

**THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

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

PRESIDENTIAL ELECTION PETITION NO E005 OF 2022

RAILA ODINGA 1ST PETITIONER

MARTHA WANGARI KARUA2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION..... 1ST RESPONDENT

WANYONYI WAFULA CHEBUKATI.....2ND RESPONDENT

BOYA MOLU.....3RD RESPONDENT

PROF ABDI YAKUB GULIYE4TH RESPONDENT

JULIANA WHONGE CHERERA.....5TH RESPONDENT

JUSTUS NYANGAYA6TH RESPONDENT

FRANCIS WANDERI 7TH RESPONDENT

IRENE MASSIT.....8TH RESPONDENT

WILLIAM SAMOEI RUTO9TH RESPONDENT

KENYAN SECTION OF THE INTERNATIONAL COMMISSION

OF JURISTS (ICJ KENYA)..... INTENDED AMICUS CURIAE

*(Being an application by the Kenyan Section of The International Commission
of Jurists (ICJ Kenya to be enjoined as Amicus Curiae)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 27th August 2022, and lodged on even date by the Kenyan Section of the International Commission of Jurists (ICJ

Kenya) pursuant to the provisions of Rule 17A of the Supreme Court (Presidential Election Petition) Rules 2017, and Rule 19 of the Supreme Court Rules 2020, seeking to be enjoined in the petition as a friend of the Court; and

[2] UPON reading the Affidavit of Mr. Christopher Gitari, Vice Chairperson of the Council of the Kenyan Section of the International Commission of Jurists (ICJ Kenya), sworn on the 3rd August, 2018; and

[3] UPON considering the applicant's grounds in support of its application, its intended *amicus* brief and written submissions filed on 27th August 2022 wherein the applicant submits that it has the relevant expertise in rule of law, democracy and the intersection of law and electoral technology, and that it intends to assist the Court in developing the law on novel legal aspects of the case, in relation to the following arguments:

- i. *What broad principles, consistent with 10 Articles 10, 38, 81, 86, and 138(3)(a), (b), and (c) of the Constitution, govern the use of technology in elections?*
- ii. *Considering legal reforms following the case of **Moses Masika Wetangula v Musikari Nazi Kombo & 2 others** Pet 12 of 2014 [2015] eKLR (amending section 87 of the Elections Act, 2011 and enacting the Election Offences Act, 2016) what is the requisite standard of proof in Kenyan election petitions? And what powers does an electoral court possess where 20 allegations imputing criminal conduct are pleaded in an election petition?*
- iii. *What are "appropriate reliefs" in the context of a presidential election petition?*
- iv. *What are the respective roles of the Commission and its Chairperson in presidential election result management under Article 138(3) (c) and 10?*

[4] UPON considering the applicant's further arguments that it **is neutral in this petition and guided by fidelity to the law** that is consistent with this Court's decision in the cases of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* Sup Ct Petition No 12 of 2013 [2014] eKLR(*Mumo Matemu Case*) and *Francis Kariuki Muruatetu & another v Republic & 5 others* Sup Ct Petition No 15 and 16 of 2015 [2016] eKLR.

[5] NOTING that no party has filed a response to this application;

[6] FURTHER considering the provisions of Rule 17A of the Supreme Court (Presidential Election Petition) Rules 2017, which makes provision for admission of a friend of the Court in a presidential election petition; and Rule 19(1) of the Supreme Court Rules 2020, which states that the court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court;

[7] NOTING the decision in *Mumo Matemu*, where this Court considered the role of *amicus curiae*, and set out the guiding principles as follows:

- i. *An amicus brief should be limited to legal arguments.*
- ii. *The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.*
- iii. *An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.*

- iv. *An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.*
- v. *The Court may call upon the Attorney-General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.*
- vi. *Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: Raila Odinga & Others v. IEBC & Others; S.C. Petition No. 5 of 2013-Katiba Institute’s application to appear as amicus).*
- vii. *An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.*
- viii. *The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role in to partisan role.*
- ix. *In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.*
- x. *An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues” [emphasis supplied].*

[8] UPON CONSIDERING that the applicant will confine itself to only addressing this Court on the constitutional principles on election technology; the Court’s jurisdiction in determining criminal issues in the petition; appropriate

reliefs in the context of a presidential election petition; and the roles of the Commission vis-a-vis its Chairperson in the management of a presidential election result;

[9] HAVING considered the application, the attached amicus brief and written submissions thereof, it is our decision that the same is merited and is for allowing. We therefore make the following Orders:

ORDERS:

- a. The application dated 27th August 2022 and lodged on even date by Kenyan Section of the International Commission of Jurists (ICJ Kenya) is allowed.*
- b. The amicus brief attached to the application is deemed as filed and the applicant shall not make oral submissions at the hearing of the petitions.*
- c. Parties shall bear their own costs.*

[10] Orders accordingly.

DATED and DELIVERED AT NAIROBI this **29th** day of **August 2022**

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

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

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

.....
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

