

REPUBLIC OF KENYA
High Court at Nairobi (Nairobi Law Courts)
Petition 192 of 2013

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

AND

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE PS MINISTRY OF EDUCATION.....2ND RESPONDENT

PATRICK S. KHAEMBA.....3RD RESPONDENT

RULING

1. Okiya Omtatah Okoiti, a civic minded Kenyan, has moved the Court by a petition dated 11th April 2013. Accompanying the petition is a Notice of Motion dated 11th April 2013 in which he seeks the following orders;

- (1) *That the application be certified as urgent and heard ex parte and service thereof be dispensed with in the first instance.*
- (2) *That a mandatory order be issued to compel the respondents, to ensure that Butere Girls High School are allowed to stage their play **Shackles of Doom** in its original script, pending the hearing and determination of the application/petition herein interparties.*
- (3) *That in the alternative, an interim conservatory order be issued suspending the forthcoming Kenya Schools and Colleges Drama Festival until the petition herein is heard and determined interparties.*
- (4) *That a mandatory order be issued stopping the 2nd respondent through its relevant organs and 3rd respondent from gagging the freedom of expression and frustrating the artistic talents being nurtured by academic institutions.*
- (5) *That this Honourable Court be pleased to join other parties relevant to this petition as and when it deems fit.*
- (6) *That the Court do give any other or further orders that will favour the cause of justice.*

(7) *That costs be in the cause.*

2. The facts upon which the petition is based are set out in the accompanying deposition by the petitioner and it states that a play known as *Shackles of Doom* to be performed by Butere Girls High School at the 2013 National Drama Festival to be held in Mombasa from 16th to 24th April 2012 was banned. The decision contained in a letter dated 1st April 2013 addressed to the Principal of Butere Girls High School from Mr Khaemba, the Executive Secretary of the Kenya National Drama Festival states as follows;

Ref No, ME/QAS/L/1/II/VOL.XI/222 Date 1st April 2013

The Principal

Butere Girls' High School

P O Private Bag

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Thro'

The County Director of Education

KAKAMEGA COUNTY

DISQUALIFICATION FROM PARTICIPATING AT THE 2013 NATIONAL DRAMA FESTIVALS

It has come to our notice that the play, "*Shackles of Doom*", presented by your school during the on-going drama festivals does not conform to the laid down rules and regulations governing the Kenya Schools and Colleges Drama Festival (2013); Rule 12.3 (vii) "Hate statements targeting communities, personalities ... both on stage and in social media."

Consequently, you are disqualified from presenting the said play at the Kenya National Drama Festival to be held in Mombasa between 16th and 24th April 2013.

(signed)

Patrick S Khaemba, HSC

EXECUTIVE SECRETARY KNDF

3. It is clear therefore that the Butere Girls School was disqualified from presenting the play despite the fact that it had qualified for the National Festivals after having performed at the Zonal, District and Provincial levels. This disqualification in effect meant that the play was banned from being presented at the festival.

4. When the matter was brought under certificate of urgency, yesterday, 15th April 2013, I certified the matter as urgent and ordered that the pleadings be served on the respondents to enable them defend the mandatory orders sought in the application. I am now satisfied that

due service was effected on the office of the Attorney General and the Ministry of Education and by 3 pm today there was no representative in court from either office.

5. I heard learned counsel for the petitioner, Mr Nguring'a, in support of the application, he emphasised the fact that this case concerned the freedom of speech and expression protected under **Article 33** of the Constitution and the only remedy the court could issue to secure that right and freedom of expression for the public was to issue the mandatory injunctions prayed for in the motion. Counsel drew the court's attention to the fact that Kenyans fought hard for freedoms enshrined in the Constitution such a ban could not be permitted to stand as it undermined the freedoms protected in the Bill of Rights.

