



**Youth Advocacy for Africa (YAA) & 7 others v Independent Electoral and Boundaries Commission & 17 others (Election Petition E002, E003 & E005 of 2022 (Consolidated)) [2022] KESC 42 (KLR) (Election Petitions) (30 August 2022) (Ruling)**

Neutral citation: [2022] KESC 42 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
ELECTION PETITIONS  
ELECTION PETITION E002, E003 & E005 OF 2022 (CONSOLIDATED)**

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,  
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**AUGUST 30, 2022**

**BETWEEN**

**YOUTH ADVOCACY FOR AFRICA (YAA) ..... 1<sup>ST</sup> APPLICANT**

**PETER KIRIKA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**WAFULA CHEBUKATI ..... 2<sup>ND</sup> RESPONDENT**

**JULIANA WHONGE CHERERA ..... 3<sup>RD</sup> RESPONDENT**

**JUSTUS NYANGAYA ..... 4<sup>TH</sup> RESPONDENT**

**IRENE MASIT ..... 5<sup>TH</sup> RESPONDENT**

**FRANCIS WANDERI ..... 6<sup>TH</sup> RESPONDENT**

**PROF. ABDI YAKUB GULIYE ..... 7<sup>TH</sup> RESPONDENT**

**BOYA MOLU ..... 8<sup>TH</sup> RESPONDENT**

**WILLIAM SAMOEI RUTO ..... 9<sup>TH</sup> RESPONDENT**

**GACHAGUA RIGATHI ..... 10<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL OF KENYA ..... 11<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
ELECTION PETITION E003 OF 2022**



**BETWEEN**

**KHELEF KHALIFA ..... 1<sup>ST</sup> APPLICANT**  
**GEORGE OSEWE ..... 2<sup>ND</sup> APPLICANT**  
**RUTH MUMBI ..... 3<sup>RD</sup> APPLICANT**  
**GRACE KAMAU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup> RESPONDENT**  
**THE CHAIRPERSON OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**H.E WILLIAM RUTO ..... 3<sup>RD</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
ELECTION PETITION E005 OF 2022**

**BETWEEN**

**RAILA AMOLO ODINGA ..... 1<sup>ST</sup> APPLICANT**  
**MARTHA WANGARI KARUA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup> RESPONDENT**  
**WANYONYI WAFULA CHEBUKATI ..... 2<sup>ND</sup> RESPONDENT**  
**BOYA MOLU ..... 3<sup>RD</sup> RESPONDENT**  
**PROF. ABDI YAKUB GULIYE ..... 4<sup>TH</sup> RESPONDENT**  
**JUSTUS NYANGAYA ..... 5<sup>TH</sup> RESPONDENT**  
**JULIANA WHONGE CHERERA ..... 6<sup>TH</sup> RESPONDENT**  
**FRANCIS WANDETI ..... 7<sup>TH</sup> RESPONDENT**  
**IRENE MASSIT ..... 8<sup>TH</sup> RESPONDENT**  
**WILLIAM SAMOEI RUTO ..... 9<sup>TH</sup> RESPONDENT**

**Court compels IEBC to give access to their servers for confirmation of the information in Form 34C**

Reported by John Ribia



**Electoral Law** – scrutiny – recount – application for scrutiny and recount - what criteria should courts employ in determining applications for scrutiny and recount in election results - whether an order allowing for the filing of further affidavits arising from the attainment of the information from the scrutiny exercise could issue given the strict timelines applicable to a presidential election petition - Elections Act, 2011, sections 39 and 44; Supreme Court Act, 2011, sections 12, 23, and 26; Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 rule 17 and 18; Election (Technology) Regulations, 2017, regulation 10

**Electoral Law** – parties to the presidential election petition – power of the court to issue orders to third parties not enjoined in the presidential election petition - whether the Supreme Court in determining a presidential election petition could grant orders to direct the production of contracts with terms of reference between third parties who were not parties to petitions before the court - Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 rules 17 and 18; Election (Technology) Regulations, 2017, regulation 10

