

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT LUWERO
MISCELLANEOUS APPLICATION NO. 036 OF 2023
ARISING FROM CIVIL SUIT NO. HC-17-CV-CS-0034-2023

THE MOST REVEREND DR. STEVEN SAMUEL KAZIMBA MUGALU ==== APPLICANT

VERSUS

- 1. MAZZI JOYCE**
- 2. MUBIRU ZIGWA**
- 3. SABAVUMA GODFREY**
- 4. WASSWA PAUL**
- 5. MUTEBI STEPHEN**
- 6. EDITH KAGIMU ===== RESPONDENTS**

BEFORE: HON JUSTICE DR. FLAVIAN ZEIJA

RULING

The Applicant herein brought the instant application by way of Notice of Motion under Section 96, 98 of the Civil Procedure Act and Order 6 Rules 29 and 30(1) 8, and Or 52 Rules (1), (2),(3) of Civil Procedure Rules for orders that;

- a) The plaint in High Court Civil Suit No HCT-17-CV-CS-0034-2023 be struck out.
- b) High Court Civil Suit No HCT-17-CV-CS-0034-2023 be dismissed with costs to the applicants
- c) The respondent be ordered to pay costs of the application.

The grounds in support of this application are set out in the affidavit deposed by Naboth Muheirwe, the Provincial Chancellor of the Church of Uganda (who doubles as an advocate of the High Court), briefly that;

1. *The plaint discloses no cause of action.*

2. *The plaintiffs have no locus standi to institute this suit HCT-17-CV-CS-0034-2023.*
3. *That Civil Suit HCT-17-CV-CS-0034-2023 is brought against a wrong party.*
4. *That Civil Suit HCT-17-CV-CS-0034-2023 is frivolous, vexatious and an abuse of court process.*
5. *The orders sought in HCT-17-CV-CS-0034-2023 are unenforceable and hence cannot be granted by this honourable court.*
6. *It is in the interest of justice that HCT-17-CV-CS-0034-2023 be dismissed*
7. *This application has been brought without unreasonable delay.*

By affidavit in reply deposed by Mutebi Stephen, the respondents detailed the grounds opposing the application. Briefly that;

1. *The affidavit supporting the application is defective for being argumentative and the deponent not being a party lacks capacity to depone it.*
2. *The Applicant is a proper party to the suit since he is the one responsible for consecrating the bishop and was petitioned to nullify the election; did not cause the service of the petition to the bishop elect; and did not summon the bishop elect to give his defence;*
3. *HCT-17-CV-CS-0034-2023 is a public interest litigation.*
4. *The reliefs sought in the main suit are maintainable and enforceable.*
5. *The suit discloses a cause of action contrary to the applicant's assertion.*

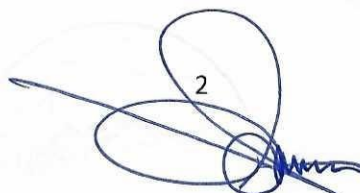
The Applicant did not file an affidavit in rejoinder

REPRESENTATION

The Applicant was represented by M/s Agaba Muheirwe & Co. Advocates whereas the Respondents were represented by M/S Waymo & Co. Advocates. Both counsel made written submissions.

BACKGROUND

The House of Bishops of the Province of Church of Uganda sitting on the 3rd day of April 2023 duly elected Rev Canon Godfrey Kasana as the 4th Diocesan Bishop of Luwero Diocese. The



House of Bishops at the same meeting resolved to have the consecration and enthronement on Sunday 16th July 2023 at St Mark's Cathedral, Luweero.

Before the scheduled consecration and enthronement could come to fruition, a petition to nullify his election was submitted to the applicant by a one Kikabi R. Kenneth, which the applicant received on the 8th of May 2023. Among the stinging allegation against the suitability of Bishop elect were allegations of adultery. It was alleged that he had an affair outside wedlock out of which he fathered a daughter called Nabatanzi Justine. She was raised in his home by his lawfully wedded wife and she is the 3rd born among his seven children. It was further alleged that he had an affair with a one Ms. Nakyomu Milly who was serving as a matron of Ssekamuli secondary school which he owns in Bamunanika sub-county and that he fathered two children with her.

On 28th June 2023, the house of Bishop sitting at Kabalega Resort Hotel considered the petition and nullified the election of Canon Kasana. The decision was communicated to the country through a press release issued on the 30th of June 2023 by Rev Canon William Ongeng and called for fresh nominations within a period of one month.

The Respondents felt aggrieved with the decision and filed a suit against the applicant. The applicant contested the validity of this suit, hence this application.

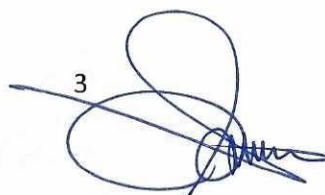
PRELIMINARY OBJECTIONS

Counsel for the respondents submitted that the application is incompetent before court for a number of reasons, to wit;

1. The affidavit in support offends O. 3 r 1 of CPR because Naboth Muhairwe deponed the affidavit without authority from the applicant.
2. The affidavit offends O. 19 R 3 of the CPR as it contains argumentative paragraphs and matters of law.
3. Naboth Muhairwe appeared on court record as applicant's counsel and deponing an affidavit as a witness offends Regulation 9 of the Advocates Act.

Thus, counsel prayed for striking out the affidavit.

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The applicant did not respond to the objections. However, my take is that this objection is misconceived.

The advocates (Professional Conduct Regulations), Regulation 9 thereof provides as follows

“Personal involvement in a client’s case.

