

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 2560 OF 2002

**BETWEEN:**

**REV. FR KASALIKA NGULUBE.....1st PLAINTIFF**

**ACKIM M. MUKOLONGO.....2nd PLAINTIFF**

**MATTHEWS N. CHILAMBO.....3rd PLAINTIFF**

- and -

**THE UPPER SHIRE DIOCESE OF THE ANGLICAN  
CHURCH.....DEFENDANT**

**CORAM: CHIMASULA PHIRI J.**

J. Dzonzi of Counsel for the Plaintiffs

**M. Mulele of Counsel for the Defendant**

**M. H. Fatch – Court Clerk**

**ORDER**

This is the plaintiff's application for an order that an injunction be granted restraining the defendant by itself, its officers, servants or agents from enthroning Bishop-Elect, Dr Bernard Malango as Bishop of the Upper Shire Diocese of the Church of Anglican in Malawi. There is an affidavit sworn by the three plaintiffs in support of the application.

The defendant opposes the application for an injunction. There is an affidavit to that effect sworn by the Vicar General of the Diocese of Upper Shire, Venerable Patrick Mapundula.

The facts which appear not to be in dispute are that on a certain date known to the defendant, the Southern Malawi Diocese of the Anglican Church was split into two namely Southern Diocese of Malawi and Upper Shire Diocese of Malawi. Following this split and the creation of the Upper Shire Diocese, there arose a vacancy in the office of the Bishop. In accordance with the Canons and Constitution of the Anglican Church of the Province of Central Africa, the Vicar General invited applications from the laity to submit names of candidates of their choice for this office. According to the plaintiffs' affidavit, it has been stated that the name of Dr Bernard Malango was submitted as one of the possible contestants for the post on top of two other names. Of course no details of those other two have been given by the plaintiffs. On a date or dates known to the defendant an Elective Assembly was convened where the names of the three candidates were deliberated and voted upon. Dr Bernard Malango was declared the winner. So far this is where the smooth sailing ends. In the rough tide the plaintiffs have attacked the Elective Assembly that contrary to the provisions of Canon 6 (10), the Elective Assembly did not declare the names of the runner-up candidates as the alternates of the Bishop in case of refusal by the Bishop-Elect or non-confirmation of the same. The defendant's response has been that the Elective Assembly has no duty to disclose names of alternative candidates under Canon 6 (10) particularly so where the election had been conducted in accordance with Canon 6 (10)(a). Further, the defendant has contended that even if the Elective Assembly had a duty to disclose, the same was subject to the laws of secrecy as enshrined in Canon 6(10)(A). For ease of reference I quote both provisions in full.

10. The Elective Assembly may either (a) Method of Election:

elect by a two-thirds majority in a secret ballot a Bishop from among those nominated in accordance with the Rules. It may also at the same time nominate by fresh election, or by successively fresh elections, one or more persons, in order that if the person first elected shall refuse to accept the office, or his election be not confirmed, the first on the alternative list shall then be regarded as the elected person; and if he also refuse, or his election be not confirmed, the next on the list shall be substituted, until the election of one is confirmed, or the list is exhausted; or (b) Delegation: it may also delegate the appointment to the Episcopal Synod or to the Archbishop of Canterbury acting together with the Archbishop of Central Africa (or the Dean of the Province) and not more than two clergy nominated by the Elective Assembly.

If an election is made as provided in

(a) above, the President of the Assembly will notify the person elected and on receiving his acceptance, he will inform the Vicar General of the Diocese concerned. If the person elected as first choice does not accept, the President will proceed to notify others alternatively elected in order of choice.

10A The Elective Assembly shall sit with closed doors, and its members are under a solemn obligation not to divulge any of its proceedings or any information concerning a postal ballot, or concerning any discussions there may have been among members preliminary to the holding of a Elective Assembly; and in particular not to divulge the identity of any unsuccessful candidates.

From these two provisions I find it extremely difficult to accept the plaintiffs contention that the Elective Assembly should have declared the names of the runner-up candidates as the alternatives of the Bishop in the case of refusal by the Bishop-Elect or non-confirmation of the same. I will tow the line of the defendant that under Canon 6 (10) which is being relied upon by the plaintiff no such duty or obligation exists. If anything, it is the contrary view which is advocated so that the unsuccessful candidates are not identifiable.

The next sea-port on this rough tide is the allegation made by the plaintiffs that owing to the fact that Dr Bernard Malango was at the material time the Archbishop of Central Africa, the election was fraught with gross irregularities and suppression of facts relating to the true character of the incumbent by virtue of his powers conferred on him under Canon 6. The plaintiffs have listed down the particulars of the alleged irregularities as follows:-

"The Chairman of the Elective Assembly neglected, ignored or failed to inform the Elective Assembly of the following facts:-

(a) Dr Bernard Malango was convicted of embezzlement of Church funds in the Diocese of Northern Zambia. The document relied upon by the plaintiffs is a letter dated 11th September 2001 from Diocese of Northern Zambia written to the Rt. Rev. Bishop S. Bakave – Dean of the Province of Central Africa.

