



Ogumbo v Opiyo the Chancellor, Anglican Church of Kenya, Diocese of Maseno West & 4 others (Civil Suit 109 of 2019) [2023] KEHC 2867 (KLR) (Civ) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 109 OF 2019

JK SERGON, J

MARCH 28, 2023

BETWEEN

EDWIN ODERA OGUMBO PLAINTIFF

AND

**HESBON OWINO OPIYO THE CHANCELLOR, ANGLICAN CHURCH OF
KENYA, DIOCESE OF MASENO WEST 1ST DEFENDANT**

**PROVINCIAL CHANCELLOR, THE ANGLICAN CHURCH OF
KENYA 2ND DEFENDANT**

**JACKSON OLE SAPIT, ARCHBISHOP ANGLICAN CHURCH OF
KENYA 3RD DEFENDANT**

ACK DIOCESE OF MASENO WEST 4TH DEFENDANT

JOHN MARK HAUNG GODIA 5TH DEFENDANT

JUDGMENT

1. The plaintiff herein filed a suit by way of the plaint dated 27th May, 2019 and sought for judgment against the defendants in the following manner:
 - i. A declaration that the elections held on 18th May 2019 that declared Rev. John Mark Haung Godia, the 5th defendant, as Bishop of the Anglican Church of Kenya Diocese of Maseno West, were irregular, and are hereby nullified.
 - ii. A permanent Prohibitory Order for Injunction restraining REV. John Mark Haung Godia, the 5th defendant, from assuming, taking up and/or performing



the functions of the office of the Bishop Anglican Church of Kenya, Diocese of Maseno West in respect of elections that were held on 18th May, 2019.

- iii. A permanent Prohibitory Order for injunction restraining the 3rd defendant from consecrating and/or issuing Rev. John Mark Haung Godia, the 5th defendant, the certificate of Enthronement as Bishop of the Anglican Church of Kenya Diocese of Maseno West in respect of elections that were held on 18th May, 2019.
 - iv. An order that fresh elections to be conducted for the position of Bishop of the Anglican Church of Kenya Diocese of Maseno West in accordance with the provisions of *the Constitution* of the Anglican Church of Kenya.
 - v. Cost of this suit.
2. The plaintiff pleaded in his plaint that the 4th defendant's election for diocesan bishop, which took place on May 18, 2019, saw the declaration of the 5th defendant as the winner, and that the election of bishops is mandated by Article X1 and Canon V of the Anglican Church of Kenya Constitution and includes, among other things, the following procedures:-
- i. The Archbishop (the 3rd defendant) upon being satisfied that the office of the Bishop (the episcopal See) is vacant informs the Diocesan Chancellor (the 1st defendant) of bishopric becoming vacant and instructs the Chancellor to hold an episcopal election in accordance with Article X1 and Canon V of *the Constitution* of the Anglican Church of Kenya.
 - ii. Diocesan Chancellor informs members of the Synod of the Diocese and members of the Provincial Standing Committee of Synod of the vacancy of the episcopal see and sends them nomination forms for their nomination of any bishop or priest who is eligible under *the Constitution* within a specified period of not more than 30 days from the date the nomination forms are sent.
 - iii. Members of the Diocesan Synod and Provincial Standing Committee of Synod sign and send their nomination forms to the concerned Diocesan Chancellor.
 - iv. The Diocesan Chancellor together with the Clerical and Lay Secretaries of the Diocesan Synod counter check the nominations to confirm compliance with the requirements as set out in *the Constitution*.
 - v. List of all valid nominations sent to the Archbishop and the Provincial Chancellor and written reasons for any person whose name is deleted from the list.
 - vi. A Search Committee is constituted comprising of 12 people being 3 priests, 3 laypersons from the vacant see, 2 bishops, 2 priests and 2 laypersons from the Province. The Provincial members are appointed by the Archbishop after consultation with the House of Bishops. The Diocesan members are appointed by the Archbishop after consultation with Diocesan Standing Committee of the Synod.
 - vii. Nominated candidates appear before the Search Committee in person for interview and evaluation, where after the Search Committee recommends



at most three candidates for the election. The Chairman of the Search Committee sends the names of the three shortlisted candidates to the Archbishop who submits the same to the Provincial Chancellor and the Diocesan Chancellor.

