FROM RHETORIC TO PRACTICE: A STUDY ON THE RIGHT TO ACCESSIBLE AND ADEQUATE HOUSING IN KENYA.

1. THE NATURE AND SCOPE OF KENYA'S RIGHT TO ADEQUATE HOUSING OBLIGATIONS UNDER INTERNATIONAL AND NATIONAL LAW

The Universal Declaration of Human Rights provides, among other things, that "everyone has the right to an adequate standard of living…including the right to housing."[1]This has been defined by the first Special Rapporteur on adequate housing as, "the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity."[2] As with other Economic and Social Rights International Law requires the progressive realization of the right, to the maximum of the country's available resources, in a non-discriminatory manner. Sadly, in many countries in the world, Kenya included, the gap between housing rights rhetoric and realization is extremely broad. A recent report on the right to housing under international law, prepared by the UN, opens by stating that the right to housing is a 'fundamental human right', and that it has been recognized by "over 100 constitutions".[3] The reality however remains that despite this constitutional recognition and the central place of this right within the global legal system; well over a billion people are not adequately housed. Millions around the world live in life or health threatening conditions, in overcrowded slums and informal settlements, or in other conditions which do not uphold their human rights and their dignity. Further millions are forcibly evicted, or threatened with forced eviction, from their homes every year.[4] This begs the question, what is the value of recognition? Does it translate into actual justiciability for those whose rights are violated? And perhaps more importantly, how are these rights to be adjudicated, especially in developing countries like Kenya where governments neither have the resources nor the ability to provide housing for huge proportions of their populations who live in crippling poverty?

---

[1] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 25(1), U.N. Doc. A/810 (1948)

[2] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, E/CN.4/2006/41, 21 March 2006

[3] Christophe Golay and Melik Ozden, The Right to Housing: A Report under International Law, 1, available at http://www.cetim.ch/en/documents/bro7-log-A4-an.pdf.

[4] UN HABITAT, Fact sheet no. 21 on the right to adequate housing, available at http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

On the basis of the provisions established in the UDHR, the right to adequate housing was elaborated and reaffirmed in 1996 by the International Covenant on Economic, Social and Cultural Rights (ICESR), of which article 11.1 reads as follows, "The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." General comment no. 4 of the committee on Economic, Social and Cultural Rights identifies the right to adequate housing as being of central importance to the enjoyment of all Economic, Social and Cultural rights.[5]

Since attaining independence in 1963, successive Kenyan governments have grappled with the behemoth that is provision of adequate housing for an ever growing population without much success. Despite being a party to the ICESCR for decades, having ratified the covenant in 1972, it is only in 2010 that the right to adequate housing was formally recognized. Following the promulgation of a new constitution in August 2010, the right to housing is now a constitutional right provided for in Kenya's expansive Bill of Rights.[6]

This research aims to identify the minimum core of the right to housing as recognized in International standards in order to assess the level of realization of the right to adequate housing in Kenya. Furthermore, I will seek to isolate specific instances of violation of the right with particular emphasis on the incidence of forced evictions which is prevalent in the country. I hope to use the experience and lessons drawn from a study of the right to housing cases in the South African Constitutional Court in order to offer practical suggestions on the very important role the Kenyan courts can play in ensuring that the right to housing is more than just an empty promise for the vast majority of the Kenyan population.

1.1 A historical overview of the housing situation in Kenya

Due to the exponential increase in population growth and urbanization since independence, the Kenyan housing sector has been unable to provide adequate housing to its residents. The shortage of both land and housing is a result of a complicated land tenure history, inefficient

[5] Paragraph 1 of General Comment No. 4 The Right To Adequate Housing (Art.11 par.1): 12/13/1991 Committee on Economic, Social and Cultural Rights, Office of the High Commissioner on Human Rights

[6] Section 43(1b) Kenya Constitution provides that "Every person has a right to accessible and adequate housing and to reasonable standards of sanitation".

regulatory frameworks, and under-resourced projects to improve housing. Those most affected by the lack of housing are primarily from lower income groups. The lack of appropriate housing has resulted in the expansion of informal settlements such as slums. Many people are forced into overcrowded establishments or are left completely homeless.

