



**Odinga & 4 others v Independent Electoral Boundaries Commission
& 7 others (Presidential Election Petition E005, E002 & E004 of 2022
(Consolidated)) [2022] KESC 43 (KLR) (29 August 2022) (Ruling)**

Neutral citation: [2022] KESC 43 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PRESIDENTIAL ELECTION PETITION E005, E002 & E004 OF 2022 (CONSOLIDATED)

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

AUGUST 29, 2022

**BEING AN APPLICATION BY THE 9TH RESPONDENT TO STRIKE OUT THE NAMES OF
THE 3RD TO 8TH RESPONDENTS IN PETITIONS E004 OF 2022, AND E005 OF
2022 AND THE NAMES OF THE 3RD TO 8TH AND 13TH RESPONDENTS IN PETITION
E002 OF 2022**

BETWEEN

**RAILA AMOLO ODINGA 1ST PETITIONER
MARTHA WANGARI KARUA 2ND PETITIONER
PETER KIRIKA 3RD PETITIONER
DAVID KARIUKI NGARI 4TH PETITIONER
YOUTH ADVOCACY AFRICA (YAA) 5TH PETITIONER**

AND

**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
IRENE MASSIT 7TH RESPONDENT**



Inclusion of IEBC commissioners as respondents in a presidential election petition does not violate section 15 of the IEBC Act which insulated them from being personally liable for any acts done in good faith in execution of the IEBC's powers.

Reported by John Ribia

***Electoral Law** - presidential election petition – parties to a presidential election petition – IEBC commissioners – whether IEBC commissioners could be included as respondents in their personal capacity in a presidential election petition - whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated the principle that commissioners of an independent constitutional body could not be liable for any acts done in good faith in execution of the body's powers – Independent Electoral and Boundaries Commission Act (Cap 7C) section 15.*

***Electoral Law** - presidential election petition – parties to a presidential election petition – Office of the Attorney General – whether the Office of the Attorney General was wrongfully named as a respondent in a presidential election petition - whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated the principle that commissioners of an independent constitutional body could not be liable for any acts done in good faith in execution of the body's powers – Independent Electoral and Boundaries Commission Act (Cap 7C) section 15.*

Brief facts

The 9th applicant (HE Dr. William Samoei Ruto) sought to strike out the names of the 3rd to 8th respondents from the presidential election petitions. The applicant contended that the respondents, being members of the 1st respondent (being Commissioners of the IEBC), an independent constitutional and corporate entity, could not be parties to the petitions. The application also sought to strike out the 13th respondent, the Office of the Attorney General, from the presidential election petition on the grounds that the respondent had no role in the petition, unless the instant court granted leave for him to be joined as a friend of the court.

Issues

- i. Whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated section 15 of the IEBC Act which insulated the commissioners from being personally liable for any acts done in good faith in execution of their mandate.
- ii. Whether the office of the Attorney General's role in a presidential election petition was limited to being a friend of the court.

Held

- 1. The statement by the 5th to 8th respondents (4 IEBC commissioners who refused to own the presidential election results due to the “opaque nature” of the process) brought them squarely within the ambit of grievance by the petitioners. The latter could not be faulted for seeking to place before the court any evidence emanating from the four. To use section 15 of the Independent Electoral and Boundaries Act as a shield would be tantamount to suppressing evidence by the applicant.
- 2. The Attorney General of the Republic of Kenya had more capacity than any other litigant in Kenya to fend off any attempts to join him in proceedings to which he ought not to be a party. As the Attorney General, he did not need the aid of the 9th respondent to accomplish such a routine task.

Applications dismissed.

Orders

No order as to costs.

Citations

Statutes



Kenya

1. Constitution of Kenya article 138(3)(c) - (Interpreted)
2. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 15 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) In general - (Cited)

Advocates

None mentioned

RULING

1. William Samoei Ruto, (the applicant) has been named as the 9th respondent in Petitions E002, E004, and E005 respectively. By three separate applications all dated the August 27, 2022, he seeks to strike out firstly, the names of the 3rd to 8th respondents in Petitions E004 and E005 respectively, and secondly, the names of the 3rd to 8th and 13th respondents in Petition E002.
2. Regarding the 3rd to 8th respondents in the three petitions, the applicant submits that the said respondents, being members of the 1st respondent, an independent constitutional and corporate entity, cannot be sued in their individual capacity. In support, the applicant cites section 15 of the [IEBC Act, 2011](#) which insulates and protects the respondents, from being personally liable for any acts done in good faith and in the execution of the 1st respondent's powers, functions and duties.
3. As for the 13th respondent in Petition E002, the applicant submits that the said respondent has no role in this petition, unless this court grants leave for him to be joined as a Friend of the court. Further, the applicant argues that the [Supreme Court \(Presidential Election\) Rules, 2017](#) do not envisage the 13th respondent as a respondent in a petition challenging the Presidential Elections.
4. We have considered the applications and written submissions in support thereof. It is not lost on us that one of the main grounds on which the three petitions are based is that the 1st respondent of which the 3rd to 8th are members, failed to perform its functions under article 138(3)(c) of the [Constitution](#). This failure as claimed by the petitioners, was occasioned by the exclusion of the 5th to 8th respondents from the verification and tallying process by the 2nd respondent.
5. This claim is based on a highly publicized Press statement by these very respondents disowning the declaration of the Presidential Election results by the 2nd respondent. This statement by the four respondents brings them squarely within the ambit of grievance by the petitioners. The latter cannot be faulted for seeking to place before the court any evidence emanating from the four. To use section 15 of the [IEBC Act](#), as a shield, would be tantamount to suppressing evidence by the applicant.
6. Regarding the application to strike out the 13th respondent from Petition E002, it is also not lost on us that the said respondent is the Attorney General of the Republic of Kenya. The holder of such an office, has more capacity than any other litigant in this Country to fend off any attempts to join him in proceedings to which he ought not to be a party. As the Attorney General, he does not need the aid of the 9th respondent to accomplish such a routine task.

Accordingly, We Make the Following Orders:

- i. The three applications by the 9th respondent dated August 27, 2022 and filed on August 28, 2022, are hereby dismissed.
- ii. No Orders as to Costs.



DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST, 2022.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. MWILU
DEPUTY CHIEF JUSTICE & VICE-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

