

**JUSTICE IN DEVELOPMENT: WHAT IS THE IMPORT
OF SECTION 152F 2(b) ON DEVELOPMENT-INDUCED
FORCED EVICTIONS FROM PUBLIC LAND**

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DECLARATION

I, BRAYAN NDERITU GITAU do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma.

Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as the University Supervisor.

Signed:.....

MR.JOSEPHAT KILONZO

ABSTRACT

Forced evictions are a global issue and have led to the displacement of millions of people. The forced eviction regime in Kenya allows a person to seek redress from the court against an eviction notice that has been issued to them. This redress is enabled under Section 152F of the Land Act as well as Article 40 of the Constitution of Kenya on the right to property. The court is called upon under Section 152F (2) (b) to decide on the matter in a just and equitable manner. There is no substantial body of jurisprudence on what 'just and equitable' means in the context of forced evictions. This paper will attempt to answer that question in the context of forced evictions done for infrastructure projects and with the use of jurisprudence developed in South African courts on the same.

Key words: Forced eviction, just and equitable, infrastructure projects.

List of Abbreviations

ACmHPR- African Commission on Human and Peoples' Rights

AfDB-African Development Bank

CESCR- Committee on Economic, Social and Cultural Rights

ECtHR-European Court of Human Rights

ICESCR-International Covenant on Economic, Social and Cultural Rights

IACtHR-The Inter-American Court on Human Rights

NLC-National Land Commission

NLCA-National Land Commission Act

PIE-Prevention of Illegal Eviction and Unlawful Occupation of Land Act

RAP-Resettlement Action Plan

SERAC- Social and Economic Rights Centre

UDHR- Universal Declaration of Human Right

List of Cases

1. *Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa
2. *Johannesburg Housing (Pty) v The Unlawful Occupiers of Newtown Urban Village* (2012), South Gauteng High Court, South Africa
3. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v The City of Johannesburg and Others* (2008), Constitutional Court of South Africa
4. *Port Elizabeth Municipality v Various Occupiers* (2004), Constitutional Court of South Africa
5. *Re: Garnet's Mining Co Ltd*, [1978] KLR
6. *The Government of RSA v Grootboom* (2000), Constitutional Court, South Africa
7. *Thubelisha Homes and Others v Various Occupants and Others* (2008), Western Cape High Court, South Africa (unreported)

CHAPTER 1

1.0 Introduction and background

Forced evictions have been defined by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) as the ‘permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’¹ The present paper shall look solely at development-induced forced evictions which come about from the need for land to be used in infrastructure projects such as road projects.

The current law on forced evictions can be found in the Land Act by way of the Land Laws (Amendment) Act 2016 (Amendment Act).² This law lays down various provisions relating to evictions such as ‘the means of notice that will be given by the National Land Commission (NLC)’³, the ‘mandatory procedures that are to be followed during evictions’⁴ and most importantly for the current discourse ‘the steps that the court can take when a notice is challenged in court.’⁵ Section 152F (2)⁶ of the Land Act provides the four possible findings that a court proceeding instituted under Section 152F (1)⁷ can reach. Of the four the most vague provision is Section 152F (2) (b) which provides that after considering the matters set out in Sections 152C, 152 D and 152 E : ‘the court may cancel, vary alter or make additions to the notice on such terms as it deems just and equitable’⁸

This provision is vague as we do not know what the law deems just and equitable in the context of development-induced forced evictions. There is currently no substantive body of jurisprudence available from Kenyan courts on the interpretation and application of Section 152 F (2) (c). It is therefore necessary that we look to jurisprudence elsewhere on a similar provision for clarification.

¹ CESCR General Comment no 7, *The Right to Adequate Housing (Article 11(1)) : Forced Evictions*,3

²Section 98, *Land Laws (Amendment) Act* (Act No.28 of 2016).

³Section 152C,*Land Act* (Act No. 6 of 2012)

⁴Section 152G,*Land Act* (Act No. 6 of 2012)

⁵Section 152F,*Land Act* (Act No. 6 of 2012)

⁶Section 152G,*Land Act* (Act No. 6 of 2012)

⁷Section 152F(1),*Land Act* (Act No. 6 of 2012)

⁸Section 152 F(2)(b),*Land Act* (Act No. 6 of 2012)

1.1 Statement of Problem

Section 152F serves as an enabling provision for evictees to seek redress from the court where a violation of their rights may occur. With the knowledge of the gravity of what is at stake in the proceedings that will follow, there is a need for both certainty and consistency from the courts. Kenya, unlike South Africa (which has a similar provision), has not had much development in the jurisprudence around this provision perhaps due to it being a relatively new law or ‘that those who would seek to invoke it are among the poorest in the society and are unable to access the courts.’⁹ As the courts would appear not to have sufficient opportunities to interpret and apply the provision, lessons from the experience in South African courts are useful so as to clarify what is “just and equitable” in the context of development-induced forced evictions.

1.2 Statement of Objectives

The objectives of this research include:

- i. Assessing the interests of the various parties that are involved during development-induced forced evictions.
- ii. Identifying the approach to the question of what is just and equitable in development-induced forced eviction in South African courts.
- iii. Making recommendations on changes that can be effected to the law to provide for just and equitable considerations

1.3 Hypothesis

Section 152F (2) (b) requires further clarification in the context of development-induced forced evictions.

1.4 Research questions

The key research questions for this study include

- i. What interests are involved in development-induced forced evictions?
- ii. What is just and equitable in development-induced forced evictions in South Africa?
- iii. In what way can Section 152(F) (2) (b) be improved?

⁹UN HABITAT, *Losing your Home: Assessing the Impact of Mass Evictions*, 2011, 2.

1.5 Literature Review

Tania Abbiate writes a comparative analysis on the right to housing in the case of forced evictions. She focuses ‘three regional courts in her analysis: The African Court of Human and Peoples’ Rights (AfCHPR), the Inter-American Court on Human Rights (IACtHR), and the European Court of Human Rights (ECtHR)’¹⁰ Abbiate finds that the ‘AfCHPR actively protects the right to housing through the use of the right to property and the right to family (this indirect approach is due to the lack of the right to housing in the African Charter on Human and Peoples’ Rights (African Charter)’¹¹ With regard to the approach taken by the IACtHR Abbiate finds that ‘an indirect approach by way of the right to property, the right to life and the right to privacy is employed.’¹² Finally, Abbiate’s analysis of the jurisprudence emanating from the ECtHR shows that the right to housing is indirectly protected by enforcing the right to the respect of one’s home found in Article 8 of the European Convention on Human and Peoples’ Rights.’¹³ The current paper differs from Abbiate’s paper in that it does not look to regional jurisprudence on the right to housing but rather what is just and equitable in the process of development-induced forced evictions.

Stuart Wilson writes on the ‘use of judicial discretion in the eviction of residents of a neighborhood in South Africa called Mandelaville and its resultant effect on their access to livelihoods and social services.’¹⁴ He finds that ‘judges wield immense power over the process of forced evictions in South Africa that could lead to the displacement of several poor people and as such the particular needs of the South African poor should be paramount.’¹⁵

Zoher Shabbir Mohamedali writes on the ‘link between developing nations that are hosting the World Cup and the housing rights violations which occur due to forced

¹⁰Tania Abbiate, ‘A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction’, *Journal of Comparative Law in Africa*, 92.

