

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 353 OF 2016

INITIATIVE FOR SOCIAL ECONOMIC RIGHTS ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

1. The Plaintiff brought this public interest litigation suit for declarations that; (i) the policy of the Government of Uganda (herein after the government) on public financing for secondary education in Uganda infringes on the right to equality and non- discrimination guaranteed under Article 21 of the Constitution of Uganda; and (ii) the policy on public financing for secondary education in Uganda infringes on the rights to quality education as guaranteed under articles 30 and 34(2) of the Constitution.
2. The Plaintiff was represented by Mr. Joseph Munoba of M/s. Murungi, Kairu & Co. Advocates and the Defendant was represented by Mr. Jimmy Obura a state attorney from the Chambers of the Defendant.
3. The facts were that at all material times in 2007, the Government introduced universal secondary education (herein after USE) to the Ugandan public and implemented it severally. The categories of USE implementing schools include, (i) public grant aided; (ii) private for profit public private partnership; (iii) private not for profit public private partnership and (iv) community schools public private partnership. Constituent to the UPOLET Head Count



database of 21st May 2014, the Government had 943 grant aided USE implementing schools and 852 public private partnership USE implementing schools and the numbers have since grown.

4. The Plaintiff contended that the Government spends approximately Ug. Shs. 230,000/= per term for a student enrolled in a Government aided school for recruitment of qualified teachers, paying staff salaries and providing science and laboratory equipment at no further expense to the school. However the Government pays Ug. Shs. 47,000/= per term for a student enrolled in USE in a public private partnership school without providing and/or facilitating recruitment of qualified teachers, paying staff salaries and providing science and laboratory equipment. There is lack of quality education in public private partnership schools as teachers in some of these schools are under qualified and do not meet certification requirements to teach in secondary schools. They rely on Ug. Shs. 47,000/= per student paid by Government hence cannot meet the operational costs, remunerate and retain qualified teachers especially in science subjects contrary to the Government's policy that makes science subjects compulsory. Public private partnership schools are established with a profit motivation and are thus pushed to absorb large numbers of students without the complementary infrastructure hence leading to a high student- teacher ratio and resultantly inability to provide remedial attention to the slow learners.
5. Further that the inequality, discrimination and poor quality of education the students obtain from USE in a public private partnership school negatively impacts them through inability to compete on equal footing with other students in non USE implementing schools at national examinations among other effects. The Plaintiff was aggrieved by the outright inequality, discrimination, and poor quality education outcomes perpetrated in secondary schools implementing the public private partnership scheme which infringed on the students right to equal treatment, non discrimination and quality education. The Plaintiff holds the Government responsible.
6. In the written statement of defence (herein after WSD), the Defendant averred that it released policy guidelines for the public private partnership implementation of USE. In implementing



the policy, the Government entered into a memorandum of understanding with foundation bodies and proprietors of private secondary schools. Under the memorandum, it is the responsibility of private schools to ensure that a qualified head teacher and other qualified staff required to deliver the secondary curriculum are in place, remunerated accordingly and retained for as long as their contractual obligations may determine. The private schools are to ensure that the class size is as recommended in the USE implementation guidelines of 60 students. The schools are also to ensure that they meet basic requirements and minimum standards.

7. Further that its educational policies do not perpetuate inequality and discrimination in education against Ugandan children. Rather to increase access to secondary education, it decided to partner with private secondary schools in areas underserved by public schools. Its partnership is premised on a memorandum of understanding that private schools shall provide the basic infrastructure including laboratories, library and instructional materials. It provides financing in accordance with its public private partnership guidelines and memorandum of understanding reached with private schools and the said policies do not contravene articles 21, 30 and 34 (2) of the Constitution. It has at all material times fulfilled all its obligations under the public private partnership and it is incumbent upon private secondary schools to fulfil their agreed upon obligations under the memorandum of understanding. The Government cannot be held responsible for alleged omissions of private secondary schools which are in any event private profit making bodies and there is no cause of action against the Defendant from the facts laid out in the plaint.
8. In reply to the WSD, the Plaintiff contended that it would raise a preliminary point of law that the WSD is bad in law for pleading evidence and the court would be moved to strike it out. In the alternative, it is the state's responsibility to ensure that education in the country is provided equally and without discrimination whether there is a memorandum of understanding with public private partnership implementing schools or not.
9. During scheduling, the issues agreed for resolution were:



- i. Whether the Government policy on public financing for secondary education in Uganda infringes on the rights to equality and non-discrimination guaranteed under article 21 of the Constitution.
- ii. Whether the Government policy on public financing for secondary education in Uganda infringes on the rights to quality education as guaranteed under the Act and the Constitution.
- iii. What remedies are available to the parties?

