



**Mwau v Independent Electoral and Boundaries Commission & 2
others (Presidential Election Petition 2 & 4 of 2017 (Consolidated))
[2017] KESC 53 (KLR) (20 November 2017) (Determination)**

John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR

Neutral citation: [2017] KESC 53 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PRESIDENTIAL ELECTION PETITION 2 & 4 OF 2017 (CONSOLIDATED)
DK MARAGA, CJ & P, PM MWILU, DCJ & VP, JB
OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
NOVEMBER 20, 2017**

BETWEEN

HON JOHN HARUN MWAU PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

WAFULA WANYONYI CHEBUKATI 2ND RESPONDENT

HE UHURU MUIGAI KENYATTA 3RD RESPONDENT

DETERMINATION

(DETERMINATION OF PETITIONS WITHOUT REASONS

(Pursuant to Rule 23(1) of the Supreme Court (Presidential Election Rules) 2017)

1. Two Petitions, Nos.2 and 4 of 2017 both challenging the election of Hon. Uhuru Kenyatta as President elect under Article 140 of the Constitution were filed on 6th November 2017. By an Order of this Court issued on 14th November 2017, because of the limited time, the two petitions were consolidated, and heard together, with each party being allowed to submit on those issues which the party had separately raised. The Judges of this Court, thereafter, retired to deliberate upon each of those issues, which were later summarized as hereunder.
2. Petition No.2 of 2017 raised five main issues. They are as follows:



- (i) Whether the 1st Respondent was required to conduct fresh nominations prior to the presidential election held on 26th October, 2017 and what steps were required to be undertaken, if at all?
 - (ii) Were the nominations conducted for the presidential candidates for the elections held 8th August, 2017 valid, after the nullification of that presidential election by the Supreme Court in its decision delivered on 1st September, 2017? When were the elections held on 8th August, 2017 deemed to have been concluded? Did another electoral cycle commence?
 - (iii) What is the impact if at all, of the defined timeframe provided under Article 140(3) of the Constitution, for the holding of a fresh election, on the conduct of nominations? How is this comparable with other forms of presidential elections contemplated in the Constitution?
 - (iv) What is the effect of a declaration of invalidity of a Presidential election under Article 140 of the Constitution? What are the criteria for qualifying candidates to participate in a fresh election?
 - (v) Are the 1st and 2nd Respondents guilty of disobedience of the Supreme Court Order to conduct the fresh election strictly in accordance with the Constitution and the applicable laws?
3. Petition No.4 of 2017 raised nine main issues. They are as follows:
- (i) What is the locus standi of the petitioners, and are they ‘persons’ in terms of Article 140(1) of the Constitution? Are the petitions properly filed as Public Interest Litigation?
 - (ii) What is the legal effect of the withdrawal of a Presidential election candidate before election? Did any of the Presidential candidates validly or properly withdraw from the Presidential election held on 26th October, 2017?
 - (iii) Did the 1st and 2nd Respondents conduct the Presidential election held on 26th October, 2017 in strict conformity with the Constitution and the applicable laws?
 - (iv) Did the election conducted on 26th October, 2017 meet the constitutional threshold of a free and fair election under Article 81 of the Constitution?
 - (v) What are the legal consequences of not holding a Presidential election in each constituency under Article 138(2) of the Constitution? Are the results declared thereon valid?
 - (vi) Was the presidential election held on 26th October, 2017 marred with illegalities and irregularities? If yes, what are the effects of these on the validity of the election?
 - (vii) What is the effect of the Election Laws (Amendment) Act, 2017 on the conduct of the Presidential election held on 26th October, 2017? Is Section 83 of the Elections Act (as amended) unconstitutional?
 - (viii) Was the election held on 26th October, 2017 and its results, legitimate and credible both in law and in fact?
 - (ix) What Orders should the Court issue, including Orders on costs?
4. Having carefully considered the above issues, the specific prayers in each petition, as well as the Constitution and the applicable laws, the Court has unanimously determined that the petitions are not merited, and the final Orders pursuant to Article 140(2) of the Constitution, as read with Rule 22(c)(iii) of the Supreme Court (Presidential Election Petition) Rules, 2017 are as follows:



- (i) Petition No.2 of 2017, Hon. John Harun Mwau v. Independent Electoral and Boundaries Commission & 2 Others), as consolidated, is hereby dismissed.
 - (ii) Petition No.4 of 2017, Njonjo Mue and Anor v. the Chairperson of the Independent Electoral and Boundaries Commission & 3 Others, as consolidated, is hereby dismissed.
 - (iii) As a consequence, the presidential election of 26th October 2017 is hereby upheld, as is the election of the 3rd respondent.
 - (iv) Each party shall bear his/its own costs.
5. A detailed and reasoned Judgment shall be issued within 21 days of this determination, in conformity with Rule 23(1) of the Supreme Court (Presidential Election Petition) Rules, 2017.
6. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2017

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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N. S. NDUNG’U

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

