

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome C.J & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PRESIDENTIAL ELECTION PETITION NO. 5 OF 2022

BETWEEN

RAILA AMOLO ODINGA..... 1ST PETITIONER

MARTHA WANGARI KARUA.....2ND PETITIONER

VERSUS

**INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT**

WANYONYI WAFULA CHEBUKATI.....2ND RESPONDENT

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 MASSIT.....8TH RESPONDENT

WILLIAM SAMOEI RUTO.....9TH RESPONDENT / APPLICANT

*(An application to strike out affidavits filed in support of the petition
together with paragraphs of the petition)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application brought under certificate of urgency by the 9th Respondent / Applicant dated 27th August 2022 under provisions of Article 253 of the Constitution of Kenya, section 13 of the Independent Electoral and Boundaries Commissions Act and Rule 11 & 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 seeking orders that:

- i) *The matter herein be certified as urgent and the same be heard expeditiously.*
- ii) *This Honourable Court be pleased to strike out the Affidavit in Support of the Petition sworn by John Mark Githongo on 21st August 2022 and filed on 22nd August 2022.*
- iii) *This Honourable Court be pleased to strike out the Further Affidavit in Support of the Petition sworn by Benson Wesongo on 21st August 2022 and filed on 22nd August 2022.*
- iv) *This Honourable Court be pleased to strike out the Affidavit in Support of the Petition sworn by Martin E. Papa on 20th August 2022 and filed on 22nd August 2022.*
- v) *Paragraphs 64 and 69 together with paragraphs 115 to 127 of the Petition be expunged.*

[2] UPON perusing the grounds on the face of the application that the affidavits are inadmissible in evidence as they contain hearsay material and that the impugned paragraphs of the petition seek to expand the purview of a petition contrary to the matters which ought to form a petition under Article 140 of the Constitution; and

[3] UPON considering the affidavit dated 27th August 2022 by Josphat Koli Nanok, the Deputy Chief Agent of UDA's Presidential Candidate at the National Tallying Centre, in support of the application who depones that the request to summon the DCI who is a known proxy of the petitioner and who has publicly avowed bias against the 9th Respondent is intended to unfairly

advance the petitioners' case by introducing extraneous matters which are beyond the purview of a petition under Article 140 of the Constitution.

[4] TAKING INTO ACCOUNT that no responses to the application were filed by the petitioners and the 1st to 8th respondents within the required timelines.

[5] NOTING the nature of the proceedings before the Court being one involving the Court's exclusive and original jurisdiction under Article 163(3)(a) of the constitution respondent's submissions dated 27th December 2021 and filed on 5th January 2022 through his advocates in which the respondent only addresses the first two issues.

[6] WE OPINE that the said affidavits reveal that they contain factual contestations which have been responded to substantively by the 1st respondent and by the applicant including through the affidavits of Martin Wachira Nyaga (on behalf of the 1st respondent) and by Dennis Itumbi who has been directly implicated and Davis Kimutai Chirchir on behalf of the applicant. It is only proper that the Court be allowed to consider the totality of the evidence before it and as guided by the rules of evidence be able to discern the probative value and evidentiary threshold of each of the evidence adduced by each party. Striking out of the affidavits at this early juncture in isolation while leaving the responses on record, in our view, is premature under the circumstances.

[7] Regarding the request to expunge specific paragraphs of the petition, again we note that it is an issue that can only be dealt with on merits as and when it is made in each of the impugned instances. In the same vein, the Court is aware of its circumscribed jurisdiction both under Article 140 and as an election court in respect of potential electoral and other offences and will defer this issue to be dealt with appropriately.

[8] FROM THE FOREGOING, the applicant has not persuaded us to grant the reliefs sought at this moment. In the end, we make the following orders:

