



IN THE HIGH COURT AT HOMA BAY

CIVIL SUIT NO. 1 OF 2012

BETWEEN

GEOFFREY OTIENO OGOLA PLAINTIFF

AND

HOMA BAY BOYS' HIGH SCHOOL 1ST DEFENDANT

MINISTRY OF EDUCATION..... 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by a plaint dated 4th December 2012 in which he sought the following reliefs against the defendants;
 - a. *A declaration of invalidity of any law or policy that denies both boys and girls equal access to state sponsored secondary schools/and or any state sponsored facilities or academic empowerment.*
 - b. *An order to compel the Ministry of Education/and or any state sponsored learning institution to put into practice enrolment programs that have equal bias on gender.*
 - c. *An order to compel all state sponsored learning institutions to change their emblem, banner, logos, advertisement, and all signs to comply with Article 27 of the Constitution.*
 - d. *Costs of the suit.*
 - e. *Any other relief that this Honourable Court may deem fit and expedient to grant.*
2. The gravamen of the plaintiff's complaint is contained in paragraphs 8, 9, 10, 11 and 12 of the plaint which states as follows:-
 8. *That Homa Bay Boys' High School which is registered as a "boys' only" institution and enrolls students primarily on the basis of gender has violated the Constitution of Kenya.*
 9. *That by making sex as a primary prerequisite for enrolment of students, Homa Bay Boys' High School, being a state funded institution, has violated Article 27 Clause 4 of the Constitution of Kenya.*
 10. *That Homa Bay Boys' School is the best state equipped secondary school in Homa Bay County, however and unfortunately, it benefits the boy child only.*
 11. *That, boys' high schools throughout Homa Bay County are more in number and better equipped than girls' high school.*
 12. *That if this blatant violation of the Constitution in favour of the boy child is left unchecked then the girl child shall continue to be socially, economically politically disadvantaged.*
3. The defendants, represented by the Office of the Attorney General, filed a statement of defence

dated 24th January 2013. The substance of the defence is a denial of the allegations pleaded. In addition they stated that the suit does not lie against the government by virtue of **section 13A** of the **Government Proceedings Act (Chapter 40 of the Laws of Kenya)**.

4. At the hearing of the matter, the Office of the Attorney General was not represented although service of process had been effected. The matter therefore proceeded *ex-parte*.
5. The plaintiff, who was acting in person, submitted simply that having Homa Bay High School as a single sex institution is discriminatory and violates **Article 27** of the Constitution, hence the court should grant relief set out in the plaint.
6. I have considered the pleadings and submissions and I think 3 issues fall for consideration as follows:-
 - a. Whether this case is competent having been instituted by way of a plaint.
 - b. Whether the suit is incompetent by reason of failure to comply with **section 13A** of the **Government Proceedings Act**.
 - c. Whether single sex schools, such as Homa Bay Boys High School, violate the provisions of **Article 27** of the Constitution.

Whether the suit is competent

7. The plaintiff instituted the suit to enforce fundamental rights and freedoms by way of plaint. Under **Article 22(3)**, the Chief Justice is empowered to make rules to enforce fundamental rights and freedoms. In 2012, the Chief Justice promulgated the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (“the **Rules**”) to govern the procedure for enforcement of fundamental rights and freedoms under the Bill of Rights.
8. Although the **Rules** require that the proceedings for enforcement of fundamental rights and freedoms be commenced by way of petition, there is provision for the proceedings to be commenced by informal documentation. I decline to strike out the plaint on the basis that it violates the **Rules** which had not been enacted by the time the plaint was filed. I am satisfied that the plaintiff has set out the claim with sufficient clarity enabling the defendant to respond to it without any objection. Moreover, no prejudice has been occasioned to the defendant. This approach accords with **Article 159(2)(d)** which enjoins the court to administer justice without undue regard to procedural technicalities.

Whether suit violates section 13A of the Government proceedings Act.

9. The defendants contends that the suit is defective on the basis of **section 13A(1)** of the **Government Proceedings Act** to oppose the suit. It provides as follows:

13A(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to these proceedings.

10. The plaintiff referred the court to the case of **Kenya Bus Service Ltd & Another v Minister for Transport & Others** NBI HCCC No. 504 of 2008 [2012]eKLR where the court held that **section 13A** of the **Government Proceedings Act** was unconstitutional as it violated **Article 48** of the Constitution as it violated the right of access to justice. Following that decision, I find the defendants’ objection without merit. Further, such a provision cannot limit or diminish the right of access to the court for enforcement of fundamental rights and freedoms guaranteed under **Article 22** of the Constitution.

Whether Article 27 of Constitution violated by Single Sex schools

11. The plaintiff, in his supporting affidavit, marshalled evidence which he contended showed that single sex schools are a violation of the Constitution. He stated that the girl child is disadvantaged as a result of the State favouring boys' schools through providing more resources and facilities. He argued that gender based exclusion in learning institutions is a form of social segregation which is no different from racial segregation. He further argued that this produces negative effects within society like racism and apartheid. The plaintiff cited the famous case of ***Brown v The Board of Education* 347 US 483 (1954)** where the United States Supreme Court outlawed laws establishing separate public schools for black and white students. He also relied on the case of ***United States v Virginia* 518 US 515 (1996)** where the United States Supreme Court declared the Virginia Military Institute, an exclusively male public undergraduate higher learning institution, unconstitutional as it violated the equal protection clause of the US Constitution.

