

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D. C. J. , ODER, H. S. C. & SEATON, J. S. C.)

CIVIL APPEAL NO. 9 OF 1990

BETWEEN

SHEIKH ALI SSENYONGA & 7
OTHERS.....APPELLANTS

AND

SHEIKH HUSSEIN RAJAB KAKOOZA.....
RESPONDENTS

AND 6 OTHERS

(Appeal from the judgment of the High Court of Uganda at Kampala (Mr. Justice Okello) dated 28/3/88).

HIGH COURT CIVIL SUIT NO. 517 OF 1987

JUDGEMENT OF THE COURT

During the years 1980 to 1987 the adherents of the Muslim religion in Uganda were divided. Muslims from outside Uganda tried to unite them. They invited the Uganda leaders of the two factions to Makkha. There they agreed to settle their differences. The terms of the settlement were set out in a document. It was called the Makkha Agreement (“the Agreement”). The following were its main points:-

1. The parties would unite in the overall body called the Uganda Muslim Supreme Council (UMSC).
2. The membership of the UMSC would comprise all persons adhering to the Islamic Faith.
3. The UMSC would act in accordance with a revised Constitution which was drawn up by experts at the Makkha meeting.

4. An interim or provisional administration would be set up to administer the affairs of the UMSC until elections could be held to fill the posts created under the Constitution.
5. The provisional administration would supervise the holding of the elections and would thereafter guarantee a smooth transfer of power to the elected officers of the UMSC.

After signing the Agreement the parties returned to Uganda. In due course the interim administration commenced its functions. In 1987 notices were issued to UMSC members to send representatives to Kampala. There they were to hold the first General Assembly and elect officers. The posts to be filled were numerous. The task was expected to last SEVERAL DAYS. Arrangements were made to accommodate delegates at Kisubi, a suburb of Kampala. The dates out for elections were April 10th to 13th 1987. Transport and accommodation were provided by UMSC.

From the outset the Assembly faced procedural problems. The first was the selection of the a presiding officer. The Agreement provided for a chief Kadhi. To fill this post the first respondent, Sheikh Kakooza had been appointed. The Agreement did not provide for a Mufti: The Constitution did so provide. Further, it stipulated that the Mufti should preside over the Assembly during the elections of its Chairman and Deputy Chairman.

There was a legal adviser among those attending the Assembly. He advised that Sheikh Kakooza, as the highest ranking person in the UMSC, should preside over the Assembly. His advice was accepted. Sheikh Kakooza took the chair by unanimous consent to preside over the elections of Chairman and Deputy Chairman.

The next problem arose from the presence in the Assembly of some Deputy District Kadhis. The Constitution of UMSC provided who should participate in the General Assembly. Among those specified were five representatives from each of the larger districts of Uganda and three representatives from each of the smaller districts. One of the representatives from each District should be the District Kadhi.

The practice before the Agreement had been for each of the 26 Districts to have a kadhi and a Deputy Kadhi appointed by the Chief Kadhi of Uganda. The Constitution of UMSC made provision for the post of District Kadhi but not for that of Deputy District Kadhi. Some District Kadhis were ill or for other reasons unable to attend the Assembly on April 10th 1987. They sent

their Deputies in their place. The legal Adviser suggested that the Deputy District Kadhis could participate. Again his advice prevailed.

At the opening Session of the Assembly, two candidates were proposed for the post of Chairman; Prince Kakungulu and Sheikh Ssenyonga, the first appellant. The latter received 61 of the 111 votes cast. He was declared Chairman and he accepted the post. By then the session had been long. It was decided to adjourn to 2:30p.m. on the following day, when they would proceed with the election of the Deputy Chairman.

On the 11th April, the delegates gather in the hall outside the room where the Assembly was to be held. As they stood around, the third Deputy Prime Minister, Honourable Abu Mayanja, appeared. He apologized for his absence from previous day's session.

Then he delivered a message: that they had made a serious mistake indicating the first Appellant, Sheikh Ssenyonga, as Chairman; that he was a man against whom the Government intended to institute criminal proceedings; or words to that effect. This message caused confusion and some anger amongst the hears. Some wanted the assault the Deputy Prime Minister. However, he was led out of and away from the building without violence.