### **Brief facts**

The petitioners in Presidential Election Petition No. E002 of 2022 (the applicants) through an application sought court orders to compel the Independent Electoral and Boundaries Commission (IEBC) to give the petitioners or any person or expert engaged by IEBC in relation to the petition, the complete unedited soft copy of the Voters Register; to give the petitioners full and unfettered physical and remote access to electronic device(s) used to capture Form 34A's and 34B's on the Kenya Integrated Election Management System (KIEMS) and transmitted to the Constituency Tallying Centre and the National Tallying Centre; to give the applicants full and unfettered physical and remote access to any server(s) at the constituency tallying centre for storing and transmitting voting information and that the servers would be forensically imaged to capture *inter alia*, metadata such as data files for all Forms 34A and Forms 34B among other orders regarding the technology used in the presidential election that was conducted on August 2022. The petitioners also sought court order for inspection, scrutiny and recount for various polling stations.

### **Issues**

- i. What criteria should courts employ in determining applications for scrutiny and recount of election results?
- ii. Whether the Supreme Court in determining the presidential election petition could grant orders to direct the production of contracts with terms of reference between third parties who were not parties to petitions before the court.
- iii. Whether an order allowing for the filing of further affidavits arising from the attainment of the information from the scrutiny exercise could issue given the strict timelines applicable to the presidential election petition.

### **Held**

1. While considering a request for scrutiny of either the forms or the technology used in an election, the request for scrutiny had to be made for a sufficient reason. Any request that would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would be rejected. Any prayer couched in general terms, not pleaded with specificity or such other request that was impracticable in terms of scope and time would be declined. The narrow timelines granted by the Constitution for the hearing and determination of a presidential election dispute, meant that only reasonable, practical and helpful orders should be issued in that regard.
2. Subject to section 12 of the Supreme Court Act all of the certified copies of the documents used to declare the results of the presidential election were already in the custody of the court and were available to the parties upon request. There was no reason to grant the prayers to avail the soft copy of the voters register and to order scrutiny of the biometric voter register as the register was already in the public domain. No justification in the context had been given to show why the same should be provided. The



- request to access to all KIEMS kits and servers for all Constituency Tallying Centers was unrealistic given the short timelines for the hearing and determination of the presidential election petitions.
3. The orders sought regarding the technological aspects of the presidential election petitions were not practicable, reasonable and helpful to ensure that the Supreme Court reached a just and fair determination of the petitions. They were couched in general terms and were vague.
  4. There could be possible legal issues that could arise in granting the prayer asking for the terms of reference between Smartmatic International and Local Service Providers. The Supreme Court could not blindly grant orders to direct the production of contracts with terms of reference between third parties who were not parties to the petitions before the court. Smartmatic International was not a party to the proceedings neither were local service providers and to demand that such terms of reference be accessed by the applicants was impractical and may cause unnecessary delay in the hearing and determination of the presidential election petition.
  5. An order allowing for the filing of further affidavits arising from the attainment of the information from the scrutiny exercise, noting the time left for the hearing and determination of the petition from the date of delivery of the instant ruling, would only but delay the proceedings and would occasion prejudice to the respondents who would not be able to respond to the issues raised in the affidavits.

*Application partly allowed.*

### **Orders**

- i. *The IEBC was to provide to the applicants copies of its technology system security policy comprising but not limited to password policy, password matrix, owners of system administration password(s), system users and levels of access, and workflow chats for identification, tallying, transmission and posting of portals and any API's that had been integrated and the list of human interface and controls for such intervention subject however to any security related issues thereof.*
- ii. *IEBC was compelled to give the applicants supervised access to any server(s) at the National Tallying Centre for storing and transmitting voting information and which were forensically imaged to capture a copy of the Form 34C which was the total votes cast.*
- iii. *The IEBC was to provide the applicants with certified copies of penetration tests conducted on the IEBC election Technology System prior to and during the 2022 General and Presidential Election including certified copies of*
  1. *all reports prepared pursuant to Regulation 10 of Election (Technology) Regulations, 2017; and*
  2. *certified copies of certificates by a professional(s) prepared pursuant to Regulation 10(2) of Election (Technology) Regulations, 2017.*
- iv. *The IEBC was directed to avail partnership agreements with its technical partners, list of users, trail and admin access to provide clarity on the IEBC systems and their usage for review and verification, subject however to any security related issues thereof.*
- v. *The ballot boxes for the following polling stations were to be opened for inspection, scrutiny and recount:*
  1. *Nandi Hills and Sinendeti Primary School in Nandi.*
  2. *Belgut, Kapsuser and Chepkutum Primary Schools in Kericho County.*
  3. *Jomvi, Mikindani and Ministry of Water Tanks Polling Stations in Mombasa County.*
  4. *Mvita, Majengo and Mvita Primary Schools in Mombasa County.*
  5. *Tinderet CONMO, in Nandi County.*
  6. *Jarok, Gathanji and Kibeo Primary School Polling in Nyandarua County.*
- vi. *The error forms signed by the chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between August 10 – 15, 2022 were to be provided to the applicants.*
- vii. *IEBC should provide certified copies of Forms 32A and 34C Book 2 used in the impugned election subject to the applicants providing to the IEBC specific contested polling stations for compliance thereof.*
- viii. *The above exercise was to be conducted within 48 hours of the instant orders.*



