

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NO. 4 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS 2012

AND

IN THE MATTER OF THE ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS 2012

AND

IN THE MATTER OF THE INDEPENDENT & ELECTORAL BOUNDARIES COMMISSION ACT 2011

AND

IN THE MATTER OF THE SUPREME COURT ACT

AND

IN THE MATTER OF THE SUPREME COURT (PRESIDENTIAL ELECTION PETITION) RULES 2013

PRESIDENTIAL ELECTION PETITION

THE PETITION OF GLADWELL WATHONI OTIENO AND ZAHID RAJAN

BETWEEN

GLADWELL WATHONI OTIENO..... 1ST PETITIONER

ZAHID RAJAN 2ND PETITIONER

AND

AHMED ISSACK HASSAN 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ... 2ND RESPONDENT

UHURU MUIGAI KENYATTA 3RD RESPONDENT

WILLIAM SAMOEI RUTO 4TH RESPONDENT

PETITION

TO THE SUPREME COURT OF KENYA

SUPREME COURT BUILDING

NAIROBI

THE HUMBLE PETITION OF GLADWELL WATHONI OTIENO AND ZAHID RAJAN in the Republic of Kenya whose address of service for the purposes of this suit is care of Kilonzo & Company Advocates, Kay Group Center, Mucai Drive, Ngong Road, of P.O. Box 59839 Nairobi Showeth as follows.

1. **THAT** the 1st Petitioner is a Kenyan Citizen and the holder of Passport Number C013093. She is also a registered voter and voted in Lang'ata Constituency in Nairobi in the Republic of Kenya, in the 2013 General Elections.
2. **THAT** the 1st Petitioner is the Executive Director of Africa Centre for Open Governance (hereinafter referred to as AfriCOG), a non governmental organization registered in Kenya under the Non Governmental Organizations and Coordination Act, with its offices in Nairobi.
3. **THAT** the 2nd Petitioner is a Kenyan Citizen and the holder of National Identity Card Number 1239145. He is also a registered voter and voted in Embakasi Constituency in Nairobi in the Republic of Kenya, in the 2013 General Elections.
4. **THAT** the 1st and 2nd Petitioners are qualified and entitled to present this Presidential Election Petition under the Constitution.
5. **THAT** the 1st Respondent is the Chairman of the Independent Electoral and Boundaries Commission (hereinafter referred to as IEBC), the 2nd Respondent.
6. **THAT** the 1st Respondent was the returning officer for the presidential elections held on 4th March 2013 and is enjoined as a party to this Petition by reason of his conduct and the conduct of his subordinates being election officers appointed under the law.
7. **THAT** the 2nd Respondent is a body corporate and an independent constitutional commission established under Article 88 and 248 of the Constitution and the Independent Electoral and Boundaries Commission Act.
8. **THAT** the 3rd Respondent was one of the presidential candidates at the 2013 Presidential Elections and was declared to be the President-elect by the 1st Respondent on 9th March 2013.

9. **THAT** the 4th Respondent was nominated by the 3rd Respondent as his Deputy Presidential Candidate and was declared to be the Deputy President-elect by the 1st Respondent on 9th March 2013.

10. **THAT** the General Elections of 2013, including the Presidential elections, were the first elections conducted under the Constitution promulgated on 27th August 2010.

11. **THAT** the Presidential Election was held on the 4th March 2013 to elect a person to the office of President and Deputy President.

12. **THAT** in the said Presidential election the following were the candidates who were aspiring to be President: -

- a. James Legilisho Kiyiapi
- b. Martha Wangari Karua
- c. Mohamed Abduba Dida
- d. Musalia Mudavadi
- e. Paul Kibugi Muite
- f. Peter Kenneth
- g. Raila Odinga
- h. Uhuru Kenyatta

13. **THAT** after counting of the votes cast and tallying at the National Center the 1st Respondent being the returning officer of the Presidential election announced or declared that the said candidates had received votes as follows and that the number of valid votes were as follows.

