

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CASE No. HCT-00-CV-MA-0282-2003

ZIRA GUMA EMMANUEL & ANOTHER PLAINTIFFS

-VERSUS-

THE MOST REV. L.M. NKOYOYO DEFENDANT

BEFORE:- THE HONOURABLE MR JUSTICE AWERI OPIO

J U D G M E N T:-

The plaintiffs are members of the Laity of the Diocese of Muhabura of the province of the Church of Uganda. The defendant is the Archbishop of the Church of the Province of Uganda, Head of the House of Bishops and the Provincial Assembly. The plaintiffs' joint and several claim against the defendant are based on alleged breach of duty and failure to perform functions imposed on him by the constitution of the Province of the Church of Uganda, misuse of powers entrusted to him by the said constitution and unlawfully assuming and for exercising powers of the Bishop of the Diocese of Muhabura.

The brief facts of this case are that a vacancy fell in the See of the Diocese of Muhabura when the then Bishop Rt. Rev. E.M. Shalita reached retirement age. The Synod of Muhabura diocese seconded Rev. Wilson Baganizi and Rev. Canon David Sebuhinja to the House of Bishops in order for it to elect a new Bishop. On 5th September, 2001 the House of Bishops elected Rev. Canon David Sebuhinja as Bishop-Elect of the diocese of Muhabura pending consecration and enthronement by the defendant which was slated for 28th April 2002. Following the announcement of the decision of the House of Bishops, there were representations by members

of the laity both in favour and against the election of Rev. Canon David Sebuhinja as Bishop-Elect of Muhabura Diocese. Consequently the defendant took over Muhabura Diocese as caretaker Bishop pending the consecration and enthronement of the Bishop-Elect.

The plaintiffs allege that the defendant has refused and or failed to consecrate and enthrone the Bishop-Elect thereby failing to perform his constitutional duties and that the defendant unlawfully took over Muhabura Diocese as caretaker Bishop. The defence case on the other hand is that the defendant is willing to consecrate and enthrone the Bishop-Elect but he is being prevented by the conflicts that ensued after the election of Bishop-Elect. Further that the defendant lawfully and constitutionally took over Muhabura Diocese as a caretaker Bishop.

During the scheduling conference the following facts were agreed upon by the parties:-

- 1) That a vacancy fell in the See of Muhabura Diocese upon the then Bishop Rt. Rev. E. Shalita reaching retirement age.
- 2) That in accordance with the constitution of the Church of the Province of Uganda, and the Diocese of Muhabura , Diocesan Synod on the 11th August 2001, nominated Rev. Wilson Baganizi and Rev. Canon David Sebuhinja to the House of Bishops, in order for it to elect a new Bishop.
- 3) That on the 5th September 2001, the House of Bishops, in consultation with the defendant, elected Rev. Canon David Sebuhinja as Bishop-Elect of the Diocese of Muhabura in order for the defendant to appoint as required under the constitution of the of the Church of the Province of Uganda and set 25/4/2002 as the date of his consecration and enthronement in the Diocese of Muhabura.

- 4) That following the announcement of the decision of the House of Bishops, there were representations by members of the laity both in favour and against the decision.
- 5) That on 24th January 2002, the defendant sought and obtained advice from the Provincial Chancellor, to the effect, inter alia, that there was no error or wrong made by either the Electoral College which nominated the two candidates or the House of Bishops which elected Rev. Canon David Sebuhinja as the Bishop-Elect of the diocese of Muhabura.
- 6) That following the advice of the Provincial Chancellor, the office of the defendant issued a press release to that effect.
- 7) That on 29th March 2002, the defendant declared that he was to take over the Diocese as caretaker Bishop, postponed the consecration and enthronement of the Bishop-Elect and on 8th April 2002, asked Bishop Shalita to handover the Diocese.
- 8) That on 13th November 2002, the House of Bishops re-affirmed their decision electing Rev. Canon David Sebuhinja and set 19th January 2003 as the new date for consecration and enthronement.
- 9) That on 23rd November 2002, the defendant convened and chaired a Synod in which the enthronement and consecration of the Bishop-Elect was discussed upon which some members walked out in protest.
- 10) That on 11th January 2003 the defendant again postponed the consecration and enthronement of the Bishop-Elect.
- 11) That on 7th April 2003 the defendant convened a Diocese Council and appointed Commissaries headed by Canon Muluta who took over the management of the Diocese.

After agreeing on the above facts, the following issues were also agreed upon for determination.

- 1) Whether the defendant lawfully took over Muhabura Diocese as a caretaker Bishop.
- 2) Whether the defendant refused to consecrate and enthrone the Bishop-Elect; and
- 3) Whether the plaintiffs are entitled to the remedies sought.

At the closure of the scheduling conference the Learned Counsel for the plaintiffs made an oral application under **Order 11 rule 6 of the Civil Procedure Rules** for a declaration that Rev. Canon David Sebuhinja was duly nominated and elected Bishop-Elect of the diocese of Muhabura and that he was entitled to consecration and enthronement. The application was opposed by Counsel for the defendant on the ground that there were already triable issues in the matter and therefore no declarations could be made at this stage. I reserved my ruling barely because I was of the view that this matter should have fallen under the powers of the Registrar in view of the **practice Direction No. 1 of 2001**. Be that as it may, **order 11 rule 6 of the Civil Procedure Rules** provides as follows:-

”Any party may at any stage of a suit, where an admission of facts has been made either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to without waiting for the determination of any other question between the parties, and the Court may upon such application make such order, or give such judgment, as the Court may think just”.

In the instant case, the nomination and election of Rev. Canon David Sebuhinja as Bishop-Elect is not being contested. In his own words Counsel for the defendant submitted that the election of Sebuhinja is not an issue. Similarly, the fact that the Bishop-Elect is entitled to consecration and

enthronement is not in issue. What is in issue is why he has not been consecrated and enthroned and when he will be consecrated and enthroned. It is therefore just for this Court upon the said application, to make an order that Rev. Canon David Sebuhinja was duly nominated and elected as Bishop-Elect of the diocese of Muhabura and that he was entitled to consecration and enthronement. Those orders are based on the above admissions and they do not dispose of the issues framed for determination.

Another preliminary issue which I would like to dispose of is failure by the defendant to attend court personally to give evidence in proof of his defence. The Learned Counsel for the plaintiff submitted that the defendant had a duty to personally and physically appear and give evidence in proof and support of his defence with or without witnesses.

Having failed to do so the defendant was caught up by the doctrine of adverse inference in that the plaintiffs would be entitled to infer that he feared to appear and give evidence about the allegations against him because he would be discredited in cross-examination.

He cited a number of cases in support of this contention. With due respect, I find the above proposition not only strange but novel. As far as I am concerned, there is no law which obliges either the plaintiff or the defendant to personally and physically appear to give evidence in proof and support of his case. what is crucial is that there ought to be evidence in proof and support of any claim in law.

In the instant case the defence contended that the Archbishop is an institution and that the Archbishop does not act alone. I do agree, DW1 Rev. Stanley Ntagali being Provincial Secretary

was the right person to swear affidavit and testify on behalf of the defendant. In any case if the plaintiffs had thought that the defendant's testimony would assist Court in arriving at a just decision, they should have applied under **Order 14 rule 1 of Civil Procedure Rules** to have him produced physically by Court. For the above reasons, I rule that the plaintiffs cannot gain any mileage in the absence of the defendant to personally appear and adduce evidence in defence. The law does not oblige him to do so. In the same vein I find a litany of cases cited by the Counsel for the plaintiffs irrelevant and or distinguishable.

I now turn to the merit of the case. In an attempt to prove their case the plaintiffs adduced the evidence of four witnesses while the defendant relied on two witnesses.

Issue No.1:-

Whether the defendant lawfully took over Muhabura Diocese as caretaker Bishop:-

As a general background, the **province of the Church of Uganda** is administered in accordance with the **Provincial Constitution and canons** made thereunder while various dioceses, Muhabura inclusive have their constitutions which pay allegiance to the Provincial Constitution and canons. At the scheduling conference, the Provincial Constitution and that of Muhabura Diocese were admitted as exhibits.

Article 9 (a) of the Provincial Constitution provides for the functions of the Archbishop as follows:-

“to have and to exercise general pastoral care, leadership supervision and discipline over the whole province in accordance with the constitution and any canons made thereunder”.

Under Article 8 (c) of the Provincial Constitution the Archbishop in addition to his duties as Archbishop is also the Bishop of the Diocese of Kampala. Thus under the auspices of the Provincial Constitution, the Archbishop is the overall head of the Province of the Church of Uganda and also the Bishop of the Diocese of Kampala which he administers in accordance with the constitution of that Diocese.

The **Provincial canons** provide for instances where the Archbishop can take over a Diocese as caretaker Bishop. That is canon 1:3:8 which provides as follows:-

“In the event of a vacancy in a Diocese as a result of death or illness or other incapacity of this Diocese a Bishop or where a Diocesan Bishop or where a Diocesan Bishop does not handover the office upon attaining the age of 65 years, the Archbishop shall take over the see until a new Bishop is elected, consecrated and enthroned”.

