REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL CASE NO 81 OF 1993

AMINA ADAM & 6 OTHERS …….. APPLICANTS

VERSUS

ROSAMMA ALEXANDER

BOARD OF GOVERNORS CONSOLATA GIRLS SECONDARY SCHOOL MERU

CATHOLIC DIOCERSE OF MERU ……. RESPONDENTS

RULING

On March 5, 1993, seven school girls, all muslims, through one Sheikh Khalid Salim Ahmed Balala as their next friend, filed a suit against the Headmistress and the Board of Governors of the Consolata Girls' Secondary School, Meru, and the Catholic Diocese of Meru. Acting for these girls was the firm of Marende Taib & Co Advocates, of Mombasa.

After various averments in the plaint, the plaintiffs prayed for judgment against the three defendants, making a declaration that the seven girls are entitled to practice their religion in the school, particularly with regard to the observance of the fast of *Ramadhan* and offer of prayers in accordance with the muslim faith; an order that the seven girls resume classes and continue with their education at the Consolata Secondary School, Meru; an injunction restraining the defendants from interfering with the plaintiffs' rights to attend the school; various damages, costs and interests.

Simultaneously with the plaint, was filed an application as a summons in chambers, basically under order 39 rule 2 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act was also cited in the heading, as were the verbiage "provisions of the Constitution of Kenya, the Education Act and all enabling provisions of the law" – a superfluity from which a neat thinker would have desisted without any loss, and present only as a verbose convolution.

The application sought orders that the three defendants by themselves or by their officers, servants or agents, do allow the seven school girls to resume classes and normal school life; that the three defendants be restrained from interfering with the seven school girls' practice of their religious beliefs, especially the observance of the fast of *Ramadhan* and performance of prayers in accordance with the laws of islam; that the three defendants and their agencies be restrained from interfering with the seven school girls' lawful rights to attend the school and manifesting and practising their religion as per the

Islamic faith.

Attached to the application was a certificate of urgency, made by Mr Taib Ali Taib, an advocate of the High Court of Kenya, and dated the same day (March 4, 1993) as the plaint and the application aforesaid. It was also filed the same day. In it Mr Taib Ali Taib certified that the chamber summons was urgent and should be heard quickly because “it would otherwise be rendered nugatory”.

This was on Friday March 5, 1993. That Friday I finished dealing with murder pleas, criminal applications and a few civil matters, by 1.00 o’clock. After the lunch break I came to my chambers at 2.00 o’clock to see if there was any urgent or other matters. By 2.15 pm, there was nothing to suggest that there would be anything for me. There was something urgent in Nairobi for me to attend to. So, I left for Nairobi.

At 2.30 pm this application and the certificate of urgency were placed before the senior principal magistrate. I take it that this was in accordance with order 46, rule 6 of the Civil Procedure Rules, the Senior Principal Magistrate acting as a High Court District Registrar and the matter being an interlocutory application. She heard and recorded Mr Taib Ali Taib’s submissions. She perused the chamber summons. She perused the supporting affidavits deponed by the applicants. And upon looking generally at the pleadings filed, she granted temporary orders.

The district registrar directed the three defendants and their agencies to allow the “six” (seven") plaintiffs to resume their classes and normal school life, and restrained the defendants from interfering with the plaintiff’s practice of their religious beliefs, observing fast of *Ramadhan,* performing prayers in accordance with the laws of muslims. She further ordered that while the plaintiffs continue to be in the school, they should strictly observe the school rules, obey the headmistress and others who are directly superior to the plaintiffs, strictly keep to the school time, and avoid any act which may cause any kind of disturbance at the school.

The district registrar further ordered and directed that her orders above, would remain operative until the matter would be heard *inter parties* within fourteen days from the date of those orders, before a judge.

All this was happening in the absence of the three defendants. It was happening without service on them of the application. It was happening without any notice served on them or their lawyers, of the application. It was happening *ex parte*.

In the course of things, the application seems to have been served upon the three defendants or one or some of them; for later, grounds of opposition, affidavits and annexed correspondence, were filed in the court, by the firm of Messrs Maitai Rimita & Co Advocates, for the defendants, and were served upon the advocates for the plaintiffs. And on Thursday March 18th, 1993, Mr Taib Ali Taib for thep plaintniffs, and Mr Maitai Rimita for the defendants, appeared before me, for the hearing of the application after due service and due notice.

I owe a lot to the advocate for the plaintiffs. I owe a lot to the advocate for the defendants. Each was very prepared to argue to the fullest possible extent the application and its opposition; and each did exactly that. I listened to everything on both sides. I recorded everything they said. I looked at everything each of them asked me to look at. I did all this with extreme patience and all the care possible. Then, each said he had nothing more to say on this application. They said they had said all there was to be said and shown me all there was to be shown. It is after this assurance that I took time to consider the application, its opposition, arguments, counter-arguments, affidavits in support, affidavits in opposition, authorities and submissions. And this is my reserved ruling after consideration with all the care I can muster, hoping that I overlook nothing of material essence or introduce nothing irrelevant and inappropriate; hoping that

justice is done; hoping that justice is seen to be done.

According to the six-page twenty – paragraph plaint, the five-page seventeen-paragraph joint affidavit of Amina Adan and Hamila Nawe, two muslim females who have attained the age of puberty, adopted by five others who are the third to seventh plaintiffs, and one called a “Further Supporting Affidavit” sworn by Taib Ali Taib, an advocagte of the High Court of Kenya, practising as a partner in the firm of lawyers representing the plaintiffs (applicants) in this suit and application, the first defendant, Rosamma Alexander is the headmistress of Consolata Girls’ Secondary School at Meru, an institution managed and ran by the Board of Governors sued as the second defendants, and the same is owned by the catholic diocese of Meru sued as the third defendant who is in charge of catholic affairs in the Meru area and under whose directions all the organs and staff of the school operates. The seven plaintiffs (applicants) are pupils of the Consolata Girls’ Secondary School. On February 24th, 1993, these students all muslims by faith, started the observance of the compulsory fast of *Ramadhan* as required by the laws of Islam.

Trouble started when, according to the applicants, the defendants “tried to force the plaintiffs to break their fast before time for so doing”, and on the following day, ie, February 25, 1993, the headmistress detained the plaintiffs and prevented them from breaking their fast at dusk and made sure that the plaintiffs did not eat until about nine o’clock at night, and she insisted that “no muslim in the school had the right to observe the fast of *Ramadhan* without her permission”. Then, Father Andrew Mbiko, a servant or agent or employee of the catholic diocese of Meru (third defendant), abused, pushed, “slapped and kicked the plaintiffs when the plaintiffs refused to obey” the order of the Headmistress to cease to observe the fast of *Ramadhan*. He insisted that the plaintiffs must be expelled from the school if they continued to fast.

The next day, February 26th, 1993, the diocese through the headmistress issued to the plaintiffs a letter of suspension dated that day, and the defendants refused to allow the plaintiffs to continue with their education “while fasting and observing their religious obligations and/or refused the plaintiffs to fast the month of *Ramadhan*”. The basic grounds on which the defendants took their stand, as alleged by the plaintiffs are that the school being a catholic institution with catholicsm as the only religion allowed to be practiced there, and it not being a mosque, “no muslims shall be tolerated there in the practice of their islamic beliefs… fasting of *Ramadhan* was forbidden there” as it “was one of the reasons that contributed to the immoral reputation of the school which the catholic diocese of Meru was determined to change”.

The plaintiffs also averred that the defendants have refused to allow the plaintiffs an opportunity to offer their five daily prayers, took away the room previously allocated to muslims to conduct their prayers therein, and on February 25th, 1993 the defendant ordered the plaintiffs to be attending the catholic church service on Sundays by force on pain of being expelled from school in default. The plaintiffs have been subjected by the defendants to harassment, mockery and ridicule and have generally had their stay at the school made extremely difficult, and they have suffered and sustained emotional distress and pain. Their rights and opportunities “ to peaceably and beneficially continue with their education” have been denied, and they have been brought to ridicule and pain on account of practising their religion, and they have consequently suffered loss and damage. They have been denied their lawful rights and opportunities to peaceably and beneficially practice their religion and to freely enjoy and manifest and “propagate their religion or belief by worship, teaching, practice and observance among other things”.