No	Name of the Candidate	Votes	Percentage
1	James Legilisho Kiyiapi	40,998	0.33
2	Martha Wangari Karua	43,881	0.36
3	Mohamed Abduba Dida	52,848	0.43
4	Musalia Mudavadi	483,981	3.93
5	Paul Kibugi Muite	12,580	0.10
6	Peter Kenneth	72,786	0.59
7	Raila Odinga	5,340,546	43.31

8	Uhuru Kenyatta	6,173,433	50.07
	Rejected Votes	108,975	0.88
	Valid Votes	12,221,053	99.12
	Total Votes Cast	12,330,028	100.0

14. **THAT** the Presidential Election was not free, fair, free from violence, or transparent; it was not administered in an impartial, efficient, accurate or accountable manner; the electoral management system adopted was neither simple, accurate, verifiable, secure, accountable nor transparent; the counting and tallying of votes were neither open, accurately collated nor promptly announced; neither were appropriate structures or mechanisms to eliminate electoral malpractice put in place, including the safe-keeping of electoral materials, contrary to articles 81 and 86 of the Constitution.

15. **THAT** the cumulative effect of the foregoing is a total violation of Article 38(2) and (3) of the Constitution.

16. **THAT** Article 3 of the Constitution placed an obligation on the 1st and 2nd Respondents to uphold the Constitution and outlaws the establishment of a government in contravention of the Constitution.

17. **THAT** by violating their obligations under Articles 38, 81 and 86 of the Constitution, the 1st and 2nd Respondent have in effect violated Article 3(2) which provides that: -

“Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.”

18. **THAT** the breaches of the constitutional and legal obligations seriously affected the validity, legality and credibility of the election and the results thereof.

19. **THAT** in the Conduct of the Presidential Elections of 2013 the 1st and 2nd Respondent did not observe or uphold the national principles of good governance, integrity, transparency and accountability provided for in Article 10 of the Constitution.

20. **THAT** an accurate, publicly available, verifiable and credible Voter Register is the corner-stone of achieving a free and fair election as contemplated by Articles 38, 81 and 86 of the Constitution of Kenya.

21. **THAT** the 1st Respondent reiterated the above in a Press Release published on the web-site of the 2nd Respondent, in which he said that “establishing and maintaining an accurate and credible Voter Register is a critical component of electoral integrity and the enfranchisement of the people. We cannot talk of free and fair elections if we do not have a credible Register to begin with.”

22. **THAT** the 1st and 2nd Respondents did not meet their obligation under Articles 38(3), 81(d), 83(2), 83(3), 88(4)(a) of the Constitution; sections 3 to 8 of the Elections Act, 2011; and the Elections (Registration of Voters) Regulations, 2012, in the registration of citizens as voters, and in the compilation and certification, and use of the Register of voters

PARTICULARS

a. Upon the close of voter registration, the 2nd Respondent published a Provisional Register as at **18th December 2012**.

b. In accordance with section 6 (as amended) of the Elections Act, after inspection, the 2nd Respondent compiled, certified and published the Principal Register of Voters; while the Notice of Certification of Compilation of the Principal Register of Voters was published in the newspapers on **18th February 2013**, the Electronic Register was published on the 2nd Respondent’s website on **24th February 2013**.

c. There exist abnormal and unexplained patterns of additions and subtractions of entries in the Register. The overall result was a net increase in the numbers of registered voters in the overall, national Voter Register.

d. In verifying a Voter Register as provided by Sections 6 and 7 of the Elections Act, 2012, there cannot be an increase to the total numbers of registered voters. There can, at best, only be transfer of voters from one voting area to another, without a net increase of voters on the overall, national Voter Register.

e. Before the elections, the 2nd Respondent released to the political parties CD-Roms containing the Register of Voters other than the Principal (Electronic) Register.

f. There were **15,703 less registered voters** on the CD-Rom than on the Principal (Electronic) Register.

g. **On March 2, 2013**, the 2nd Respondent published on its web site a List of Voters without biometrics, amounting to **36,236 new voters**. This was well after publication of the Principal Voters Register. There is no plausible legal explanation for an increase of registered voters after publication of the Principal Voters Register. Any such list is unconstitutional and illegal.

h. **On March 9, 2013**, the 2nd Respondent announced the results of the presidential election. In announcing these results, there were differences from the Principal (Electronic) Register.

i. Although the differences in total numbers of registered voters may appear small in some cases, this is evidence that the 2nd Respondent used numbers that do not mirror those in the Principal Voters Register.