- ix. *Each party was to be represented by two agents during the exercises above and they would at all times be under the supervision of the Registrar of the Supreme Court and her staff. The Registrar was to file her report by 5:00 PM on September 1, 2022 and avail copies to all parties.*
- x. *Any party was at liberty to submit on the Report before conclusion of the hearing as was to be directed by the President of the court.*
- xi. *No order as to costs.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* Civil Appeal No 105 of 2017; [2017] eKLR - (Explained)
2. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Petition 1 of 2017; [2017] eKLR - (Mentioned)

### **Statutes**

#### **Kenya**

1. Access to Information Act, 2016 (Act No 31 of 2016) In general - (Cited)
2. Constitution of Kenya articles 1, 2, 3, 19, 20, 22, 23(3); 35; 81; 86;138(1)(c); 140; 159; 258 - (Interpreted)
3. Elections (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) regulation 10(2) - (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) sections 39(1)(c); 44 - (Interpreted)
5. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 27 - (Interpreted)
6. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 24 of 2011 Sub Leg) rules 3, 4,17, 18 - (Interpreted)
7. Supreme Court Act, 2011 (cap 9B) sections 12, 23, 26 - (Interpreted)

### **Advocates**

None mentioned

## **RULING**

1. Upon reading the notice of motion by Youth Advocacy Africa (YAA) and Peter Kirika, the petitioners in Presidential Election Petition No E002 of 2022 brought under articles 19, 20,22, 23(3), 35, 81, 86, 140, 159 and 258 of the Constitution, sections 39 and 44 of the Elections Act, 2022, sections 12, 23 & 26 of the Supreme Court Act, 2011 rule 17 and 18 of the Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 and all other enabling provisions wherein they seek orders that:
  1. The IEBC be compelled to give the petitioners or any person or expert engaged by IEBC in relation to this petition, the complete unedited soft copy of the Voters register in excel format used in the General Elections held on August 9, 2022;
  2. The IEBC be compelled to give the petitioners full and unfettered physical and remote access to electronic device(s) used to capture Form 34A's and 34B's on the KIEMS system and transmitted to the Constituency Tallying Centre and the National Tallying Centre;



