



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL DIVISION
CONSTITUTION PETITION NO. 3 “A” OF 2017
CHARLES NECHIO LUTAHPETITIONER
VERSUS
THE ANGLICAN CHURCH OF KENYARESPONDENT
R U L I N G

Introduction

1. The petitioner moved this court on the 24.03.2017 by way of a notice of motion which was certified urgent and the court ordered that the same be served upon the parties for interparties hearing on 10.4.2017. On 10.4.2017 conservatory orders were granted by consent restraining the Respondents and/or the interested parties from conducting, and/or going on or getting involved in the process of the election of the 3rd Bishop of the Anglican church of Kenya Mumias Diocese which process was stopped. The petitioner has now filed an amended Notice of Motion dated 7.04.2017 brought pursuant to Various Articles of the Constitution of Kenya. He seeks leave to file an amended petition and also prays that the annexed amended petition be deemed duly filed and a grant of conservatory orders prohibiting interested parties and any other party from carrying on and/or otherwise conducting election process of the 3rd Bishop of the Anglican Church Mumias Diocese pending the hearing of the petition.
2. The application is premised on the grounds on the face of the application and supported by the affidavit of Charles N. Lutah
3. Of importance from the petitioner’s affidavit is that he is an Anglican faithful of Imanga Parish within the Anglican Diocese of Mumias attending St. Annes Emukokho Church. See a copy of his title envelope. He depones in his affidavit that since the seat of the Anglican Church Bishop of Mumias Diocese fell vacant following the resignation of the 2nd Bishop Most Rev. Beneah Salala, he together with other Anglican faithful’s expect the process of electing the 3rd Bishop to be fair.
4. He narrates the ongoing process of finding a new bishop which he claims to have been flawed since the laid down procedure as contained in the Provincial Anglican Church Constitution as well as the Diocesan Constitution and the Constitution of Kenya were not followed.
5. According to the petitioner the vacancy attracted seven (7) nominees, two (2) of whom were dropped leaving five (5) to undergo the search process.
6. He depones further that of the five (5) two (2) names were dropped at the approval stage without any

valid reasons and no communication was made to the faithful's concerning the decision to drop the two names.

7. He adds that the search committee was incorrectly constituted and makes mention of Article XI Rule 8 of the Provincial Anglican Church of Kenya Constitution which mandates the Archbishop to appoint members of the search committee. He claims that although a search committee was appointed the same was reconstituted by Diocesan Administrative secretary and the archbishop commissar 48 hours to the search process/or election. He blames this change of the search committee on Rev. Joshua Okwisia the current Vicar General. He adds that there were no consultations between the Bishop/Arch Bishop and the standing committee of the Synod as required by Article XI Rule 8 of the Anglican Church of Kenya Constitution.

8. Among other allegations raised by the petitioner are that one of the three(3) approved candidates has pending disciplinary issues and that during the approval stage, one of the members was drunk.

Response.

9. The application is opposed. There are three replying affidavits on record one by Reverend Dr. Jackson Nasoore Ole Sapit Archbishop of the Anglican Church of Kenya the 5th Respondent is dated 18th April, 2017.

10. The second affidavit is by Rev. Joshua Okwisia Kalerwa also dated 18th April, 2017 and the third affidavit by Rev. Dismas Sifuna dated 20th April, 2017.

11. Briefly, the Most Reverend Dr. Jackson Nasoore Ole Sapit maintains that in conducting the elections of a new Bishop to replace the retired Bishop of the Diocese of Mumias, the provisions of the provincial constitution of the Anglican Church of Kenya were strictly adhered to. He explains that the said constitution which came into force on the 16th March, 2002 sets out all steps necessary to conduct an episcopal election and also provides for ways in which disputes that may arise would be resolved. See Article XII and Canon V of the said Conditions.

12. He explains in his affidavit that following the Bishops notification of his intention to proceed for early retirement he started the process for electing the Bishops successor. He appointed a search committee after due consultation to interview candidates. He depones further that the search committee recommends up to a maximum of three candidates for election.

13. He claims that he never received a complaint from the candidates who appeared before the search committee. He adds that as the Archbishop of Kenya he has a constitutional mandate to make changes of the composition of a search committee, if there is a need to change the same which he did in this particular case. He points out that the correct procedure for appointing the search committee is found in Article XI (8) of the constitution. He makes some clarifications regarding the role of Rev. Joshua Okwisia as the Archbishops commissary and quickly adds that Rev. Okwisia is not a member of the search committee. He depones further that three names were forwarded to him as required under article XI (9) of the constitution. He has emphasized that under the constitution of the Anglican Church there are mechanisms or processes of dealing with grievances relating to the conduct of elections which procedure the petitioner has not followed.