j. That the Presiding Officers, (Constituency-level) Returning Officers and County Returning Officers in Forms 34, 35 and 36 respectively, were using different numbers of registered voters from that contained in the Principal (Electronic) Register, and between the different elections for President, Governor, Senator, Women's Representative and Member of the National Assembly.

k. For instance, the respective Forms 34, 35 and 36 for Makueni Constituency (Number 086), signed by the same person, Mr. Joseph Kamandi Kittony, the County Returning Officer, applied the following different figures for registered voters: -

Elective office	Total Registered Voters applied
<i>Number of registered voters in the Principal (Electronic) Register, in the 2nd Respondent's web site</i>	64,708
President	64,708

Governor	64,877
Senator	64,879
Member of National Assembly	64,976

l. The net effect of the anomalies in the Voter Register impugn the accuracy, credibility, accountability, verifiability, integrity, validity, result, outcome and declaration by the 1st and 2nd Respondents of the Presidential Election.

23. **THAT** the electronic voter registration, identification and results transmission systems were specifically intended to protect the integrity of the individual vote by preventing multiple voter registration, multiple voting or stuffing of ballots, erroneous tallying or any other irregularities. This was a specific requirement of the Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007 (The Kriegler Report.) It was underscored as an essential measure to protect the integrity of the vote and prevent the kind of violence that followed the disputed election result in December 2007. It was, therefore, crucial to the implementation and enforcement of Articles 38, 81 and 86 of the Constitution.

24. **THAT** when fully functional, a Biometric Voter Registration (BVR) kit does three things: it provides a fool-proof register of voters; it automatically subtracts from the main national register voters who have voted and thus provides a running tally of total votes cast and is centrally integrated so that multiple voting becomes physically impossible.

25. **THAT** none of these features worked on voting day. First, while the BVR is supposed to be a check against multiple voting, the system did not have a subtractive value, the option that deletes the name of a person who has voted and updates the central server on the total votes cast. If this option had been built into the software and consistently applied, it would have progressively updated the list of voters around the country, and at the close of the voting, it would have been possible to immediately ascertain the exact voter turnout.

26. **THAT** a BVR system typically has a national data-base that is also backed up virtually. The data-base should be remotely accessible from the polling stations. In this case it was not. Having failed to do the right thing, the IEBC then resorted to the completely

unsatisfactory step of downloading segments of the voter-register to the laptops that were eventually sent to polling stations. But this raises even more questions: what exactly did the IEBC download to the laptops?

27. **THAT**, given lack of a link to the central voter database, polling stations would not have been able to subtract those who had voted from the central database. And merely crossing out the name of the voter from the physical register at the polling station guaranteed nothing if more copies of the same register existed. In effect, there was nothing to stop double voting.

28. **THAT** the BVR system relied heavily on a steady supply of electricity for the laptops on which the system would be run. However, in many places no attempt was made to provide backup power beyond the life of the one battery the computer started out on. In some stations, batteries had died within one hour of the opening of the polling. A majority of polling stations had no electric power and rapidly abandoned the BVR system as the laptops had died due to lack of power.

29. **THAT** the 1st and 2nd Respondent did not meet their obligation under Article 86 (a) of the Constitution to ensure that voting and tallying was conducted using a simple system.

PARTICULARS

- a. During the voter registration exercise, the Biometric Voter Registration Kits were not connected to the national Servers and database of the 2nd Respondent.
- b. The Electronic Voter Identification Devices failed to function during voting.
- c. The electronic transmission of results from the presiding and returning officers failed.

30. **THAT** the 1st and 2nd Respondent did not meet their obligation under Article 86 (b) of the Constitution to ensure that voting was conducted in an accurate system.

PARTICULARS

- a. In many instances, the laptop computers used for the electronic voter identification had not been charged, or could not sustain battery life
- b. The electronic transmission of results failed.