It is very clear from the above canon that there are four circumstances under which the Archbishop may take over a Diocese as caretaker Bishop; these are:-

- i) Upon the death of the Diocesan Bishop.
- ii) Illness of the Diocesan Bishop.

- iii) When the Diocesan Bishop is affected by any other incapacity.
- iv) Where a Diocesan Bishop does not hand over the office upon attaining the age of 65 years.

The Learned Counsel for the defendant contended that the Archbishop took over the Diocese under the fourth circumstance i.e. because the retiring Bishop could not handover because the Archbishop had not consecrated and enthroned the Bishop-Elect. Hence there was a vacancy in the see of Muhabura Diocese to be filled up. With due respect, I do not agree with that line of argument. The situation envisaged under the above circumstance arises when the retiring Bishop for one reason or another fails to handover the diocese upon his attaining the retirement age. In the instant case, the vacancy fell vacant under Article 13 (a) of the Provincial Constitution when Bishop Shalita became of age. That Article provides as follows:-

“The Constitution of each Diocese shall provide that when a vacancy in the see arises or is imminent the Synod of the Diocese shall make representations to the House of Bishops concerning the appointment of a new Bishop. Such representations shall contain two nominations for the said appointment. The Archbishop with the House of Bishops shall consider any representations so made and if they think fit refer the matter back to the Synod for further consideration. Thereafter and in any case within a period of a year from the date of the vacancy, the Diocesan Bishops in consultation with the Archbishop and subject to his final consent shall nominate a person to him for appointment and if need be for consecration”.

When that vacancy fell vacant in Muhabura Diocese, the House of Bishop filled the same on 5th September 2001 when they elected Rev. Canon David Sebuhinja as Bishop-Elect pending the final hurdle which was consecration and enthronement. Therefore after 5th September 2001 there was no vacancy in the Diocese of Muhabura. This is even fortified by the testimony of DW1 Rev. Canon Stanley Ntagali when he stated that:-

“The House of Bishops can’t sit to elect another Bishop while Rev. Canon David Sebuhinja is still Bishop-Elect. The Electoral College can’t nominate other persons”.

After filling the said vacancy the defendant set a number of dates for the consecration and enthronement of the Bishop-Elect. There is no scintilla of evidence on record to show that the retiring Bishop, the Rt. Rev. Shalita either stayed in office by force or refused to handover to the incoming Bishop. If any thing, it was the defendant’s case that it is the practice that whenever a Bishop is elected, the outgoing remains and abdicates the See on the consecration and enthronement day. It is therefore clear from the above that the situation in Muhabura Diocese does not fall within the ambit of canon 1:3:8 simply because the retiring Bishop never resisted handing over the Diocese. Evidence on record indicated that he was forced to handover under very abnormal circumstances before official ceremony where he could not abdicate his seat and hand over the pastoral staff to the incoming Bishop.

For the above reasons I do agree with Counsel for the plaintiffs that the defendant did not lawfully take over the Diocese as a caretaker Bishop. The take over was irregular in view of the clear provision of **Section 1:3:8 of the Provincial Canons.**

Issue No. 2:-

Whether the defendant refused to consecrate and enthrone the Bishop-Elect:-

From the pleadings and evidence on record it is the plaintiffs' case that the defendant has refused/neglected to consecrate and enthrone the Bishop-Elect while the defendant's case is simply that he is ready and willing to consecrate and enthrone the Bishop-Elect, but he is prevented by insecurity arising out of the conflicts in the Diocese.

The law which provides for the appointment and consecration of Bishops is found in Article 13 (a) of the Provincial Constitution which states as follows for the shake of clarity:-

“the Constitution of each Diocese shall provide that when a vacancy in the see arises or is imminent the Synod of the Diocese shall make representations to the House of Bishops concerning the appointment of a new Bishop such representations shall contain two nominations for the said appointment. The Archbishop with the House of Bishops shall consider any representations so made and if they think fit refer the matter back to the Synod for further consideration. Thereafter and in any case within a period of a year from the date of vacancy, the Diocesan Bishops in consultation with the Archbishop and subject to his final consent shall nominate a person to him for appointment and if need be for consecration”.

Article 13 (b) and (c) provide for other types of appointments, i.e.

13 (b) – Bishop co-adjuter, a suffragen or assistant Bishop.

13 (c) - Bishop by transaction i.e. exchange of sees between two or more Diocesan Bishops.