(b) That according to Canon 6(1) Dr Bernard Malango was disqualified from running for this office by reason that he was already a Bishop of the Diocese of Northern Zambia and the Archbishop of Central Africa. Canon 6(1) reads as follows:

"The Bishop of any Diocese in this Province may be elected or chosen from among the male communicants of any Diocese in the Province or of any other Diocese in communion with this Province."

"Does a person cease to be a communicant upon assuming the office of a Bishop? It would be an awkward situation if the answer were 'Yes'.

(c) That Dr Bernard Malango was further disqualified under Canon 7(4) by reason that his weakness for embezzlement and misappropriation of Church funds rendered him a person of unsound faith, morals and a person who was under such liabilities or contracts as not to be a Free Agent and therefore canonically disqualified from the post. Canon 7(4) reads as follows:-

#### 4. Grounds of Objection

Valid objection may be made  
on the ground either that the  
See is not canonically vacant  
age, or that the election was  
informal, or that the person  
elected is not of canonical age  
or of competent learning, or  
of sound faith, or of good  
morals, or is otherwise  
canonically disqualified or  
that he is under such  
liabilities or contracts as not  
to be a free agent; provided  
always that no objection to  
the validity of the election on  
the grounds of informality can  
be entertained unless notice  
of such objection shall have  
been lodged with the Registrar  
of the Province within twenty-  
one days after the dissolution

of the Elective Assembly.

(d) That Dr Bernard Malango was involved in cases of financial scandals when he was serving at St Georges Cathedral in Zomba, Chilema Ecumenical Lay Training Centre and Holy Innocent Anglican Church in Limbe.

(e) That Dr Bernard Malango was and still is to the knowledge of all Provincial Bishops present and voting in the Elective Assembly a habitual drunkard.

The defendant's response to these allegations is contained in paragraph 8 of the Affidavit of Venerable Patrick Mapundula which states that the Bishop-Elect was never convicted of embezzlement in Zambia and there is no conviction order by any Ecclesiastical Court. Neither the plaintiffs nor their representatives produced evidence of financial scandals allegedly committed by the Bishop-Elect and when the same took place. Further, there is no evidence before this Court that the Bishop-Elect is a drunkard and even the letter of 11th September 2001 above-mentioned does not state so.

The cardinal point of law is that a person who makes an allegation must prove his/her allegation. It is not sufficient for any plaintiff just to make allegations and expect that the evidence to rebut those allegations should come from the defendant. The plaintiff must first lay down his/her evidence in support of the allegations against the defendant. Suspicion or speculation or prejudice is no evidence no matter how strong it may be.

The next port of call on this rough tide and ride is the plaintiffs evidence that members of St Georges Cathedral of Zomba led by the plaintiffs lodged an objection to the confirmation of Dr Bernard Malango's election. Following this objection a Court of Confirmation was convened. It is alleged by the plaintiffs that contrary to the rules of natural justice, the same persons who sat in the Elective Assembly also sat in the Confirmation Court including the Chairperson, Bishop Peter Nyanja of the Diocese of Lake Malawi. Again, it is stated that the Chancellor of the Diocese of Upper Shire was not allowed to be part of the Confirmation Court. In response to this, the defendant has argued in the affidavit evidence that the Letter of Objection does not contain signatures or names of those Christians for the Court to appreciate whether the decision was indeed taken after consultations between the Christians of St Georges Cathedral and their elective representatives. The simple argument of the defendant is that the plaintiffs have not shown that they had mandate of their church members to lodge the Letter of Objection. I have carefully scrutinized the Letter of Objection and my impression is that the same was written on behalf of the Christians of St Georges Cathedral. It expressly states so in the first paragraph. However, technically the Letter of Objection does not state or show that the same was written on instructions or with mandate of the Christians of St Georges Cathedral. If the same were done on instructions from the Christians it should have been explicit in the letter i.e. by showing names/signatures of those

Christians or minutes of meeting/meetings of the Christians instructing the plaintiffs to lodge Letter of Objection. Nonetheless, I will consider in this ruling the rights of the plaintiffs per se i.e. whether or not the plaintiffs would have a right to lodge a Letter of Objection.

