

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
MBEYA DISTRICT REGISTRY  
AT MBEYA  
MISC. CIVIL APPLICATION NO. 14 OF 2022  
(Originating from the High Court of Tanzania at Mbeya  
Civil Case No. 03 of 2022)**

**BISHOP DKT. EDWARD JOHNSON MWAIKALI.....APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF EVANGELICAL  
LUTHERAN CHURCH IN TANZANIA (ELCT).....1<sup>ST</sup> RESPONDENT  
HON. BISHOP DKT. FREDRICK SHOO.....2<sup>ND</sup> RESPONDENT  
REV. JACKSON B. MWAKIBASI.....3<sup>RD</sup> RESPONDENT  
REV. GEOFFREY MWAKIHABA.....4<sup>TH</sup> RESPONDENT  
REV. DKT. MESHACK NJINGA.....5<sup>TH</sup> RESPONDENT  
ALIKO MWAIFULILO.....6<sup>TH</sup> RESPONDENT  
JUDIKA MONGI.....7<sup>TH</sup> RESPONDENT  
EMMY MWABULANGA.....8<sup>TH</sup> RESPONDENT  
DKT. HEBELI LUVANDA.....9<sup>TH</sup> RESPONDENT  
OBADIA NGOHELO.....10<sup>TH</sup> RESPONDENT  
FRED CHAMO.....11<sup>TH</sup> RESPONDENT  
ATUPELAGE SUNGULUMA.....12<sup>TH</sup> RESPONDENT  
ELLY MWANGOSI.....13<sup>TH</sup> RESPONDENT  
YUVILATI CHAULA.....14<sup>TH</sup> RESPONDENT  
STELLA KAGEGILE.....15<sup>TH</sup> RESPONDENT  
ROSTA KABAGA.....16<sup>TH</sup> RESPONDENT  
BOAZ MWAKALITOLO.....17<sup>TH</sup> RESPONDENT  
REV. CHARLES NDIKUTILA.....18<sup>TH</sup> RESPONDENT  
REV. JUDITH KAJELLA.....19<sup>TH</sup> RESPONDENT  
REV. GEORGE MWAKANYAMALE.....20<sup>TH</sup> RESPONDENT  
REV. DKT. NYIBUKO MWAMBOLA.....21<sup>ST</sup> RESPONDENT  
REV. SAMWEL MWANSASU.....22<sup>ND</sup> RESPONDENT  
REV. MELKIZEDEKI MBILINYI.....23<sup>RD</sup> RESPONDENT  
REV. BARAKA SANGA.....24<sup>TH</sup> RESPONDENT  
CESILIA NSOMBO.....25<sup>TH</sup> RESPONDENT  
TUGANIGWE BONIFACE.....26<sup>TH</sup> RESPONDENT  
FILIBERT JOSELPH NG'WANANOGU.....27<sup>TH</sup> RESPONDENT  
SAMSON MZEE MKISI.....28<sup>TH</sup> RESPONDENT  
ANNA MWAMKINGA.....29<sup>TH</sup> RESPONDENT**

## **R U L I N G**

*Date: 1<sup>st</sup> and 3<sup>rd</sup> June, 2022*

### **KARAYEMAHA, J**

By way of chamber summons filed on 25/04/2022 under certificate of extreme urgency supported by an affidavit sworn by Bishop Dr. Edward Johnson Mwaikali (hereinafter, the applicant) and made under Order XXXVII Rule 1(a) and Rule 4 of the Civil Procedure Code [Cap 33 R.E 2019] (hereinafter, the CPC), the applicant is moving this Court to grant against The Registered Trustees Of Evangelical Lutheran Church in Tanzania (ELCT) (1<sup>st</sup> respondent), Hon. Bishop Dr. Fredrick Shoo (2<sup>nd</sup> respondent), Rev. Jackson B. Mwakibasi (3<sup>rd</sup> respondent), Rev. Geoffrey Mwakihaba (4<sup>th</sup> respondent), Rev. Dr. Meshack Njinga (5<sup>th</sup> respondent) and the 6<sup>th</sup> to 29<sup>th</sup> respondents for the following orders:

1. That the Honourable Court be pleased to grant an order of temporary injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, their agents or assignees to force the applicant to hand over to them the insignia (Ring of the Bishop, Cross of the Bishop and Bishop's Staff-*Fimbo ya Askofu*) letter dated 09/04/2022 (sic) and UPENDO gazette dated 24/04/2022 (sic) announced that the 1<sup>st</sup> and 2<sup>nd</sup> respondents intend to put in

power the 4<sup>th</sup> and 5<sup>th</sup> respondents on 05/06/2022 and take over the office of the Bishop of the Evangelical Lutheran Church in Tanzania-Konde Diocese Ruanda area pending the hearing and determination inter-parties of this Civil Case No. 3 of 2022 in the High Court of Tanzania at Mbeya.