10. The parties proceeded by witness statement in lieu of examination in chief. The Plaintiffs called two witnesses. Ms. Salima Namusobyia the Plaintiff's Executive Director testified as PW1. PW2 was Ms. Angela Nabwowe, the Plaintiff's Programs Director. The Defendant chose not to call any witnesses. The parties made written submissions after hearing of witnesses.

11. I have carefully read all the pleadings and submissions of all the parties. In resolving the issues, I will first highlight some of the relevant legal provisions. Article 21 of the Constitution provides for equality and freedom from discrimination. Clause 1 provides that "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. Article 30 provides that "All persons have a right to education." Article 34(2) provides that "A child is entitled to basic education which shall be the responsibility of the State and the parents of the child.

12. Article 13(1) of the International Covenant on Economic, Social and Cultural Rights provides that "The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."



13. Paragraph 14 of the General comment No. 24 (2017) on State obligations under the ICESCR¹ in the context of business activities provides that “the obligation to protect means that State parties must effectively prevent infringements of economic, social and cultural rights in the context of business activities. This requires that States parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies.”
14. Paragraph 13 of the ICESCR General Comment 13 provides that “According to article 13 (2) (b), secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”. The phrase “generally available” signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee's interpretation of “accessible”, see paragraph 6 above. The phrase “every appropriate means” reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.”
15. Article 28(1) of the Convention on the Rights of the Child (CRC)² provides that “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) make higher education accessible to all on the basis of capacity by every appropriate means; (d) make educational and vocational information and guidance available and accessible to all

¹ Uganda ratified the ICESCR on 21st January 1997

²Uganda ratified the CRC on 17th August 1990



children; (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.”

16. Paragraph 25 of the (CRC) General Comment No. 16, states that “Under international human rights law there are three types of obligation on States: to respect, to protect and to fulfil human rights. They encompass obligations of result and obligations of conduct. States are not relieved of their obligations under the Convention and the Optional Protocols thereto when their functions are delegated or outsourced to a private business or non-profit organization. A State will thereby be in breach of its obligations under the Convention where it fails to respect, protect and fulfil children’s rights in relation to business activities and operations that impact on children. The scope of these duties is explored further below, whilst the required framework for implementation is discussed in chapter VI.”

17. Paragraph 28 of the CRC General Comment No. 16 provides that “States have an obligation to protect against infringements of rights guaranteed under the Convention and the Optional Protocols thereto by third parties. This duty is of primary importance when considering States’ obligations with regards to the business sector. It means that States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children’s rights. Such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children’s rights. States must investigate, adjudicate and redress violations of children’s rights caused or contributed to by a business enterprise. A State is therefore responsible for infringements of children’s rights caused or contributed to by business enterprises where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements.”

18. Paragraph 29 provides that “The obligation to fulfil requires States to take positive action to facilitate, promote and provide for the enjoyment of children’s rights. This means that States must implement legislative, administrative, budgetary, judicial, promotional and other measures in conformity with article 4 relating to business activities that impact on children’s



rights. Such measures should ensure the best environment for full realization of the Convention and the Optional Protocols thereto. To meet this obligation, States should provide stable and predictable legal and regulatory environments which enable business enterprises to respect children's rights. This includes clear and well-enforced law and standards on labour, employment, health and safety, environment, anti-corruption, land use and taxation that comply with the Convention and the Optional Protocols thereto. It also includes law and policies designed to create equality of opportunity and treatment in employment; measures to promote vocational training and decent work, and to raise living standards; and policies conducive to the promotion of small and medium enterprises. States should put in place measures to promote knowledge and understanding of the Convention and the Optional Protocols thereto within government departments, agencies and other State-based institutions that shape business practices, and foster a culture in business that is respectful of children's rights."

19. I will now turn to the analysis. In paragraph 4a of the WSD, Government avers that it released policy guidelines for the public private partnership implementation of USE. In paragraph 4d, it avers that in implementing the above said policy of USE it entered into a memorandum of understanding with foundation bodies and proprietors of private secondary schools. However neither the signed memorandum nor the policy guidelines were attached for this court's consideration. It is strange that the Defendant did not avail copies of these documents. However the Plaintiff attached appendix G a memorandum of understanding between Ministry of Education and Sports and the foundation bodies /proprietors of private secondary schools. Although not signed or witnessed by any of the contracting parties at the end, I will take this to be the template of the terms in the memorandum. This template has given me an understanding of the nature of relationship developed between Government and the private actors under the USE scheme for private secondary schools.