On the allegation that the Court of Confirmation was improperly constituted, the defendant has dismissed that allegation by contending that in accordance with Canons and Constitution of the Church of the Province of Central Africa, the Court of Confirmation was properly constituted. The argument of the plaintiffs is that there were 22 members of Elective Assembly and 3 out of these also sat in the 15 member Court of Confirmation. The plaintiffs are saying that these 3 members exerted undue influence over the other members of the Court of Confirmation. The plaintiffs contend that these 3 members were sitting as judges in their own cause and therefore the decision to confirm the election of Dr Bernard Malango was improperly made. On the face of it there was breach of principles of natural justice. Principles of natural justice demand that not only should justice be done but it must manifestly be seen to have been done. It may be established through evidence that the 3 members of the Confirmation Court never acted in any prejudicial manner but the mere fact that they were part of the Court raises legal concern.

Before getting to the final destination on this tough and rough journey there are very serious points which arose from the affidavits and the submissions. Firstly, the plaintiffs wish the interim injunction to be continued while the defendant says it should be discharged or dissolved. My finding is that there is no injunction in existence. The one that was obtained ex-parte on 7th August, 2002 was granted for ten days only. After that period it was self-dissolved by efflux of time. The plaintiffs Counsel submitted that he could not fulfil the conditions stipulated in the Order for Injunction because there was strike by Courts support staff. No evidence was exhibited from the Registrar of the Courts. This is not a matter of judicial notice. The plaintiffs should have proved that the alleged strike was within the period of 7th and 17th August, 2002. Even if that be proved it must be shown that no motion/chamber judge was available to hear such urgent applications as the one at hand. Again it must be observed that at the time of hearing this application on 17th December, 2002 the plaintiffs had not commenced appropriate legal proceedings as ordered in the interim injunction i.e. 4 months down the line. Furthermore, the plaintiffs admitted that they have appealed to the Archbishop of Canterbury on the matter i.e. they are pursuing the matter both in the judicial courts as well as the ecclesiastical courts. I wish to believe that this is an abuse of process. Moreover, the defendant argues that the plaintiffs should have appealed to the Provincial authorities and not to the Archbishop of Canterbury. If this is correct, it means the appeal will be sent back and it may not be known when the ecclesiastical forum will determine the matter. Equally, with 4 months delay in instituting legal proceedings in the judicial courts, I form the opinion that the plaintiffs are deliberately trying to frustrate the operations of the Diocese. One has got to imagine the leadership vacuum arising from the interlocutory injunction order. It is clear in my mind that once the Bishop-Elect is enthroned he can be dethroned if there are good reasons for doing so. There is no similar

effect created by the injunction order. The Upper Shire Diocese of the Anglican Church needs a leader. There should not be any pretence that all is well in the absence of the Bishop-Elect.

The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. In **Mobil Oil (Malawi) Limited v Leonard Mutsinze** – Civil Cause No. 1510 of 1992, Chatsika J. stated that:

"the principles upon which an application for an injunction will be considered are set out in Order 29/1/2 and 29/1/3 of the Rules of the Supreme Court and were succinctly elucidated in the case of **American Cynamid Company v Ethicon Limited (1975) AC 396**. Before an injunction can be granted, it must be established that the applicant has a good claim to the right he seeks to protect. The court does not decide the claim on the evidence contained in the affidavits. A good claim is said to have been established if the applicant shows that there is a serious point to be decided. When these principles have been established, the Court exercises its discretion on the balance of convenience. In deciding the question of the balance of convenience the Court will consider whether damages will be a sufficient remedy for the mischief which is complained of and even if it considers that damages will be a sufficient remedy, it must further consider and decide whether the defendant or wrong doer shall be able to pay such damages."

In the present case, I could be wrong, but I still hold my view that the 3 plaintiffs have a right to bring these proceedings in their own right. They have indicated in their affidavit that they are all communicants and ordained priest and members of the Anglican Church based at St Georges Anglican Cathedral in Zomba. This makes them comply with Canon 7(5) in terms of qualifications of objector. This has been exhibited as PM3/NMC 4.

Secondly, the serious issue which the plaintiffs are intending to seek the determination of the court is whether or not the Bishop-Elect was properly elected and confirmed. This cannot be properly decided on the affidavits. It requires a trial. However, up to the time of the hearing of this application, the plaintiffs had not commenced such proceedings. This was even contrary to the interlocutory injunction order of 7th August 2002. One cannot blow hot and cold at the same time. The plaintiffs are guilty of inordinate and inexcusable delay in commencing their intended proceedings. A person who seeks the aid of equity must do so with reasonable despatch.

Thirdly, the plaintiffs have not shown that damages would not be an adequate remedy or difficult to assess. In fact in their affidavit as well as submissions, the plaintiffs are not explicit as to the nature of their loss or anticipated damage.

The balance of convenience favours that I should exercise my discretion in favour of

refusal for an injunction order which the plaintiffs are seeking. The application is dismissed with costs.

**MADE IN CHAMBERS** this 10th day of January 2003 at Blantyre.

G. M. Chimasula Phiri

**JUDGE**