Kenya is among the poorest countries in the world with 56 per cent of the population living below the poverty line of US$ 1 per day (2002), compared to 52 per cent in 1997.[7] A large majority of the urban population lives in informal settlements. According to a UN-Habitat 2008 study, some 60 to 80 percent of residents in Kenya's largest urban centers, Kisumu, Mombasa and Nairobi, live in informal settlements. These informal settlements are crowded, with poor quality housing and lack basic services such as access roads, education facilities, and sanitation facilities, and suffer chronic insecurity. In fact, while 60 percent of Nairobi's population lives in informal settlements; their homes occupy only five percent of the total land area in the city and its environs.[8]

The current official perception that informal settlements are illegal can be traced back to the colonial era in Kenya.[9] Originally, unauthorized settlements sprang up because Africans were displaced by the arrival of European settlers. The Europeans expropriated large tracts of land around Nairobi and did not allow Africans to enter the city unless they had a permit. Basic, temporary accommodation was only provided to those Africans – mostly men – who were formally employed. Africans were viewed as temporary sojourners in urban areas.

After achieving independence in 1963, Kenya experienced a phenomenal increase in urban populations and demand for housing. This was due to several factors: continued rural-urban migration, population growth due to improvements in healthcare services, the expansion of city boundaries, and the relaxation of influx controls.[10]

---

[7] Organization for Economic Cooperation and Development (OECD), African Outlook - Country Study: Kenya, 2003, p. 186

[8] United Nations-HABITAT, UN-HABITAT and the Kenya Slum Upgrading Programme, Strategy Document, 2008, p.10.

[9] Winnie Mitullah and Kivutha Kibwana, 'A Tale of Two Cities: Policy, Law and Illegal Settlements in Kenya', in Edesio Fernandes and Ann Varley (eds.), Illegal Cities: Law and Urban Change in Developing Countries (Zed Books, 1998), pp. 196-199.

[10] *Ibid*.

In the 1990s, the dominant and official approach to housing policy was 'enablement'. Besides site-and-service provision and slum upgrading, greater emphasis was placed upon facilitating the role of other actors in housing. To a large extent, this approach was informed by the neo-liberal agenda: the creation of institutional capacity and an open-market environment for expanding private activity in the formal sector. Regulations that were seen as inhibiting the development of the low-income housing sector were repealed.[11]

Residents of informal settlements are denied a range of essential services including electricity, water, sanitation, garbage collection, and education and healthcare centers. The fact that the official position is that informal settlements are illegal necessarily locks out the residents from any and all access to public services and facilities owed to them by the government. In itself, the failure to officially recognize the informal settlements is not a violation of international human rights law, yet it certainly obstructs any efforts to ensure that the residents of these settlements realize their right to adequate housing.

1.2 A review of Kenyan Legislation on the right to housing

The United National General Assembly has stated that "States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations." [12]Furthermore, the Committee on ESCR has adopted General Comment No. 9 which states that "although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party."[13]In light of these provisions the government, both past and present, has made attempts to use legislation in order to secure the right to adequate housing to the citizenry.

[11] 'Nairobi Situation Analysis' (Nairobi, 2001), a report researched and compiled by a team of three resource experts at the University of Nairobi: Prof. Paul Syagga, Dr Winnie Mitullah and Dr Sarah Karirah Gitau (see, for a summary, Habitat Debate, Vol. 7 No. 3, Sept. 2001)

[12] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United National General Assembly, resolution60/147, UN Doc. A/RES/60/147 (21 March 2005)

[13] Committee on Economic, Social and Cultural Rights, General Comment No. 9, the domestic application of the Covenant (Nineteenth session, 1998), para. 5, U.N. Doc. E/C.12/1998/24 (1998), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003)