¹¹Tania Abbiate, ‘A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction’, *Journal of Comparative Law in Africa*, 103.

¹²Tania Abbiate, ‘A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction’, *Journal of Comparative Law in Africa*, 105

¹³Tania Abbiate, ‘A Comparative Analysis of the Jurisprudence Regarding the Right to Housing in the Case of Forced Eviction’, *Journal of Comparative Law in Africa*, 105.

¹⁴Stuart Wilson, ‘Judicial Enforcement for the Right to Protection from Arbitrary Eviction: Lessons from Mandelaville,’ *South African Journal on Human Rights*, 2006, 535-<
<https://doi.org/10.1080/19962126.2006.11864901>> on 8 March 2020.

¹⁵Stuart Wilson, ‘Judicial Enforcement for the Right to Protection from Arbitrary Eviction: Lessons from Mandelaville, 535.

evictions that are carried out.’¹⁶ Mohamedali compared the situations with ‘Brazil and South Africa on one hand (representing developing countries) and Germany on the other representing developed countries.’¹⁷ Mohamedali finds that ‘indeed there is a link between the level of development that a host country has and the likelihood of housing rights violations occurring. It was their assertion that where a developing country that was hosting a World Cup the incidences of forced eviction increased.’¹⁸ The current paper differs from the above as it will not look at infrastructure development caused by hosting of the World Cup (which is subject to FIFA standards as Mohamedali showed in their paper) but rather infrastructure development motivated by a need for growth and development within a state.

Laurence Juma writes on ‘the potential that the Constitution of Kenya 2010 (the Constitution) offered for the protection against unlawful eviction of poor populations living in urban centers.’¹⁹ He finds that the ‘courts are moving towards the enforcement of the right to housing especially with the use of international instruments being eased by the removal of the previous dualist regime in the Constitution.’²⁰ The current paper differs from Juma’s paper in that it considers a forced eviction law that was enacted in 2016 (roughly four years after Juma wrote his paper) and thus differs significantly in its content. Another difference that is evident is that Juma attempts to appraise the whole system of housing rights as they relate to forced evictions while the current paper will only endeavor to clarify a single provision within the forced eviction legal regime.

¹⁶ Zoher Shabbir Mohamedali, ‘The Correlation between Forced evictions and Housing Rights Violations in Developing Nations Hosting the FIFA World Cup’, Published LLB Dissertation, Strathmore University, Nairobi, 2017,1.

¹⁷ Zoher Shabbir Mohamedali, ‘The Correlation between Forced evictions and Housing Rights Violations in Developing Nations Hosting the FIFA World Cup’, Published LLB Dissertation, Strathmore University, Nairobi, 2017,1.

¹⁸ Zoher Shabbir Mohamedali, ‘The Correlation between Forced evictions and Housing Rights Violations in Developing Nations Hosting the FIFA World Cup’, Published LLB Dissertation, Strathmore University, Nairobi, 2017, 37.

¹⁹ Laurence Juma, ‘Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya,’ 12 *Africa Human Rights Law Journal* 2, 2012,470.

²⁰ Laurence Juma, ‘Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya,’ 507

1.6 Research Methodology

The research will be based on desktop analysis and is carried out by mainly using primary sources such as the constitution, statute and international instruments. The secondary sources shall be books, articles and journals.

1.7 Assumptions

The chief assumption that will be used in the paper is that the forced evictions that is conducted by the government is necessary as it is for a public purpose.

1.8 Limitations

The main limitation that the study will face is that of ascertaining Kenya's judicial position on Section 152F (2) (b)²¹ as there is little or no reported case law touching on it.

1.9 Chapter Breakdown

Chapter 1 provides an introduction to the paper as well as the statement of problem, research questions and the hypothesis that will guide the paper.

Chapter 2 lays down the theoretical framework that will underpin the study.

Chapter 3 discusses the various interests at play in development-induced forced evictions

Chapter 4 is an analysis of the jurisprudence emanating from South African courts on forced evictions.

Chapter 5 concludes the paper and offers some recommendations

²¹Section 152 F(2)(b), *Land Act* (Act No. 6 of 2012)

CHAPTER 2

2.0 Theoretical Framework

2.1 Introduction

The question that is posed and shall be answered by the current paper is what is just and equitable in development-induced forced evictions. This question requires that the paper's theoretical stance on matters of justice is clear. To this end the theory of justice as fairness as espoused by John Rawls shall be applied to the issue of development induced forced evictions.

2.2 Justice as Fairness

The theory of justice as fairness was developed by John Rawls. This theory is an attempt to identify 'the principles which would underlie a system which offers a balance between competing claims (a just system)'²² Rawls identifies two principles which comprise his conception of justice. The first principle is that 'each person participating in a practice, or affected by it, has an equal right to freedom compatible with a similar freedom for other persons.'²³ The second principle is that 'inequalities are permissible as long as they lead to a benefit for everyone.'²⁴

Rawls states that the first principle 'does not permit any categorization or distinction that is made by legal systems and other practices that would lead to an infringement of the equal liberty of the people who are participating in them.'²⁵ In other words 'it entails the elimination of arbitrary distinctions and the establishment of a proper balance between competing claims.'²⁶ When applied to section 152F (2) (b) it would mean a balance, between the government's claims and the claims of the evictees, must be struck for the court to find a forced eviction to be just.

Rawls clarifies that the 'inequalities referred to in the second principle are not those of differences between positions in society, but rather the benefits and burdens that are attached to them.'²⁷ In further elaborating on this point Rawls makes reference to the relation between the citizens and the various offices in government. He states that 'citizens would not object to the different offices of the government such as president

²²John Rawls, 'Justice as Fairness' 67 *Philosophical Review* 2,1958,165

²³John Rawls, 'Justice as Fairness' 165

²⁴John Rawls, 'Justice as Fairness' 167

²⁵John Rawls, 'Justice as Fairness' 166

²⁶John Rawls, 'Justice as Fairness' 165

²⁷John Rawls, 'Justice as Fairness' 167

and senate or the privileges that come with them. Rather they would object to distribution of power and wealth that may result from the ways men use the privilege.’²⁸ This position reflects on forced evictions in the following manner: the citizens are not concerned with the imbalance of power and privileges between them and the NLC, rather they are against being left extremely disadvantaged after the NLC uses such powers and privileges one of which is forced eviction.

Nien-he Hsieh writes on justice and fairness (what he calls Rawlsian Justice) as it relates to workplace republicanism. Hsieh’s most important analysis of Rawlsian justice for the purposes of the current paper is his take on the right to ownership as developed in justice and fairness. Hsieh states that ‘under Rawlsian justice personal property is considered a basic right.’²⁹ This basic right to property is ‘distinguished from the right to own productive assets.’³⁰ Hsieh states that the ‘distinction is drawn from the relation of the two rights to the social bases of self-respect.’³¹ He finds that the right to own personal property is ‘a necessary social base of self-respect in that it is necessary for the full exercise of moral powers while the right to own a productive assets isn’t.’³² Hsieh notes that though ‘Rawls did not mention a comprehensive list of types of property that fall within the realm of personal property, Rawls states that ‘dwellings and private grounds form part of personal property.’³³ This view on Rawlsian Justice has a bearing on forced evictions in Kenya. The homes of those who are evicted form part of their personal property and as such it is only just that where they are deprived of this right it is only a brief deprivation.