12. In order to prove his case, the plaintiff relied on Kenya Certificate of Secondary Education (KCSE) and Kenya Certificate of Primary Education (KCPE) examination results as follows;

- a. In 2013 the top 100 KCSE candidates nationally comprised 84 male and 17 female students.
- b. In 2013 the top 100 KCPE candidates nationally comprised 68 male and 47 female students.
- c. In 2012 the top 100 KCSE candidates nationally comprised 62 male and 38 female students.
- d. In 2012 the top 100 KCPE candidates nationally comprised 69 male and 31 female students.

13. The plaintiff also produced evidence to show that of top 100 schools in KCSE in the year 2013, only 10 were from Homa Bay, Migori, Siaya and Kisumu Counties and only 4 of them were female only schools. In the year 2012, there were only 8 schools from the aforementioned counties and only 2 of them were female only schools.

14. **Article 27** of the **Constitution** which deals with equality and freedom from discrimination provides as follows;

(1) Every person is equal before the Law and has the right to equal protection and equal benefit of the Law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under Clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in Clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

15. **Article 27** of the Constitution guarantees equality for all persons and prohibits discrimination. The term "*discrimination*" implies any distinction, exclusion, restriction or preference which is based

on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In the context of education, it refers to any distinction, exclusion, limitation or preference based on the enumerated grounds which has the purpose of nullifying or impairing equality of treatment in education. According to **Article 1** of the **1960 UNESCO Convention against Discrimination in Education** such distinction, exclusion, limitation or preference may be manifested in depriving any person or group of persons of access to education of any type or at any level; of limiting any person or group of persons to education of inferior standard; or of establishing or maintaining separate education systems or institutions for persons or groups of persons.

16. While **Article 1** prohibits discrimination on the basis of sex, **Article 2(a)** of the **1960 UNESCO Convention** permits establishment of single sex education institutions as long as they meet equality standards in providing education. It states as follows;

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

17. Single sex schools are as old as the formal education system in Kenya. They have social, religious and cultural foundations. Arguments may be made in support of or in opposition to single sex schools (see generally **Rosemary Solomone, Rights and Wrongs in the Debate over Single-Sex Schooling, 93 Boston University Law Review, 271 (2013)**). On the negative side, it has been argued that single sex schools perpetuate patriarchy and other retrogressive religious and cultural practices which may lead to a violation of fundamental human rights. Those who support single sex schools argue that they offer girls a setting which fosters greater educational achievement by removing them from an environment of negative influences and placing them where they are able to flourish.

18. It is well established that the Constitution itself permits unequal treatment (see **Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another, NRB Petition No. 102 of 2011 [2011]eKLR** and **Community Advocacy and Awareness Trust & 8 Others v Attorney General, NRB Petition 243 of 2011 [2012]eKLR**). In **RM v Attorney General [2008] 1 KLR (G & F) 574**, the Court appreciated this principle as follows;

The equal provisions do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different. The law does all that is needed when it does all it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as first as its means allow. We further hold that the principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful if they satisfy the following:- (1) Pursue a legitimate aim such affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.

19. The fact that single-sex schools are deep rooted within our education system means that the court has to scrutinize the evidence presented to see whether maintaining these schools meets a legitimate government purpose. In **John Kabui Mwai and 3 Others v Kenya National Examination Council Nairobi Petition No. 15 of 2011 [2011]eKLR** the court upheld the classification of private and public schools for purposes of selecting students to join national public schools. In doing so the court observed that;

We need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component ... In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context ... It is only by examining the larger context that a court can determine whether differential treatment results in equality. [Emphasis mine]

20. Even if the Court were to hold that there is discriminatory treatment between boys and girls by reason of establishment of single sex schools, that alone would not necessarily amount to discrimination under the Constitution. The Court would have to look at the larger social, political and legal context since it is only by examining the larger context that a court can determine whether differential treatment results in inequality. The evidence that the petitioner had placed before the court shows that there are fewer girls' schools in the top performing schools and fewer girls among in the top performing candidates. This fact alone cannot lead the court to conclude that it is as a result of discrimination caused by separate boys and girls institutions. There may be other factors at play which had not been presented to the court and examined.

21. It must also be recalled that the theme of taking care of the vulnerable and marginalized is a central theme in our Constitution. Though speaking in a the context of political representation, the sentiments expressed by the Apex Court are no less applicable to the sphere of education of the girl child. ***In the matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion No. 2 of 2012 [2012]eKLR***, it observed as follows;

[47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as “the socialization of patriarchy”; and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance.

22. Thus single sex schools may be justified under the provisions of **Article 27(6)** of the Constitution which permits affirmative to redress any disadvantage suffered by individuals or groups as a result of past discrimination and **Article 43** of the **Constitution** which guarantees education as a social and economic right. These provisions, amongst others, which recognise the rights of minorities and the marginalized provide a window through which girl child education must be examined.

23. In this case though, I am unable to state on the basis of the evidence presented that the continued maintenance of the single sex schools is discriminatory and unconstitutional. I therefore decline to grant the orders set out in the plaint and I accordingly dismiss this suit.

24.I commend the plaintiff, who acted in person, for his efforts to articulate the vision of the Constitution. I therefore make no order as to costs.

DATED and DELIVERED at NAIROBI this 7th day of November 2014.

D.S. MAJANJA

JUDGE

Plaintiff in person.