6. I have considered the facts set out in the petition and deposition. I am aware of the centrality of the rights and freedom of expression in a democratic state and the obligation of the court to give effect to the enjoyment of fundamental rights and freedoms to the fullest extent. I agree with the petitioner's advocates that such freedoms have been hard fought and this court will scrutinise carefully any action that will tend to undermine these freedoms. I am also aware that plays such as the one banned occur in a school setting with certain rules and standards but this of itself does not limit or diminish the rights of students to express themselves or exercise their creative freedom or that of the public to receive or impart information and ideas.

7. In this case and on a prima facie basis it is difficult to justify the disqualification as the play must have passed several stages of competition as evidenced by the fact that it qualified for the national competition. It was also watched by several audiences in the zone, district and province and was indeed scrutinised by the various expert adjudicators at all levels. It has now been disqualified on account of hate speech pursuant to some provision of the rules and regulations governing the Kenya Schools and Drama Festival. It is true that the protection afforded to freedom of expression in **Article 33** expressly excludes hate speech (see *Hon. Chirau Ali Mwakwere v Robert Mabera and Others, Nairobi Petition No. 6 of 2012 (Unreported)*) but reference to hate speech often stirs up emotional responses and may be used to limit what is otherwise legitimate expression of ideas which may result as a cover up to assail the freedom of expression protected under the Constitution.

8. Plays are a medium of expression of ideas which are sometimes subversive of accepted ideas. Plays may challenge long held beliefs and conventional wisdom. Artistic expression is not merely intended to gratify the soul. It also stirs our conscience so that we can reflect on the difficult questions of the day. The political and social history of our nation is replete with instances where plays were banned for being seditious or subversive. This is the country of Ngugi wa Thiong'o, Micere Mugo, Francis Imbuga, Okoth Obonyo and other great playwrights who through their writings contributed to the cause of freedom we now enjoy.

Some plays were banned because they went against the grain of the accepted political thinking. Kenya has moved on and a ban, such as the one imposed by the Kenya National Drama Festival must be justified as it constitutes a limitation of the freedom of expression. I am not convinced that Kenya is such a weak democracy whose foundation cannot withstand a play by high school students. I am also of the view that if our democracy is to flourish then it is students of today who must at an early age understand the meaning of freedom.

9. The 1st respondent was given an opportunity to justify its action but has not come to court to do so. In the circumstances, I find and hold that the disqualification of Butere Girls High School from presenting the play “*Shackles of Doom*” at the National Drama Festival constitutes a ban of the play and is therefore a violation of the freedom of expression guaranteed under **Article 33** of the Constitution. I am therefore entitled to give such relief as will protect the purposes of the Constitution that is to secure freedom of expression.

10. The orders sought by the petitioners in the motion are too drastic and wide and will affect innocent parties and as such I decline to make them. I am also reluctant to make an order that will interfere with the School festival programme without appreciation the nature of the festival which is set to end on 24th April 2013. I am also conscious of the fact that Butere High School is not a party to these proceedings and it would be improper to make an order without hearing them. I however think a suitable remedy will be one that asserts the supremacy of the Constitution and I will therefore grant the 1st respondent an opportunity to address me on an appropriate remedy before I make a final order.

11. In the circumstances, I hereby order as follows;

(1) The 1st respondent shall show cause on 17th April 2013 at 2.30 pm why the play “*Shackles of Doom*” by Butere Girls High School shall not be presented at the Kenya Schools and Colleges Drama Festivals.

(2) In default the court shall be at liberty to make such orders as it deems fit and just to grant.

DATED and DELIVERED at NAIROBI this 16th day April 2013

D.S. MAJANJA

JUDGE

Mr Nguring’ a instructed by Ishmael and Company Advocates for the petitioner.

ORDER

In view of the statement by Mr Kaumba, learned counsel for the respondents, that the play “*Shackles of Doom*” by Butere Girls High School shall be presented at the Kenya National School and Colleges Drama Festival to be held in Mombasa. This matter is now marked as settled on those terms. I direct that the Ministry of Education shall bear the transport costs of

ensuring the Butere High School attend the Festival. There shall be no order as to costs.
Orders accordingly.

DATED at **NAIROBI** this 18th day of April 2013.

D. S. MAJANJA

JUDGE



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