

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 195 OF 2019

REV. PETER MAKALLA.....1ST PLAINTIFF
REV. SIMON LOKO.....2ND PLAINTIFF
REV. WILLIAM MITIMINGI.....3RD PLAINTIFF
REV. HOSEA MMBAGA.....4TH PLAINTIFF
REV. JOSEPH GOGO.....5TH PLAINTIFF
REV. FRANK PETER BOGASI.....6TH PLAINTIFF
REV. REGINALD MAKULE7TH PLAINTIFF
REV. ELIAKIMU PETER MWINUKA.....8TH PLAINTIFF
REV. EZEKIEL LUKANDA.....9TH PLAINTIFF

VERSUS

REV. JACOB MAMEO OLE PAULO1ST DEFENDANT
REV. GEORGE ANDREW PINDUA2ND DEFENDANT
ALLEN TUHERI KINYAMASONGO.....3RD DEFENDANT
REGISTERED TRUSTEES OF THE
EVANGELICAL LUTHERAN CHURCH
IN TANZANIA- MOROGORO DIOCESES }4TH DEFENDANT

RULING

MASABO, J.

In this suit, the plaintiffs who are all priests and members of the Evangelical Lutheran Church in Tanzania (ELCT) Morogoro Diocese have knocked the doors of this court seeking for impeachment of the Bishop of their respect Diocese, whom they claim, he has acted in total contravention of the

constitution of the Diocese. They are jointly suing the Bishop, one Rev. Jacob Mameo Ole Paulo, the Registered Trustees of The Evangelical Lutheran Church in Tanzania- Morogoro Dioceses, and two others members of the church for breach of the Constitution of the ELCT Morogoro Diocese (the Diocese Constitution), and the Constitution of the Evangelical Lutheran Church in Tanzania. They are specifically disgruntled by the change of the Diocese which unlawfully brought into being a new Constitution of 2015, election of the 1st Defendant as Bishop and his continued occupancy of the post after the expiry of three interim years.

In their prayers, they have beseeched this court to award the following orders:

- i. A declaratory order that the constitution of the Evangelical Lutheran Church in Tanzania-Morogoro Diocese of 2011 is the only constitution in force in the dioceses;
- ii. A declaratory order that the purported Constitution of the Evangelical Lutheran Church in Tanzania- Morogoro Diocese of 2015 is null and void;
- iii. An order stopping the first defendant to claim that he is Bishop of ELCT Morogoro Diocese as such claim contravenes the Constitution of ELCT Morogoro Diocese 2011;
- iv. An order that the office of the Bishop of ELCT Morogoro Dioceses is vacant and directing the defendants to call for Bishop's election according to Constitution of ELCT Morogoro Dioceses 2011 within sixty days;
- v. Costs be provided for
- vi. Any other order and relief as the court may deem fit.

Upon being served the defendants jointly filed a notice of preliminary objection on point of law to the effect that:

1. this court has no jurisdiction to hear and determine this suit;
2. this Court has not been properly moved to adjudicate upon the constitutional matters raised in the suit;
3. the plaintiffs have no locus stand.

Hearing of the preliminary objection proceeded in writing. Both parties were represented. The Plaintiffs were represented by Mr. Baraka K. Lweeka, learned counsel and the Defendants had a representation of Mr. Ezra Joshua Mwaluko, learned counsel.

In support of the preliminary objection Mr. Mwaluko submitted that, the first point of the preliminary objection is two limbed. The first limb of which is that, the matters is a constitutional matter in which the plaintiffs are seeking to enforce the right to freedom of religion as provided for under section 19(1) and (2) of the Constitution of the United Republic of Tanzania, 1977 and second, that the matter is *res judicata*.

On the first limb, it was argued that the pleadings and the contents thereto are to the effect that the plaintiff are seeking to enforce their right to religion which broadly encompasses the right to profess, practice and propagate religion, the right to elect leaders of religious bodies, the right to pass constitutions and management of religious bodies. Therefore, it ought to have been brought as constitutional. He cited the case of **Hamisi Rajabu Dibagula v Republic (2004)** TLR 181 to fortify his point.