The plaintiffs seeing that despite demand made and notice of intention to sue given the defendants failed to allow the plaintiffs to continue with their education and to observe the fast of *Ramadhan* and offer prayers, sued these defendants for a declaration that the plaintiffs are entitled to practice their religion in

the school, an order that the defendants allow the plaintiffs to resume and continue with their education at the school, and a perpetual injunction against the defendants interfering with their plaintiffs' lawful rights to attend the school and to peaceably and beneficially continue with their education, while at the same time observing their religious obligations including fasting and praying.

The affidavit of Amina Adan and Hamila Nawe gives the details of what happened on the material days leading to the filing of this suit. The plaintiffs "confirm" having attained the age of puberty; they started fasting on February 24th, 1993; at 6.50 pm they were breaking their fast by eating the food provided by the school; it was in the school dining room; the food was *ugali* and vegetables. Two unnamed teachers on duty and wielding a stick ordered the plaintiffs to leave eating to go directly to the office of the headmistress to see her; the plaintiffs obliged and waited for the headmistress till 8.30 pm when the teachers again told the plaintiffs to go to the class for studies hungry. The next day the plaintiffs went to one of the rooms at the school to say their afternoon prayers. It is not said whether it was before, during or after, saying prayers, but sometime on that day an unnamed teacher on duty told the plaintiffs to see the headmistress; they did; after patient waiting as the Headmistress went about her usual administrative chores, she saw them; after some discussion of their problem with the plaintiffs the headmistress informed the plaintiffs that there would be no fasting at the school, and she refused to heed their pleas to be allowed to fast. After further discussion between Father Mbiko the administrator of the catholic diocese of Meru, and the Headmistress as the plaintiffs watched, the Headmistress told the plaintiffs to go home, and Father Mbiko started abusing, slapping and kicking them, pushing them and telling them that the plaintiffs would go home the following morning and remain at home " on suspension for two weeks".

The following day the Headmistress gave the plaintiffs suspension letters, copies of which were annexed to their affidavit, and she told the plaintiffs that they would go and fast at their homes but not in the school. She further informed the plaintiffs that they would go and stay at home for the entire two weeks of the suspension whereafter they should return to the school with their parents only if the plaintiffs were willing to abandon their observance of the fast of *Ramadhan*, and that if the plaintiffs still insisted (presumably on fasting) then they should not go back to the school.

The plaintiffs neither went to their homes nor returned with their parents. Instead, they decided to see the *Imam* of the mosque at Meru in his capacity as the plaintiffs' religious leader. They sought "his advice and intercession" to sort out the problem with the school authorities. They say they did this because they "live some distance outside Meru". Then, the *imam* "together with several muslim leaders interceded in the matter with the school authorities as a result of which" the plaintiffs were taken back for one night only. Apparently indignant at the bringing into the mater of muslim leaders, the Headmistress sent away the plaintiffs and told them "to go straight home" to their parents, and to fast at home and not in the school. She clearly told them that in that school only the catholic religion was followed and she did not want the plaintiffs to make another religion in the school. Henceforth, if they returned to the school, the plaintiffs would have to attend the church service on Sunday like everybody else, they said.

The plaintiffs swore that they felt very aggrieved by the decision of the school authorities to suspend them and to chase them away from school "simply because" of their observance of their religious duties in accordance with their islamic faith; and that it was impossible for them not to observe their faith because the observance is compulsory and mandatory as it is also crucial for them to continue with their education in a peaceful and dignified manner, their future depending on it.

The rest of the affidavit and the plaint are basically legal arguments on the constitutional position on the freedom of conscience and worship, guaranteed unhindered religious practice without persecution, fear or intimidation. It is then sworn that unless the Court gives the orders sought, the plaintiffs stand to suffer

irreparable damage with a real possibility that their future may be ruined. The “end of term examinations are looming ahead”, they said. This Court must exercise its discretion in a just, fair and equitable manner to save the future of the plaintiffs, and to safeguard their constitutional rights enshrined in the Constitution of Kenya.

When the defendants were served with the plaint, the application and the affidavits of the plaintiffs, the defendants admitting that the plaintiffs were students at the school, filed a joint written statement of defence stating that the defendants did not know that the plaintiffs were some of the muslims fasting until the plaintiffs were suspended from the school for being absent from class self-study. Denying that the plaintiffs were manhandled, kicked or slapped, the defendants also denied that they denied the plaintiffs their right to observe *Ramadhan* or their religious prayers. They stated the *Ramadhan* is being used by the plaintiffs to cover up offences by them against school rules. The defendants stated in their written statement of defence that the suit is premature, brought in bad faith and to seek publicity. All the allegations and arguments in the plaint, adverse to the defendants were denied in the defence. The defendants stated that the plaintiffs were suspended from the school and required to bring their parents, for being absent from class self-study at night, and that such absence was against school rules.

After reading the affidavits of the respondent Mrs Rosamma Alexander, the Headmistress of the school and the first defendant in the suit, swore an affidavit expressing surprise at what she called “the lies that have been told about the incident that led to the suspension of the applicants”. She denied all the allegations against her and the other defendants, calling those allegations as nothing but a fabrication to spoil her name and that of the other defendants. She deponed that there were several girls in the school who were fasting without being prevented from doing so by anybody. Indeed, there were also catholics in the school who were also fasting during this time of Lent. Having said this, the Headmistress deponed to her version of the matter, that this incident started on the evening of February 24th, 1993 when it was discovered that the plaintiffs were not in the class for their evening studies. When the plaintiffs later appeared at night they refused to tell the prefect where they had been.The following day the matter was reprted to the Headmistress but the plainitffs refused to disclose where they had been.

It being against the school rules for one to be out of the school compound at night or to be absent from self-study, without permission, the administrator of the school was informed of the plaintiffs’ having been absent without permission. Upon that report, it was decided that for the good of the girls (the plaintiffs) the matter must be discussed in the presence of the parents or guardians of the plaintiffs. Accordingly, letters were written to that effect, and were given to each of the girls to take to their respective parents or guardians. (A copy of the letter was attached to the affidavit of the Headmistress, and it is a copy of the same letter a copy of which was attached to the affidavit of the first and second plaintiffs which was adopted by the rest of the plaintiffs).

Instead of the plaintiffs bringing their parents they brought to the school muslim leaders and newspaper reporters, whereupon the Headmistress “naturally” refused to discuss the behaviour of the school-girls with strangers who were making all manner of unfounded allegations. The headmistress was of the strong view that the girls did not want their parents to know about their behaviour and that they were using *Ramadhan* as a scape-goat. She was also of the strong view that this case is not brought for the good and welfare of the plaintiffs but to seek publicity for some muslim leaders. She argued in her affidavit, that it is for the good of the girls that they comply with the terms of suspension so that counseling can be done by the parents and the school authorities. She continued that she would be surprised if the parents of the plaintiffs would encourage them to be leaving the school compound at night for whatever reasons. Saying that the contents of her affidavit were true, she prayed that the temporary orders made *ex parte* be vacated to enable the applicants to bring their parents to the school “so that the matter can be settled internally and for the good of the applicants”.

Father Andrew Mbiko, the administrator of the diocese of Meru, also swore an affidavit, saying that he had read the contents of the affidavit of the Headmistress of the school, agreed with it and adopted those contents. He contended himself with denying that he manhandled, kicked or abused the plaintiffs, not having any cause for doing so. He denied all the allegations made against him and stood by the affidavit of the Headmistress Mrs Rosanna Alexander.

Having read the affidavits sworn by Father Andrew Mbiko and by Mrs Rosanna Alexander, and noted the contents thereof, Mr Taib Ali Taib, the very advocate of the High Court of Kenya who confirms that he had the conduct of these proceedings for the plaintiffs as their counsel, rended his robes of advocacy, slung them off him, send them flying out, garbed himself in the witness garments, jumped from the advocates bar into the witness ring, with the pugilistic gloves of an affiant to testify by affidavit, swearing and arguing, denying and accusing, being informed and believing, sending salvos, ducking and protecting – as a lawyer, as a deponent, all at once. All this in what he called a further supporting affidavit.