3. The IEBC be compelled to give full and unfettered physical and remote access to the smartphones used on 9<sup>th</sup> August 2022 General Elections by the Returning Officers deployed in constituencies in Murang'a County, Kirinyaga County, Laikipia County, and Baringo Central Constituency in line with paragraph (k) of the Kenya Gazette Notice Vol CXXIV No 150 dated August 3, 2022;
4. That the IEBC be compelled to give access to and supply to the court and to the petitioners certified copies of the raw images of Forms 34As prepared and obtained from the Polling Stations by the Presiding Officers before being converted to PDF Format as well as all the Forms 32As prepared at all the Polling Stations in the Presidential Elections held on August 9, 2022;
5. That the IEBC be compelled to give access and supply to the Court and to the parties' information and data in its exclusive possession on;
  - (a) The IEBC Election System Network Architecture comprising but not limited to the servers, number of servers, location of the servers; the firewalls, the IP addresses, the operating systems, and software running applications.
  - (b) The IEBC election technology system security policy comprising but not limited to password policy, password matrix, owners of system administration password(s), system users and levels of access, and workflow chats for identification, tallying, transmission, and posting of portals and any API's that had been integrated and a list of human interface activities and controls for such intervention.
  - (c) Certified copies of certificates of penetration tests conducted on the IEBC election Technology System prior to and during the 2022 General and Presidential Election including certified copies of a) all reports prepared pursuant to regulation 10 of *Election (Technology) Regulations, 2017*, and b) certified copies of certificates by a professional(s) prepared pursuant to regulation 10(2) of *Election (Technology) Regulations, 2017*.
  - (d) In relation to KIEMS kits; the (i) static IP addresses of each KIEMS kit used during the presidential election held on August 9, 2022, (ii) specific GPS location of each KIEMS Kits and GPS location for each polling station used during the Presidential Election for each period including August 5, 2022 and August 15, 2022; (iii) certified list of all KIEMS Kits unique device identifiers including but not limited to MAC address, IMEI numbers, Sim Card numbers procured used, unused and or deployed during the elections; (iv) polling station allocation for each KIEMS Kits used during the presidential election including the six back up kits per ward; (v) electronic voter identification (EVID) logs of each KIEMS Kits used during the presidential election on 9<sup>th</sup> August 2022 transmitted from polling stations to the constituency tallying Centre and to IEBC National Tallying Centre; and from i) IEBC Result Transmission Data Base Application protocol interphase (API) logs showing user access rights, time of transmissions from KIEMS Kits to the IEBC Result Transmission Data Base, Access time of transmission from IEBC Result Transmission Data Base to the Media Houses API; (vi) count of identified voters by each KIEMS Kit by biometric identification to alphanumeric search, manual identification through physical register and overall count including found and not found; logs for EVI application logs to include log in details of the user, opening and closing time, voters IDs, device MAC address, mode of identification, time stamp, polling station Code and GPS location; RTS applications to include log in details of the user, opening and closing time of the application, time



of Form 34As image captured and transmitted and; access to the original Form 34A image captured by the KIEMS Kits, sent to the RTS central server prior to processing to PDF with original metadata including time stamp, resolution, device ID and GPS location.

- (e). technical partnership agreements for IEBC Election technology system including the list of technical partners, the kind of access they had, the list for APIs for exchange of data with partners, log in trail of users and equipment into IEBC servers, log in trails of users and equipment into the KIEMS Database management systems; and access to administrative access into the IEBC obelisc portal between August 9, 2022 to date.
6. That IEBC be compelled to give the applicants and any person engaged by the court full and unfettered physical and remote access to any local server connected to the electronic device(s) used to verify voters identification against the list of registered voters at each polling station, from which a forensic image will be taken;
7. That IEBC be compelled to give the applicants full and unfettered physical and remote access to any server(s) at the constituency tallying centre for storing and transmitting voting information and that the servers will be forensically imaged to capture *inter alia*, metadata such as data files for all Forms 34A and Forms 34B.
8. That IEBC be compelled to give the applicants access to certified copies of the original Forms 34B prepared at and obtained from the Constituency Tallying centers and returning officers;
9. That IEBC be compelled to give access to particulars of the webmaster(s), log-in time, log-in access, log-in codes, and logs of all the Forms 34A and 34B PDF Forms uploaded from the RTS to the public portal;
10. That IEBC be compelled to give certified copies of the minutes of IEBC postponing elections for Governor in Mombasa and Kakamega Counties
11. That IEBC be compelled to supply to the court and the petitioners' copies of the Minutes of the 1<sup>st</sup> respondent held to tally and verify the count of the presidential election in line with article 138(1)(c) of the Constitution; and
2. Upon considering the grounds in support of the application and the averments in the supporting affidavit sworn by Peter Kirika and Francis Wamutitu where the applicants claim that: that the impugned declaration of the presidential results was made in breach of the Constitution and the national legislation, in particular, the Election (Technology) Regulations, 2017 and section 39(1)(C) of the Elections Act 2011; that the IEBC Election Technology System was penetrated and or deliberately compromised and used in a manner not intended by law so as to interfere and affect the result of the presidential election; that the information sought is critical to demonstrate that IEBC did not conduct a free, fair, secure, verifiable, accountable and transparent presidential election and; that the grant of access to the information and data sought is in line with the IEBC's duty to be independent, transparent and accountable; and
3. Also noting the Notice of Motion by Khelef Khalifa, George Osewe, Ruth Mumbi and Grace Kamau, the petitioners in Presidential Election Petition No E003 of 2022 brought pursuant to rule 3, 4 & 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 wherein they seek orders that:
  1. The IEBC do produce the full KPMG independent audit of the Register of Voters report dated June 16, 2022.