- viii. Archbishop determines the election date and requests the Diocesan Chancellor to convene the Electoral College duly constituted in accordance with Article XI (12).
 - ix. Diocesan Chancellor sends list of candidates to all the electoral college within the set timelines and informs them of the voting date, place and time
 - x. The Diocesan Chancellor presides over the election in accordance with the procedure set out under Canon V (S) but with no right, to vote. Voting is done in three stages namely elimination stage, two thirds majority stage and simple majority stage.
 - xi. Pursuant to Canon V (5) (e), each candidate entitled to two observers who shall be members of the Electoral College, to verify the counting process.
3. The plaintiff further pleaded in his plaint that following the nomination of three candidates, including The Rev. John Mark Huang Godia (5th defendant), The Rev. Prof. James Owino Kombe, and The Rev. Canon Francis Omondi Obieno, the 1st defendant called a meeting of the electoral college on May 18, 2019, when elections were held and the 5th defendant was proclaimed the Bishop of the 4th defendant.
 4. The plaintiff avers that the election processes leading to the elections that were conducted on 18th May 2019 were in breach of the foregoing provisions of Article X and Canon V of *the Constitution* of the Anglican Church of Kenya, and in breach of the rules of natural justice, as particularized in paragraph 9 of the Plaint.
 5. The plaintiff further avers that the impugned elections lacked integrity, were illegal, null and void ab initio and as a consequence of the foregoing procedural improprieties, illegalities, irregularities and malpractices, the impugned election has been divested of the essential elements of freeness and fairness.
 6. It was pleaded by the plaintiff in his plaint that his rights to an impartial administrative process, a legitimate expectation based on *the constitution* of the Anglican Church of Kenya and the principles of natural justice, an infringement on his right to cast a ballot and have it count as a participant in the episcopal see elections, a right to observe the election and confirm the results of the vote-counting, and a right to vote have all been grossly violated. As a result, he has suffered damages.
 7. The defendants entered appearance upon service of summons and filed their statement of defence on 13th April, 2018 to deny the plaintiff's claim.
 8. In their statement of defence, the defendants stated that the process of conducting the election for the vacant See of Maseno West Diocese was in full compliance with Constitution and Canons of the Anglican Church of Kenya.
 9. The defendants further stated that the elections were held in accordance and in compliance with *the Constitution* of the Anglican Church of Kenya and that no one infringed the rights of the plaintiff to vote and therefore the plaintiff participated in the governance of the church to elect their next Bishop.
 10. At the hearing of the suit, the plaintiff testified and called two (2) additional witnesses, while the 1st defendant testified and called one more witnesses in support of their case.