Jon Mandle attempts to find what he calls the ‘senses of the reasonable within John Rawls’ justice as fairness.’³⁴ Mandle identifies four senses of the reasonable in Rawls’ work. Of the four the final sense is the most relevant for the current discourse. Mandle states that this fourth sense entails that ‘a person is reasonable if she accepts principles of justice which can be justified from the perspective of others who may not agree with her on what the conception of the good is.’³⁵ This sense of the reasonable

²⁸John Rawls, ‘Justice as Fairness’ 167

²⁹ Nien-he Hsieh, ‘Justice and Workplace Republicanism’ 31 *Social Theory and Practice* 1, 2015, 118

³⁰Nien-he Hsieh, ‘Justice and Workplace Republicanism’ 119

³¹Nien-he Hsieh, ‘Justice and Workplace Republicanism’ 118

³²Nien-he Hsieh, ‘Justice and Workplace Republicanism’ 119

³³Nien-he Hsieh, ‘Justice and Workplace Republicanism’ 119

³⁴Jon Mandle, ‘The reasonable in Justice and Fairness’ 29 *Canadian Law Journal* 1, 1999, 75

³⁵Jon Mandle, ‘The reasonable in Justice and Fairness’ 77

appears to be drawn from Rawls' idea that justice entails a balance of differing claims. As has been earlier mentioned there are several parties involved in development induced forced evictions. The fourth sense of the reasonable applies to them as it would only be reasonable that all the parties to the forced eviction are aware of the interests of others and are willing to concede some interests of their own.

James Buchanan states that though 'he was initially inclined to agree with Rawls' theory his opinion on the same had changed.'³⁶ He gives two reasons for no longer strongly supporting Rawls' view on justice. The first reason is that 'Rawls had stretched the contractarian conception to the extent that it had become weak.'³⁷ The second reason the Buchanan gives is his own shifting mindset away from contractarianism.'³⁸ Buchanan's apparent assault on Rawls' theory is 'rooted in the second principle (which speaks of permissible inequalities in society)'³⁹ He states that Rawls' makes an error where he lays down a description of the "just society" or the "good society"⁴⁰ In Buchanan's view the task that a contractarian such as Rawls has is to lay down the criteria for fairness and not to specify the outcomes of negotiations between parties.'⁴¹

Another critique that Buchanan has is that Rawls' theory is not realistic. He states that 'Decision makers are ordinary men and as such would not strive to preserve the principles of justice as laid down by Rawls in every single decision they make.'⁴² Buchanan bases this argument on a distinction he draws between constitutional context and operational context. He states that 'where a decision has to be made such as a legislative decision it would be incorrect to expect the representatives of various interests to act on some ideal principles of justice.'⁴³ In the constitutional context (where the rules are being selected) the case is different as 'since rules that are to be selected are to be in operation for an unknown length of time those choosing them are inclined to choose rules that are fair or whose unfairness is within reasonable limits.'⁴⁴ Buchanan's view is of some relevance to the current discourse. If his line of reasoning is to be followed then one can assume that the decision makers in the NLC make their decisions without much

³⁶James Buchanan, 'A Theory of Justice by John Rawls' 13 *Public Choice* ,1972,123

³⁷James Buchanan, 'A Theory of Justice by John Rawls' ,123

³⁸James Buchanan, 'A Theory of Justice by John Rawls' ,123

³⁹James Buchanan, 'A Theory of Justice by John Rawls' ,125

⁴⁰James Buchanan, 'A Theory of Justice by John Rawls' ,125

⁴¹James Buchanan, 'A Theory of Justice by John Rawls' ,125

⁴²James Buchanan, 'A Theory of Justice by John Rawls' , 126

⁴³James Buchanan, 'A Theory of Justice by John Rawls' ,126

⁴⁴James Buchanan, 'A Theory of Justice by John Rawls' ,127

consideration for the principles of justice. Section 152F (2) (b) allows the court to intervene and read the principles of justice into the process of forced evictions where the NLC has failed to do so.

2.4 Conclusion

Justice or that which is just lies at the core of this paper. This justice is simply being placed into the context of development-induced forced evictions. John Rawls in his seminal work on justice and fairness essentially lays down the requirement that equality between persons is ensured where they are participating in or affected a practice. Even with this in mind inequalities are allowed where they lead to benefits for all. Forced evictions are easily placed within this framework as though the evictees must concede to the power of the NLC to evict them they are not devoid of rights and liberties that are to be protected in a just society.

CHAPTER 3

3.0 The Interests Involved in Development Induced Forced Evictions from Public Land

3.1 Introduction

There are several key players involved in development-induced forced evictions all of whom have interests. The first player is the government which through the National Land Commission carries out evictions. The second player is those who are evicted and who must be protected by the law during the process of evictions. The third player is the international financial institutions such as the World Bank and the African Development Bank whose assistance is usually required to fund the infrastructure development projects.

3.2 The Government's interest in Public Land Management

The government's main interest in development-induced forced evictions is ensuring that there are no hindrances to the construction of the intended infrastructure on public land. The government's mandate in this regard is derived for the Constitution and the Land Act both of which provide for the management of public land.

Article 62⁴⁵ of the Constitution provides for public land. Articles 62(2)⁴⁶ and 62(3)⁴⁷ of the Constitution provide for the various types of public land that are vested in the county government and the national government respectfully. The two above provisions also provide that the National Land Commission shall manage the public land on behalf of the county and national governments. A similar provision exists in the National Land Commission Act (NLCA). At Section 5(1) the NLCA provides that 'the Commission (NLC) shall manage public land on behalf of the national and county government'⁴⁸

Part II of the Land Act provides for the management of public land. At 'Section 8 it provides for a few roles that the NLC will exercise in public land management.'⁴⁹ The most relevant role for the current discourse is Section 8(d) which provides that 'the NLC may require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant

⁴⁵Article 62, *Constitution of Kenya* (2010)

⁴⁶Article 62(2), *Constitution of Kenya* (2010)

⁴⁷Article 62(3), *Constitution of Kenya* (2010)

⁴⁸Section 5(1)(a), *National Land Commission Act* (Act No. 5 of 2012)

⁴⁹Section 8, *Land Act* (Act No. 6 of 2012)

order or other instrument.’⁵⁰ Infrastructure development can be one of the specified purposes which are envisioned in the above statute.

3.2.1 The Government’s Duty to Respect, Protect and Promote Human Rights

The above duty was outlined by the African Commission of Human and Peoples’ Rights (ACmHPR) in the matter of ‘Social Economic Rights Action Centre v Nigeria (Ogoni case).’⁵¹ In this matter the ACmHPR was to consider the ‘destruction of the environment that the Ogoni people relied upon.’⁵² The main issue was that the government was not directly involved but rather placed the military powers of the state under the companies that were doing the oil mining.’⁵³

With regards to the states duty to respect the ACmHPR found that ‘a State should not interfere with the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and the liberty of their actions.’⁵⁴ This is the most relevant obligation for the current discourse as the forced evictions that are carried out are done by the NLC which acts on behalf of the national and county governments. The implication of this obligation as stated in the Ogoni case is that in carrying out forced evictions all the fundamental human rights of the evicted persons must be a priority to the NLC.