2. That costs be in the due course.
3. Any other order this Honourable Court may deem fit to grant.

Along with the joint counter affidavit of the 1<sup>st</sup> to 5<sup>th</sup> respondents sworn by CPA Laota Mungaya, Bishop Dr. Fredrick Shoo, Rev. Jackson B. Mwakibasi, Rev. Geoffrey Mwakihaba and Rev. Dr. Meshack Njinga, the applicant was put to notice that on the date fixed for hearing of the said application the 1<sup>st</sup> to 5<sup>th</sup> respondents would raise a preliminary objection (the PO) on the ground that *this Court has no jurisdiction to entertain the this application.*

As the matter before me was filed under certificate of urgency, I decided to deal and hear both the PO and the application together, meaning that if the PO is upheld then the matter ends there. However, if it is dismissed, then I would proceed determining the application.

When the PO and the application were called on for hearing, the applicant was represented by a team of three learned advocates led by

Mr. Samson Mbamba. Others in the team were Mr. William Mashoke and Godwin Musa Mwaipongo. On the other hand, the 1<sup>st</sup> to 5<sup>th</sup> respondents had the legal services of two learned advocates led by Dr. Daniel Pallangyo. The other was Mr. Peter Kilanga. The 6<sup>th</sup> to 29<sup>th</sup> respondents save for the 4<sup>th</sup> and 16<sup>th</sup> enjoyed legal services of Mr. Ramsey Mwamakamba learned Advocate. Despite efforts to serve them, the 4<sup>th</sup> and 16<sup>th</sup> respondents refused to receive the summonses. They similarly neither appeared nor filed any document. On the reason that this matter was brought under certificate of urgency and it was in the applicant's interest that the swearing in and installation of the 4<sup>th</sup> and 5<sup>th</sup> respondents is scheduled to take place on 05/06/2022, I decided to proceed in their absence.

I began with the hearing of the PO. Being a PO, to be accepted it must be cleared and established to be a point of law and meets the standard laid down in array of precedents. It is with this preamble, I am coerced, before going into the gist of it, to first determine whether or not it is a point of law warranting this court to proceed accordingly. A general rule, as rightly argued by Mr. Mbamba and Mr. Musa, is that a raised point of PO must be on a point of law which if argued as such will tend to dispose of the suit without any need to call for evidence to prove

that fact. See the case of **Kelvin Rajabu Ungele and 3 others vs. Republic**, Misc. Economic Cause No. 3 of 2018 (HC-Mtwara) and **Karata Ernest and others vs. Attorney General**, Civil Revision No. 10 of 2010(both unreported). Equally, in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd.** [1969] EA 696, cited by Mr. Mbamba and acknowledged by Dr. Pallangyo, His Lordship Law, J. (as he then was) stated at page 700:

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit .."*

The fact gleaned there from is that a PO should be based on pleadings and attachments before the court and should not depend on any other evidence.

Marrying the celebrated principle with the current matter, the raised PO is that the *Court has no jurisdiction* to hear and determine the application. While Dr. Pallangyo is contented that the PO raised is a pure point of law because it arises from the pleadings and may dispose of the suit, Mr. Mbamba harbours a different view. He is firm that evidence is needed to prove whether or not the applicant engaged the Church

machinery first before lodging the application and main case. On my part a keen discussion and proper consideration of the pleadings in relation to this point, may definitely lead to the finality of this matter. It is plain from the pleadings that the issue of engaging the Church machinery in resolving the dispute is not appearing anywhere. A trite law is that in civil litigations parties are bound by their pleadings. Therefore, it is forecasted that the applicant will prove what he alleged in his plaint. It is not expected in my view to bring in new matters which were not put to the attention of the defendants. I think, as the law and procedure stand, the applicant will not be allowed to amend his pleadings after the PO has been determined. In view of that I am fully satisfied that the PO is a point of law and therefore, I can proceed to determine it accordingly.