Meanwhile the first respondent, Sheikh Kakooza had been on the way by car to the Assembly Hall. Overnint he had been having doubts about the legality of the day's proceedings.

On reflection it seemed wrong that the Assembly had been chaired by the person such as himself, not a mufti. He expressed these doubts to his companions in the car: Dr. Sheikh Kisule an expert in Sharia Law and Sheikh Byekwaso a representative from the Follow-up Committee of the Makkha Agreement, who had been sent to observe the elections under the Constitution. From some source the first respondent, Sheikh Kakooza, received a report, possibly exaggerated, of the confusion and anger that followed Hon. A

bu Mayanja's message.

The car occupants decided to return to the first respondent's hotel room. There, with the assistance and advice of Dr. Kisule and Sheikh Byekwaso, the first respondent drafted a notice adjourning the Assembly sine die. The notice was sent to be announced to the individual delegates.

The first appellant, Sheikh Ssenyonga heard or learnt of the first respondent's adjournment of the Assembly. So did other delegates. Some decided to collect their allowances of some shs. 100,000/- each and return home. Others, the majority decided to continue the business of electing officers under the Constitution. This they did under the Chairmanship of the first appellant on the 11th and 12th April. On the 13th April 1987 they concluded the General Assembly and went their separate ways.

Subsequently the first appellant, Sheikh Ssenyonga, and the other appellants went to take up their duties. The respondents refused to hand over the keys, books and other requirements for management and administration of the UMSC. The appellants therefore filed a suit in the High Court claiming a declaration, an Order and an injunction in respect of their respective offices. The respondents one to five filed a written statement of Defense denying their claims. The respondents' six to seven filed a defense and counter claim that the appellants were improperly elected and were unfair to hold the offices they claimed.

During the course of the trial numerous witnesses were called by both sides. The learned judge on 28th March 1988 gave judgment in which he rejected all the prayers in the Plaint and (in effect) granted the prayers in the counter claim. Against this judgment there were filed eight grounds in an original memorandum of appeal and seven other grounds in a supplementary memorandum. There was also a cross-appeal, containing seven grounds in two memoranda of appeal.

We pause at this stage to observe that the Constitution provided its own dispute – settling procedure: This is the Electoral Commission consisting of elected members, whose decisions on matters within its jurisdiction shall be final. This body was asked (properly in our view) to adjudicate the instant dispute and did so. None of the parties however, accepts that adjudication as the last word. Instead, all wished for a court decision in order that guidelines may be laid down for the future.

In view of the importance of the matter we have acceded to the parties' request to hear and render a decision of the instant dispute. After having done so, we would hope that should further disputes arise; the UMSC will find it desirable to adhere to the decisions of the Electoral Commission or else amend the Constitutional provisions relating to dispute settlement.

Several grounds of appeal and across appeal were argued together. We shall deal with them in the same manner. Before doing so, we would observe that the UMSC has been constituted as a legal entity in the form of an unlimited company without share capital. It has a Memorandum and Articles of Association, which is the Constitution. As such, it is subject to company Law. At the same time, it is distinguished from such other artificial persons as its purposes are not merely materialistic but spiritual and altruistic as well.

It may also be distinguished from companies whose membership may have been acquired by the purchase of shares offered to the public. In the UMSC, membership is exclusively confined to those eligible by religious criteria. It is thus a private not a public company.

The first ground of appeal related to the validity of the first session of the General Assembly. The learned trial judge had not upheld the legality of the first respondent, Sheikh Kakooza, presiding over the election of the Chairman, because he lacked the necessary qualification. He held also that the presence of Deputy District Kadhis and their participation in the voting rendered the election of the first appellant invalid. Counsel for the appellants submitted that the District Kadhis were members of the General Assembly by virtue of their offices and not in their personal capacities. What was intended by the drafters of the Constitution was that each District in Uganda should have among its delegation a representative of the office of the District Kadhi. Therefore, it was submitted, the substitution, in the event of illness or other incapacity of the District Kadhi, of his Deputy ensured the representation of the office which was intended. Counsel argued that, like the substitution of the Chief Kadhi for the Mufti, to preside over the election of the Chairman and Deputy Chairman, it was recommended by the legal adviser as a practical solution to a problem which the Constitution makers did not envisage.