However, despite avowals by past governments to protect human rights, the previous constitution made no mention of Economic and Social Rights and instead focused on Civil and Political rights. It contained no direct provision recognizing the right to adequate housing and its section 75 (1) merely recognized the right to protection of one's property.[14] It further went on to provide, in its section 70 (c), for protection for the privacy of one's home and other property and from deprivation of property without compensation. These two provisions formed the basis of all right to adequate housing challenges brought before the high court. For example, the Kenyan High court in **Musa Mohammed Dagane & 25 others v Attorney General & another (constitutional petition no.56 OF 2009)**, held that forced evictions carried out "without any and or adequate compensation by the Government of Kenya violated their right to property as guaranteed under section 75 of the Constitution of Kenya". The court acknowledged that under the old constitution the right to adequate housing could be inferred and indeed flowed from the right to property.

Besides the constitution, there were six other pieces of legislation relating to housing. The first set of laws, the Building Societies Act, the Housing Act, and the Sectional Properties Act provide the legal bases for financing and ownership arrangements for housing. The Building Societies Act provides for the formation and registration of building societies, while the Housing Act provides for public financing for home development as it establishes the National Housing Corporation (NHC), a parastatal organization which is charged with providing loans from public funds for the construction of private dwellings. On the other hand, the Sectional Properties Act provides for division of buildings into units to be owned by individuals in addition to providing a framework for the use and management of common properties. The second set of laws includes the Rent Restriction Act and the Landlords and Tenants Act. Both of these regulate relations between landlords and tenants. An associated law is the Employers Ordinance which also has provisions that require employers to subsidize their employees' housing costs.

Additionally, there have been numerous policy papers addressing the issue of the right to adequate housing. The first comprehensive Housing Policy for Kenya was developed in 1966/67 was Sessional Paper No. 5. The policy directed the Government "to provide the maximum

[14] "no property of any kind shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except under certain conditions, conditions that are laid down in the Government Lands Act"

number of people with adequate shelter and a healthy environment at the lowest possible cost". However, despite this policy, the investment in housing remained minimal and sporadic. In 2004 a revised National Housing Policy was articulated in Sessional Paper No. 3 of 2004 which was intended to address the deteriorating housing conditions countrywide and to bridge the shortfall in housing stock arising from demand that far surpasses supply, particularly in urban areas. Some of the key objectives of the policy are to facilitate progressive realization of the right to housing by enhancing ownership of housing through expansion of access to housing finance in addition to promoting security of tenure for land for all groups, particularly low income earners. Others are to promote inclusive participation in development of public housing policy and to streamline the legal and institutional framework to promote housing development. The policy also calls for the improvement of land management and the expansion of infrastructure such as electricity and water which are crucial for adequate housing. The implementation of the policy objectives are mainly coordinated by the Ministry of Housing.[15] The ministry of housing is a key player in the field of housing and is mandated to facilitate development and management of quality and affordable shelter for Kenyans.[16] Sessional Paper No. 3 on National Land Policy 2009 also addresses the issue of housing especially with regard to informal settlements. It recommends the development of, in consultation with affected communities, "A slum upgrading and resettlement programme under flexible tenure systems."[17]

Perhaps the most significant provision in the law dealing with the right to adequate housing is the provision enshrined in the new constitution guaranteeing a right to accessible and adequate housing. The promulgation of the new constitution infused a much needed vigor to the quest for adequate housing in Kenya. For instance, The Draft National Policy on Human Rights, 2010, acknowledges that there are serious gaps in the enjoyment of the right to adequate housing in Kenya.[18] One of the key targets of the draft policy is to compel government to implement the National Housing Policy. As proof of its commitment to realizing this right, at least on paper, the government under the aegis of the ministry of housing formulated the draft housing bill in October 2011. This Bill is aimed at providing the legislative framework for effective coordination, regulation, guidance, facilitation, capacity building and monitoring of the housing

[15] Hakijamii report, "*Assessment of the Right to Adequate housing in Kenya 2009-201*0"
[16] Presidential Circular No. 1 of 2008
[17] Government Of Kenya "Sessional Paper No. 3 of 2009 on National Land Policy" August 2009
[18] Government of Kenya, "Draft National Policy on Human Rights" 2010, p. 11 and 16-17

and human settlements sector. The draft recognizes the private sector as the "engine" and the government as a "key enabler, catalyst and partner" in housing development, and proposes the establishment of a Kenya Housing Authority, a one-stop shop for all matters housing in the country. The authority is mandated to exercise general supervision and control over all matters relating to housing and human settlement in Kenya. The bill is set to become law in June 2013 and it remains to be seen whether the laudable objectives it sets out will be realized.