Relying on Rule X111 of the Constitution of the Evangelical Lutheran Church of Tanzania, 2015 (hereinafter the ELCT Constitution), Dr. Pallangyo contended that the matter at hand was prematurely brought to Court. He submitted that the dispute emanates from the decision of the Konde Diocese general meeting which casted a no confidence vote on the applicant and removed him from power and eventually elected the 4<sup>th</sup> respondent as the Bishop of Konde Diocese. In

Dr. Pallangyo's view, this was purely a religious matter hence intra church dispute. As to what the applicant ought to have done, Dr. Pallangyo stated zealously that the applicant had to comply with Rule XIII (1) and (2) of the ELCT Constitution by referring the dispute to the ELCT general assembly which as per the Constitution is a final Church authority in all matters and affairs of the church and its respective organs. The learned Counsel argued further that the ELCT is a religious institute registered under the Constitution. Bound by the Constitution, the applicant had first to invoke the internal dispute resolution mechanism, he stated. The learned counsel submitted at length that this dispute between the parties is a religious one and so ought to be referred to the ELCT general assembly before approaching Civil Court. To support his view, Dr. Pallangyo sought aid and relied on the decision in **Rev. Peter Makala & 8 others vs. Rev. Jacob Mameo Ole Paulo and 3 others**, Civil Case No. 195 of 2019, **Mr. Loth Oilevo & 2 others vs. the Registered Trustees of the Anglican Church of Tanzania (SO 4757) & another**, Civil Case No. 18 of 2011, **The Registered Trustees of the Islamic Solidarity Center vs. Jaabir Swalehe Koosa and 3 others**, Civil Appeal No. 1 of 2020 (all unreported). On what circumstances the Court can intervene, the learned counsel was categorical that it is where there is breach of public peace, morality and

good order. He remarked that since there is no assertion in the main case of breach of peace or any part in the plaint indicating that there was breach of peace, the court is not to entertain this application.

Reacting to Dr. Pallangyo's submission, Mr. Mbamba responded quite vehemently that the issue of jurisdiction being legal one must be protected jealously especially where it involves access to justice. He argued at length and exemplified that the issue of jurisdiction should not be lightly taken but carefully considered and in view of that cited the case of **Julius Ishengoma Francis Ndyanabo vs. Attorney General**, [2004] TLR 14. He went on remarking that there should be clear words of the law ousting the jurisdiction of the law which he was of firm view that it never existed anywhere in this matter. The learned counsel wound up by submitting that where there is a prayer concerning basic rights, Courts should not be bound by technicalities. To buttress his position he cited the case of **Christopher Mtikila vs. Attorney General**, (2006) TLR 279. Having submitted as such he prayed for this Court to overrule the PO and declare that it has jurisdiction.

On his part, Mr. Musa commenced his submission contending that the matter at hand has two faces, to wit, a right to be heard and public interest. He however, attacked the cited cases of **Rev. Peter Makala**



(supra), **Mr. Loth Oilevo & 2 others** (supra), **The Registered Trustees of the Islamic Solidarity Center** (supra) as being distinguishable from the instant matter. He argued guided by the case of **Rev. Peter Makala** (supra) and the case of **Registered Trustees of Noor Masjid Dodoma vs. Jafary Manyema & 11 others**, DC Civil Appeal No. 20 of 2020 that the Court has no jurisdiction when the suit concerns religious dispute but has jurisdiction when issues of public interest and orders are raised. Like Mr. Mbamba, Mr. Musa urged this court to overrule the PO but opined that since this dispute involve people from the same church costs should not be awarded to either party.

In his admirably brief rejoinder, Dr. Pallangyo stood on his ground that this dispute is a religious one and so the applicant was to engage the intra church dispute resolution mechanism before coming to Court. He argued that the ELCT Constitution lays down procedures to follow when one is aggrieved by any decision. He recalled that Rule XIII of the ELCT Constitution was to be complied with by the applicant by exhausting remedies available. With that position, the learned Counsel argued that the cases he cited, that is, **Rev. Peter Makala** (supra), **Mr. Loth Oilevo & 2 others** (supra), and **The Registered Trustees of**

**the Islamic Solidarity Center** (supra) are relevant to the current situation.

On taking the floor, Mr. Kilanga argued very briefly that there is no dispute that the applicant was to comply with procedures enshrined under Rule XIII of the ELCT Constitution but did not comply with them. He added that the applicant's counsel did not reply on the contention that the applicant, on being aggrieved by the decision of Konde Diocese general meeting was to appeal to the ELCT general meeting. In his view, their conduct to agreeing with respondents' assertions.

Having anxiously considered the pleadings in Civil Case No. 3 of 2022 and rival submissions by either side, in my view, this court is called upon to determine whether the dispute is religious or not. After determining that issue the next one will be whether or not this Court has jurisdiction.