On the second limb of this point, it was submitted that the suit is *res judicata* to Civil Case No. 26 of 2016 between **Robert Mwanga and Rev. Jacob Mameo Ole Paulo** (former suit) which was finally determined by the Resident Magistrate Court for Morogoro at Morogoro on 21st April 2017 thus it contravenes section 9 of the Civil Procedure Code [Cap 33 RE 2019]. In support of this point it was exemplified that, the former suit is similar to the instant case in that in the former suit, just like in the instant suit, the plaintiff was challenging the election of the 1st defendant herein and that, the matter was dismissed for want of jurisdiction. It was argued further that since in the said case the plaintiff litigated for and on behalf of all members of the diocese and no appeal was preferred against the decision of the court, the matter is deemed to have been finally determined.

On the second point of preliminary objection that the court has not been properly moved, it was argued that the plaintiff has not exhausted the internal remedies (remedies available under the ELCT constitution) and especially the General Assembly (Mkutano Mkuu) which is the final authority of all matters pertaining to the conduct of the church as per Rule XIII of the ELCT Constitution, 2015. Therefore, it should be dismissed.

On the final point of preliminary objection, it was submitted that the plaintiffs have no locus stand because they are purporting to sue in the representative capacity for and on behalf of all members/congregants the ELCT- Morogoro diocese in total disregard of the legal requirements and procedures for institution of a representation suit. The case of **Lujuna Shubi Balonzi v**

Registered Trustees of Chama Cha Mapinduzi (1996) T.L.R 2002; and **Kiteria Menezes and 33 Others v Area Engineering Works Ltd and The Attorney General** (1998) T.L. 434, were cited in support.

In rebuttal, Mr. Lweeka argued that the first limb of the preliminary objection is misconceived because this court has jurisdiction derived from Article 108 (2) of the Constitution and section 7(1) of the Civil Procedure Code, [Cap 33 RE 2019]. He submitted further that Defendants has not shown a specific provision ousting the jurisdiction of this court that there is no basis in saying that it has no jurisdiction. Mr. Lweeka argued further that Article 19 of the Constitution is inapplicable because its scope does not bar the jurisdiction of this court to regulate affairs and management of religious bodies. He cited Article 29 of the constitution and argued that, the enjoyment of the right provided for under 19 is to be exercised within the confines of Article 29.

He further cited the Societies Act, Cap 337 RE 2002, and the Trustees Incorporation Act, Cap 218 RE 2002 , and Rule 4(c) and 7 (1)(a)(ii) and 7(4) of The Societies (application for Registration) Rules, G.N.227 of 2001 and submitted that, at registration of societies, religious institution present a constitution which according to Rule 7 (a)(ii) can only be changed upon obtaining the permission of the Registrar of Societies. He submitted that, The Registered Trustees of ELCT Morogoro-Diocese is a legal personality with a right to sue and to be sued in its name pursuant to Section 8(1)(b) of the Trustees Incorporation Act, hence it can be sued in this court. Mr.

Lweeka argued that the cases of **Hamisi Rajabu Dibagula v Republic (2004) TLR 181** and **Zakaria Kamwele** is distinguishable from this case.

Regarding the argument that this suit is *res judicata* Mr. Lweeka argue that it is baseless as the defendant failed to demonstrated existence of the five ingredients of *res judicata* , to wit: " (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially is issue in the former suit; (ii) The former suit must have been between the same parties or privies claiming under them; (iii)the parties must have litigated under same the title in the former suit; (iv)the court which decided the former suit must have been competent to try the subsequent suit; and, (v)the matter in issue must have been heard and finally decided in the former suit. In support of this point, Mr. Lweeka cited the case of **Paniel Lotta V Gabriel Tanaki and Others** [2003] TLR 312 and **Peter Paul Semwijah v Integrated Property Consultancy Company Limited and Others**, in Land Appeal No. 21 of 2017.