In it he said that the affidavits of the Headmistress and the administrator of the diocese of Meru, “have raised matters and issues which are untrue and which are designed to appeal to the Court’s sense of sympathy to the further detriment of the plaintiffs, who are my clients herein”. This is stated without saying it is on information or belief. It is stated as a fact from his own knowledge. So he ought to bear personal responsibility for its factual accuracy or inaccuracy should it be tested on cross-examination.

In the next place he depones that he is reliably informed by his clients and he verily believes that information to be true, that the plaintiffs never absented themselves from the school, school compound or self–study session, adding that anything said to the contrary is a mere fabrication intended to discredit them in my eyes. He is further reliably informed by the plaintiffs, and he verily believes it, that Father Andrew Mbiko physically manhandled, kicked, slapped and abused the plaintiffs, particularly the fourth one, “seriously”.

Mr Taib Ali Taib, an advocate of the High Court of Kenya swore that he interviewed several muslim leaders who were present at the school during the discussion with the Headmistress, and Mr Taib Ali Taib himself has personally corroborated the muslim leaders’ information, which he verily believes to be true, that the plaintiffs were never suspended and chased away from the school because they had absconded from school at night without permission, but that they were sent home purely for the reason that they were fasting and exercising their religion and islamic beliefs which the defendants did not want the plaintiffs to do. I note here that the alleged muslim leaders have not been disclosed, they have not sworn any affidavit themselves, and no reason is offered for their not swearing to what they heard and saw at first hand, preferring to remain anonymous and shielded from any possible questioning on their information.

Certain Photostat copies of press clippings said to have appeared in the Daily Nation of February 28th, 1993 and The Standard of March 4th, 1993, are attached to the affidavit of Mr Taib Ali Taib who interprets them as making it clear that the defendants “had actually chased away the plaintiffs for fasting during the month of *Ramadhan*, stating that in fact Father Mbiko was quoted as having said that fasting makes studying difficult and that no dozing, weak and lethargic students will be allowed in the school. The administrator had also been quoted as having said that students were at the school for four years only and that they have all the other years of their lives to fast and that he would allow the plaintiffs to report back to school only after their parents guaranteed that the girls would stop fasting. Added Mr Taib Ali Taib, “I have personally confirmed that truthfulness and correctness of this report from the reporter himself and the same is corroborated by the allegations and averments made by the plaintiffs” against the defendants.

Then, he argued in paragraph 8 of his affidavit, that in the circumstances, this Court should not allow the seniority of position and authority of the defendants over the minor plaintiffs, to affect its judgment *vis-à-vis* the credibility of the statements of the plaintiffs "simply because of their minority status". Mr Taib Ali Taib concluded by saying that he swore the affidavit in support of the plaintiffs' application, and that what he stated in it is true to the best of his knowledge, belief and understanding.

On March 18th, 1993, the application came up before me. The advocates for both parties were present. They were armed to the teeth with excellent arguments. First was Mr Taib Ali Taib for the applicants. May I be permitted to observe that he presented and argued the application admirably. He carefully went through the affidavits in support of the application, adopting every word of them. He dealt with the position taken by the respondents and called it false and incorrect, and their replying affidavit as nothing more than an exercise in damage control. Acknowledging that the applicants were late for dinner, he said they were late "due to fasting". Still repeating what was stated in the affidavits in support of the application he said that the reasons for suspending the applicants were as stated by them and not as stated by the defendants. Accordingly, he said, section 78 of the Constitution of Kenya had been violated, and any school rules which contravened that provision must collapse, for no one can set up an institution which has rules contrary to the laws of the land. The Court must protect our Constitution. The Court must avert a nasty scenario where muslims will be chased out of christian schools, christians chased out of hindu schools, and *vice versa*. This is a matter of great public importance as there has to be co-existence of denominations.

Repeating what he said in his own affidavit, Mr Taib Ali Taib said that the most disturbing issue is that of seniority and maturity which, he said, must invariably crop up. He said that the Court should not ignore the weight of the evidence of the applicants on the mere grounds of the applicants being minors.

In a helpful way, Mr Taib Ali Taib drew my attention to the well-known case of *Aniello Giella v Cassman Brown & Co Ltd*, [1973] EA 358, as the case laying down "the conditions", for granting an interlocutory injunction. I have read and studied that case and all the others before and after it, both in this country and in numerous other jurisdictions. I have discussed these decisions at great length in my Principles of Injunctions, 1987 (Oxford University Press), paragraphs 5.1-5.11-9, at pages 32 – 70, ie chapter 5. I have since studied these cases in many other judgments and rulings in the High Court. I do not see any reason for me to set out any further discussion in this ruling. Suffice it to summarise the results as I shall presently do after considering what the advocates on both sides in this application have said.

To illustrate his points, Mr Taib Ali Taib referred me to the cases of *Shamta Juma v Siri Guru Singh Sabha*, HCCC 834 of 1990 (at Nairobi); *Shafiqa Ali Dharani and others v Wanjala and others,* HCCC 759 of 1990 (at Mombasa); *Republic and others v City Council of Nairobi,* [1968] E A 406; copies of all of which he usefully made available. He referred to *Chivatsi and another v Republic*, Court of Appeal Criminal Appeal No 77 of 1989 on a point he made that we should not moralise using our own value judgments against others. He overlooked to avail a copy of that case, and I have not been able to find it here at Meru, and as a result I have not had the benefit of reading it. I have carefully read and considered all the other cases copies of which Mr Taib Ali Taib supplied.

Next was Mr Maitai Rimita. He opposed the application. He adopted the previously filed grounds of opposition, and the affidavits of the Headmistress and Father Andrew Mbiko. He said that the school admits and enrolls students to the school from various religious faiths, christian of various denominations, muslims and hindus. In the school there are more moslem students besides the applicants in this case. The applicants were never stopped from fasting. Indeed, even catholics were and are still also fasting because they, too have this season as their period for Lent. The subject of fasting did not come up in the school at all, until a few days after the applicants had been suspended.

Adopting the explanation set out in the Headmistress' affidavit, and the position taken in the written statement of defence, Mr Rimita explained the factual position of the circumstances leading to the suspension of the students. Basically, he said that the students went against the school rules which prohibited any student from absenting herself from studies without permission from the school authorities, and that the students refused to disclose where they had been, upon which refusal they were suspended and the reasons for suspension were stated in the letter of February 26, 1993 given them to take to their parents who were the addressees. He said apart from what was stated in that letter, there were no other conditions imposed for the re-admission of the student plaintiffs. To this day, the parents have never gone to the school; the case has been filed, without the school authorities having been given a chance to take a decision in the matter; and unless such a decision has been made, it is too early for the Court to interfere. This is an internal matter, and the school machinery has not been exhausted in dealing with the dispute. For this later proposition he referred to the case of *Patel and others v Dhanji and others* [1975] EA 301, which Mr Taib Ali Taib dismissed as irrelevant to the instant application, saying there is no authority for saying that internal rules must be exhausted before coming to the Court; and that immediately a wrong is committed, a cause of action arises and a person aggrieved is entitled to come to Court without waiting for school rules to be followed. It was also Mr Taib Ali Taib's submission in reply that the law does not bind the applicants to bring their parents to the school to discuss school problems.

In this state of affairs Mr Taib Ali Taib wanted an injunction issued, and Mr Maitai Rimita resisting the application, wanted the application dismissed with costs.

It is now the Court's turn. I have looked at all these goings-on. I have gone back to first principles as the starting point. It is upon the application of these relevant principles that I shall decide this application. They are in the Holy Bible of the christians; they are in the Glorious Holy Qur'an of the muslims; they are in the laws of the land. (I mention only the Holy Scriptures of the parties involved in this application).