2. An order for scrutiny and review of the following information infrastructure deployed by the IEBC including: the API server access primary server; all the files in IEBC's external server; all proxy users, all authorized access users; IP address of proxy users, information on all rest request, get access, head access, post access, put access, delete access, patch access, and options access to the servers; server integration access, all information generated at the back office, KIEMS Kit deployment register, database entry register, IP address of all Kits, Transmission gateways, IDM Registered, integrated data management system, dashboard users, system users access rights, command center users (administrative rights of access).
  3. That IEBC does provide a list of all the KIEMS Kits turn around turnout reporting logs for all the polling stations indicating the total number of voters captured under the KIEMS Kits and the same be scrutinized by the court.
  4. That IEBC does provide geolocation data/logs of the KIEMS Kit while on voter identification mode and results transmission mode;
  5. That IEBC does provide the KIEMS Kit mobile device management logs for Forms 34C in CSV or in excel format, Forms 37B in CSV or in excel format, and Forms 38B in CSV or in Excel format.
  6. That IEBC does provide a list of Form 32As capturing the details of all registered voters not identified through the KIEMS Kits and were identified to vote manually.
  7. That's the IEBC does produce all the Forms 34A book 2.
  8. That the Court does issue an order for scrutiny of the Biometric Voter Register used in the 2022 presidential elections pending the hearing and determination of the petition; and
4. Further considering the grounds in support of the application, the averments contained in the supporting affidavit of Khelef Khalifa sworn on behalf of the petitioners and their written submissions dated August 28, 2022 where they contend that IEBC is required, at least six months before a general election, to engage a professional reputable firm to conduct an audit of the Voters Register in order to verify the accuracy of the Register, recommend mechanisms of enhancing the accuracy of the register and update the register; that IEBC had engaged the services of KPMG on or about April 7, 2022 to conduct an audit of the register of Voters while the continuous voter registration was still ongoing and therefore, the Auditor could not get accurate information on the Voters Register; that despite the legal requirement that IEBC publicizes the audit report, the same is yet to be done despite the allegation that the IEBC's ICT system was vulnerable to hacking and manipulation and; that the audit report revealed serious gaps in IEBC's new voter register system despite IEBC claiming that they had fixed the anomalies identified in the audit report with there been no public or private information confirming the rectification and therefore the applicants urge the court to find that the electoral process adopted by IEBC and the Chairperson of the IEBC in particular during the General Election held on August 9, 2022 was convoluted, opaque, vulnerable to manipulation, and fraught with unconstitutionality, illegalities and irregularities which substantially affected the presidential election results; and
  5. Having also considered the Notice of Motion by Raila Odinga and Martha Karua, the petitioners in Presidential Election Petition No E005 of 2022 brought pursuant to articles 1,2,3,19,20, 22, 23(3), 35,81,86,140,159 and 258 of the Constitution, section 39,44, 80(4), and 82 of the Elections Act, section 27 of the IEBC Act, section 23 & 26 of the Supreme Court Act, 2011, rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017, regulation 15 of the Elections (Technology) Regulations 2017 and all enabling provisions of the law wherein they seek orders that:



1. The IEBC do deliver to the court the following documents for inspection: all physical and digital(public portal ) forms 34B in respect of the two hundred and ninety Constituencies; all Forms 32A used in the election to authorize manual identification of voters; the full KPMG Report on the Register of Voters; full audit report on the technology used; Report of the vendor, due diligence, technology used in the General Election on August 9, 2022; error forms signed by the Chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between 10<sup>th</sup> to August 15, 2022; copies of polling station diaries from Kiambu, Kirinyaga, Nyandarua, Nyeri, Muranga, West Pokot, Bomet and Bungoma Counties; result transmissions system simulation exercise report of the results; training schedule if any for technology operators; the sign offs/ verification of ballot paper printing and distribution, the terms of reference of all support contracts between Smartmatic International and Local Service Providers, the list of third party integration including APIs and associated security controls, the list of data repositories for both the physical and digital copies of election materials.
  2. Prayer 5 as sought by the applicants in Presidential Petition E002 of 2022 and additionally, that IEBC does deliver the IEBC Election technology system redundancy plan comprising the business continuity plan and disaster recovery plan;
  3. That the IEBC does deliver to the court and parties all ballot boxes for inspection, scrutiny and recount in the following polling stations, Nandi Hills and Sinendeti Primary School in Nandi, Belgut, Kapsuser and Chepkutum Primary Schools in Kericho County; Jomvi, Mikindani and Ministry of Water Tanks Polling Stations in Mombasa County; Mvita, Majengo and Mvita Primary Schools in Mombasa County; Tinderet CONMO, in Nandi County; Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County;
  4. That the IEBC does deliver all ballot boxes in Bomet, Nandi, Kiambu, Kericho, Kirinyaga and Nyeri counties for inspection, scrutiny, recount and such terms as it deems fit;
  5. That in the alternative, the IEBC does deliver all ballot boxes in Gatundu North Constituency, Chepalungu Constituency, Konoin Constituency, Sotik Constituency, Kiambaa Constituency, Belgut and Nyali Constituency for inspection, scrutiny and recount on such terms as the court deems fit;and
  6. That this court be pleased to grant the applicants 48 hours from the date of supply to inspect, scrutinize and recount as the case may be, the foregoing information and to file such affidavits or reports as may be necessary;and
6. Upon reading the grounds in support of the application, the averments in the supporting affidavit sworn by Martha Karua on behalf of the petitioners and their written submissions filed and dated August 26, 2022 where the applicants claim that IEBC conducted and supervised the impugned election of 9<sup>th</sup> August and on August 15, 2022, the Chairperson purported to announce William Ruto as president-elect and gazetted him in Notice No CXXIV on August 16, 2022; that the impugned declaration of the presidential results were made in flagrant violation of the *Constitution* and the Electoral Laws; that the electronic transmissions of results from polling stations to the Constituency Tallying Centre were not secure so as to deliver a free, fair, secure, credible, transparent, accurate and verifiable election; that the statutory forms 34 A, B, and C used to declare the results were fraudulently manipulated or altered by compromised staff of IEBC and third parties with the connivance of the Chairperson and senior staff of IEBC in order to achieve a predetermined outcome in favour of the President-elect and further submission that the results transmissions system was demonstrably compromised and there was corroboration with glaring irregularities, inaccuracies, inconsistencies in the physical and public portal result forms as demonstrated to court, with the applicants relying on



Independent *Electoral & Boundaries Commission v Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017; [2017] eKLR (The Maina Kiai Case);

7. We Now opine as follows:

- i) The applicants have in their applications, set out their prayers specifically asking for scrutiny as well as the information they intend to be granted access to. We note that this court, while considering an application for access and scrutiny in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others, Presidential Petition No 1 of 2017*; [2017] eKLR determined that, while considering a request for scrutiny of either the Forms or the technology used in an election, the request for scrutiny must be made for a sufficient reason and that any prayer that would in effect be a fishing exercise to procure fresh evidence not already contained in the petition must be rejected. Further any prayer couched in general terms, not pleaded with specificity or such request is impracticable in terms of scope and time will also be declined. Furthermore, we noted that, because of the narrow timelines granted by the *Constitution* to hear and determine a presidential election dispute, only reasonable, practical and helpful orders should be issued in that regard. We shall maintain that criteria in determining the present applications.
- ii) Section 12 of the *Supreme Court Act* obligates IEBC to submit to the court certified copies of the documents used to declare the results of the Presidential Election including the Forms used to announce the results of the elections at the polling station and the constituency tallying center and to declare the result at the national tallying center. All these documents are already in the custody of the court and are available to the parties upon request.
- iii) Flowing from the above therefore and with regard to prayer 1 in Presidential Election Petition No E002 of 2022 as well as prayer 8 in Presidential Election Petition No. E003 of 2022 on the availing of the soft copy of the voters register as well prayer 8 in Presidential Election Petition No E003 of 2022 seeking scrutiny of the biometric voter register, we see no reason to grant these prayers as the register is already in the public domain and in any event, no justification in the context of the dispute before us has been given why the same should be provided.
- iv) On prayer 2 in Presidential Election Petition No E002 of 2022 which touches on access to all KIEMS kits and servers for all Constituency Tallying Centers, we note that such a request is unrealistic given the short timelines for the hearing and determination of the petitions before us.
- v) With regard to prayers 4,5, 6, 7, 8, and 10 in Presidential Election Petition No E002 of 2022 as well as Prayer 2 in Presidential Election Petition No. E003 of 2022 and Prayers 1 and 2 in Presidential Election Petition No E005 of 2022 which majorly touch on the technological aspects of the presidential election petitions, we note that the orders sought are not practicable, reasonable and helpful to ensure that we reach a just and fair determination of the petitions. They are also couched in general terms and are vague.
- vi) With regard to prayer 1 in petition Presidential Election Petition No E005 of 2022 asking for the terms of reference between Smartmatic International and Local Service Providers, we note that there may be possible legal issues that may arise as this Court cannot blindly grant orders to direct the production of contracts with terms of reference between third parties who are not parties to the petitions before us. Smartmatic International is not a party to these proceedings neither are local service providers and to demand that such terms of reference be accessed by the applicants is impractical and may cause unnecessary delay in the hearing and determination of the election petitions before us.