Having cited these authorities Mr. Lweeka proceeded to submit that, while it is true that there was Civil Case No. 26 of 2016 before the Resident Magistrate Court for Morogoro, it was not between the parties herein. Rather, it was between **Robert Mwanga v Jacob Mameo Ole Paulo** (the 1st Defendant herein); **Returning Officer Mkuu wa Kanisa la Kiinjili la Kilutheri Tanzania** and **The Registered Trustees of The Evangelical Lutheran Church** (the 4th Defendant herein). He further implored this court to reject the prayer for *res judicata* because the judgment attached to the

Defendants submission is not the one for which the plea is based. The attached judgment, he argued, had only one respondent who is not the defendant in this suit.

He further submitted that even if this court was to find that the failure to attach the judgment is inconsequential, still, the prayer for *res judicata* cannot be sustained because: The cause of action in Civil Case No. 26 of 2016 differs with the one in instant case whereby in the former case, the plaintiff was challenging election conducted on 25th June 2015 whereas in the instant case, what is at issue is breach of constitution by the 1st defendant who has refused to all for Bishop election even after the expiry of his three years.

On the second element of *res judicata*, Mr. Lweeka submitted that the parties herein were not parties or privies to the parties in the former suit because in the former suit Robert Mwanga was suing in his personal capacity and one of the reasons his matter was struck out was that he did not have locus stand to litigate on behalf of all members of the ELCT Morogoro Diocese. He also argued that even if the two ingredients above were satisfied, the prayer would still fail as the matter was not heard and determined by a court of competent jurisdiction as the court before which the matter was filed declared itself to have no jurisdiction over the matter.

With respect to the second point of the preliminary objection that, this Court has not been properly moved to adjudicate upon the constitutional matters

raised in the suit, Mr. Lweeka rebutted that this is not correct as the suit is not a constitutional matter. It is not challenging breach of any of the provisions of the Constitution of the United Republic of Tanzania but the constitution of Morogoro Diocese. He further argued that there are no internal mechanisms with ELCT- Morogoro Dioceses to which the plaintiffs herein could have referred their discontentment hence there was no internal remedy to exhaust because the the General Meeting cannot command the Defendants to do what they do not want to.

On the last point of preliminary objection, Mr, Lweeka's rebuttal was that the plaintiff's have a *locus stand* as their individual rights have been infringed by the Defendants hence they have a right to institute this matter pursuant to Article 26(2) of the Constitution of the United Republic of Tanzania, 1977 which provides that "every person has the right to take legal action to ensure protection of the constitution and the laws of the land.

In rejoining, Mr. Mwaluko submitted that, making of constitutions of religious institutions, election of religious leaders and right to participate in general meetings/assemblies of the respective institutions is part and parcel of the right to freedom of religion as provided for under article 19 and can not be questioned by courts unless they are inconsistent with public policy, morality and good order. That, since there is no assertion in the plaint that the approval of the 2015 constitution and the election of the 1st Defendant as Bishop are against public peace, morality and good order, there is no justification upon which this court can interfere. He added that, although the

impugned constitution has been in force since 2015, there have not been any breach of peace also, the 1st defendant has been in power since 2015 and there has been no breach of peace hence any intervention by this court will amount to a blatant violation of Article 19(1) and (2).

On the second point of the first preliminary objection, it was reiterated that the instant suit is *res judicata* to Civil Case No. 26 of 2016 because, the 1st Respondent herein was a party, the plaintiff Joseph Mwanga litigated on behalf of all members of the church including the plaintiffs who were aggrieved by the election of the 1st Defendant. That, since the matter in the previous suit is substantially in issue in this suit can not be sustained as that would be inconsistent with the principle of *res judicata*.