On the duty to protect the ACmHPR stated that ‘the state has an obligation to protect beneficiaries (citizens) against political, economic and social interferences.’⁵⁵ With reference to forced evictions this would require that the state does not allow political, economic and social interests to cause injustices to occur in the process of evicting people from their homes.

In considering the state’s duty to promote human rights the ACmPHR found that ‘the state must ensure that individuals are free to exercise their rights and freedoms.’⁵⁶ The Commission gave the examples of ‘promoting tolerance, raising awareness and

⁵⁰Section 8(d) , *Land Act* (Act No. 6 of 2012)

⁵¹*Social Economic Rights Action Centre v Nigeria* Communication 155/96 ACmHPR 15 Activity Report (2001)

⁵²*Social Economic Rights Action Centre v Nigeria*,1

⁵³*Social Economic Rights Action Centre v Nigeria*,1

⁵⁴*Social Economic Rights Action Centre v Nigeria*,4

⁵⁵*Social Economic Rights Action Centre v Nigeria*,4

⁵⁶*Social Economic Rights Action Centre v Nigeria*,5

building infrastructure as ways of achieving the above.’⁵⁷ Here the ACmHPR an intersection that is key in the current discourse becomes apparent. The ACmHPR has stated that infrastructure development fall under the obligation to promote that all states must meet. This same infrastructure development (as we have seen) leads to the violation of various rights which goes against the duty to respect. This shows that the state has no absolute power and the evicted persons have no absolute rights in terms of the forced eviction process. What is necessary is that the powers of the state are checked with the rights of the evicted persons in mind (effectively a balance must be struck between the two).

Coomans calls this framework used by the ACmPHR the ‘obligations approach to human rights.’⁵⁸In Cooman’s view ‘the implication of this approach is that a state cannot only carry out one of the obligations but must carry out all at once in order to observe all the civil, political, social and economic rights of her citizens.’⁵⁹ With this view in mind, not only the right to a clean and healthy environment that was at the core of the Ogoni case but also, the right to adequate housing in Kenya can be assessed against the duty/obligation to respect, protect and promote human rights.

3.3 The interests of Evicted Persons

For evicted persons their main interest is in having shelter (which is linked to the right to adequate housing).The right to adequate housing is provided for under Article 43(b) of the Constitution⁶⁰. The right is also found in Article 25 of the Universal Declaration of Human Rights (UDHR)⁶¹ as well as Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶² The Committee on Economic, Social and Cultural Rights (CESCR) addresses the issue of the right to housing in General Comments 4 and 7 on the right to adequate housing.

In General Comment No. 4 on the Right to Adequate Housing (General Comment No.4) CESR states that ‘the right to housing which is linked to the right to an adequate standard of living is crucial in the enjoyment of all economic, social and

⁵⁷*Social Economic Rights Action Centre v Nigeria*, 5

⁵⁸ Fons Coomans, The Ogoni Case before the African Court of Human and Peoples’ Rights, 52 *International Comparative Law Quarterly* 3,2003,752

⁵⁹ Fons Coomans, The Ogoni Case before the African Court of Human and Peoples’ Rights,752

⁶⁰Article 43(b), *Constitution of Kenya* (2010).

⁶¹Article 25, *Universal Declaration of Human Rights*

⁶²Article 11, *International Covenant on Economic, Social and Cultural Rights*.

cultural rights.’⁶³A noteworthy point is that the CESCR ‘recognizes that even those who are in informal settlements are entitled to some form of security.’⁶⁴ The implication of this is that those who are subjected to development-induced forced evictions are entitled to some form of security over their right to housing and as such should not have it arbitrarily deprived.

General Comment No.7 on the Right to Adequate Housing: Forced Evictions (General Comment No. 7).In General Comment No. 7 the CESCR recognizes that ‘infrastructure development is one of the reasons why forced evictions take place.’⁶⁵ The CESCR also notes that ‘women, children, youth, older persons, ethnic minorities and other marginalized groups suffer more during forced eviction.’⁶⁶Of these groups ‘the CESCR highlights women as the most affected due to the entrenched discrimination regarding property rights that they face in society.’⁶⁷ We therefore have a distinction whereby certain groups of people such as women may have an interest that may need to be addressed before other interests are considered during development-induced forced evictions.

3.4 Interests of International Financial Institutions (IFIs)

In the past ‘IFIs as well as governmental organisations would use their specialized mandate to avoid dealing with areas of intersection between their fields and other fields involved in the development process.’⁶⁸ ‘International Financial Institutions, like the World Bank for example, would state that their mandate was limited to matters of economic development.’⁶⁹ It was their position that ‘human rights and related issues (which they called political matters) were specifically excluded in their Articles of Agreement.’⁷⁰

It would appear that IFIs have changed their approach in recent times to one where they have come to accept the wider implications of their activities. The World Bank and the African Development Bank (AfDB) both have guidelines on the

⁶³CESCR, *General Comment No.4, The right to adequate housing*, 13 December 1991,1

⁶⁴CESCR, *General Comment No.4, The right to adequate housing*,5

⁶⁵CESCR *General Comment no 7, The Right to Adequate Housing (Article 11(1)): Forced Evictions*,7

⁶⁶CESCR *General Comment no 7, The Right to Adequate Housing (Article 11(1)): Forced Evictions*,10

⁶⁷CESCR *General Comment no 7, The Right to Adequate Housing (Article 11(1)): Forced Evictions*,10

⁶⁸Daniel Bradlow, *Human Rights, Public Finance and the Development Process: A Critical Introduction*,8
American University Journal of Law and Policy 1,1992,3

⁶⁹Daniel Bradlow, *Human Rights, Public Finance and the Development Process: A Critical Introduction*,3

⁷⁰Daniel Bradlow, *Human Rights, Public Finance and the Development Process: A Critical Introduction*,3

infrastructure projects that they fund. The guidelines mentioned above are: the World Bank's operational policy on involuntary resettlement (OP 4.12) which was adopted in 2001 and AfDB's Involuntary Resettlement Policy of 2003. These two policies have some common objectives such as an 'emphasis on the avoidance of involuntary resettlement where possible and the minimizing of adverse effect where it is unavoidable'⁷¹ and 'enabling the displaced people to attain a higher standard of living and income or at the very least restore them to their position before resettlement took place.'⁷²

The importance of these policies is clear and as such they are used to guide feasibility studies that are done in Kenya prior to the commencement of infrastructure projects. One of the aspects of feasibility studies that is heavily influenced by such policies is the Resettlement Action Plan (RAP). The 'RAP is a document that is prepared so as to guide the process of involuntary land acquisition.'⁷³ In drafting an RAP the relevant body ascertains 'the persons affected by the project'⁷⁴ and the 'process of resettlement and compensation.'⁷⁵ If followed these considerations coupled with several others would align the infrastructure project with the policies that have been mentioned above.