As rightly submitted by Dr. Pallangyo the parties wrangle is traced from the Konde Diocese general meeting held on 22/03/2022. It was through that meeting the applicant was stripped of the Bishop title, leadership of the diocese and removed from office. He was in the same vein aggrieved by the decision requiring him to hand over the insignia (Ring of the Bishop, Cross of the Bishop and Bishop's *Staff-Fimbo ya*

*Askofu*) and the Bishop's office of the ELCT-Konde Diocese Ruanda area and the 4<sup>th</sup> and 5<sup>th</sup> respondents to take oath and be coronated to take over the office on 05/06/2022. Reading extensively the pleadings in Civil case No. 3 of 2022, the applicant was contented that the 3<sup>rd</sup> respondent had no powers to chair the general meeting, to instruct the 2<sup>nd</sup> respondent to write a letter removing him from his position as a Bishop and that a letter dated 23/03/2022 addressed to the applicant was null and void. He was further contented that the 2<sup>nd</sup> respondent had no powers to order him to hand over the insignia and the office of the Bishop and above all he was not accorded a chance to be heard by the special general assembly. He as well faulted the election of the 4<sup>th</sup> respondent as a Bishop and 5<sup>th</sup> respondent as an assistant of the Bishop. He asserted that the same was illegal, null and void. To demonstrate his deeper disagreement, he launched steps to challenge everything done on 22/03/2022. To him he found this court better placed to declare everything done illegal.

In view of the foregoing, I should out-rightly, with respect, state that indeed as rightly submitted by Dr. Palangyo, the material facts of this case lead to a singular conclusion that the dispute in this case is a religious one.

As to what amounts to religious dispute, Masabo, J. observed in **Rev. Peter Makala** (supra), that:

*"When confronted with a dispute of this nature, civil courts usually consider whether the matter is purely religion (sic) 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."*

Massengi, J after examining the pleadings in the case of **Mr. Loth Oilevo & 2 others** (supra), was satisfied that the matter before the Court was of religious nature because its basis was on election of the Bishop of Mount Kilimanjaro Diocese. Kagomba, J in **Registered Trustees of Noor Masjid Dodoma** (supra) scrutinized the pleadings of the District Court and formed an opinion that the gist of the appellant's claim against the respondents was tortuous acts of unlawful interference with the day to day activities of the appellant's work place. He concluded that he concluded that the dispute between parties was not of religious nature.

Gaining inspiration from these decisions, therefore, there is no direct definition of religious dispute or examples but in my view it can be defined as a situation in which religious adherents are involved in a

serious disagreement or argument with one another especially where there is opposition in ideas, opinions, feelings and wishes. It engages a combination of contested domains, i.e., ideology/morality, power, personality, space/place and group identity.

In this case the dispute as introduced above is about the removal of the applicant from the office of the Bishop, stripping of his Bishop title and an order to handle the insignia. It is my finding, therefore, that the dispute between parties can be simply classified as intra religious dispute which is rooted in pure religious matters of serious disagreement or argument, opinion, ideas, wishes and feelings.

Considering the cited cases, it goes without saying that this Court has consistently adopted a general approach of "hands off" to matters which are religious per se. This approach stems from the perception that religious organizations, like groups in society, regulate themselves and the principles of internal governance they have chosen are diverse. A common sense should lead us to the conclusion that Civil Courts cannot adjudicate disputes relating to church policy and administration or on religious doctrine or practice.

Gleaning from the discussion above, I am now settled that the dispute between the parties is religious in nature. The question that

comes to the fore at this juncture is how this Court should deal with it. In simple terms, the issue is whether this Court has jurisdiction to entertain it.

This Court has constantly held that where a dispute is religious, it should then fall within the ambit of the constitution established by that particular religious organ. In the instant case, as Dr. Pallangyo submitted, the ELCT Constitution, 2015. Rule XIII (1) and (2) of the ELCT Constitution provides for the internal mechanism of resolving intra-church disputes. I think it is best for the rule to speak for itself:

*"(1) Kanisa la Kiinjili la Kilutheri Tanzania lina mamlaka ya mwisho kwa njia ya Mkutano Mkuu wa Kanisa kulingana na Katiba hii katika mambo yanayohusu maisha na kazi zote za Kanisa na vyombo vyake mbalimbali vya kikatiba.*

*(2) Kanisa litakuwa na Dayosisi zake, ambazo zitaongozwa na Kanuni na Sheria zao, ambazo hazipingani na Katiba ya Kanisa ambazo zimethibitishwa na Mkutano Mkuu wa Kanisa. Ikitokea kuwa Kanuni au Sheria ya Dayosisi inapingana na Katiba ya Kanisa, Katiba ya Kanisa ndiyo itakuwa na mamlaka ya mwisho."*