Mr Mwaluko rejoined further that, it is clear from paragraph 6 of the plaint that the plaintiff's suit is a constitutional matter hence they ought to have properly moved the court. He also submitted that there are other remedies to wit, the General Assembly and General Meeting within the Diocese which the plaintiffs ought to have exhausted but they opted not to. Lastly, on the third preliminary objection, Mr. Mwaluko argued that although the plaintiffs have a right to sue, such right must be exercised in accordance with the law, most especially Order 1 Rule 8 of the Civil Procedure Code which provides for procedures for instituting a representative suit.

I have carefully considered the submissions by both parties. There are four main points for determination, **First**; whether the suit is a constitutional

matter hence this court has no jurisdiction to entertain it; **Two**, whether the suit is incompetent for the plaintiff's failure to exhausted internal dispute resolution mechanisms and if so; **Three**, whether the suit is *res judicata*; and **Four**, whether the plaintiffs have *locus standi*.

With regard to the first issues, it has been argued that the suit herein is a constitutional matter hence ought to have been brought as a human rights petition. Mr. Mwaluko's argument is that the suit has been wrongly brought as it falls under Article 19 of the Constitution of the United Republic of Tanzania, 1977 hence it ought to have been brought as a constitutional matter. On the other hand, the Plaintiffs have maintained that the matter is not a constitutional matter and it is correctly before this court. This matter will not detain me. With respect, I do not agree with Mr. Mwaluko's argument. In my settled view, what is being challenged in this suit is not the Defendant's interference with plaintiff's right to profess or practice religion. Rather, it is about the Defendants alleged breach of the Diocese constitution. Since the constitution which is alleged to have been breached by the Defendant is not a provision of the Constitution of the United Republic of Tanzania, 1977 and Mr. Mwaluko did not clearly exemplify his point, I cannot comprehend how this constitutes a constitutional matter. The first issue is therefore, answered in the negative.

In the second issue, the defendants' contention is that there are dispute mechanisms within the Lutheran Church of Tanzania which the plaintiff ought to have exhausted prior to knocking the door of this court. It is an

undisputed fact that the dispute herein is an intra-church dispute involving 7 priests of the ELCT- Morogoro Diocese being the plaintiff and the incumbent Bishop of ELCT- Morogoro Diocese, the Board of Trustees of the ELCT- Morogoro Diocese and two other person whose membership of the ELCT- Morogoro Diocese is undisputed. It is equally undisputable that the ELCT- Morogoro Diocese being part of the Evangelical Lutheran Church of Tanzania subscribes to the Constitution of the Evangelical Lutheran Church in Tanzania, 2015 and so are all members of the Evangelical Lutheran Church in Tanzania, the plaintiffs and the defendants herein inclusive.

Relying on Article XIII of the Constitution of the Evangelical Lutheran Church of Tanzania, 2015, the defendants have contended that the suit has been prematurely brought to this court as the plaintiff has not exhausted the remedies available within the church. The remedy, it is argued, is the General Assembly (Mkutano Mkuu) of the Evangelical Lutheran Church in Tanzania, which according to article XIII (Kanuni ya XIII) is the final authority in all matters and affairs of the church and its respective organs. The Defendants urge that the General Assembly is a dispute resolution mechanism for all intra-church disputes. Hence it was erroneous for the plaintiff to institute the suit prior to exhausting this remedy. On their party, the plaintiffs do not dispute the existence of the General Assembly and its dispute resolution powers. They allege that it is toothless and inferior to the Defendants in that it can cannot compel them to mend things. They also insist that although the dispute is an intra-church dispute, the jurisdiction of this court is not ousted.