Mr Taib Ali Taib seemed to worry about the fact that his clients were minors and the defendants held senior positions of authority, and he feared that the Court might let the latters' seniority and authority weigh over and against the plaintiff minors' minority status. No. That fear should not arise. It is written in the book of the Leviticus, chapter 19, verse 13, "do not take advantage of anyone or rob him", and at verse 15, "be honest and just when you make decisions in legal cases; do not show favouritism to the poor or fear the rich". In the book of Deuteronomy, chapter 16, verse 18, it is written the judges " are to judge the people impartially. They are not to be unjust or show partiality in their judgments. They are not to be unjust or show partiality in their judgments"; they must always be fair and just. There are references to impartiality elsewhere in the Holy Bible, both in the Old and New Testaments. In the Holy Qur'an too, the way decisions and judgment should be arrived at, is taught. Among the places where to find these teachings is Surah 101, Al Qariah (The Great Calamity) saying that on Judgment Day as the Day of Clamour, every deed will be weighed in a just balance, and find its real value and setting"

"…a Balance of Justice will weight and appraise all deeds: and those whose good will show substance and weigh will achieve a life of good pleasure and satisfaction. While those whose good will be light will find themselves, alas, in a blazing Pit of Punishment".

And see Mathew 25 verses 31-44, on the Final Judgment. There is no reference to maturity, minority, seniority or authority, as criteria for judgment. Indeed, if Mathew 18 verse 2, Mark 9 verses 33-37, and Luke 9, verses 46-48, are to be guides, children are a model of virtue, and as Mathew, chapter 19 verses 13-15, Mark 10 verses 13-16 and Luke chapter 18 verses 15-17 teach, the Kingdom of Heaven belongs to children. I cannot discriminate against these children in this suit on account of their youth. You look at the laws of Kenya and you find no discrimination against children's evidence on mere grounds of the

children being young. Subject to the rules of corroboration in certain circumstances, and corroboration may also apply to the evidence of certain adults, there is no difference in evaluating the evidence of the old and of the young. So I shall, as muslims would say, weigh and appraise all the deeds of these young ones and give them their rightful consideration without trembling before the christian Headmistress and administrator who stand in positions of seniority and authority; nor shall I unduly fall head over heels and believe everything said because it is in favour of these little ones to whom the Kingdom of Heaven belongs. One's station in life, and one's creed, shall not be the determining factor for the acceptability of his or her version of the story. There shall be no charity, and there shall be no undue thrift, in the acceptance of any party's evidential material placed before the Court. In the eyes of the law all are equal, and I treat all the parties in this suit as such. I favour no one; I fear no one.

I have carefully looked at the affidavits on both sides. In great measure they were seriously faulty. They were in many respects argumentative, expressive of legal conclusions and opinions, surprises and doctrinal assertions; broad accusations and defences; statements of rules and assertions of their breach without supportive factual data. Take the affidavit of the Headmistress, for instance: she said that the strangers brought to the school by the plaintiffs "were making all manner of unfounded allegations". The so-called unfounded allegations are not disclosed; the Court is not given a chance by having presented to it what allegations were made by those strangers, so that it can judge for itself whether the allegations were "unfounded". She also says that this case is not brought for the good and welfare of the plaintiffs but to seek publicity for some muslim leaders. The factual base for this strong view is not laid and stated in the affidavit, to enable the Court to see whether that conclusion is justified and supported.

Similar faults are found in the affidavits on the side of the plaintiff applicants. For instance, they swear that they have attained the age of puberty, without telling us when they were born or how old they are, so that the Court is once more denied a chance to see for itself whether their ages support their conclusion that they have reached the puberty stage. Nor do the plaintiffs say whether it is biological puberty or islamic puberty, nor as to when they attained it. Nobody had told the Court what fasting in islam consists of, so that one cannot tell whether certain aspects of the plaintiffs' acts may or may not have been within the law. What is it, as a matter of fact, did the plaintiffs do, in acts or omissions, to constitute fasting" Factual accounts in this regard were required, to enable the Court to see whether the plaintiffs were fasting. But the acts of fasting were not stated by the plaintiffs. I do not know whether the plaintiffs wished the Court to be conversant with islamic fasting, and whether the Court should take judicial notice of what constitutes the fast of *Ramadhan* as distinguished from the concept of it, has not been raised for determination. The religious leaders said to have been involved in the matter have remained undisclosed. The nature of their "advice and intercession" sought remains undisclosed. They speak of "observance of their religious duties in accordance with their Islamic faith", without telling the Court what acts or abstinence would constitute "observance of their religious duties", they speak of "religious duties" without naming them; they are silent on what is "in accordance with their islamic faith", given the many schools of Islam. Then there are constitutional arguments all set out in the affidavit.

Affidavits must deal only with facts which the deponents can prove of their own knowledge. In interlocutory proceedings such as the present one, however, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated. For this purpose, those applications only are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping the scales of justice evenly balanced till the rights can be decided, or for the purpose of obtaining some direction of the Court as to the conduct of the case. Although in interlocutory proceedings an affidavit may contain statements as to the deponent's information or belief if the source of the information and grounds of believe are stated (see order 18, rule 3(1) of our Civil Procedure Rules), an affidavit founded on statements of an informant who might have been called or who could himself swear positively an affidavit as to the facts, is not allowed; see *Re Palmes, Palmes v R* (1901) W

N 146.

An affidavit is not a platform for the dissemination of philosophical ideals, for the exposition of ideals, the propagation of opinions, dogmatic assertions, heightened counsel and sooth-saying prophecy. It is not a medium for testing the waters of inter-religious doctrinal animosity. It is not a dissertation on the Constitution, and it is not a discourse on the law. It is to be confined to facts as the deponent is able of his own knowledge to prove, or in interlocutory proceedings, it may further or in the alternative set out statements of information and belief but show the sources and grounds of the information and belief respectively. For these reasons I have disregarded all matters in all the affidavits which are not facts and are not statements of information and belief or are such statements of information and belief but the sources of the information and grounds are not shown.

Then there is this affidavit of the advocate Mr Taib Ali Taib. One does not deny the right of an advocate to swear an affidavit. It is a right which, however, must be exercised circumspectly and in carefully chosen situations. If not done with caution an advocate may find himself engaging in an unhandsome conduct or unwittingly misleading the Court on account of excessive partisanship and unquestioning belief of his client or other informants. His vision may be so clouded by his supportive inclination towards his clients that he falls in the danger of divulging confidential matters given him by his client, without the latter's authorization. He risks a grave dereliction of his duty to the Court. He risks a conflict of interests. He may be embarrassed in the execution of his instructions, presentation of fair judgment, fulfillment of his duty to the Court, and carrying the responsibility of truth as a deponing witness. In contentious matters such as the instant case, it is irregular for an advocate to appear in the dual capacity of counsel and giving evidence as a witness whether *viva voce* or by affidavit. An advocate is an officer of the Court. Platt, J (as he then was) in *Gandesha v Killingi Coffee Estate Ltd,* [1969] EA 299, disapproved of an advocate being a witness and counsel in the same case, and held that if a party wishes an advocate to testify as a witness, the proper course is for the advocate to act as a witness rather than as counsel. I agree. An advocate should not accept a retainer or instructions to conduct proceedings in a case in which he has reason to believe he will be a witness, and if, being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear, and must retire from acting an an advocate in the case without jeopardizing his client's interests. I believe I have the support Sinclair, CJ in *In Re Osman Hussein* (1923 – 1960) 1 A L R (Mal) 276, when I state that it is undesirable that an advocate, while conducting a case or application for a party, should appear as a witness *viva voce* or as affiant swearing an affidavit in the same case. The good sense of the rule stopping an advocate to swear an affidavit in a case in which he appears as an advocate, may be seen in the provision which empowers a Court to order the attendance of a deponent for cross-examination. By order 18 rule 2, at the instance of a party, a Court may order the attendance for cross-examination of a deponent of an affidavit; and such attendance may be in Court. There are a number of important matters in Mr Taib Ali Taib's affidavit on which he may be cross-examined. For instance, he may be asked about his bold assertion that what the Headmistress and Father Andrew Mbiko said was "untrue' and was "designed to appeal to the Court's sense of sympathy" and that it was "to the further detriment of the plaintiffs". He alleged this is a fact, not as a piece of information or belief. He talks of being reliably informed by his clients, without saying why or on what ground he found his clients' information reliable. Nor does he show any grounds of his belief in the truthfulness of his clients' information. He may be asked questions as to why his clients themselves did not swear to what he swore. The newspaper clippings which he attached to his affidavit show different reporters, and yet Mr Taib Ali Taib said that he had Personally confirmed the truthfulness and correctness of the newspaper report from "the reporter himself". Which reporter" Of which paper" He talks of having interviewed several muslim leaders. He does not name them. No reason (if any) was given why such muslim leaders did not swear affidavits. For these reasons I have found Mr Taib Ali Taib's affidavit incurably irregular, bad, and I reject it. I expunge it in its entirety and disregard it. I base my ruling on aspects of the affidavits of the plaintiffs and of the

defendants only in so far as they relate to facts, and information and belief supported by shown sources and grounds thereof.