We were referred to the case of Rayfield V. Hanes and Ors (1960) ch.d.1 In that case the plaintiff was the shareholder in a company, Art 11 of the Articles of Association of which required him to inform the Directors of his intention to transfer shares in the company, and which provided that the Directors “will take the said shares equally between them at a fair value”. Upon the directors being notified, they contended that they need not take and pay for the plaintiff’s shares, on the ground that the articles imposed no such liability upon them. On the plaintiffs’ claim for the determination of the fair value of his shares, and for an order that the directors should purchase

such shares at a fair value, it was held, inter alia, that upon their true construction the articles required the directors to purchase the plaintiff's shares at a fair price.

In the course of his judgment, Vaisey J., observed (at P.4):

..... It has been said that articles of association ought not to be construed too meticulously. See per Wynn Parry J. in re Hartley Baird Ltd (1955) CR. 143, 146) where he said: 'In the interpretation of sun the maxim ut res magis valeat quam pereat should certainly be applied, and I propose to interpret these articles in the light of that maxim'.

Am not aware that this maxim has ever been put into English, but I suggest that it directs to "validate if possible". And see also per Jenkins L. J. in Holmes V. Keyes (1959) ch. 19 (215) where he is reported as saying that in view of the 'articles of association of the company should be regarded as a business document and should be constructed so as to give them reasonable business efficacy. In preference to result which would or might prove unworkable.

Again, (at p.9 of the judgments) Vaisey J. had this to say:-

..... The conclusion to which I have come is that the maxim should not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership; see the well-known passages in re Yenidje Tobacco Co. (1916) 2 ch. 426".

It will be observed that Rayfield V. Hanes (above –cited) differs from the fact of the instant case in that there a purely commercial company was concerned; the decision was taken in order to promote business efficacy. It will also be observed that Rayfield was a private company, as is the UMSC, and according to Vaisey; J. Rayfield was of “that class of companies that bears a close analogy to partnership”.

Another ground of appeal related to the legality of the sessions of the General Assembly held after the 10th April. The legality of the sessions was challenged on the ground that no or inefficient notices had been given that the sessions would be held by any persons who were entitled to attend did not do so because they were aware that the General Assembly had been indefinitely postponed by the radio announcement and chits circulated by the first respondent, Sheikh Kakooza; they were therefore misled into not attending and participating in the sessions at which all of the officers prescribed by the Constitution were filled. Therefore, it was argued, election of persons to those offices was invalid.

The learned judge had held that the purported adjournment of the meeting sine die by the first respondent. Sheikh Kakooza, was null and void because he had no authority to do so by his sole fiat. It followed that the sessions on the 11th, to the 13th April were a continuation of the General Assembly session which began on the 10th April. With this holding, we agree. It follows that no notices were necessary, although possibly desirable as a matter of courtesy. Where we differ from the learned judge, however, is his finding that the elections during the continuation sessions should be declared invalid because of the presence and participation of the Deputy District Kadhis. For reasons the counsel for the Appellants urged regarding election of the chairman which we have given earlier, we think that the votes of the Deputy District Kadhis should have been disregarded and the elections should not have been held to be invalid on that ground.

The third ground of appeal was that the learned judge erred in law and in fact in finding that the second appellant, Sheikh Luwemba, did not qualify under the Constitution because he did not possess a degree in Sharia or its equivalent.

Article 6(2) of the Constitution provided that to be considered for the office of Mufti, a person had to be a Ugandan, at least 40 years old, fluent in Arabic language, respectable, properly married and a good practicing Muslim, AHLISUNNAH WAL-JAMA’AH, free from offences

under the National and Islamic Laws and “holder of a degree or its equivalent from recognized Islamic University”.

We have not had it suggested that the second appellant filed to possess any qualification except the one underlined above (although there were some allegations that he lacked other qualifications which were rejected by the trial judge).