11. The plaintiff who was PW1 adopted his signed witness statement dated 27th May 2019 as his evidence in chief and stated that he is 53 years old and married with 4 children.
12. In cross-examination the plaintiff stated that he was a part of the ACK Diocese Maseno West's standing committee, one of the 23 voters and electors, and he maintains by his claim that the issues mentioned were not addressed.
13. He further stated that he was present at the meeting of the diocesan committee where the qualifications for the twelve members who would be appointed were considered. That there was nothing wrong with him serving as both an elector and a representative for Canon Omondi, since other candidates had representatives, etc.
14. It was the testimony of the plaintiff he was intimidated by the Bishops employing agents and that he has documentation of the trip arranged for the electors and that everyone made their own travel arrangements. He claims that the defendants obtained the ballot papers, but he lacks evidence to support this claim.
15. The witness stated that the method used for nominations was not in accordance with *the constitution* of the Anglican Church of Kenya and that his legitimate expectation was that they were going to elect in a free and fair election.
16. In re-examination the witness stated that he was not a candidate but an elector and that he is in court because his rights as an elector were infringed.
17. Symon Omondi Otiang who was PW2 adopted the contents of his signed witness statement before stating that he is an ordained priest and that his main complaint in this matter is that the election was flawed.
18. The witness stated that he expected to be told when the nomination would be undertaken but that they were not told as the letters were given privately and not in the meeting as well as the fact that also an election committee had been formed.
19. On cross-examination by Mr. Osiemo, the witness stated that he was not an elector but a member of the standing committee of the synod and that Christians never participated in the said elections.
20. Symon Omondi Otiang who was DW1 adopted the contents of his signed witness statement before stating that he has been an advocate of the High Court for the past 41 years and that he is the Chair of the Electoral College and the Diocese Chancellor of the Maseno West Dioceses.
21. The witness stated that there was a consecration of the new Bishop and that he is aware that the Archbishop called for an objection but no one raised an objection.
22. On cross-examination by Mr. Khaminwa, the witness stated that there is no merit in the plaintiff's complaint and if there's any conflict of interest, the same was addressed
23. The witness stated that they did not have any cases of violence in Maseno West Diocese and that the same occurs on allegation of elections not being free and fair.
24. Lawrence Ahago Aluru who was DW2 adopted the contents of his signed witness statement and stated that he is a priest in the ACK Maseno Diocese.
25. On cross-examination, the witness stated that he was a representative of John Mark Godia, but he has no idea how many votes each candidate received. John Godia presided over the elections, and he is



- unable to determine how many votes each contender received. that the results of the voting exercise were disclosed, and that the chairman of the electoral board maintained the results on file.
26. On cross-examination by Miss Cherotich, the witness stated that he played more than one role in the electoral process and that by signing the observers' form it was a sign of acceptance of the election.
 27. On re-examination by Mr.Osiemo the witness stated that he has not been told how he overstepped his mandate and that the Chairman announced the results in the presence of the candidates as well as the bishops.
 28. Nelson Opiyo Waringa who was DW3 adopted the contents of his signed witness statement and stated that he is a priest in the Diocese of Maseno West and that he was serving in Ndere Parish as a vicar.
 29. On cross-examination by Miss Jerotich, the witness stated that he did not participate in the elections and that he reported the forgeries to the church chancellor supervisors but did not report to the police.
 30. On re-examination by Mr. Osiemo, the witness stated that he was not an elector or in the search committee. That he further stated that he mentioned the names of the deceased but he could not be able to produce the death certificates and that it was common knowledge that the people are deceased.
 31. Upon close of the trial, directions were given that this suit be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and was able to identify that there is only one issue falling for determination which is whether the election was conducted properly and in accordance with the Kenyan Anglican Church, and if so, whether the plaintiff met the burden of proof required to call for the orders he seeks.
 32. The plaintiff submitted that the electoral process lacked integrity and infringed upon the rules of natural justice by failing to ensure that the same was conducted with objectivity in line with procedural fairness .The plaintiff relied on the case of *Republic v National Land Commission & 2 Others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kabawa West)*(2018) eKLR stating as follows:

“ A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.”
 33. It is the plaintiff's submissions that the parties nominated for the elections were not given a fair opportunity to contest for the seat of Bishop, it is their argument that blurring lines of the electoral offices distinct functions and responsibilities ,the defendants interfered with said principle by having persons perform more than one role in the election .
 34. The plaintiff further submitted that one Lawrence Ahago Aluru, the Clerical Secretary was involved in the verification of nominations, voting and observing ,campaigning for one of the candidates, organizing the elections by procuring ballot papers and communicating to the candidates on critical issues concerning the elections.



35. It is the plaintiff's contention that the dangers of the aforesaid plurality lies in possible monopolization of powers that function against the interests of justice and this serves as one of the underpinning reasons upon which the law recognizes the principles of separation of powers and that the same was acknowledged in the case of *Kimaru & 17 Others v Attorney General & another, Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020 (2022) KEHC 114 (KLR) (Constitutional and Human Rights)(1 February 2022) (Judgment)as follows:-

“The spirit and vision behind separation of powers was that there be checks and balances, and that no single person or institution should have a monopoly of all powers.”