Mr Taib Ali Taib said that the conditions for granting an interlocutory injunction are as set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] E A 358, which we all know. And as we all know it is there stated that first, an applicant must show a *prima facie* case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide the application on the balance of convenience. These conditions were merely being re-echoed, for they had earlier been set out in the Kenyan case of *EA Industries LTd v Trufoods Ltd,* [1972] E A 420. They have again been re-stated in another Kenya case of *Salim and others v Okong'o and others* [1976] Kenya LR 42. There are many other cases, reported and unreported, repeating these conditions.

Accepted so often without question in later decisions, it looks as if the three conditions are evenly required for the granting of an interlocutory injunction just as the three certainties are required for the creation of an express trust. This has led to a wrong belief that the simple formulation encapsulates the whole of the law on temporary injunctions. The truth of the matter, however, is that it does not in fact do so. In the first place such a formulation is incomplete and leaves much unsaid. It ignores other factors, including many strict requirements which need to be taken into account, such as imminent serious consequences of granting or refusing to grant the injunction. Being neither a comprehensive statement of the rules governing the exercise of the discretion, nor an abridgement of them, the above formulation stands rather as a ready mnemonic for an unsuspectedly large and detailed body of rules and principles. Secondly, the statements in those cases are not adequate expressions of the principles to which they refer. They are, as may be expected of a mnemonic, ambiguous . They have meaning only in the context of prescriptions. So, the stamp of repeated approval and restatement of a familiar mnemonic is no guarantee that the body of law to which it refers has been systematized, settled, or understood. In the third place, even in this very short formulation there is an internal inconsistency, for while the first condition appears to state categorically that a Court must be satisfied as to the existence of a *prima facie* case, the statement of the so-called third condition indicates that the Court need not to be satisfied in that very regard; ie, if a *prima facie* case has not been proved the Court may nevertheless grant an injunction where the balance of convenience favours the applicant. Logically, the doubt referred to must be a doubt as to the existence of a *prima facie* case; it cannot be a doubt as to whether the applicant will suffer irreparable damage, because the balance of convenience is defined as a comparison of the irreparable losses likely to be suffered by the applicant and the respondent. And when one recalls the dictum of Rudd, J in *Shah and another v Devji*, [1965] E A 91, and what we see happening in this country whereby judges grant injunctions in some quite shadowy cases, with or without terms, with or without undertakings, then it becomes clear that even these alleged conditions are not the conditions.

This formulation based on *Giella's* case must, therefore, be regarded at best as a terse reminder of a large body of law, and not as the prescription of how the discretion must be exercised. As a mnemonic it may have its uses, in which case the incompleteness and ambiguity may not be serious. Indeed, masters of equity will so often sense the unstated rules that they may not notice the inadequacy of the formulation. As a matter of fact, they so often, even unconsciously, have recourse to the unstated rules that they simply do not notice the inadequacy of the formulation; and they intuitively fill out the gaps. Moreover, in the context of litigation one does not always expect a truly systematic account of the whole injunction law. Injunction law constitutes a remarkably large body of rules doctrines and principles, which simply cannot be comprehensively adverted to in any single judgment or ruling. So, some cases may so often be disposed of with reference to some quite outstanding factor (eg delay or laches) that the other factors may be ignored; or where matter of principles are under discussion, it may be found that

incomplete statements are made because the case at hand may be argued about one such principle, and there may be no mention of the other doctrines or principles, which are left to be taken for granted.

It is,therefore, inaccurate and wrong for anybody to make an unguarded statement such as, “the conditions for granting an interlocutory injunction are”, and then set out three of them, purporting to expound all “the law on interlocutory injunctions”, as if what is stated is the whole law on the subject. If you cannot include all the considerations in your statement, you must qualify the statement and say that the conditions or factors set out are those which are relevant to the case being considered, and that there are other considerations but which do not arise in the matter in issue. The imperfect formular so far repeated often is not perfected by repetition, nor is its application rendered easier by authoritative assertions that it is the law or by the self-deception that the principles “are well-settled” when the practice demonstrates the opposite position.

Having due regard to the practice in this country, the right formulation of the principles for the issuance of temporary injunctions is this, that among other considerations a Court takes into account in determining whether a temporary injunction should be granted, are the considerations first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at the full hearing; secondly, the Court will ordinarily consider whether there is a threat of irreparable harm; and thirdly, whether harm to the respondent would outweigh the need for temporary relief to the applicant. I prefer such a guarded way of putting the proposition because many other factors may come into play, such as public interest involved. Many of these considerations may also depend on what temporary injunctions one seeks, e.g. a mandatory or a prohibitory temporary injunction.

Taking into account the traditional formulations and the practice in this country I take it that in considering an application a Court requires certain minimum conditions to be satisfied before a temporary injunction will be granted. It will first require to be satisfied on a balance of probability, on whether the applicant has established an arguable case that the respondent’s act or omission is wrongful: *Dewani and others v Datoo and others,* [1 952], 25 KLR 55. The Court needs to be satisfied in the first place that there exist reasonable grounds for doubting the legality of the apprehended or continuing acts of the respondent and that they could constitute a violation of the applicant’s legal, customary law, islamic law or equitable right. If the applicant does not present an arguable case that the respondent’s act or omission is wrongful, no injunction is granted. If the answer is “yes” and he has done so, the next question to answer is whether the applicant will suffer damage as a result of the respondent’s acts or omission in the period which must elapse before the trial. In other words, if the Court is satisfied that there is an arguable case it must next make an assessment of the practical consequences likely to be faced by the applicant supposing that no temporary protection is extended to him by way of a temporary injunction. This is obviously an important matter, for the object of the remedy is not to ensure obedience to the law, or respect for abstract legal rights, but to prevent probable practical harm and prejudice to the applicant during the period prior to the trial. The remedy of temporary injunction is not declartory of the law . So, the applicant must satisfy the Court that unless the respondent’s activity or omission is made subject to the control or direction of an injunction, his position will in some serious way be changed for the worse: that he will suffer damage as a consequence of the respondent’s act or omission. By “damage” is meant that at this point the respondent’s actions are regarded not from the legal point of view as being violations of a right, but simply as a probable source of practical harmful consequences to the applicant. Thus, “damage” here has an ordinary, and not a legal, meaning. And the risk must be of serious damage, not a trivial one. The applicant’s case may be impeccable but so inconsiderable may be the threatened damage as to justify the applicant to be regarded as being engaged in a misguided attempt to assert fanciful rights. Moreover, the damage must be future and not past, for an order by the Court to restrain acts which have caused damage, but which are unlikely to be repeated or cause further damage, would be futile and no better than slamming shut

the stable-door after the horse has bolted. The object of a temporary injunction is to prevent future injury. In addition one cannot secure himself by means of a temporary injunction against a mere possibility that he will be disadvantaged by the respondent's acts in future; the risk must be very probable to be suffered, and suffered soon, ie that it is imminent.

If the applicant will not soon suffer serious consequences in the period prior to the hearing, or the danger is not urgent and imminent, the next question to ask is, is the case very strong" If the answer is "No", then no injunction. If he will suffer serious consequences and the danger is imminent, or if the case is very strong, the next step is to ask whether other remedies are inadequate. The applicant to succeed must persuade the Court of the inadequacy of other remedies. If other remedies are adequate, no injunction. If they are inadequate, then the Court considers discretionary factors.