The term if need be presupposes that appointment may be made of persons who have already taken oath of consecration like the two categories I have mentioned above. It does not mean that the Archbishop had discretion in the matter. I shall return to this point later.

In the instant case all the normal procedures had been complied with. That position was duly confirmed by the Press Release issued by the Provincial Secretary Rev. Canon George Tibesigwa which reads in part as follows:-

“Following the nomination of two candidates, the Rev. Canon Dr Wilson Baganizi and the Rev. Canon David Sebuhinja by Muhabura Diocesan Electoral College and the subsequent election of Rev. Canon David Sebuhinja as the Bishop – Elect by the House of Bishops to succeed the Rt. Rev. Ernst Shalita and the rejection of Canon Sebuhinja and the unbecoming behaviour that followed which are vehemently condemned, Christians should know that the correct procedure and requirements for the nomination and election as provided in the Diocesan and Provincial Constitutions and Canons were duly followed.

It is our conviction that if the Diocesan Electoral College had not found the Rev. Canon David Sebuhinja suitable to be a Bishop, they would not have forwarded his name to the House of Bishops for consideration.

The role of an Electoral College of a Diocese in an electoral process of a Bishop is to search for, scrutinize and nominate two candidates. The final decision of election lies

with the House of Bishops. These respective roles were duly exercised and complied with. Every Christian in the Church of Uganda is duty bound to respect, obey and observe both the Diocesan and Provincial Canons and Constitutions.

We have, since the announcement of the decision of the House of Bishops regarding the election of Rev. Canon David Sebuhinja, received several representations, some in support of the decision and others in opposition to the decision. We have carefully listened, read several memoranda, visited Christians in Muhabura Diocese and reviewed both positions. We have read several correspondences from the group that is opposed to the election of Bishop-Elect. We have followed comments from the public in the media and radio programme. No where is it alleged that the correct procedure in the nomination and election was not followed”.

Despite the above position the defence maintained that consecration could not be performed because of the conflict in the Diocese between the Section of Christians who were against the election of Rev. Canon David Sebuhinja as Bishop-Elect and another Section of Christians who were not in favour of his election.

Rev. Canon Stanley Ntagali (DW1) testified that after the election of Rev. Sebuhinja as Bishop-Elect, the defendant’s office received memoranda and reports some in favour of the election and others against the election of the Bishop-Elect. There was a memorandum signed by 1002 Christians of Muhabura against the Bishop-Elect (Defence Exhibit D2). There was also a memorandum from Christians of St. Andrews Cathedral Seseme signed by 201 Christians

(Defence Exhibit D3). DW1 further cited the Kyamugambi report and Bishop Sinabulya's report to show the nature of the conflict. He stated that the conflict reached the attention of the desk of the Inspector General of Police who advised that an amicable solution should be found to the conflict. DW1 concluded that the only way forward was to reconcile the two factions of Christians and then arrange for consecration and enthronement of the Bishop-Elect.

Rev. Canon Baker Habimana (DW2) also confirmed that the Bishop-Elect could not be consecrated and enthroned because of the conflict in the Diocese. He stated that the retired Bishop Shalita reported some of the cases to Police and even wrote a letter to the Resident District Commissioner and the Archbishop about the conflict and the likelihood of bloodshed in the Diocese. He also stated that as a result some churches and parishes like Kyeibumba, Nyakabungo, Gisorora, Matinza and Rwaramba do not have leadership. Those church leaders were thrown out by the faction against the election of Rev. David Sebuhinja as Bishop-Elect. He concluded that as a result of the conflict armed securico guards were now guarding the Diocesan offices, the Bishop-Elect and the retired Bishop whereas before the conflict the Diocese offices were only being guarded by night watchmen who were not armed and retired Bishop and Bishop-Elect were not being guarded at all.

The plaintiffs on their side maintained that the conflict was normal and as such it should not have stopped the process of consecration and enthronement. They maintained that there was no insecurity in the Diocese to warrant postponing the consecration.

From the foregoing it is vivid that the church of the province of Uganda is run in very sound principles and doctrines. First of all the procedure for the appointment of a Bishop must be adhered to. In the instant case, there is no doubt that Rev. Canon David Sebuinja was properly elected as Bishop-Elect of Muhabura Diocese under Article 13 (a) of the Provincial Constitution. It is also the doctrine of the church as provided by Canon 3:1 that consecration is mandatory before a Bishop can take up an office. It states:-

“..... No person shall be admitted to the office of Bishop, Priest or Deacon in the Church of Uganda, or allowed to execute any of the said offices, except he/she be called, tried, examined, and admitted thereunto according to the ordinal or any form of service alternative thereto approved by the Provincial Assembly under Canon or has formerly had Episcopal consecration or ordination in some Church whose orders are recognized and accepted by the Church of Uganda”.