3.5 Conclusion

The interests of the government, evicted persons and IFIs are among several other interests but are the three most dominant. As we have seen all three have frameworks which relate to their interests in forced evictions. These interests converge and diverge at different points and as such need to be balanced. In the next chapter the attempts to balance these interests that have been made by the Constitutional Court of South Africa will be discussed.

⁷¹World Bank, *Operational Policy on Involuntary Resettlement*, 2001,1 and African Development Bank, *Involuntary Resettlement Policy*, 2003,9

⁷²World Bank, *Operational Policy on Involuntary Resettlement*, 2001,1 and African Development Bank, *Involuntary Resettlement Policy*, 2003,9

⁷³Kenya National Highways Authority, *Feasibility Studies and Detailed Engineering Design of the Multinational Arusha-Holili/Taveta-Voi Road Resettlement Action Plan*, October 2012,1

⁷⁴Kenya National Highways Authority, *Feasibility Studies and Detailed Engineering Design of the Multinational Arusha-Holili/Taveta-Voi Road Resettlement Action Plan*, October 2012,29

⁷⁵Kenya National Highways Authority, *Feasibility Studies and Detailed Engineering Design of the Multinational Arusha-Holili/Taveta-Voi Road Resettlement Action Plan*, October 2012,36

CHAPTER 4

4.0 What is just and equitable in development induced forced evictions

4.1 Introduction

In the current chapter what is just and equitable in development induced forced evictions will be discussed. The discussion will be guided by the considerations of the Constitutional Court of South Africa. The discussion will be centered on the decision of the court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (the Joe Slovo case).⁷⁶ Other cases from the Constitutional Court will be used to elaborate on the various considerations.

4.2 The relevance of the Joe Slovo case to the current discourse

As has been mentioned above the Joe Slovo case is of great relevance to the discourse due to the Constitutional Court's detailed assessment of what is just and equitable in the context of forced evictions. Another reason why this case has been selected is because those who were evicted had established their settlement on public land. This fact is very important as the Constitutional Court has held on a separate occasion that 'where evictions take place on private land there is the additional concept of the right to property that the private owner has and which must then be balanced against the right to housing that is enjoyed by those who are to evicted.'⁷⁷ In the context of development-induced forced evictions in Kenya the evictees are typically on public land and since the state does not enjoy the right to property such an interest need not be considered.

4.3 Considerations that the court must address in establishing if an eviction is just and equitable

4.3.1 Circumstances of occupation of the land

This consideration is provided under 'Section 6(3) (a) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act.'⁷⁸ It is provided for as one of three considerations that a court must make when determining whether an eviction is just and equitable. The Constitutional Court found that 'the residents of Joe Slovo had moved to the settlement in search of employment and as such had nowhere else to go

⁷⁶*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

⁷⁷*The City of Johannesburg v Changing Tides and Others* (2011) Supreme Court of Appeal, South Africa

⁷⁸Section 6(3)(a), *Prevention of Illegal Eviction and Unlawful Occupation of Land Act*, (1998)

(a situation the Constitutional Court was sympathetic towards).⁷⁹ In the judgment of Moseneke DCJ on this matter he expressed that ‘the land was public land that was unused and was cleared and occupied by the residents. As it was public its owner was the City which allowed the residents to reside in the Joe Slovo settlement for 15 years during which time no attempt was made to evict them.’⁸⁰ Moseneke DCJ went on to cite the Western Cape High Court’s ruling in the matter of *Thubelisha Homes and Others v Various Occupants and Others*.⁸¹ He used paragraph 27 of the aforementioned ruling to affirm that ‘an eviction order is rarely ever upheld where it is regards a community that has settled for a long period of time without disturbance.’⁸²

4.3.2 The period the unlawful occupier has resided on the land in question

This is the second consideration as provided for in Section 6(3) (b) of PIE.⁸³ The Constitutional court found that ‘the residents of Joe Slovo had occupied the settlement at different times in the 15 years.’⁸⁴ The Constitutional Court discussed this factor thoroughly in the case of *Port Elizabeth Municipality v Various Occupiers*.⁸⁵ At paragraph 17 the Constitutional Court found that ‘justice and equity require that a court treads carefully when evicting settled communities.’⁸⁶ Sachs J stated that ‘the longer the unlawful occupiers have been on the land the more established they are (they are more integrated in terms of employment, schooling and enjoyment of social amenities).’⁸⁷ Sachs J distinguished the Constitutional Court’s approach settled families from those that had only recently begun to occupy an areas. On this matter he stated that ‘the Constitutional Court would be more cautious when authorizing the eviction of the settled families and when such an eviction was allowed they would ensure steps are taken to reduce its adverse effects on the evictees.’⁸⁸

⁷⁹*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

⁸⁰*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

⁸¹*Thubelisha Homes and Others v Various Occupants and Others*(2008), Western Cape High Court, South Africa (unreported)

⁸²*Thubelisha Homes and Others v Various Occupants and Others*(2008), Western Cape High Court, South Africa (unreported)

⁸³Section 6(3)(b),*Prevention of Illegal Eviction and Unlawful Occupation of Land Act*, (1998)

⁸⁴*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

⁸⁵ *Port Elizabeth Municipality v Various Occupiers* (2004), Constitutional Court of South Africa

⁸⁶*Port Elizabeth Municipality v Various Occupiers* (2004), Constitutional Court of South Africa

⁸⁷*Port Elizabeth Municipality v Various Occupiers* (2004), Constitutional Court of South Africa

⁸⁸*Port Elizabeth Municipality v Various Occupiers* (2004), Constitutional Court of South Africa

No provision is made for this in the legal framework on forced evictions in Kenya. Laurence Juma who shares these findings goes on to state that ‘such a requirement (the building of schools, shelter and even medical care for evicted persons) is not far-fetched even for a developing country like Kenya.’⁸⁹ He cites worldwide trends where many municipalities are willing to offer alternative sites for settlement to reinforce his argument.’⁹⁰

4.3.3 The availability to the unlawful occupier of suitable alternative accommodation or land

This is the final consideration that is provided for in PIE. Though it is the last provision in PIE several courts have found that ‘the list is not exhaustive and they are free to consider any other factors that are necessary in determining whether it is just and equitable to allow the eviction of illegal settlers.’⁹¹

Stuurman in her analysis of forced evictions in South Africa notes that ‘there is no definition of ‘suitable alternative accommodation in PIE.’⁹²She looks to Extension of Security of Tenure Act which provides a possible definition. In her view an interpretation of the Extension of Security of Tenure Act suggests that suitable alternative accommodation is ‘safe and overall not less favourable than the occupiers’ previous situation.’⁹³ She elaborates on suitable ‘as regarding: the reasonable means and requirements of the occupiers, their joint ability to earn a living and the requirement that they reside in close proximity to job opportunities.’⁹⁴

The Constitutional Court in the Joe Slovo Case found that ‘the state had made available temporary relocation units (TRUs) about 15 km away in an area called Delft. The court also stated that the TRUs were physically better than the current settlement

⁸⁹Laurence Juma, ‘Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya,’ 505

⁹⁰Laurence Juma, ‘Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya,’ 505

⁹¹The Supreme Court of Appeal made this finding in the matter of *Baartman and Others v Port Elizabeth Municipality* (2004), Supreme Court of Appeal, South Africa at paragraph 8.

