

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & P; Mwilu, DCJ & V-P; Ojwang, Wanjala, and Lenaola, SCJJ)

ELECTION PETITION NO. 1 OF 2017

—BETWEEN—

- 1. RAILA AMOLO ODINGA**
- 2. STEPHEN KALONZO MUSYOKA** }**PETITIONERS**

—AND—

- 1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**
- 2. CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** }**RESPONDENTS**
- 3. H.E UHURU MUIGAI KENYATTA**

—AND—

- 1. DR. EKURU AUKOT**
- 2. PROF. MICHAEL WAINAINA** }**INTERESTED PARTIES**

—AND—

- 1. THE ATTORNEY-GENERAL**
- 2. THE LAW SOCIETY OF KENYA** }**AMICI CURIAE**

(Being an application under certificate of urgency by 2nd respondent, by way of Notice of Motion seeking clarification of part of the Supreme Court’s majority Judgment delivered on 20th September, 2017)

THE OPINION OF OJWANG, SCJ

A. INTRODUCTION AND BACKGROUND

[1] Following the delivery of the majority Judgment on 20th September, 2017 – a Judgment which annulled the outcome of the Presidential election held on 8th

August, 2017, and which decreed that the election be repeated within a period of 60 days – the Chairman of the Independent Electoral and Boundaries Commission returned to the Court, with a motion seeking clarification of an aspect of the task assigned to him, by the wording of the said Judgment.

[2] The Constitution of Kenya, 2010, Article 163(2) provides that:

“The Supreme Court shall be properly constituted for purposes of its proceedings if it is composed of five judges.”

[3] At the hearing of the Notice of Motion, which related to a final Judgment issuing forth from the Court, I was part of the quorum-setting, notwithstanding that I had delivered a detailed, *dissenting Judgment* on 20th September, 2017. Having been fully involved in the hearing of the Notice of Motion, I now have the obligation to render a separate opinion, which properly reflects my viewpoint as a Judge.

[4] However, upon considering the tenor and effect of the majority’s position in this Ruling, on jurisdiction and related elements, I find myself in agreement with the overall outcome, in that regard. Hence this opinion, which nonetheless takes a differing course of explication.

[5] The majority Judgment embodied the declaration *that “the Presidential Election held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result [by the IEBC Chairman] invalid, null and void.”*

[6] Being concerned to fully comply with the majority’s terms, in the conduct of elections again, the 2nd respondent moved the Court to make an appropriate clarification, on the following points:

(a) is it the ballot figures recorded in Forms 34B, submitted by the constituency Returning Officers to the National Tallying Centre; or the ballot figures recorded on Forms 34A from individual polling stations – that must be used in declaring the Presidential election results?

(b) how ought the respondents to proceed in ascertaining the vote tallies, where discrepancies are found between the two sets of forms (34A and 34B)?

[7] The two questions arose not only because the majority decision had *left them open*, but in particular, because that decision had upheld an earlier Court of Appeal decision, ***Independent Electoral & Boundaries Commission v. Maina Kiai and Five Others***, Civ. Appeal No. 105 of 2017; [2017] eKLR to the effect that the 2nd respondent *may not correct, vary, confirm, alter, modify or adjust the results* transmitted from the constituency tallying centre to the National Tallying Centre: the effect being that the results declared by the constituency returning officer were final, as far as the National Tallying Centre was concerned. Notwithstanding such a prescription in the said ***Maina Kiai*** case, the majority Judgment had required a *verification* of votes cast by the respondents – and this would entail an arithmetical process.

[8] The applicant states that the Judgment of 20th September, 2017 does not signal the obligation required of the respondents, if upon “verification” they find that the vote-count recorded on the basis of Forms 34B does not conform to that captured in Forms 34A.

B. MOVING THE COURT

[9] The applicant’s motion is brought in the context of Articles 138, 163 and 159 of the Constitution; Section 21(4) of the Supreme Court Act, 2011 (Act No. 7 of

2011); and Rule 3(2), (4), (5) of the Supreme Court Rules, 2012.

[10] Article 138 of the Constitution relates to the procedure applicable to Presidential election; Article 163 provides for the establishment and jurisdiction of the Supreme Court; and Article 159 gives broad directions on the reaches of judicial authority.

[11] Questions of jurisdiction, against such a background, are to be seen in relation to the terms of Section 21(4) of the Supreme Court Act, which thus provides:

“Within fourteen days of delivery of its judgment, ruling or order, the Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the Court.”

[12] The one case that has considered the Supreme Court’s special jurisdiction under the Constitution of Kenya, 2010 is ***Hon. Lemanken Aramat v. Harun Maitamei Lempaka and 2 Others***, Petition No. 5 of 2014 [para.101]:

“We would make it clear in the instant case, that it is a responsibility vested in the Supreme Court to interpret the Constitution with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carries the overall responsibility [Article 163(7)] for providing guidance on matters of law for the State’s judicial branch, it follows that its jurisdiction is an enlarged one, enabling it

in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.”

C. JURISDICTION

[13] The questions arising in the instant application speak for themselves; and I have no doubt that the Court ought to have spoken with distinct clarity, if indeed, the respondents were ever to discharge the obligations placed upon them. The Court’s *jurisdiction*, therefore, in entertaining the application, is beyond doubt.

D. FORMS 34A, 34B, AND THE QUESTION OF VERIFICATION

[14] From the submissions made by counsel, it is apparent that the several sets of forms used in the collation and expression of vote-count are not always consistent – and so may pose challenges to the respondents’ task of accurate accounting. In the main Ruling of this Court, on this occasion, it is stated that:

“It is therefore the duty of the 2nd respondent to bring to the attention of the public any inaccuracies discovered by the verification, even as he declares the results as generated in Forms 34B. The effect of such inaccuracies on an election depends on their gravity or otherwise.”

[15] Form 34B as a basis of declaration of vote-outcome, in my view, is practically sound. However, given the vitality of *finality in electoral processes*, the 2nd respondent ought to take responsibility for assessing in the first place, the *relevance of any discrepancy in the recorded details, to the electoral result*. On that basis the result should be declared, save that an aggrieved party may move *the Supreme Court*, on the basis of *clear evidence pointing towards a differing course*.

[16] Such a position *may well qualify the principle* in the **Maina Kiai** case: and this would be entirely in order, given the Supreme Court's stature, by the terms of *Article 163(7) of the Constitution*: "**All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.**"

[17] This opinion represents my perception on the issues brought before this Court, by the applicants; and on the basis of its standpoints, and in particular as regards the Supreme Court's jurisdiction, I am in accord with the majority Ruling.

DATE and **DELIVERED** at **NAIROBI** this 17th day of October, 2017.

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J.B. OJWANG
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA