

**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. E007 OF 2022

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISESE.....2ND PETITIONER

VICTOR OKUNA.....3RD PETITIONER

**JOHN MAINA Suing AS EXECUTIVE DIRECTOR FOR CENTRE FOR
DIASPORA AFFAIRS.....4TH PETITIONER**

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION..... 1ST RESPONDENT

WAFULA W. CHEBUKATI.....2ND RESPONDENT

JULIANA WHONGE CHERERA.....3RD RESPONDENT

FRANCIS WANDERI 4TH RESPONDENT

JUSTUS NYANGAYA.....5TH RESPONDENT

IRENE MASSIT.....6TH RESPONDENT

PROF ABDI YAKUB GULIYE 7TH RESPONDENT

BOYA MOLU.....8TH RESPONDENT

THE HON. ATTAORNEY GENERAL.....9TH RESPONDENT

AND

ODINGA RAILA.....1ST INTERESTED PARTY
SAMOEI WILLIAM RUTO2ND INTERESTED PARTY
WAIHIGA DAVID MWAURE.....3RD INTERESTED PARTY
WAJACKOYAH GEORGE LUCHIRI.....4TH INTERESTED PARTY

*(Being an application by the Attorney General seeking leave to admit the
Replying Affidavits of Dr. Joseph K. Kinyua and Dr. Kennedy)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 28th August 2022 and filed on 29th August 2022, pursuant to Rule 11(3) and Rule 17 of the Supreme Court (Presidential Petition) Rules 2017, seeking this Court to deem the attached Replying Affidavits of Dr. Joseph K. Kinyua and Dr. Kennedy Kihara as properly filed; and

[2] UPON reading the Supporting Affidavit of Mr. Charles Mutinda, the Chief Litigation Counsel in the Office of the Attorney General sworn on 28th August 2022; and

[3] UPON perusing the grounds adduced by the applicant in support of the orders sought whereby the applicant states that: the Replying Affidavits filed in Presidential Petition no. E005 of 2022 in response to all issues arising in the presidential petitions including the instant petition, as deposed by Wafula Chebukati, Boya Molu and Abdi Yakub Guliye, on 26th August 2022 have made allegations against specified members of the National Security Advisory Committee (the NSAC); there are allegations that a delegation from NSAC visited the 1st and 2nd respondents at the National Tallying Centre at the Bomas of Kenya and attempted to subvert the will of the people as expressed through the election of 9th August 2022 by attempting to influence the 1st and 2nd respondents into declaring a particular candidate the president-elect, despite the outcome of the

election process; the said allegations are serious and damaging as they cast on critical institutions and offices within the framework of Government in the country; it is imperative that the specified members of the NSAC be given an opportunity to set the record straight and to assist this Court in the determination of the issues in controversy which are shared across other petitions that have been filed in relation to the presidential election including Petition No. E005 of 2022; it is fair that the officers and offices against whom such allegations have been made are allowed the opportunity to be heard and to respond to the said allegations and not to be condemned unheard; and that the application is timeous considering the impugned affidavits were filed on 27th August 2022; and

[4] FURTHER CONSIDERING under Rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 there is no provision to allow any further or other affidavits of this nature; this Court's finding on further evidence in a presidential election petition in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others*, Petition 5 of 2013; [2013] eKLR where the Court declined to admit "further affidavit" as the same would have led to consequences not only subverting the Constitution itself; and Rule 5 which provides that the effect of non-compliance with the Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the Constitution;

[5] HOWEVER, we have considered the special circumstances where the allegations made by the 2nd, 7th and 8th Respondents are contained in their replying Affidavits to the presidential Petitions before us. Some allegations touch on happenings before and during the presidential elections held on 9th August 2022, and also touch on issues pending before this Court. Bearing in mind the serious nature of the allegations made and repercussions of the said allegations, we find it fair to admit the Replying Affidavits of Dr. Joseph K. Kinyua and Dr. Kennedy

Kihara through which specified members of the National Security Advisory Committee (the NSAC) can be accorded the right to be heard.

[6] For the foregoing reasons, we find that this application is for allowing and the final Orders of the Court are as follows:

ORDERS:

- a. The application dated 28th August 2022 and filed on 29th August 2022 seeking this Court to admit the attached Replying Affidavits of Dr. Joseph K. Kinyua and Dr. Kennedy Kihara as properly filed is hereby allowed.*
- b. The Replying Affidavits of Dr. Joseph K. Kinyua and Dr. Kennedy Kihara are hereby admitted as properly filed.*
- c. There shall be no orders as to costs.*

[7] Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th Day of August 2022.

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M.K KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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

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

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

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**NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT**

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