Once satisfied that the minimal conditions have been fulfilled by the applicant, that is to say, having, in effect, checked on the good sense of the applicant or his advisers in making the application, the Court must next, in order of significance, take into account the discretionary factors. Obviously any consideration of the factors before it is clear that the conditions have been satisfied might prove to be a waste of time. A discretionary factor involves two things: (a) some general justificatory principle or doctrine (eg laches or acquiescence), and (b) the proof of circumstances in a particular case which attract the application of the principle. Essentially, discretionary factors represent a check-list to make sure nothing is overlooked which ought to be considered, and nothing is considered which ought to be considered, and nothing is considered which ought not to be considered: their consideration is an appraisal to check that certain matters exist and prevail. Basically, they are no more than persuasive reasons why an injunction should or should not be imposed on the respondent. For instance, persuasive arguments may be advanced (a) that the applicant ought to get the remedy because there is no doubt at all that his rights have been infringed – he ought to get it because he will probably win; (b) that no injunction should be granted because it would cause undue hardship to the respondent or third parties out of all proportions to the benefits to be conferred on the applicant by its issuance, (c) that no injunction should issue because the applicant has in fact acted wrongly in connection with the matter in question; (d) that the applicant ought not get the injunction because the respondent has altered his position to his detriment while the applicant was watching without protest. So, it is at this stage that the Court will consider (a) the probability of success at the trial as a discretionary factor, and not as a minimal condition, (b) the balance of convenience (also variously expressed as balance of hardship, balance of justice or injustice), as practical consequences of granting or refusing the injunction, (c) the conduct of the parties, which shall entail delay as a disentitling factor, acquiescence as another disentitling factor, and lack of clean hands as a further disentitling factor, (d) evaluation of a bundle of alternative remedies in the light of the discretionary factors.

Difficulties or impossibility of enforcing the injunction may weigh heavily against it, and it will be refused where compliance with it will require the supervision of the Court, or where it involves perpetual or indefinite checking, directions or superintendance (*AG v Block and another* [1959] EA 180). It will be refused where the granting it would be in vain, for, equity, like nature, will do nothing in vain. A Court cannot stultify itself by entertaining matters in which the relief claimed cannot be enforced, or if the injunction will be ineffective for practical purpose, or be defeated by some other lawful arrangement. (*Rossyln Estates Ltd v Underwood* (1955), 22 EACA 191); or if the injunction will prevent a party from satisfying valid administrative or other lawful obligations *Nti v Sunyanihence and others* (1962) 2 G L R 118); or if the defendant has entirely abandoned his intention of doing the act complained of (*AG v Dorin* [1912] 1 Ch 378).

And the Court must extract some undertaking as to damages, from the applicant, as the price he must pay before a temporary injunction is granted. The applicant must undertake that if at the trial it is found

that he was not entitled to the temporary protection by injunction, he will pay damages to the respondent for the loss suffered by the respondent by reason of the injunctive restraint or enjoinment.

If things have favoured the applicant, the Court grants the temporary injunction sought, it may grant the injunction but order an inquiry as to damages; it may limit the duration of the injunction, and impose suitable conditions. In injunction law there is no initial presumption of right in favour of the applicant. He must establish a preemption of merit, and then move to the persuasive factors.

That is the broad legal position on temporary injunction law relevant to the instant application. In this application it was said by Mr Taib Ali Taib, that this Court must avert a nasty scenario where schools sponsored or managed by different religious denominations will kick out certain school children if the respondents in this case are not subjected to injunctive restraint. From the legal point of view that consideration should not arise at this stage. Each case of suspension or expulsion will be dealt with in its circumstances peculiar to it. If it will be expulsion or suspension for lawful reasons I fear no such scenario. If the chasing away will be for the inter-religious hate and revenge, the law will take its own course when such eventuality materializes, or when it threatens to occur. The Government department concerned with education may take appropriate measures to avert it, the Government as a whole may easily deal with the situation; courts may stop it. It is not as easy as it is being portrayed. Other forces may make the occurrence impossible. Christian schools may not do such a ghastly thing because they teach that when a wrong is done to you, forgive it; and the theme of forgiveness run throughout the Holy Bible. It is in Exodus 29 verse 36, Exodus 32 verses 30-32, Leviticus 4 verses 20-35, Deuteronomy 21, verse 8, first Book of the Kings 8 verses 30-39, 46-50, the Psalms 32 verse 1, the Psalms 130 verse 4, Isaiah 33 verse 24 and chapter 53 verses 10-12, Daniel 9 verse 19, Micah 7 verses 18-19, Mathew 6 verses 14-15 also in chapter 9 verses 1-8 and chapter 18 verses 18 verses 21-35, Mark 4 verse 12, and chapter 11 verses 25-26, luke 3 verse 3, chapter 7 verses 36-50 and chapter 17 verses 3-4, John 20 verse 23. You find it in Saint Pauls letters to the Corinthians, Ephesians, Colossians, and in many other places.

The muslims will not engage in such unrighteous acts, because as it is taught in Surah 16 c 127, Allah is with those who live in self-restraint, they are good examples of virtue, for as it is taught in Surah 21, c 149, the great exemplars of virtue conquered evil, and not pay back evil in its own coin, however great the temptation; only faith and goodness will prevail in the end. Let us not be so pessimistic, for as it is taught at Surah 30 c 182, mischief may occur or even spread, but Allah will restore the balance in the end; destruction awaits those that break His Harmony; let the righteous wait and endure with constancy, for evil is shaky, with no roots and is doomed to perish utterly.

Having faith in these teachings, and in the efficiency of our Governmental machinery to cope with the feared scenario, I do not attach weight to this aspect of the arguments.

On the other hand I have considered the likely student upheavals that may ensure if Courts emotionally made orders that unsettle lawful institutional authority. No school would govern; no student would be governable; nobody would submit to lawful authority unless and until so ordered by the Court. Application upon application, nay, a deluge of applications, will inundate the Courts. We shall then establish a culture of unreasonable disobedience. Institutions shall be ran by excessive judicial intervention. We shall erect a bad spectre. We shall have nothing but Government by injunction. That is wrong. We must seek common principles, avoid dissembling and dogmatic disputing (see Surah 3 c 57). Uhud showed how dangerous it was to disobey orders, rules and authorities, to dispute or to seek selfish ends. Surah 3 c 59 commands, “Trust your Leader”. Truth and obedience are glorious virtues; seek not occasions for quibbles, and settle you quarrels under the guidance of Allah’s messenger, ever keeping away from every kind of falsehood (see Surah 4 c 63).

Instead of starting the scenario alleged to be likely, or instead of disputing and quibbling, and feeling aggrieved or imagining persecution and oppression in certain institutions, do what the Holy Quran teaches us to do, namely, migrate from places hostile to Islam if possible, for it is written in Surah 4 c 65, “Live not in places hostile to islam if you are able to migrate”, for “spacious is Allah’s earth”. I emphasise this remedy in the light of the principles of injunction law to which I have made reference, namely, impossibility of performance and the Courts attitude that they will not be called upon to supervise and superindent the compliance of their orders. If an injunction is granted in this case, and the school is compelled to take back the applicants, it will require a constant follow-up to ensure that the applicants are taught like other students, they are given home-work like other students, they are afforded individual attention whenever needed, their home-work is corrected like that of any other student, they are not ignored where they should not be ignored, they are disciplined like any other students, they are assisted in every respect. Human nature being what it is, it is not far-fetched to visualize a situation where there can be a token obedience of the injunction by merely allowing the applicants back to the school compound only in body, and be denied everything else that may matter to them; they may be let merely to float along, loiter around, ignored, or grudgingly assisted. Human nature being what it is, one may reasonably then anticipate a spate of applications to the Court to force the respondents to do this, to do that, on end. There will be no knowing the list of grievances that will emanate. There will be no knowing what disciplinary measure will be taken by the respondents against the plaintiffs and be well-understood by the plaintiffs as being in good faith or as punitive to them as unwanted pupils. Each side will be unduly suspicious of the other. The overconcern of the students with whether the injunction is being obeyed or flouted may be so overwhelming that it becomes their pre-occupation, to the detriment of their studies and good conduct.

