition as a respondent**” to demonstrate that nothing prohibits a Petitioner from joining any party as a respondent.
- iii. Once joined as a respondent, and having been served with the petition, under Rule 11 of the Supreme Court (Presidential Election Petition) Rules, 2017, such a party has an option to either oppose the petition within four days of service of the petition by filing and serving a response to the petition or simply file a notice of intention not to oppose the petition within three days of service of the petition. If the respondent chooses the former, it is open for him or her to apply for the striking out of the petition against him or her for misjoinder or that it does not disclose a cause of action against him or her, or for such like reasons. That option is vested in the person named as a respondent. In the instant petition, for instance the Attorney-General has accordingly exercised his options. On 26<sup>th</sup> August 2022, he filed a notice of intention not to oppose the petition.

[6] **CONSEQUENTLY**, we find no merit in the application and dismiss it with no orders as to costs.

[7] **ACCORDINGLY**, we make the following orders:

- i) ***The Notice of Motion dated 27<sup>th</sup> August, 2022 is hereby dismissed.***
- ii) ***There shall be no orders as to costs.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> Day of August, 2022.**

.....  
**M.K KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true**  
**copy of the original.**

**REGISTRAR**  
**SUPREME COURT OF KENYA**