As I stated earlier, that section if read together with Article 13 (a) of the Provincial Constitution would show that consecration may not be necessary only where a Bishop-Elect had already subscribed to Episcopal consecration in some church whose orders are recognized and accepted by the church of Uganda. For the above reason, it was mandatory that the Bishop-Elect had to be consecrated and enthroned since he had never before subscribed to any Episcopal consecration.

In the instant case all the principles and doctrines had been complied with in appointing the Bishop-Elect. It is in agreement by both parties that the decision of the House of Bishops on that matter is irreversible. That being so the issue of conflict in the Diocese would therefore have

been of a secondary consideration which would not have stopped the defendant from consecrating the Bishop-Elect as that would undermine the authority of the church. The authority of the church which is based on principles and doctrines which are contained in the Provincial Constitution and Canons and form the foundation of the church, ought to be honoured and protected at all costs. Democracy should come in only as a means of improving those principles and doctrines and not to destroy them. It is along that line that I do not find any basis on the side of the defendant in protracting consecration allegedly for the purpose of reconciling the factions. Reconciliation in my view must be premised on sound principles. I do believe that reconciliation is good for the running of the church but it should not undermine the authority and foundation of the church like in the instant case. For the above reasons I hold that it was wrong for the defendant to protract consecration for such a length of time on allegation of insecurity brought about by factions in the Diocese. Consecration was a lawful activity for which Government would have been an interested party in providing security. Above all there is no law which provides that service of consecration should only be in the Diocese of enthronement. What the law provides is that the candidate must have qualification, celebration must be done by the Archbishop or his appointee with at least two other Bishops and the same must take place on a Sunday or a Holy day unless the Archbishop, for urgent and weighty case, appoints some other day: **See Canon 3:6.**

For the above reasons the defendant could have and can still opt for another venue other than Muhabura Diocese. In all these I observe that the defendant did not exercise his discretion lawfully under the Provincial Constitution and Canons to have the Bishop-Elect consecrated and enthroned. The factions he bowed down to were a mere question of intolerance which should

have been looked into after the consecration and enthronement and in case of severity that would have constituted a subject of his taking over the Diocese lawfully this time under Canon 1:3:8. That is where a Diocesan Bishop is incapacitated from running his Diocese by any factor. In light of the above observations the second issue is answered in the affirmative.

Issue 3:-

Whether the plaintiffs are entitled to the Remedies sought:

A preliminary point of law was raised during the submission by Counsel for the defendant that the plaintiffs had no cause of action in law. The Learned Counsel contended that the plaintiffs did not enjoy any right protected under the law and that they were not aggrieved parties in this matter.

The matter before this Court is based on the allegations that the defendant had violated the Provincial Constitution by refusing to consecrate and enthrone Bishop-Elect. The plaintiffs are members of the Laity of Muhabura Diocese. As members of the Laity they are bound by the above constitution in the same way the defendant is. It is therefore within their rights to see that the provisions of the Constitution are enforced to the letter and possibly the spirit and they become aggrieved in circumstances where they feel that the constitution and canons are being flouted. Therefore, the scenario before this Court clearly clothes the plaintiffs with a cause of action against the defendant: See Auto Garage & Others Vs Motokov [1971] EA 514.

I now move to the remedies available to the plaintiffs. In view of my findings above, the following orders are pertinent and reasonable in this matter. They are:-

- (i) That Rev. Canon David Sebuinja was duly nominated and elected Bishop-Elect of the Diocese of Muhabura.
- (ii) Though the defendant is willing and ready to consecrate and enthrone the Bishop-Elect it is ordered that the same be done within a reasonable time.
- (iii) Since the Commissaries were appointed by the Synod I order that they continue running the affairs of the Diocese together with the Diocesan Council as the defendant prepares to consecrate and enthrone the Bishop-Elect.
- (iv) No order of injunction shall issue against the defendant in view of his general power of leadership and supervision of the whole Province of the Church of Uganda;
- (v) Costs of this suit shall be provided for in favour of the plaintiffs. I so order.

3/11/2003:-

Mr Kagumire present for Defendant.

Richard Mwebembezi for the plaintiffs.

Judgment read in chambers as in open Court.

RUBBY AWERI OPIO

J U D G E

3/11/2003.