⁹²Lowesa Stuurman, ‘Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective, Published LLM Thesis, Potchefstroom University for Christian Higher Learning, Potchefstroom, 2002, 62.

⁹³Lowesa Stuurman, ‘Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective, Published LLM Thesis, Potchefstroom University for Christian Higher Learning, Potchefstroom, 2002, 62

⁹⁴Lowesa Stuurman, ‘Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective, Published LLM Thesis, Potchefstroom University for Christian Higher Learning, Potchefstroom, 2002, 62

or at the very least more hygienic.’⁹⁵ Though ‘courts have generally considered this consideration to be the most important in the analysis of justice and equity’⁹⁶ they have also held that ‘the lack of alternative housing does not necessarily cause the eviction to cease to be just and equitable.’⁹⁷Stuurman finds this holding as inconsistent with that in the famous case of the *Government of RSA v Grootboom*⁹⁸ She makes reference to the holding that ‘even though the right to access housing could not be realized immediately, some form of temporary relief must be given to those who have no access to land.’⁹⁹

The relevant forced eviction laws in section 152 of the Land Act¹⁰⁰ do not mention the obligation of the state to provide alternative housing or at least provide temporary housing as the evictees try to resettle. There is, however, a law that can be invoked to read this requirement into development induced forced eviction. The Constitutional Court has stated that the requirement that alternative accommodation is considered or made available ‘forms part of the state’s obligation to ensure the access to adequate housing which is enshrined in the South African Constitution.’¹⁰¹

The implication of this in Kenya is that the right to adequate housing can then be used to justify a requirement that where persons are evicted steps are taken for them to be able to resettle in an area entirely at the cost of the state or subsidized at the state’s expense. The state in Kenya cannot be seen as having forgotten those who it evicts from public land as the review of various RAPS has shown. ‘Those who are evicted are entitled to compensation for the structures that are lost, 15% disturbance allowance and compensation for loss of business as well as the right to salvage any building materials that they can’¹⁰² This is commendable however those evicted are left with what they need to rebuild but no place to settle. They are thus likely to simply relocate to different public land or even encroach on private land until the next time the NLC is required to evict them. The above consideration only seeks to supplement the above

⁹⁵*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

⁹⁶Section 152, *Land Act* (Act No.6 of 2012)

⁹⁷*Port Elizabeth Municipality v Peoples’ Dialogue on Land and Shelter* (2001).

⁹⁸Lowesa Stuurman, ‘Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective, Published LLM Thesis, Potchefstroom University for Christian Higher Learning, Potchefstroom, 2002, 58

⁹⁹*The Government of RSA v Grootboom* (2000), Constitutional Court, South Africa.

¹⁰⁰Section 152, *Land Act* (Act No. 6 of 2012)

¹⁰¹Article 26, *Constitution of South Africa* (1997)

¹⁰²Kenya National Highways Authority, *Reviewing and Updating of the Resettlement Action Plan(RAP) for the Proposed Upgrading to Bitumen Standards of Mogadashe-Samatar-Wajir Road*, 2020,m

efforts of the state as opposed to introducing entirely new practices so as to enable the state to sufficiently fulfil its obligation under Article 43 of the Constitution¹⁰³

4.3.4 An Account of Engagement

On this point Moseneke DCJ finds that ‘it is important whether the government made an effort to engage the community rather than impose its decisions on them.’¹⁰⁴This meaningful engagement was also considered by the court in *Occupiers of Olivia Road, Berea Township and 197 Main Street, Johannesburg v The City of Johannesburg and Others*.¹⁰⁵ At paragraph 21 of the judgment the Constitutional Court held that ‘where a municipality launches eviction proceedings a complete and accurate account of engagement that is conducted, as well as proof that the body took reasonable steps in furtherance of the process must be tendered to the court.’¹⁰⁶

In her analysis of the Joe Slovo case Kirsten Mclean presents the jurisprudence on meaningful engagement as it emanates from the Constitutional Court in the matter of *The Occupiers of Olivia Road*.¹⁰⁷At paragraph 14 the court pronounced itself on the process of meaningful engagement in the following manner:

‘Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine— (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing

¹⁰³Article 43(b), *Constitution of Kenya* (2010)

¹⁰⁴*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

¹⁰⁵*Occupiers of Olivia Road, Berea Township and 197 Main Street, Johannesburg v The City of Johannesburg and Others*(2008), Constitutional Court of South Africa

¹⁰⁶*Occupiers of Olivia Road, Berea Township and 197 Main Street, Johannesburg v The City of Johannesburg and Others*(2008), Constitutional Court of South Africa

¹⁰⁷*Occupiers of 51 Olivia Road, Berea Township and 197 Mainstreet, Johannesburg v City of Johannesburg and Others* (2008), Constitutional Court, South Africa.

circumstances; and (e) when and how the city could or would fulfil these obligations.’¹⁰⁸

It is of note that though the court endorsed the need for meaningful engagement before eviction proceedings are instituted the court seemed to ‘undermine the principle of meaningful engagement as it readily allowed an eviction where meaningful engagement was not achieved.’¹⁰⁹

In the Kenyan context the concept of meaningful engagement is ‘captured as “participation of the people” in Article 10(2) of the Constitution which provides for national values and principles of governance.’¹¹⁰The policy adopted by the state in infrastructure development is that extensive meetings with Project Affected Persons (PAPS)¹¹¹ are held and that these form part of the RAPs that are prepared. One RAP discloses that ‘of the 844 PAPS, 329 were consulted across 10 community meetings and 8 affected persons consultation meetings.’¹¹²The three main objectives of the meetings were: to raise awareness of the project, to engage the local community especially affected persons on the benefits and problems that may arise from the project and how they will be mitigated and to gather recommendations from members of the local administration.’¹¹³

In the context of a matter brought before a court under Section 152F(2)(b) of the Land Act¹¹⁴ the court must then require proof that there was insufficient engagement with the community and as such it would be just and equitable to cancel or vary the notice of eviction.

¹⁰⁸ *Occupiers of 51 Olivia Road, Berea Township and 197 Mainstreet, Johannesburg v City of Johannesburg and Others* (2008), Constitutional Court, South Africa

¹⁰⁹ Kirsty Melean, ‘Meaningful Engagement: One Step Forward or Two Back: Some Thoughts on Joe Slovo’, 2010, 237- <

https://heinonline.org.ezproxy.library.strathmore.edu/HOL/PDFsearchable?handle=hein.journals/conrev_3&collection=journals§ion=0&id=223&print=20§ioncount=1&ext=.pdf&nocover=> on 13 April 2020.

¹¹⁰ Article 10(2), *Constitution of Kenya* (2010)

¹¹¹ PAPS are defined as any person experiencing loss of any assets or loss of access to income, whether of a temporary or a permanent nature due to ;and acquisition process, regardless of whether they are physically displaced or relocated or not.

¹¹² Kenya National Highways Authority, *Reviewing and Updating of the Resettlement Action Plan(RAP) for the Proposed Upgrading to Bitumen Standards of Mogadashe-Samatar-Wajir Road*, 2020, Part 6

¹¹³ Kenya National Highways Authority, *Reviewing and Updating of the Resettlement Action Plan(RAP) for the Proposed Upgrading to Bitumen Standards of Mogadashe-Samatar-Wajir Road*, 2020, Part 6

¹¹⁴ Section 152F(2)(b), *Land Act* (Act No.6 of 2012)

4.3.5 The historical and policy context

At Paragraph 163 Moseneke DCJ states ‘it is necessary to give due regard to all historical circumstances that have led to land shortages and consequently, large affluent areas co-existing with overcrowded pockets of impoverished and insecure informal neighbourhoods.’¹¹⁵ In South Africa the most apparent reason for the issue of land shortage is the apartheid regime. This conclusion can be drawn from the words of Moseneke DCJ at paragraph 150 of the Joe Slovo judgment. He ‘supports the claims of the applicants that the housing crisis is directly attributable to the apartheid housing policies one of which was the “coloured labour preference policy” as well as the influx control pass laws.’¹¹⁶

Stuurman elaborates some of the policies that were implemented in apartheid South Africa which led to the crisis of homelessness among members of the black community. He highlights the Native Land Act¹¹⁷ which effectively ‘left black people with 7% of the land to use while the remaining 93% was left at the disposal of the white community.’¹¹⁸ Another statute from South Africa’s dark past is the Development Trust and Land Act.¹¹⁹ This act ‘prohibited the acquisition of land in controlled areas which were essentially white rural areas.’¹²⁰ Finally Stuurman relied on a short passage from a Constitutional Court decision which read, ‘Squatting has become a way of life for most citizens as no other means of acquiring adequate shelter are available to them. One must always remember that people squat because they have to, not because they want to.’¹²¹

Like South Africa, Kenya has had a long past consisting of historical land injustices. Patricia Kameri Mbote discusses some of these injustices as part of the “land

¹¹⁵*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

¹¹⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v The City of Johannesburg and Others* (2008), Constitutional Court of South Africa

¹¹⁶ *Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

¹¹⁷ *Native Land Act* (1913, South Africa)

¹¹⁸ Lowesa Stuurman, ‘Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective, Published LLM Thesis, Potchefstroom University for Christian Higher Learning, Potchefstroom, 2002, 27.

¹¹⁹ *Development Trust and Land Act* (Act No.18 of 1936) South Africa.

¹²⁰ Lowesa Stuurman, ‘Illegal Eviction and Unlawful Occupation of Land: A Comparative Perspective, Published LLM Thesis, Potchefstroom University for Christian Higher Learning, Potchefstroom, 2002, 28.

¹²¹ *Port Elizabeth Municipality v Peoples’ Dialogue on Land and Shelter* (2000).

question”.¹²² She states that ‘shortly after independence there existed a duality as regards the land management and distribution in the country.’¹²³ This duality was manifested as a ‘cash crop/export area at the disposal of a small number of white settlers and a subsistence farming area for the African peasantry.’¹²⁴ The most important aspect of this duality for purposes of the current discourse was ‘a land distribution scheme that allocated large tracts of fertile land to the whites and small portions of marginal land for the Africans.’¹²⁵

There was a general expectation that ‘with the indigenous elites taking over from the colonial regime there would be progressive reforms.’¹²⁶ In reality what happened was that ‘the colonial land policies and structures were simply continued.’¹²⁷ The ‘reinforcement of colonial policies in Kenya led directly to inequality in land ownership and use, landlessness and, squatting, land degradation and Africans’ resentment of the white settlers.’¹²⁸

Some 46 years after independence the effects of the colonial policies were still felt and expressed in the National Land Policy (Sessional Paper No.3 of 2009). It was stated in Sessional Paper No.3 that some of the ‘more recent manifestations of the duality propagated by these policies are: rapid urbanization, general disregard for land use planning regulations and a disparity in land ownership.’¹²⁹ It is clear that the issues which originated several decades ago are still being felt today. This ripple effect is, perhaps, the motivation behind the ‘mandate granted to the NLC in Article 67(2) (e) to investigate claims of historical land injustices.’¹³⁰ In the context of forced evictions the court would be just and equitable in giving some special consideration for those who

¹²²Patricia Kameri Mbote, ‘The Land Question in Kenya: Legal Aid ethical Dimensions’, Governance: Institutions and the Human Condition, Nairobi, 2009,8

¹²³Patricia Kameri Mbote, ‘The Land Question in Kenya: Legal Aid ethical Dimensions’, Governance: Institutions and the Human Condition, Nairobi, 2009,8

¹²⁴Patricia Kameri Mbote, ‘The Land Question in Kenya: Legal Aid ethical Dimensions’, Governance: Institutions and the Human Condition, Nairobi, 2009,8

¹²⁵Patricia Kameri Mbote, ‘The Land Question in Kenya: Legal Aid ethical Dimensions’, Governance: Institutions and the Human Condition, Nairobi, 2009,9

¹²⁶Patricia Kameri Mbote, ‘The Land Question in Kenya: Legal Aid ethical Dimensions’, Governance: Institutions and the Human Condition, Nairobi, 2009,9

¹²⁷Patricia Kameri Mbote, ‘The Land Question in Kenya: Legal Aid ethical Dimensions’, Governance: Institutions and the Human Condition, Nairobi, 2009,9

¹²⁸ Paul Syagga, ‘Public Land, Historical Land Injustices and the new Constitution,’ Society for International Development, SID Constitution Working Paper No.9,9-< <http://sidint.net/docs/WP9.pdf>> on 14 April 2020

¹²⁹Chapter 2, Sessional Paper No.3 of 2009 on National Land Policy.

¹³⁰Article 67(2)(e), *Constitution of Kenya* (2010).

are landless due to a chain of events that are linked to the continuation of the colonial land policies in Kenya.

4.4 Conclusion

In this chapter the Joe Slovo case has been analysed to come up with some considerations that a court should make in interest of establishing whether it would be just and equitable to cancel or alter an eviction notice under Section 152F(2)(b) of the Land Act. The five considerations that have been drawn from the case are: the availability of alternative accommodation, the period of occupation of the land, the circumstances of occupation of the land, an account of engagement and the historical and policy context of the occupation. With these five a court should be able to determine what is just and equitable in a development-forced eviction matter with a view to protecting various rights that the potential evictees enjoy.

CHAPTER 5

5.0 Conclusion and Recommendations

5.1 Introduction

In chapter 1 the research topic has been introduced as well as the research problem and objectives. In chapter 2 justice as fairness as proposed by John Rawls has been linked by the topic and used as the research paper's theoretical underpinning. In chapter 3 the interests that are at play in development induced forced evictions. In chapter 4 South African jurisprudence emanating principally from the Joe Slovo case at the Constitutional Court was used to establish what is just and equitable in the context of forced evictions. This chapter shall conclude the present paper and make recommendations on changes to the current forced evictions regime.

5.2 Conclusion

A court that is faced with an application brought under Section 152F (2) (b) of the Land Act¹³¹ is required to make a decision based on what is just and equitable. This requirement gives the court discretion, which is perhaps necessary, as every case has unique circumstances that may require an equally unique approach to what is just and equitable. This paper requires that the justice upheld by the court is based on fairness such that all parties involved would expect to be treated in such a manner if their roles were reversed.