- vii) Regarding prayer 6 by the applicants in Presidential Election Petition No E005 of 2022 on the filing of further affidavits arising from the attainment of the information from the scrutiny exercise, noting the time left for the hearing and determination of the petition from the date of delivery of this ruling, such an order would only but delay the proceedings and will occasion prejudice to the respondents who will not be able to respond to the issues raised in the affidavits. That prayer is therefore disallowed.
8. Having noted the above, we hereby grant the following orders:
1. The IEBC shall provide to the applicants copies of its technology system security policy comprising but not limited to password policy, password matrix, owners of system administration password(s), system users and levels of access, and workflow charts for identification, tallying, transmission, and posting of portals and any API's that had been integrated and the list of human interface and controls for such intervention subject however to any security related issues thereof.
  2. That IEBC be compelled to give the applicants supervised access to any server(s) at the National Tallying Centre for storing and transmitting voting information and which are forensically imaged to capture a copy of the Form 34C which is the total votes cast.
  3. The IEBC shall provide the applicants with Certified copies of penetration tests conducted on the IEBC election Technology System prior to and during the 2022 General and Presidential Election including certified copies of a) all reports prepared pursuant to Regulation 10 of *Election (Technology) Regulations, 2017* and b) certified copies of certificates by a professional(s) prepared pursuant to Regulation 10(2) of *Election Technology Regulations, 2017*.
  4. IEBC is hereby directed to avail partnership agreements with its technical partners, list of users, trail, and admin access to provide clarity on the IEBC systems and their usage for review and verification, Subject however to any security related issues thereof.
  5. That the ballot boxes for the following polling stations be opened for inspection, scrutiny and recount: Nandi Hills and Sinendeti Primary School in Nandi, Belgut, Kapsuser and Chepkutum Primary Schools in Kericho County; Jomvi, Mikindani and Ministry of Water Tanks Polling Stations in Mombasa County; Mvita, Majengo and Mvita Primary Schools in Mombasa County; Tinderet CONMO, in Nandi County; Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County;
  6. That the error forms signed by the Chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between 10<sup>th</sup> to 15<sup>th</sup> August 2022 be provided to the applicants.
  7. That IEBC should provide certified copies of Forms 32A and 34C Book 2 used in the impugned election Subject to the applicants providing to the IEBC specific contested polling stations for compliance thereof.
  8. That the above exercise shall be conducted within 48 hours of these orders ie from 2 pm on Tuesday, 30<sup>th</sup> August to 2 pm on Thursday, September 1, 2022.
  9. Each Party shall be represented by two agents during the exercises above and they shall at times be under the supervision of the Registrar of the court and her staff. The Registrar shall file her report by 5 pm on September 1, 2022 and avail copies to all parties.



10. Any party is at liberty to submit on the report before conclusion of the hearing as shall be directed by the President of this court.

11. There shall be no order as to costs.

9. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF AUGUST, 2022.**

.....

**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**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**

**SUPREME COURT OF KENYA**