36. It is the plaintiff's submissions that by allowing the retiring Bishop's family and associates to campaign for the 5th defendant, interfered with the independence of the election process by personally interacting with the members of the Electoral College pending the performance of the election proceedings.

37. The plaintiff contends that the failure to ensure the 5th defendant proceeded on his leave from his official duty being a four month study leave instead they allowed the 5th defendant to remain in office where he could easily manipulate the election process.

38. The plaintiff pointed out that the defendants did not provide legitimate results in the subject election as they noted that the observer forms provided by the defendants speaks only to the number of ballot papers ,the number of votes cast, the number of spoilt votes and the number of unused votes.

39. The plaintiff noted that at no point had the defendants indicated a breakdown of the votes in a manner that suggests the individual votes garnered by each candidate and that the aforesaid forms cannot legitimately be the basis upon which the 5th defendant was declared winner of the said lection being that they do not definitively indicate the breakdown of the votes casted.

40. In response, the defendants submitted that the plaintiff has not discharged his legal burden of proof and therefore is not deserving of the orders sought in this Court.

41. The defendants cited Section 107 an 108 of the *Evidence Act* provides as follows:

(1) “Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts”

(2) When a person is bound to prove the existence of any it is said that the burden of proof lies on that person.

“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”

42. The defendant further relied on the case of *Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua* (2015) eKLR

“.....As I have already stated, in law, the burden of proving the claim was the Appellant's including the allegation that the Respondent did not pay the sum claimed as agreed; i.e. into the account provided..... The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant..... The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstance of this case, the Respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen



had the trial magistrate held that the Respondent bore burden to prove that he deposited the sum of Kshs. 98,200- the debt being claimed herein.”

43. It is clear that the 1st defendant stated that elections were conducted in strict compliance with *the Constitution* of the Anglican Church and confirmed the agents observed and verified the voting exercise and that it is only the plaintiff who is alleging that the same was not done and never called a corroborate his allegations.
44. Contrary to the claims that the Diocesan Standing Committee was never consulted, the 1st defendant claimed that on March 1, 2019, the Diocesan Standing Committee met and discussed the names of the search committee members. Twelve names were ultimately agreed upon and forwarded to the Archbishop for appointment.
45. In response to the claim that the Vice Chairman of the Synod was ineligible to vote since he served on both the Search Committee and the Electoral College, he affirmed that the Vice Chairman of the Synod was qualified to vote under Article XI 12(b) of the Anglican Church Constitution.
46. It is evident from the pleadings and testimony of the witnesses consulted in support of the plaintiff case that no convincing evidence was presented to demonstrate how and how the alleged irregularities and illegalities affected the conduct of the election.
47. It is also clear that the summoned witnesses were unable to demonstrate to the court how the alleged irregularities and illegalities complained of had an impact on the electoral process.
48. In the case of *Geoffrey Muthinja & 4 Others v Samuel Muguna Henry & 2 Others* (2018) eKLR the applicants made allegations on the manner the election was conducted .However they did not back up their allegations with evidence .Courts of law have stated in cases without number that orders will not be issued on the basis of mere allegations or allegations of high level generalization. The applicants failed to specifically state the specific violations that occurred during the elections or the particular contravention of the law, Constitution and Rules of the church. There are only bare statement in the supporting affidavit .
49. I concur with the defendants that there isn't any evidence that has been shown to the court that would allow it to rule that the elections were rigged and should be thrown out.
50. The rule of evidence is clear that “He who alleges must prove” The maxim has been grounded in law under Section 107 of the Law of Evidence. The same was enunciated by Justice Majanja in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015]eKLR when he said that: “...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

“ 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”
51. No documentary evidence was produced to show that the 5th defendant did not win the elections so as to nullify the said elections.



52. Reference is made to Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

53. In the end I find that the plaintiff failed to prove his case on a balance of probabilities. The suit is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant

.....for the 4th Defendant

.....for the 5th Defendant