The Joe Slovo case¹³² has proven to be very useful in the current discourse as the considerations made by the Constitutional Court were eloquently presented in the judgments of the various Constitutional Court justices. Though 'the Constitutional Court has pronounced itself on various occasions as establishing what is just and equitable for all,'¹³³ there is a clear inclination towards a finding that favours those who are to be evicted due to the risk of homelessness that they face.

¹³¹Section 152F(2)(b), *Land Act* (Act No.6 of 2012)

¹³²*Joe Slovo Community, Western Cape v Thubelisha Homes and 2 others* (2009), The Constitutional Court of South Africa

¹³³*Port Elizabeth Municipality v Various Occupiers* (2004), Constitutional Court of South Africa

Ultimately the rationale behind a forced eviction regime is to protect those who are evicted by the state from the various harms that accompany forced evictions such as damage to people's property, the loss or rendering of productive assets as useless and their livelihoods are ruined.'¹³⁴

5.3 Recommendations

5.3.1 Borrowing from the South African jurisprudence on Forced Evictions into Kenyan legislation

An argument that may be raised against the above proposition is that the introduction of written considerations of what is just and equitable would be limiting the discretion that the court is granted. The implication of this argument is that injustices are expected where the court erroneously overlooks certain factors in favour of those provided in law. In the case of *Johannesburg Housing (Pty) v The Unlawful Occupiers of Newtown Urban Village*¹³⁵ Willis J gives this notion considerable attention in his judgment. He states that 'lawyers are more familiar with the "just and equitable" in the context of liquidation matters due to the length of time that legislation on companies has been in existence.'¹³⁶

Interestingly, this is as true for South Africa as it is for Kenya. What is just and equitable, as it relates to judicial discretion, has been considered in the context of liquidation of companies from as early as 1978 in the matter of *Re: Garnett's Mining Co.Ltd*¹³⁷. In the matter the court found that,

'Whether or not a company should be wound up by the court on the grounds that it is just and equitable to do so under Section 219(f) is a matter of discretion. The court's discretion is wide but must be exercised judiciously. Each case depends on its own facts as they are at the time of the hearing.....'¹³⁸

Willis J, after laying down extensive jurisprudence on the matter, finds that 'judicial decision making requires "a sacrifice of self" where the determination of the

¹³⁴United Nations Human Settlements Program, *Losing your Home: Assessing the Impact of Eviction*,3

¹³⁵*Johannesburg Housing (Pty) v The Unlawful Occupiers of Newtown Urban Village* (2012), South Gauteng High Court, South Africa

¹³⁶ *Johannesburg Housing (Pty) v The Unlawful Occupiers of Newtown Urban Village* (2012), South Gauteng High Court, South Africa

¹³⁷*Re: Garnett's Mining Co Ltd*, [1978] KLR

¹³⁸*Johannesburg Housing (Pty) v The Unlawful Occupiers of Newtown Urban Village* (2012), South Gauteng High Court, South Africa

just and equitable is based on an objective test.’¹³⁹ In making this finding he concurs with the holding of the court in *Tjospomie Boerdery (Pty) Limited v Drakensburg Bottliers (Pty) Limited and Another* where the learned judge states that,

‘Deciding as to justice and equity... does not involve the preference of the particular Court or Judge according to what he finds appropriate in the circumstances. Difficult though justice and equity are to define, they have to be seen as setting an objective standard that will be the same in every court in the land.’¹⁴⁰

This idea that an objective test is required is what this paper proposes. This should not however be construed to mean that the same exact considerations will be used in cases with varying facts. The Constitutional Court’s approach on the application of this objective test method is most ideal. The Constitutional Court ‘has established that the requirements provided by PIE are peremptory but not exhaustive.’¹⁴¹ What this means is that the court will first have to consider the requirements provided for in legislation before considering other factors that may arise from the facts. With this approach an objective standard is achieved while at the same time allowing the court to exercise discretion to the extent that the case requires.

5.3.2 The Formulation of a National Policy on Forced Evictions

The case in Kenya today is that the policy on forced evictions is heavily guided by the policy guidelines of the AfDB and the World Bank. Though these are very thorough and well drafted policies they are general in nature and ‘are more for the guidance of projects funded by their respective drafters.’¹⁴² One RAP¹⁴³ has used 3 different World Bank policies that revolve around resettlement issues. The very same RAP states that ‘the project is partially financed by the World Bank.’¹⁴⁴ One may conclude that the policies are being implemented solely because it is a prerequisite for continued funding of the projects made not because it is good practice. This evidenced

¹³⁹Johannesburg Housing (Pty) v The Unlawful Occupiers of Newtown Urban Village (2012), South Gauteng High Court, South Africa

¹⁴⁰*Tjospomie Boerdery (Pty) Limited v Drakensburg Bottliers (Pty) Limited and Another* (1989)

¹⁴¹*Port Elizabeth Municipality v Various Occupiers* (2004), The Constitutional Court of South Africa

¹⁴²African Development Bank, *Involuntary Resettlement Policy*, 2002, IV.

¹⁴³Kenya National Highways Authority, *Reviewing and Updating of the Resettlement Action Plan(RAP) for the Proposed Upgrading to Bitumen Standards of Mogadashe-Samatar-Wajir Road*, 2020,35

¹⁴⁴Kenya National Highways Authority, *Reviewing and Updating of the Resettlement Action Plan(RAP) for the Proposed Upgrading to Bitumen Standards of Mogadashe-Samatar-Wajir Road*, 2020,35

by a separate RAP¹⁴⁵ that ‘only quotes the AfDB guidelines (and also happens to be regarding a project funded by the AfDB)’.¹⁴⁶

A locally drafted policy, aside from being operative despite who is funding the project, may also address the issues that are unique to forced evictions in Kenya. Issues such as the historical land injustices covered in chapter 4 would require that the process of forced evictions is delicately handled to avoid creating mistrust between communities and the state.

5.3.3 The Formulation of a Forced Eviction Tribunal

This tribunal could be constituted on an ad hoc basis to deal specifically with the issue of forced eviction. The tribunal would be composed of specialists from fields such as land law and housing rights and would be led by a magistrate who would be appointed by the Chief Justice. This tribunal would be geared towards access to justice and as such would be inexpensive to apply to and be capable of sitting in various different counties to reduce the costs for the petitioners. The benefit of having such a tribunal would be that the cases it handles would be decided upon by experts and decisions would be quick which is important so as not to leave the potential evictees in a state of limbo for too long. Appeals from this tribunal would lie to the Environment and Land Court which is ‘mandated with matters of use and occupation of land under Article 162 2(b) of the Constitution’.¹⁴⁷

¹⁴⁵Kenya National Highways Authority, *Feasibility Studies and Detailed Engineering Design of the Multinational Arusha-Holili/Taveta-Voi Road: Resettlement Action Plan (RAP)*,2012

¹⁴⁶Kenya National Highways Authority, *Feasibility Studies and Detailed Engineering Design of the Multinational Arusha-Holili/Taveta-Voi Road: Resettlement Action Plan (RAP)*,2012,14

¹⁴⁷Article 162 2(b), Constitution of Kenya (2010).

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