The learned judge in his judgment considered the possible interpretation of the words underlined and came to the conclusion that “a Mufti must have a degree in Sharia or equivalent degree in Sharia from a recognized Islamic University.

The judge found from the evidence that the certificates produced by Sheikh Luwemba were indicative that he was the holder of a S. A. degree in Dawa. Dawa has been defined to mean Islamic call to non-muslims to join Islam.

We have observed from the evidence that the number of Uganda Muslims qualified to be Mufti under Article 6 of the Constitution as few, if any. Possibly the only person who possesses a degree in Sharia is Dr. Kisule and he would be ineligible because he is now aged thirty four years only. In the circumstances the only consideration was whether Sheikh Luwemba possesses a qualification that was equivalent to a degree in Sharia.

There was evidence that he attended a course in the Republic of Libya for which he was awarded a Certificate equivalent to “A level School Certificate. One of the subjects he studied was Sharia. Thereafter, he took another course in the same country in Sharia at Dawa for which he was awarded a second certificate which was equivalent to a B.A. Degree.

In 1977 he undertook a 5 year degree course in Libya but did not complete it because he abandoned it and accompanied Libya troops to Uganda in 1979 when they came to fight on the side of Idi Amin during the liberation war. He stopped in third year.

There was also evidence that he taught Sharia for four years at Uganda’s highest Islamic Institute at Bugembe in Jinja and that he held several high elective offices including that of Chief Kadhi in the UMSC. We hold, with respect to the learned trial judge, that these qualifications and experience were enough. Accordingly we would allow this ground of appeal.

Ground four of the appeal was that the judge erred in law and in fact when he held that the UMSC Constitution stipulates no qualification for the office of the Deputy Mufti and that the third Appellant Sheikh Semakula had the qualifications for the said post.

It appears that the Constitution set out qualifications for every office save that of the Deputy Mufti. We were asked to hold, by counsel for the appellants that the omission was deliberate and any adult Uganda Muslim, provided he was of good character, might be elected to the post. Counsel for the respondents, on the other hand, submitted that as Article 5(2) states that the work of the Deputy Mufti is to “assist the Mufti in the execution of his functions and duties”, it should be considered that the Deputy Mufti might in some circumstances, be asked to act in place of Mufti when the latter was unable to act. Therefore he should have the same qualifications as the Mufti.

We have already observed that the number of Uganda Muslims qualified to be a Mufti under Constitution may be few, if any. A realistic approach to the Constitution and one that makes it workable has to be followed. We would therefore hold that a deputy Mufti need have no specific academic qualification but should have some and he should have experience in matters of Sharia.

Obviously he should have qualities of good character and preferably he should be fluent in Arabic language, be a good practicing Muslim and be AHLISUNNAH WAL-JAMA’H. It appears from the evidence that Sheikh Semakula possesses the qualifications we have indicated above. In particular he has been teaching Sharia for a number of years at the highest academic institution for Muslims in Uganda. We are of the view that his election to the post was valid.

Ground 5 of the appeal relates to the post of Secretary for Finance and Planning. The qualifications for such post are set out in Article 15(2) of the Constitution. The holder of the post must possess a degree in commerce or its equivalent and five years working experience. At the trial the Fifth appellant Haji Ibrahim Mpiira never testified as to whether he had the qualifications stipulated and no one else gave evidence to show he had them.

The learned Judge held that the evidential burden was on the fifth appellant to prove that he had them, which he had not discharged. Counsel for the appellants submitted that the onus lay on the respondents to prove that he did not have the necessary qualifications; that merely by offering himself for election, Haji Mpiira must be deemed to have the necessary qualifications.

We are of the view that the general rule must apply he who alleges must prove. It is the appellants who allege that the fifth appellant is qualified. To hold that the negative must be proved by the respondents. It appears that the learned Judge's attention was called to shaw vs. Thompson (1876) 3 Ch. D. 233. In that case a meeting was held to discuss the method for the election of a vicar. The meeting should have been convened, according to the ancient usage and custom, by the church wardens of the parish church. All the parishioners and inhabitants in vestry assembled were entitled to participate in the election. The election was subsequently challenged on the ground that the manner of voting, the number of polling places, and the number of days and period during each day for which the poll should be kept open, had not been conducted according to the ancient usage and custom. It was held, that the conduct of the church wardens had been erroneous and illegal; but, there being no evidence of any voter having been deprived of an opportunity of voting, that the election could not be disturbed.