I was referred to the case of *Shamta Juma*. It is materially different from the instant case. There it was found as a fact at that stage, that the applicant had not gone to school dressed in a manner that was repugnant to the school dress code; and that she had not been in breach of any school rule. From the ruling it appears that the prayer in that case was very simple, namely, to “be allowed to wear a headscarf” in the school. There is no difficulty in complying with an order to that effect. It was a prayer for an order allowing the applicant to manifest her religion by doing a specific and clear act, namely, wearing her headscarf. In the instant case, things are not so straight-forward. It cannot be said confidently or with a reasonable forecast, that the seven plaintiffs have a *prima facie* case with a probability of success, or that they have established a presumption of merit, or that they have an arguable case. There is the defence and affidavits sworn on the side of the defendants, together with the copy of the letter suspending of the plaintiffs from the school, saying that the plaintiffs were in breach of the school rules, that they have refused to bring their parents to the school to have the matter internally resolved, and no reason has been given as to why upto this point the plaintiffs’ parents or guardians have not been involved either with the school authorities or in this case at all. Nobody knows why Sheikh Khalid Salim Ahmed Balala, and not the applicants’ parents or guardians have not been involved either with the school authorities or in this case at all. Nobody knows why Sheikh Khalid Salim Ahmed Balala, and not the applicants’ parents or guardians, is persuing the matter as a next friend. There is nothing improper shown in him doing so, but that this intervention is unexplained does not add a plus to the applicants’ case at this stage. Moreover, it is not clear whether the position of the next friend, Khamis Ramadhan, in the *Shamta Juma* case was also unexplained, or whether he was a parent or guardian, or whether he was otherwise a proper person to be a next friend. Nothing was raised in that case about any muslim leaders seeking publicity. Nothing was there raised in that case to suggest that parents or a guardian had kept out of the dispute as is the case here. In the instant case such clinical detachment by the parents or guardians of the plaintiffs, coupled with the accusation that some muslim leaders are using the case to get undeserved publicity, and the silence of the muslim leaders said to have interceded on behalf of the plaintiffs in the face of the accusation, weaken the plaintiffs’ effort to show that the respondents’ act is wrongful.

The respondents allege that the plaintiffs were in breach of school rules. The plaintiffs do not explain the actual things they did as an observance of fast of *Ramadhan.* They infact, through their advocates, admit coming late for dinner. They needed to show that what they did necessarily required the time they took in order to observe the fast. But they have not disclosed what they did. The suspension letter states the reasons for suspension; it does not mention fasting as one of them. There is no reason given to the Court to ignore the grounds for suspension cited in the letter. Perhaps at the hearing that letter will be successfully discounted, but in the absence of a basis at the moment to ignore it, makes one reasonably to take it that breach of school rules, and not fasting, was the reason for the suspension of the plaintiffs.

Unlike in the *Shamta Juma* case, in the instant case, the applicants want an injunction that the defendants allow the applicants to resume classes " and normal school life" and to restrain the defendants "from interfering with the plaintiffs' practice of their religious beliefs" including the observance of the fast of *Ramadhan* and performance of their prayers in accordance with the laws of Islam. They want to be allowed to practice their religion as per the islamic faith. To enforce such an injunction is not anywhere similar to enforcing an order commanding the respondent to allow the plaintiff to wear a headscarf. The orders sought in this case are akin to orders requiring performance of contracts for personal service, and their compliance with will require enormous supervision by the court, will involve indefinite work. The Court must always be careful to see that the respondent knows exactly in fact what he has to do, and this means not as a matter of law but as a matter of fact, so that in carrying out the order he can do specific acts. The order must be detailed enough to give the respondent exact notice of what he is required to do. (*The Despina Pontikos* [1975] EA 38. This is not possible in this case.

*Shafiqa Ali Dharani and others,*was decided by my most illustrious brother, Mr Justice Omolo. It, too, sought a declaration that the applicants were entitled to practice their religion in the school "by wearing…a headscarf" and an order to allow them to be dressed as aforesaid. Omolo, J, granted the orders. Again, as you can see they are orders allowing the doing of a specific thing, namely, "to wear the headscasf or a *hijab* covering their faces". The respondent would know precisely what, as a matter of fact, not as a matter of law, was required of her. Again, there the learned judge was satisfied, on the material before him, that it was "clear" that the Headmistress "does not approve of their wearing" the headscarfs. In the instant case the defendant say and swear that they are not against the Islamic rule and practice of fasting or anything Islamic; and nothing is before the Court to dislodge that assertion for the moment. At page 5 of the ruling he said that he could not say that the defendants were acting unconstitutionally in insisting that the plaintiffs wore only the prescribed school uniform. "The final determination will only be made after the Court has fully heard the evidence from both sides". (b) He appears to say that in that case the Headmistress had not summoned the parents of the plaintiffs and had not accorded them an apportunity to be heard. Not so in the instant case. Letters were given to the plaintiffs, summoning their parents to come to the school. They have not come. No explanation is given for their not coming. It is, o the face of it, the Headmistress who has been denied a fair chance to explain why she acted the way she did.

Another aspect in Judge Omolo's ruling is with respect to irreparable harm. There he found that some of the plaintiffs were sitting for their final examinations and that if they were excluded from school, they might not be able to sit for their examinations, with the result that their lives might be ruined for ever. As for the junior plaintiffs, it was found that they might never have a chance to catch up with what might be taught in their absence; and they were also sitting for terminal examinations. None of these factors has been established in the instant case. The Court has not been told in what class these plaintiffs are or each one of them is. No examinations are specifically spoken of as being impending. Each school has its own special aspects. It may be that the Consolata Girls' Secondary School, Meru, has and can arrange without difficulty, remedial tuition and coaching for the plaintiffs to be upto date with the rest of the students at the school. It may be special arrangements may be made for tests and examination to be

sat. It may be during the two weeks' suspension period no academic activities are going on at the school and no examinations being done during that period. It may be it is a school's musical festivals season during which the school is holding no other classes and the plaintiffs are not participants in the festivals except perhaps as the cheering lot or spectators. It is for the plaintiffs to establish that they are likely to suffer irreparable loss if an injunction does not issue. They have not addressed themselves on any of these aspects about their school, and in what way, if at all, they may suffer irremediable damage.

In the instant application too many pertinently relevant questions have been left unattended to by the applicants. When did these applicants join the school" When did the Headmistress start heading the school" when did the applicants attain the age of puberty and liable to the compulsory observance of the fast of *Ramadhan"* Was this maiden observance of the fast at this school" These questions are relevant because if the students have been at the school for more than one fasting season and they have been of puberty age for more than one fasting season, with this same Headmistress in charge at the school, and they had been fasting without any appreciable or any ado, then their case at this stage would be too weak to be believed. If the revese was shown, their case would be more readily accepted. The applicants' silence on these obvious matters serves as a minus to their case.

Were the plaintiffs the only muslims of fast-observing age" If there were other students in similar situations and they observed the fast without being suspended from the school, as the defendants have said, then it is probably true that the applicants were suspended from the school not for fasting, but for going against the school rules. It was for the applicants to dispel this probable version of what actually happened. They have not addressed themselves to this aspects.

The plaint, in paragraph 14, says that the defendants have refused to allow the plaintiffs to offer their five daily prayers and "took away the room previously allocated to the muslims to conduct their prayers"; but paragraph 7 of the plaintiffs' affidavit says that there is an empty room at the school where the plaintiffs normally said their afternoon prayers and evening ones. The plaintiffs do not say they say their afternoon and evening prayers in defiance of the defendants, or that they stealthly go into the room. Why is there this apparent self–contradiction at this early stage"

As to why the plaintiffs did not (and have not) gone to their parents as required, they say it was because they come from "some distance outside Meru" (paragraph 12 of their affidavit). The distance is not disclosed, by kilometers, miles or however. How long would it have taken each plaintiff to get home and back" No lack of means or transport-money is cited as having been any problem. No engagements of their parents or guardians are said to have prevented the parents' or guardians' attendance. Why have the parents or guardians not gone to the school as requested by the Headmistress" It all started with the *imam*, then "several muslim leaders", culminating in Sheikh Khalid Ahmed Salim Balala suing as a next friend. If parents or guardians are alive, they have been kept out of it all. Whether it is in the best interests of these girls for their parents not to see the Headmistress over the matter, and for them not to have a say on whether or not to go to Court, remains unknown. For now, it is striking to note that parents who are said to have paid fees, bought uniforms and other necessary requirements "at considerable cost" (paragraph 7 of the plaint), are denied a chance to play a role in the dispute.