In view of Rule XIII, since the applicant was sternly aggrieved by the decision of the Konde Diocese general assembly, the remedy was to

appeal to the ELCT General Assembly (Mkutano Mkuu wa Kanisa) which is a final authority in all matters and affairs of the church and its respective organs. I say so because it is undisputed that ELCT-Konde Diocese being part of the ELCT subscribes to ELCT Constitution, 2015 and so are all members of ELCT, the applicant and respondents inclusive. In that sense all ELCT members bound by the ELCT Constitution, 2015 must comply with procedures stipulated therein in resolving internal disputes.

Mr. Mbamba and Mr. Musa do not dispute the existence of the overall ELCT Constitution, General Assembly and its dispute resolution powers. They allege that the matter before this court is about parties' rights and public interest which give the Court mandate to intervene. They seem to argue that the issue of peace is out of hand and will be contained after the Court has granted the application. They thus insist that this court has jurisdiction. It is my view that they misconceived those facts. Chaos, disorder and public unrest as far as this matter is concerned are rooted in the religious dispute. They did not emerge from nowhere or abyss. They will be, in my considered opinion, be contained after proper forum is engaged to resolve the dispute between parties. I say so because no grantee that the application should be granted.

The issue that the Civil Courts have no jurisdiction where there are internal dispute resolution mechanisms of religious disputes and a question whether such mechanisms have been exhausted is not a grey pasture. Both points have been time without number considered and the position has always been 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** (supra) Massengi, J held, while dealing with a corresponding matter, that since article 29 (d) of the Anglican Church Constitution establishes House of Bishops (Nyumba ya Maaskofu) as dispute resolution mechanism for matters concerning the church, the plaintiffs were duty bound to exhaust the internal remedy before approaching the Court. By way of conclusion, he said that:

*"I therefore agree with the 1<sup>st</sup> defendant counsel that plaintiffs did not exhaust 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 premature and renders this court to lack jurisdiction to determine the matter before it..."*



In **Rev. Jonathan Mwamboza vs. Bishop Dr. Stephen Munga, The Registered Trustees of North Eastern Diocese-ELCT**, Labour Dispute No. 1 of 2011 (Labour Court Case Digest 2011-2012) Rweyemamu, J. declined to entertain the matter between parties on the reason that their dispute settlement machinery commencing from pastoral council, the executive council and culminating with an appeal to synod had not been exhausted by the complainant.

Similarly, in **Rev. Peter Makala** (supra) this Court stated that:

*"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 under the ELCT Constitution, 2015. In the premise, I am of the settled view that the plaintiffs having failed to pursue their grievances as provided in the Constitution they should be allowed to proceed with their dispute resolution mechanism as members of the church before pursuing claim before this Court."*

This is no doubt a good principle from which I draw inspiration. In the instant case the applicant had an obvious avenue within which he

could lodge his grievances. He failed to do so and no justification as to why he by-passed that procedure which has been provided. That was a gross contravention of the ELCT Constitution, 2015 to which he is a subject and bound to honour. While the Court is to protect its jurisdiction jealously as correctly submitted by Mr. Mbamba, it is equally posed to ensure that registered institutions, churches inclusive, operate in accordance with laws and the Constitution of the land.

In sum, I agree with Dr. Pallangyo and Mr. Kilanga that the applicant did not exhaust the remedies enshrined in the ELCT Constitution, 2015 to solve the dispute internally. Apparently, there is no justification to by-pass the Constitution. I therefore, take the path of other decisions and hold that this application was prematurely preferred to this court. The applicant is enjoined to pursue his rights in a proper channel by observing all internal laws and procedures first. In that situation, I am behooved to hold that this Court lacks jurisdiction at this juncture to entertain and determine this application. In the fine, the merited objection is sustained.

The application is henceforth struck out for being incompetent and untenable. In the circumstances of this case and since an order for

payment of costs is discretionary, I order that each party shall bear his/her own costs.

In the event this Court settles to order as follows:

1. That the application has been preferred to this court prematurely.
2. That this Court lacks jurisdiction at this juncture to entertain and determine this application.
3. That application is struck out for being incompetent and untenable.
4. That each party shall bear his/her own costs.

It is so ordered.

**DATED at MBEYA this 3<sup>rd</sup> day of June, 2022**



A handwritten signature in black ink, appearing to read "J. M. Karayemaha", is written over a horizontal line.

**J. M. KARAYEMAHA  
JUDGE**