Whether ordinary courts have jurisdiction over intra-church, is a highly contested matter. The supreme court of Canada in ***Syndicat Northcrest v. Amselem***, 2004 SCC 47, [2004] had this to say regarding the interphase between religious disputes and the jurisdiction of ordinary courts:

“...the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation”, precept, “commandment”, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”

When confronted with a dispute of this nature, civil courts usually consider whether the matter is purely religion or not. It is crucial to examine the pleadings carefully because most often, disputes of this nature tend to have a mix of religious and temporal matters. Where the dispute is religious, mechanisms established within the Constitution have always been considered as best suited to avoid any entanglement of the court into religion (see **Mr. Loth Oilevo & 2 Others v the Registered Trustees of the Anglican Church of Tanzania and Another** (supra)). In contrast, if the matter involves breach of rights and threat of public order, the court will always intervene.

The issue as to the existence of internal dispute resolution mechanisms and whether such mechanisms have been exhausted is not an unchartered

territory. Our courts have considered similar points in numerous occasions and the position has been always that, where a dispute resolution mechanism exists for the redress of any particular grievance, such system must first be exhausted. In **Mr. Loth Oilevo & 2 Others v the Registered Trustees of the Anglican Church of Tanzania and Another** (supra), this Court (Massengi J) while dealing with a seminal issues, held that since Article 29(d) of the Church Constitution establish House of Bishops (Nyumba ya Maaskofu) as dispute resolution mechanism for matters concerning the church, the plaintiff were duty bound to exhaust the internal remedy before knocking the doors of the court. In conclusion, he held that:

“I therefore agree with the 1st Defendant’s counsel that plaintiffs did not the appellate mechanism provided by their own constitution to solve the problem at hand and there is no justification to bypass that constitution. That being the case, then the application before this court is pre-mature and renders this court to lack jurisdiction to determine the matter before it...”

Similarly, in **Rev Jonathan Mwamboza v Bishop Dr. Stephen Munga, The registered Trustee of Noth Easter Dioces-ELCT**, Labour Dispute No. 1 of 2011 (Labour Court Digest 2011-2012, No. 12) where Rweyemamu J held that, the matter between the parties could not be entertained in the ordinary court as there was a dispute settlement mechanism within the church constituting the pastoral council, the executive council and none of which were exhausted.

Since in the instant case the existence of the General Assembly as a dispute resolution mechanism is undisputed and since the fact that, the plaintiffs did not channel this Assembly is equally undisputed, the question for determination is whether the plaintiffs had demonstrated a good cause for bypassing the Assembly. With respect to Mr. Lweeka, I find no justification for bypassing the General Assembly. The issues sternly contested here, namely election of Bishop who is church official and breach of the church constitution are, certainly, church affairs covered under Article XIII of the ELCT Constitution.

The Plaintiff's prayers to wit, a declaratory order that the constitution of the Evangelical Lutheran Church in Tanzania-Morogoro Diocese of 2011 is the only constitution in force in the dioceses; a declaratory order that the purported Constitutional of the Evangelical Lutheran Church in Tanzania-Morogoro Diocese of 2011 is null and void; an order stopping the first defendant from claiming that he is Bishop of ELCT Morogoro diocese; and a declaratory order that the office of the Bishop of ELCT Morogoro Dioceses is vacant and an order compelling the defendants to call for Bishop's election, are in my view purely within 60 days speak loudly about the nature of the suit. The structures existent under the Constitution of the Evangelical Lutheran Church of Tanzania, 2011 can not be bypassed in resolving such disputes.

In my humble view, although this court has jurisdiction to ensure that registered institution, churches inclusive, operate in accordance with the law,

the dispute herein has been prematurely brought to this court in disregard of the need to exhaust the remedies pursue the remedies provided for under the ELCT Constitution 2015. Under the premise, I am of the settled view that the plaintiffs having failed to pursue their grievance as provided in the Constitution they should be allowed to proceed with their dispute resolution mechanism as members of church before pursuing claim before this Court.

Having found the suit to have been prematurely instituted in this court, I find no need to proceed to the remaining issues.

Accordingly, I strike out the suit for incompetence.

DATED at DAR ES SALAAM this 25th day of August 2020.



J.L. MASABO

JUDGE