20. The Defendant contends that under these policy documents, it is the private schools to ensure that class sizes do not exceed the recommended 60 students, and that qualified head teachers and other staff are hired to deliver the secondary school curriculum, remunerated accordingly



and retained for as long as their contractual obligations may determine. That it is the schools to ensure that they meet the minimum standards and requirements. The sense I get from these averments is that beyond the policy guidelines and the memorandum of understanding, the Government has not effectively or satisfactorily continuously monitored the implementation of the policy guidelines and memorandum of understanding in the public private partnership. This points to an abdication of Government's obligation to protect the right of education as envisaged in the legal provisions above.

21. The obligation to protect requires the State to take positive measures to ensure that non-state actors such as multi-national corporations, local companies, private persons, and armed groups do not violate economic, social and cultural rights. This includes regulating and monitoring the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights and ensuring the effective implementation of relevant legislation and programs and to provide remedies for such violations.³
22. The obligation to protect is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.⁴
23. There is also the Abidjan Principles on the human rights obligations of states to provide public education and to regulate private involvement in education.⁵ These are in sync with

³See the SERAC case: Communication No. 155 of 1996.

⁴ African Commission on Human and People's Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October 2011.

⁵ The Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education were adopted in Côte d'Ivoire on 13th February, 2019, following a three-year participatory consultation and drafting process.



state obligations under the different international and regional treaties and can safely be relied on. Regulation 50 of the Abidjan Principles provides that “where private provision of education is the result of the lack of availability of free, quality, public education, States must take all effective measures to develop or restore universal access to free, quality, public education as effectively and expeditiously as possible. As they do so, they must concomitantly require private instructional educational institutions to meet the minimum standards set by the State, and bring them into compliance, or, following due process, close down those private instructional educational institutions that fall below these standards.”

24. Regulation 51 provides that “States must take all effective measures, including particularly the adoption and enforcement of effective regulatory measures, to ensure the realisation of the right to education where private actors are involved in the provision of education. This includes situations in which private actors conduct their activities without any State involvement or control, or when they operate informally or illegally.”
25. Nothing in the memorandum or policy guidelines can take away the Government’s obligation to regulate private actors in education as a measure of protecting the right to education for all Ugandans. In this case there is no demonstration that the state fulfilled its obligation to regulate and ensure that the private actors met the minimum standards and base infrastructure in the USE public private partnership schools.
26. The Defendant contests the fact that the Government gives Government aided schools a total of approximately Ug. shs. 230,000/= per student including capitation, contributions towards recruitment of qualified teachers, paying staff salaries; and providing science and laboratory equipment. The Defendant submits that Government gives 41,000/= per student in Government aided schools and 47,000/= in the USE public private partnership schools as capitation grant.
27. After carefully looking at all the pleadings and submissions, I have no basis to consider that the Applicant presents that the Government aided schools receive capitation grant of 230,000/= as presented by the Defendant. While the Defendant pulls out the capitation grant



received by Government aided schools, it does not deny them receiving the other components of the 230, 000/= like contributions towards recruitment of qualified teachers, paying staff salaries and providing science that the Applicant presents.

28. A look at the detailed report of the Plaintiff gives intricate details on the performance of Government aided schools and USE public private partnership schools. In this August 2016 report titled "A threat or opportunity? Public private partnership in education in Uganda," the Plaintiff's cogent research which the Defendant does not dispute compares the quality of education, physical facilities in USE public private partnership schools, management of funds, supervision of the USE public private partnership schools, fees structures in different schools including additional fees charged, gender break down of students enrolled, O level science subject failure rate and O level performance of students in Government aided schools and USE public private partnership schools. It worked with schools in eastern, northern and central Uganda.
29. The empirical data in the report demonstrates that accountability for funds received in the USE public private partnership schools is a challenge. From 2011 to 2015, there were alarming levels of average failure rates in science subjects in most USE public private partnership schools visited ranging from 59% to 81%. Some of the USE public private partnership schools lacked basic infrastructure such as a library or sufficient number of permanent class rooms. Generally the empirical data demonstrates that most of the USE public private partnership schools may not have sufficient funds to finance the basic infrastructure of laboratories, latrines and sports fields. One Respondent in the research stated that "schools cannot recruit, motivate and retain teachers because they lack the financial muscle."
30. While USE public private partnership schools were intended to ensure improvements in the quality of education, the report demonstrates that the quality of education in the USE public private partnership schools is poor when compared to private schools not supported by Government and Government aided schools. USE public private partnership schools were



found to be of poor quality and lacked basic infrastructure as well as important instructional inputs such as libraries and laboratories.