- c. In many instances, the necessary applications (apps) that were to be uploaded on the mobile phones had not been uploaded.
- d. In many instances, the mobile phones that were to be used to transmit the results had not been charged.
- e. In many instances, the mobile phones were unable to communicate with the national Servers and database of the 2nd Respondent.
- f. The electronic transmission of results produced misleading and incorrect tallying of votes.
- g. After the complete failure of the electronic results transmission system, and the consequent resort to manual tallying of the votes, the 1st and 2nd Respondent did not put in place sufficient measures to ensure the accuracy of the vote.
- h. Several instances exist where aggregate totals on Forms 36 are higher than the votes cast.
- i. The 1st and 2nd Respondent failed to put in place appropriate policies, strategies, structures and mechanisms to manage risk, put in place contingency and back-up measures, and, in the event of failure of the electronic components of the electoral system, prevent and eliminate electoral malpractice.
- j. The 1st and 2nd Respondent failed to put in place appropriate policies, strategies, structures and mechanisms for the safekeeping of election materials, of both a physical and electronic form.
- k. In the event of failure of any or all of the electronic components of the electoral system, the 1st and 2nd Respondent were under obligation to recover and restore them.
- l. The 1st and 2nd Respondent had a constitutional obligation, under Article 86(d) of the Constitution to do the above.
- m. The above failures constitute culpable, and indeed, willful negligence.

31. **THAT** the 1st and 2nd Respondents did not meet their obligation under Article 86 (a) of the Constitution to ensure that voting was conducted using an accountable and verifiable system.

PARTICULARS

a. The 1st and 2nd Respondents failed to carry out the obligation under Article 138 (3)(c) of the Constitution to tally and verify the presidential votes cast in polling stations.

b. As a result of the failure of the electronic transmission of results there were no provisional results for verification, at the Polling, Constituency, County and national levels.

c. The 1st and 2nd Respondents excluded party agents and accredited Observers from the National Tallying Center, in violation of Regulations 84 and 85 of the Elections (General) Regulations, 2012, thereby precluding any credible tallying or verification.

d. The 2nd Respondent ejected party agents and accredited Observers from the National Tallying Center, in violation of Regulations 84 and 85 of the Elections (General) Regulations, 2012.

e. On failure of the electronic transmission of results the 1st and 2nd Respondents had a constitutional and legal obligation to verify and then tally the presidential votes cast at all polling stations from Form 34.

f. The Kriegler Report said that it was not possible to conduct any analysis of the December 2007 elections, saying:

“The first reason is that the IREC analysis of tallying etc. in nineteen sample constituencies demonstrates convincingly that there are so many more or less erroneous constituency results...that one cannot rely on any figures from the ECK. “ (Section 6.8)

g. Similarly, there are so many irregularities on Forms 34, 35 and 36, and the entire electoral process of the 4th March 2013 Presidential Elections, and these

irregularities affected the validity, credibility, outcome, results and declaration of the election.

32. **THAT** the 1st and 2nd Respondent did not meet their obligation under Article 86 (b) of the Constitution to ensure a secure system of voting.

PARTICULARS

a. The electronic transmission of results generated a vote count that maintained a consistent gap between the two leading presidential candidates. It is scientifically impossible to maintain a consistent gap in results that are being randomly relayed.

b. The 1st and 2nd Respondent acknowledged that the electronic transmission of results generated rejected votes that were inaccurate.

33. **THAT** the 1st and 2nd Respondent did not meet their obligation under Articles 10, 38 and 86 (a) of the Constitution to ensure that the entire election cycle was conducted in a transparent and participatory manner.

PARTICULARS

a. Prior to the actual voting day, various citizens' agencies sought explanations and assurances from the 1st and 2nd Respondents regarding their readiness and preparedness to deliver a credible, free, fair and transparent election and in most cases no response or assurance was offered.

b. While the voting was underway, and upon failure of the electronic voter identification systems, there was neither explanation nor assurance to the public, either at the Polling Stations or from the 1st or 2nd Respondents.

c. There was undue delay in publicly acknowledging the evident failures in the electronic results transmission system. To date there has been no explanation of the reasons for the failure, the steps taken to mitigate, or rectify, the failures or a detailed and credible assurance

d. The 1st and 2nd Respondents excluded party agents and accredited Observers from the National Tallying Center, in violation of Regulations 84 and 85 of the

Elections (General) Regulations, 2012, thereby precluding any credible tallying or verification.

e. The 1st and 2nd Respondent ejected party agents and accredited Observers from the National Tallying Center, in violation of Regulations 84 and 85 of the Elections (General) Regulations, 2012.

34. **THAT** the 2nd Respondent did not meet its obligations under Article 86 (d) and 201 of the Constitution and Sections 102 and 105 of the Public Procurement and Disposal Act, 2005 to ensure that there were appropriate structures and mechanisms to eliminate electoral malpractices.