No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears

Reading the provisions of this regulation, it does not in any way bar an advocate from deposing an affidavit on behalf of his client especially if the matter deposed upon is not contentious and may not require him/her to take a stand. The best example is where an advocate is supporting an application raising a point of law. Where an advocate does not appear in personal conduct of a matter, he/she can depone an affidavit on matters within his knowledge on behalf of his client. This is the situation in this application. Naboth is not in personal conduct of this matter. He deposed this affidavit on points of law arising from the respondents’ pleadings. Be that as it may, a point of law can be brought to the attention of court by anyone. The objections are therefore, overruled.

DETERMINATION OF ISSUES

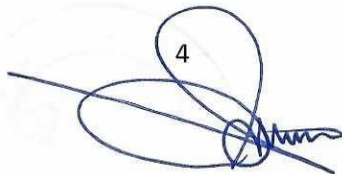
Issues 1&2

Whether Civil Suit HCT-17-CV-CS-0034-2023 is brought against a wrong party?

and

Whether Civil Suit HCT-17-CV-CS-0034-2023 is frivolous, vexatious and an abuse of court process?

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I will determine issues 1 and 2 concurrently.

Counsel for the applicant submitted that the applicant was wrongly sued for actions of another body called the House of Bishops. Counsel for the applicant suggested that counsel for the respondents should be held personally liable for not advising his clients.

In reply, Counsel for the respondents submitted that the suit was brought against the applicant because he is responsible for consecration of the bishop and the suit seeks for a consecration order. Further that the petition to annul his election was addressed to the applicant and he is the one who knows how he addressed it.

It is apparent from the pleadings of the respondents that the cancellation of the Election of Canon Kasana was communicated by a one Canon William Ongeng the Provincial Secretary. This was annexure 'C' to the plaint where he clearly communicated the decision of the "House of Bishops." How then can the respondents claim that they do not know how the petition was processed. It is even not clear how they got in possession of the petition because it is not copied to them neither is it copied to the Canon Kasana whose interest they claim to protect. The case was therefore, brought against a wrong party and it stands no chance of success against the applicant.

Issue 3

Whether the orders sought from this honourable court are enforceable?

Counsel for the applicant submitted that the order for a declaration that the purported cancellation was null and void cannot be granted because the cancellation was rightly done. The declaration that the Can Godfrey Kasana is still the dully elected Bishop cannot be granted because the election was cancelled by the same House of Bishops that elected him. An order setting aside the cancellation would interference with a religious question and violation of the rules, Regulations and Traditions of the Church of Uganda. The order to consecrate Cannon Godfrey Kasana cannot be granted because the consecration is not the handwork of the applicant.

Counsel for the respondent submitted that the matter before court is a civil dispute. The applicant in his written statement of defence did not contest the issue of jurisdiction. While referring to the cases of **Rev. Charled Odeke Akunya Vs the Registered Trustees of**

Church of Uganda, (HCCS No 305 of 2020 and Rev. Canon Cyrus Adiga Nakari Vs Rt Rev. Sabino Ocan Odoki and Anor, HCSS No 2 of 2017, he emphasized that a dispute involving a religious office is a civil dispute. He quoted from the decision of Justice Mubiru, to buttress this argument.

My take is that Justice Mubiru was quoted out of context. He emphasized that:

“maintainability of a suit should not be confused with exercise of Jurisdiction because even there, the courts may refrain from adjudicating purely religious matters, save where the right to property or to an office depends on the questions as to religious faith, belief, doctrine or creed as the courts may be handicapped to enter into the hazardous atmosphere of religion”. He indeed declined to enter the murky waters or religious doctrines.

The general rule is that religious controversies are not the proper subject of civil court inquiry (**See Serbian E. Orthodox Diocese v. Milivojevic, 426 U.S. 696, 713 (1976)**). It is therefore, taken as a constitutional gospel in all the commonwealth jurisdictions and also the United States that courts have no business handling religious questions. In other words, courts should not resolve cases that turn on questions of religious doctrine and practice. This is popularly referred to as the “religious question” doctrine. That means that courts cannot resolve “controversies over religious doctrine and practice (See: **Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969)**). As a result, courts will dismiss claims that hinge on religious questions even if no other religious institution is waiting in the wings to resolve the religious dispute. In this way, the religious question doctrine prohibits courts from addressing a wide set of claims even though dismissing such claims will leave plaintiffs without any forum that has the authority and ability to provide redress of serious cognizable harms (**see Perry Dane, “Omalous” Autonomy, 2004 B.Y.U. L. REV. 1715, 1733-34**). Religious institutions should be empowered to resolve internal disputes that “involve matters of faith, doctrine, church governance, and polity (**See: Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir.2002)**).

Article 29 of the Constitution of the Republic of Uganda (as amended) provides for freedom of worship. It goes without saying that it provides for religious freedom to subscribe to certain faith and to unsubscribe. Once you subscribe to a certain faith, you must go by its tenets. The respondents subscribe to the Anglican faith. The Anglican Church in Uganda has certain canons it follows. Without a doubt, the canons provide for how a bishop is appointed in the

church. It also provides for how the disputes relating to election of Bishops are resolved. It is not the business of this Court to entertain disputes relating to consecration of a Bishop. Courts cannot appoint a Bishop for the Church. That is a spiritual matter for which courts cannot claim to be competent. The Anglican Church in Uganda has all the necessary bodies to resolve such a disputes.

In the end result, this application is allowed with the following orders;

- 1) Civil Suit No. HCT-17-CV-CS-0034 OF 2023, is hereby dismissed as it lacks merit and is not tenable at law.
- 2) Each party shall meet their costs of the suit, to promote reconciliation in the church.

I so order.

Dated this 25th day of October 2023.



Flavian Zeija (PhD)

PRINCIPAL JUDGE