31. The report also finds that the 47,000/= per student enrolled capitation grant made by Government at the start of the program in 2007 has been affected through the years by among others inflation and has become insufficient to meet the actual cost of education.
32. It is too low to deliver quality education and all teachers in the research revealed a high teacher turnover rate due to low remuneration. The research also demonstrates that many of the USE public private partnership schools are prohibitive of the right to education of children from poor families who cannot afford them.
33. As part of their trial bundle, the Plaintiff also adduced other relevant research connected to USE public private partnership schools in education. This includes the public-private partnership in education in Uganda by Bo-Joe Brans and the Uganda National Examination Board (UNEB) performance statistics data.
34. In paragraph 27 PW1 refers to the research by Bo- Joe Brans. This research was attached as part of the trial bundle chapter two. This research presents that the prevailing PPP education in Uganda raises concerns of equity and quality of education.
35. In paragraph 6 (IV) of her witness statement, PW2 averred that owing to the inadequacies in the USE public private partnership schools, it is difficult for students to take on combinations in science subjects at advanced level and cannot pursue science related courses at the university. This limits their chances of Government sponsorship which is largely dominated by science courses due to the government policy on science education. She refers to the UNEB performance statistics data which shows performance of different schools in core subjects offered at O level attached to the Plaintiff's trial bundle as chapter five.



36. The Defendant produced four reports. These were the UPOLET report by Ministry of Education; a Ministry of Education paper on declining performance in science and mathematics at secondary education level and possible mitigation measures; public private partnerships in education, evidence from a randomized controlled trial in Uganda by the World Bank; and the achievement of S2 students in English language, mathematics and biology, national assessment of progress in education by UNEB. In addition the Defendant also produced annexure E in which the Permanent Secretary Ministry of Finance indicated the phasing out 870 USE PPP schools starting January 2018 and further communications of this decision by the Permanent Secretary Ministry of education to different schools.

37. In all this, the Defendant is making the point that Government aided schools also have financial challenges to cater for all teachers sufficiently, infrastructure challenges, the quality and performance in Government aided schools is also generally poor and the performance in Public private partnership schools has improved through the years.

38. After carefully considering all the reports from both sides, it is clear to see that based on the performance results, there is a consistent pattern of USE public private partnership schools being in a more deplorable state thus posting more deplorable results keeping the students from these schools in a more disadvantaged position than their counter parts in Government aided schools. This more disadvantaged position points to the students in these USE public private partnership schools being discriminated in the enjoyment of their right to education, whose provision is the duty of the state.

39. Nothing in the Defendant's submissions or reports attached thereto demonstrates that the Defendant took the necessary steps to monitor and regulate the PPP schools once they started operating. By failing to monitor and regulate the PPP schools, the Defendant laid the bed for breaches of the right to education in PPP schools identified by the Plaintiff investigations.



40. These breaches clearly have the ripple effect of students from USE public private partnership schools receiving comparatively very low quality education, posting very poor O level results, being deprived of accessing advanced level and university education and having an education that is not meaningful to them. This amounts to breach of the right to education. It also infringes the right to equality and non discrimination under article 21 of the Constitution.
41. Above all, it points to a failure on the part of Government in that it did not properly study or envisage how USE public private partnership schools in education were to be operationalized. Above all, there is a clear demonstration that the Government did not consider how as part of its duty to protect the right to education, it was to regulate USE public private partnership schools to ensure that they provide quality education and produce quality students from their educational systems. This burden remains on the Government always.
42. The Defendant submitted that Government's final position is to phase out public private partnership schools.⁶ This is also indicated in annexure E where the Secretary to the Treasury communicates the phasing out of all public private partnership schools. There's a high chance that this phasing out is due to the basket of negative aspects associated with these schools as highlighted in the Plaintiff's cogent reports.
43. Based on all the above, issues one and two are resolved in the affirmative. The Plaintiff's suit succeeds with the following declarations and directions:
- i. The Government policy on public financing of the secondary education infringes on the right to education under articles 30 and 34 (2) of the Constitution.
 - ii. The policy infringes on the right to equality and freedom from discrimination under article 21 of the Constitution.

⁶ See paragraph 3 page 5 of the Defendant submissions (all unnumbered).



- iii. Government must ensure equity for all children in the design and implementation of education programs.
- iv. Government should take its lead position in regulating private involvement in education to ensure that minimum standards are always adhered to by the private actors and also that defaulters are sanctioned. In doing so, Government should seek guidance from the Abidjan Principles on the human rights obligations of states to provide public education and to regulate private involvement in education in designing education programs in the country.
- v. Each party shall bear its own costs.

I so order.



Lydia Mugambe
Judge
17th July 2019