PARTICULARS

a. The 2nd Respondent awarded the tender for the supply, delivery, installation, configuration, training, testing and commissioning of electronic voter identification devices to an unqualified bidder.

35. **THAT** the 1st and 2nd Respondents did not meet their obligation under Article 88 (4) (e) to settle disputes that arose subsequent to the declaration of presidential election results from constituencies.

PARTICULARS

a. The 1st and 2nd Respondent ejected party agents and accredited Observers from the National Tallying Center when they drew the attention of the 1st and 2nd Respondents to the irregularities in results from Constituencies, in violation of Regulations 84 and 85 of the Elections (General) Regulations, 2012.

36. **THAT** in light of the fundamental irregularities in the conduct the Presidential elections it cannot be said that it was conducted substantially in accordance with the Constitution, the Elections Act and Regulations,

37. **THAT** in auditing an electoral process to determine its validity, this Court will not be dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes.

38. **THAT** in determining whether the fundamental irregularities affected the outcome and results, the Court ought to use both qualitative and quantitative tests.

39. **THAT** it is the Petitioners' case that the grounds raised in the Petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not accurate, credible, transparent, free, fair or accountable.

40. **THAT** it is the Petitioners' case that in a democratic election the means by which a winner is declared plays a central role. The votes must be verifiable by the paper trail left behind. And it must be demonstrated that there exist favorable circumstances for a fair election and that no person was prejudiced by an act or omission of an election official.

41. **THAT** following historical experiences including the post-election violence, which resulted from a failed electoral process in 2007, the people of Kenya gave themselves a new Constitution establishing, among others, this Honorable Supreme Court, which has *sui generis* and exclusive jurisdiction over disputes arising from Presidential elections.

42. **THAT** the people of Kenya do not know, and may never know, what happened to their votes in 2007. The failures of 2007 must never be repeated. The 2010 Constitution was their promise that this will never happen again. It is the solemn responsibility of this Honourable Supreme Court to deliver that promise.

43. **REASONS WHEREFORE** the Petitioners pray for the following reliefs:

a. **A DECLARATION** that the absence of a credible Principal Voters Register vitiates the validity of the Presidential elections of 4th March 2013.

b. **A DECLARATION** that the failure to verify the Presidential votes cast at the Polling Stations vitiates the validity of the Presidential elections thereby rendering it null and void.

c. **A DECLARATION** that the proclamation, by the 1st and 2nd Respondents, of the 3rd Respondent as President-elect was invalid, and therefore that the Form 38 Certificate issued to the 3rd Respondent is invalid.

d. **AN ORDER** for preservation and production of all Forms 34 and 36 related to the Presidential election.

e. **AN ORDER** for preservation of the computer servers and mobile phones used in the Presidential elections, and of the data in them, and their production for independent audit.

- f. **AN ORDER** for an independent forensic process and systems investigation of the conduct of the Presidential elections by the 2nd Respondent.
- g. **AN ORDER** that the costs of the Petition be borne by the 1st and 2nd Respondents.
- h. **ANY OTHER DECLARATION OR ORDER** that the Court may deem fit, in the interests of justice.

DATED AT NAIROBI THIS 16TH DAY OF MARCH 2013

GLADWELL WATHONI OTIENO

1ST PETITIONER

ZAHID RAJAN

2ND PETITIONER

KILONZO & COMPANY

ADVOCATES FOR THE PETITIONERS

DRAWN & FILED BY

KILONZO & COMPANY

ADVOCATES

KAY GROUP CENTER

NGONG ROAD/MUCAI DRIVE

OPPOSITE NAIROBI BAPTIST CHURCH

P.O. BOX 59839 00200 GPO

NAIROBI

COPIES TO BE SERVED ON

1. AHMED ISSACK HASSAN
ahmedissack@iebc.or.ke, info@iebc.or.ke

2. INDEPENDENT ELECTORAL BOUNDARIES COMMISSION
info@iebc.or.ke

3. UHURU MUIGAI KENYATTA
info@tna.co.ke

4. WILLIAM SAMOEI RUTO
info@tna.co.ke

LODGED IN THE REGISTRY AT NAIROBI ON THEDAY OF MARCH 2013

REGISTRAR