



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Election Petition 3 of 2013**

**MUSIKARI NAZI KOMBO.....PETITIONER**

**versus**

**MOSES MASIKA WETANGULA.....1ST RESPONDENT  
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT  
MADAHANAH MBAYA.....3RD RESPONDENT**

**RULING**

**Affidavit: Need for certification of translation**

[1] Mr. Ochieng Oduol, counsel for the 1st Respondent, applied that the affidavits of Reverend Joseph Machani Wekesa and Bishop Judith Nanjala Wechuli sworn on 8/4/2013 be struck out for they offend the provisions of the Evidence Act. His reasons for applying are that:

- a) Although the affidavits are in English language, the instructions were given by the deponents to the advocates who drew the affidavits in Kiswahili language.
- b) That the original text was, therefore, in Kiswahili and needed a certificate of translation into English.
- c) That there is no certificate of translation annexed in those affidavits.
- d) That this is a fatal omission which renders the affidavit wholly inadmissible.

[2] According to Mr. Ochieng Oduol, the affidavits should be struck out.

[3] Mr. Erick Gumbo, counsel for the 2nd and 3rd Respondents, supported the application and added more vigor to it; that parties should bring primary evidence before the court. In the event of any intervention by a third party, a certificate must issue. The original version of such evidence must also be availed to parties. He lamented, in this case, there has been no compliance with that requirement of the law. Accordingly, that was a fatal omission which makes it impossible for any comparison to be done between the primary evidence and the affidavits.

[4] He further argued that this state of affairs opens up a real likelihood for the witness to disown the affidavit; an act that will impinge on the integrity of the affidavit and the evidence therein. He quoted sections 63 – 66 of the Evidence Act in support of his arguments.

**Mr Ndambiri opposed the application**

[5] Mr. Ndambiri, counsel for the Petitioner opposed the application. He termed it as an abuse of the process of the court. According to him, the witnesses confirmed that they understood the contents of the

affidavit. The contents of the affidavits in question have nothing to do with translation from one language to another.

[6] He submitted that the witnesses expressed themselves to him in Kiswahili but that does not mean that they do not understand English language. Ndambiri was of the opinion that the witnesses can read the affidavits except it is their desire to express themselves in Kiswahili. To him, it would be most unfair to take such a draconian action of striking out the affidavits. Ndambiri holds the view that a witness can choose to express self in mother tongue and that would be quite in order. He expressed concern that should the court require the witness to express themselves in English, the exercise would take a long time.

[7] He pointed out to court that section 66 of the Evidence Act deals with secondary evidence and not primary evidence.

[8] He asked the court to dismiss the application.

### **Ochieng & Gumbo replies**

[9] Ochieng Oduol, counsel for the 1st Respondent in reply emphasized that the witnesses gave evidence to counsels in Kiswahili but was translated into English by Joyce Mumu and Mr. Ndambiri. Counsels should, therefore, have complied with the law. The affidavits in issue do not even state that the deponents gave testimony in Kiswahili, translated and read back to them such that they understood the contents. This breach is fatal and the law should be upheld by striking out the impugned affidavits.

[10] Mr. Gumbo reiterated that section 65 of the Evidence Act deals with primary document to be inspected by the court. Primary document was in Kiswahili, but is before the court is in English and is, therefore, a secondary document.

### **COURT RENDERS ITSELF THUS**

[11] The big question here is; whether the affidavits sworn by Rev. Joseph Machani Wekesa and Bishop Judith Nanjala Wechuli and filed in court on 8/4/2013 are a translation of some original document?

[12] The two affidavits are on record and form part of the record of the trial as per Rule 12(1) (c) of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Are these affidavits capable of being regarded as translations of some original document?

[13] The way the Respondents have argued this point suggests that those affidavits are mere translations of some primary document. The primary document, according to them, consists in the communication between the advocates and the witnesses in the preparation of the affidavits. That communication was in Kiswahili. There ought to have been another document in Kiswahili. Let me pose there. Can that communication bear the legal connotation of “a primary evidence” or “Primary document” in the sense of the Evidence Act?

[14] Communication between the witnesses and their advocates, properly understood, was in the nature of instructions which culminated into the depositions in the affidavits now before me. Those communications cannot, with all due respect, constitute original or primary document for purposes of the Evidence Act, particularly section 65. By whatever language the instructions were remitted, they had to be reduced into a language the witnesses understood. It is instructive to note, the instructions were on preparation of an affidavit for purposes of these proceedings. The witnesses clearly stated that they understood English and could speak it too, only that they preferred to use Kiswahili language for purposes of cross-examination and re-examination. Without making any decision, I do not think, it would be legally or even constitutionally permissible to insist that a witness should give evidence in a particular language. That should be the basis for interpretation in judicial proceedings.

[15] There is also nothing to show that the witnesses did not understand the contents of the affidavits in

question. In fact they told the court they understood the contents of and stood by the affidavits. They confirmed the depositions are theirs to the best of their knowledge, belief and information.

[16] I am not persuaded to find that there was another affidavit in Kiswahili language which required a translation. The affidavits in question are the original and or primary documents under section 65 of the Evidence Act which provides that:

**“65 (1) Primary evidence means the document itself produced for the inspection of the court.**

The affidavits are, therefore, not copies or translations of some original documents as to be considered as secondary documents under section 66 of the Evidence Act.

[17] The affidavits were signed by the witnesses. They recognized and acknowledged being responsible for the accuracy and truth of the averments in those affidavits. Further, those affidavits were made under oath and that has not been disputed.

[18] The court has wide discretion on admissibility of affidavits. See the case of **Life Assurance Corp of India v Panesar [1967] E.A 614 and Zola & another V Ralli Bros Ltd & Another [1969] E.A. 691**. When such matters arise, the court should have regard to all the circumstances of the case, the accuracy of the averments in the affidavits, and the fact that the deponents are the makers of the affidavits in question in accordance with section 35 (4) of the Evidence Act.

[19] Accordingly, I find that the affidavits sworn by Rev. Joseph Machani Wekesa and Bishop Judith Nanjala Wechuli on 8/4/2013 and filed in court on the same day are properly before the court. I decline to strike them out and order that they can give testimony on those affidavits in accordance with the directions of the court regulating the procedure on cross-examination and re-examination.

**Dated, signed and delivered in Bungoma this 7<sup>th</sup> day of June, 2013**

**F. GIKONYO**  
**JUDGE**

**In the presence of:**

Khisa CA

Ndambiri and Ngaira for Petitioner

Respondents: Ochieng, Masinde, Wasilwa and Makokha for 1st Respondent. Fumbo for 2nd and 3rd respondents.

COURT: Ruling read in open court.

**F. GIKONYO**  
**JUDGE**