The headmistress wishes, and appears anxious, to resolve this matter. She wants the parents to attend and their daughters be given a fair chance to exonerate themselves in the presence of thier parents. No decision has been taken by the Headmistress. Two weeks' suspension was probably considered by her as sufficient time within which the parents or guardians could be reached and for them to arrange to go to the school. A shorter time would probably have been insufficient for some parents to prepare to go to the school. One does not see anything punitive or unreasonable about a school head asking parents to go to a school to discuss accusations made against their children in the school. The Court does not

comprehend why a person should be aggrieved by another's request that a perceived problem be discussed with a view to finding a solution to it. In our system of law an invitation to reason together is not a cause of action; a decision and its implementation or threat to carry it out may be. Here we have only an invitation to talk. No one should be incensed by it.

Looking at the letter of suspension in the light of all the affidavits, and there being no first hand affidavit evidence from the muslim leaders who interceded in the matter, the Court believes the version of the Headmistress that the fast of *Ramadhan* has nothing to do with this matter. That is what appears on the materials so far presented to the Court. A different picture may, or may not emerge at the hearing of the suit. I must keep my mind open till then.

Section 78 of the Constitution of Kenya was once more brought to the fore, as it has always been in the previous cases cited to me. And *Republic v El Mann* [1969] EA 357, and *Madhwa and others v City Council of Nairobi*, [1968] EA 406, were cited to show how courts have been firm in defending the Constitution. I entirely accept the principle of non-discrimination. I sternly defend our Constitution with complete resolution. Not the slightest speck of it shall be trifled with. The freedom of conscience and to embrace the faith of one's choice cannot be allowed to be jeopardized or assailed.

We must at all times, and vigilantly, defend every cherished jewel in the Constitution of Kenya. This Constitution fulfils a dual purpose. On the one hand it gives every person an efficient remedy against misdoings by public authorities as well as private individuals. On the other hand it protects public authorities from being harassed by busybodies and cranks. This Constitution is a capsule of the three precepts of the law: (1) to live honestly, (2) not to injure your neighbour, and (3) to render each man his due.

On the present materials before me in this application, no *prima facie*, or even an arguable, case has been made out that the school authorities have defied any of these precepts and trifled with any aspect of the Constitution. It is simply a matter of school administrative routine in matters of student discipline, not touching on the fast of *Ramadhan*.

As of now, and at the hearing this may turn out to be not the case or to be true, when one considers everything on the record and the conduct of this application, the dominant picture created is one of the sevens imps in a fiendish design of a contemptible falsehood setting up a poor hoax. Finding themselves late for school assignments for whatever reason and caught in the act, these, the wretched concoctors of grievance, believing there might be extravagant gullibility in their religious fraternity, set their wits to work, "Shout, 'Islam is under attack!', you degenerate", whispered the fiend in them. They so whimpered. And sure enough, the daggers of Islam were drawn in their imagined defence: these muslim students should not be touched at ll in the school administration; whoever shall raise a disciplining finger against these seven, shall be an enemy of islam, an assailant of the Constitution of Kenya. Hence, this suit, this application.

Still basing this ruling on only what was placed before me at this stage, I find that in two of the cases cited to me by Mr Taib Ali Taib, namely, *Shamta Juma v Siri Guru Singh Sabha and Nairobi City Commission*, and the other, *Shafiqa Ali Dharani and others v Wanjala and another,* the applicants were muslims; they were school-girls; the disputes involved Islam. I have not been told whether or not the cases were finalized, and if so, what the decisions were at the trial. In the instant case it is again students and Islam. In the earlier two cases, the schools involved as defendants were ran under the aegis of the sikh religion in one, and the other appears to be a christian-ran school. One case was in February, 1990, followed some nine months later, in November of the same year, by the other case. Some two years later comes the instant case. There might have been others in between these periods.

Men of reflecting intellect, increase in the odd extravaganza in ill-conceived, unfounded and unreasonable defiance of lawfully established authority.

Except where it is demonstrated that a grievance is well-conceived and a genuine lawful out-of court attempt to resolve it has failed, Courts should not readily avail themselves as battle-grounds for every gladiator. We should not by an excessive invocation of Court intervention, set lawful institutional authority at nought, stage a judicial coup d'etat in schools and other institutions, and impose a despotic regime of government by injunction, ruling by injunction, management by injunction.

You do that and you soon open the floodgates of hell: institution authorites defied and ridiculed to nothing; general unrest, Courts swamped with funny applications to a creaking point at the expense of meritorious causes; the law enforcement machinery overstretched beyond sensible coping; and our meager national resources misemployed under the guise of the administration of justice.

Apart from these broad principles and general considerations, I have tested the present factual materials as so far disclosed on affidavits and arguments by counsel, in the light of the relevant temporary injunction law and decided cases, and have found the following to be the position.

1. Have the applicants established an arguable case that the respondents' act is wrongful" No. So, no injunction.

2. (1) Even if the answer was "Yes" will the applicants be liable to suffer serious consequences in the period prior to the hearing" And is the danger urgent and immenent" No.

(2) Is their case strong at this point" No, it is not. So, no injunction.

3. But if the answer to the second question was in the affirmative, are other remedies inadequate" No, they are not inadequate; the students need only bring their parents to the school and their problem will be resolved; and any period lost while they are away can easily be compensated by remedial or special tuition, there being no specified examinations or periodical tests said to be expected in the intervening period.

4. Is there a probability of success at the hearing of the main suit" This cannot be prophesied in this hailstorm of affidavits and counter-affidavits at this point of time.

5.Where does the balance of convenience lie" I have considered whether the applicants will suffer greater injury if the injunction is refused then the respondents will suffer if it is granted. If I grant the injunction the respondents will suffer damage of an uncompensatable nature. The injunction may be misconstrued by other students and the school may fall out of control; it may even send ripples in other institutions and cause upheavals to the detriment of our own children and the country to no one's advantage. On the other hand, in view of what I say at No 3, the applicants would suffer negligible harm.

6. As to the conduct of the parties for the purposes of the interlocutory relief, I find that by coming to the Court without accepting the Headmistress' invitation of the children's parents to the school for settlement of the problem, the applicants have overshot themselves, put the cart before the horse, and acted in a high-handed manner, thereby disentitling themselves to the equitable remedy of injunction.

7. A consideration of remedies in the light of the discretionary factors which every Court must take account of gives only one answer; Let the parties live in self-restraint in one united brotherhood, in mutual consultation in the spirit of Surah 42 c 212 of the Holy Quran, and reason together in the spirit of

the Holy Bible. This is a school disciplinary matter. Give the Headmistress a fair opportunity to ask her students of their whereabouts when they are late for a school assignment even if it is during the fast of *Ramadhan*; and give the seven children a fair chance to answer their headmistress; give the parents or guardians of the children a fair say in the dispute.

8. As to the usual undertakings as to damages, the applicants have not offered any. They do not say they are prepared to abide by any terms if the injunction is granted. This is a case where an offer of suitable undertakings was expected, and as none is made, the Court withholds the exercise of its judicial discretion in favour of the applicants.

All things taken together as they presently stand, the Court finds that the application is not well-founded; it is pre-mature, unmeritorious, against the interest of the students, oppressive to the school authorities; does not disclose actual or imminent irremediable loss; its grant would be a disaster to school and other institutional authority, without any compensating benefits to the parties and the community at large. This Court is not accustomed to issuing imbecile injunctions, or those which, without good cause shown, bring lawful institutional authority to a virtual proscription. The one sought to-day is such a one. The application is dismissed. The *exparte* interlocutory injunction which was granted by the District Registrar in my temporary absence is set aside and vacated. The respondents are at liberty to run the school in accordance with its rules and may proceed with the disciplinary measure which was arrested *exparte*. In all the circumstances of the case, let the costs of this application be costs in the cause. Orders accordingly.

Dated and Delivered at Meru this 30th day of March, 1993

R.C.M KULOBA

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JUDGE