In Shaw v. Thompson (above-cited) there was no dispute of fact, except as to the allegation that by reason of the poll closing at 8: pm several working men were prevented from voting. The result of the evidence was held by the Court to be that practically no working man was prevented by the arrangements made from recording his vote. In the instant case there is no evidence to suggest that, even if those who did not receive notices were present, they would have made any difference in the ultimate result of the voting's.

We therefore allow the appeal on all grounds, except ground 5 relating to the election of the fifth appellant, Haji Ibrahim Mpiira as Secretary for Finance and Planning. We dismiss all grounds of the cross-appeal as well as the two grounds of the supplementary cross-appeal.

We accordingly set aside the declaration and order of the learned trial Judge and substitute therefore the following;

- (i) Declare that the elections held on April 10th to 13th 1987 at Kibuli by the General Assembly of UMSC were lawful and valid, save for that of the Secretary for Finance and Planning (Haji Ibrahim Mpiira) because of lack of proof of the requisite qualifications.

- (ii) Order that the Respondents jointly and severally hand over the management and administration of the UMSC to those officers who were elected by the General Assembly held April 10th to 13th 1987.
- (iii) Order that within 30 days from the date of this Judgment, fresh elections should be organized and held within 60 days in accordance with the Constitution of the UMSC for the post of Secretary for Finance and Planning by the General Assembly. Provided over by the Mufti, Sheikh Saad Luwemba.
- (iv) Order that the election referred to in (iii) above should be organized and supervised by the Electoral Commission, to whom candidates should submit their qualifications for screening as to eligibility before being presented for election.
- (v) Enjoin the respondents who were respectively officers of the Interim Administration from continuing or purporting to so act as such from the date of this judgment and/or from the date of the confirmation by the electoral Commission of the valid election of an officer to the post of Secretary Finance and Planning.

(Defendants) would be to impose an unnecessary burden on them. The learned Judge's holding was, in our view, the correct one.

The next ground of appeal was that the judge erred in law and in fact when he held that on the whole the elections proceedings of the UMSC held between the 10th and 13th 1987 were null and void by reason of the first that: (a) the elections were held under the Chairmanship of the first appellant Sheikh Ali Ssenyonga and (b) some members of the electoral bodies were not invited to take part in the election.

We have already referred to the circumstances which led to the adjournment sine die of the session of the Assembly by the first respondent, Sheikh Kakooza. We agree with the learned trial judge that the purported adjournment was illegal. We believe that the power to adjourn or continue the Assembly lay in the membership. There was more than a quorum present when the decision to continue under the Chairmanship of Sheikh Ssenyonga was taken. We believe that the decision was valid.

The learned Judge considered Rayfield v. Hanes & ors (above-cited) and also Holmes v. Keyes (1959) Ch. 199 and he accepted that the less meticulous rule of interpretation should be applied

to the Constitution in order to achieve reasonable business efficacy. But he did not consider that it was necessary and reasonable that the words “leader and Head” of Muslims in Uganda should be read into Art. 4 (1) of the Constitution so that someone like the Chief Kadhi, who was the current leader and head of Muslims in Uganda, could chair over the election of the Chairman of the Council in order to bring the Constitution into force.

Regarding a cost which was a ground of the appeal and of the cross-appeal, we would have preferred to order that the UMSC pays all costs because in our view the suit was brought for the benefit of the Muslim community in Uganda as a whole. However the UMSC was not a party to the suit hence no order can be made against it. In the circumstances, we uphold the Oder of the lower court that each party suffer its own costs in the proceedings and make the same order in respect or the appeal and cross-appeal.

DATED AT MENGO THIS 19TH DAY OF MARCH, 1991.

Sgn: S.T. MANYINDO

DEPUTY CHIEF JUSTICE

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

E.E. SEATON

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS TRUE

COPY OF THE ORIGINAL.

B. F. B. BABIGUMIRA

REGISTRAR SUPREME COURT