14. Ven. Joshua Okwisia in his affidavit denies having manipulated the results of the search committee. He states that the membership of the search committee is decided by his Grace the Archbishop and he is only informed of who has been appointed to sit in the committee.

15. He reaffirms what the Most Reverend Dr. Jackson Nasoore Ole Sapit stated in his affidavit on the replacement of some members of the search committee. In his affidavit Rev. Dismas Sifuna the Vicar in charge of St. Stephens Inganga Parish of Mumias Diocese where the petitioner claims to be a member has distanced himself from the said claims.

16. He states that the tithe card that the petitioner has annexed as the basis of his membership is not in the name of the petitioner. He maintains that the petitioner is not a communicant member of the said church although he attends service from time to time but does not partake of Holy Communion which is a significant and necessary rite for one to be considered a member.

17. The petitioner has filed a further affidavit dated 4.05.2017 where he maintains that pertinent provisions of the provincial constitution of the Anglican church of Kenya were indeed violated and the Archbishop is aware of this. He states therein that the ecclesiastical nature of the petition and the constitution of the Anglican Church of Kenya cannot oust the unlimited jurisdiction of the High Court including that of determining the allegation of infringement of fundamental individual rights.

18. He maintains that he is a member of the Anglican Church as the tithe card bears his surname and the reverend's signature. The application herein was canvassed orally by counsel of the rival parties.

Determination

19. This court is of the view that the petitioner is a member of the Anglican Church as proved by the copy of the tithe booklet annexed to his affidavit which indicates his surname on the top. He therefore has a locus standi to bring the application and the petition in his own behalf as a member of the said church. He claims that he is also bringing the petition and/or the application on behalf of other faithful's but there is no evidence by any other faithful by way of affidavit and/or signature giving the petitioner authority to file the petition on their behalf. The Petitioner has therefore come to this court as an individual and not on behalf of other faithfuls.

20. The issue of amendment of the petition is a fundamental right and this court allows the same. That settles prayers 2 and 3 of the notice of motion as the respondent have also not raised issue and/or objected to the amendments sought. The annexed amended petition is deemed as duly filed.

21. This court has been taken through the constitution of the Anglican Church particularly on the procedures to be followed when electing a Bishop which the petitioner applicant believes the same to have been flawed.

22. This court's attention has also been drawn to the provisions/mechanisms of resolving internal disputes that are contained in the said constitution and which are said not to have not been followed by the respondent/interested parties. On his part the petitioner who subscribes to the provisions of the said constitution of the Anglican Church claims that the ecclesiastical nature of the elections and the constitution of the Anglican Church of Kenya cannot oust the unlimited jurisdiction of the High Court in determining the allegations of infringement of his fundamental rights.

23. As held in the case of **Hinga and another – vs – PCEA through Rev. Dr. Njoya & Another H.C Civil case No.2098 of 1985 Aluoch J** as she then was persuasively held that a court of law should be slow in interfering with church matters unless the rules of natural justice were being violated. She also held that as the procedure laid down in the churches' constitution was not exhausted, the case had come to the court prematurely.

24. I also find that the instant application and petition by the petitioner has been brought to this court prematurely. The petitioner has failed and/or ignored the laid down procedure as contained in the Anglican Constitution to resolve the issues that he is now complaining about to this court. Though he wants this court to find that the procedure of electing the 3rd Bishop have been flouted he himself does not want to follow the proper channels of resolving the same dispute internally as provided by the same Anglican Church constitution.

25. It would be in the interest of justice that the petitioner follows the laid down church procedure so that order is maintained. In any event he has shown in his further affidavit that he has witnesses who can back up his allegations at the church level. Without belabouring the point I find the application of 10.4.2017 specifically the orders seeking conservatory orders to stop election of a new Bishop to have no merit.

Prayers (d) and (e) are therefore denied but prayers (b) and (c) allowed. Parties will share the costs of this application being members of the same church.

Orders accordingly

Ruling delivered, signed and dated in open court at Kakamega this 14th day of June 2017

RUTH N. SITATI

JUDGE

In the presence of:

Mr. Namatsi.....for Petitioner

Mr. Limo.....for respondent

Polycap.....court Assistant