Even with the above provisions and the fact that Kenya is party to the six core international human rights treaties, has ratified the two Optional Protocols to the Convention on the Rights of the Child and is a party to the African Charter on Human and Peoples' Rights, human rights abuses in the form of forced evictions by the government are a common occurrence. There has been a failure of the Governments to respect and protect the right to adequate housing, including access to essential services such as potable water, electricity and sanitation, and to land, particularly with respect to the poorest segments of society, including in informal settlements. This failure has been accentuated by corruption, mismanagement of State and local resources, land-grabbing, increasing poverty rates and growing slums.[19]

This brief background of the Kenyan realities goes to show that the right to adequate housing has for a long time been a mere "manifesto right" for a great number of the population.

1.3 An in-depth look at the nature of Kenya's obligations under International law

As already mentioned, article 25(1) of the UDHR sets out the basis for the right to adequate housing and although non-binding in nature, has been acknowledged to be the most authoritative document cataloguing the various human rights. The key treaty in as far as economic and social rights are concerned is the ICESCR Article 11 of which provides for the right to an adequate standard of living which also implies access to adequate housing.

Article 2(1) of the ICESCR sets out the general obligations that states undertake with respect to ESC rights, including the right to adequate housing, stating that, "each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with

[19] United Nations (2004), *Report of the Special Rapporteur on Adequate Housing as a Component of the right to an Adequate Standard of Living in Kenya*. E/CN.4/2005/48/Add.2

a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." this article has been the subject of a lot of controversy with many critics arguing that it gives an escape routes for government intent on doing nothing to realize economic and social rights. However, in its third general comment the ESCR committee reiterated that, "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content…It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."[20]

In addition to the ICESCR, Kenya is a signatory to the following treaties which provide for a right to adequate housing:

a) International Convention on Elimination of Racial Discrimination (CERD). Article 5(e) (iii) provides that state parties undertake to prohibit and eliminate discrimination in the enjoyment of the right to housing.

b) International Convention on the Rights of the Child (CRC). Article 27(3) provides that state parties have an obligation to assist parents in the provision of nutrition, clothing and housing.

c) African Charter on Human and People's Rights (ACHPR). Following a decision by the African Commission on Human and People's Rights in the case of **Nigeria v. SERAC**, the African Charter is now understood to include an implied right to housing which is derived from the express rights to property, health and family.

Thus, in as far as the right to adequate housing is concerned; the government of Kenya is under a duty to take steps to the maximum of its available resources in order to ensure the progressive realization of the right subject to the available resources.

The most logical progression of this duty is to determine exactly what "adequate" means in this context. The ECSR committee has been adamant that the right to adequate housing should not be interpreted narrowly, rather it should be seen as the right to live somewhere in security, dignity

[20] Paragraph 3 of General Comment No. 3 The Nature of State Obligations (Art.2 par.1):. 12/14/1990 Committee on Economic, Social and Cultural Rights, Office of the High Commissioner on Human Rights

and peace. A more comprehensive meaning of the term “adequacy” as it relates to housing has been elaborated in general comment no. 4.

At its 6th session on 1991 the ESCR committee addressed the issue of the right to adequate housing and gave a comprehensive list of seven indicators that can be used to assess the quality of housing provided by the state in any given context. These include:

a) Legal security of tenure: the aim is to ensure that regardless of the type of tenure held, all persons have a degree of security which guarantees legal protection against forced evictions and other kinds of harassment.
b) Availability of service, materials, facilities and infrastructure: housing is more than four walls and a roof over one’s head. There should be access to sanitation, electricity, light, water and other services necessary to ensure full enjoyment of the right.
c) Affordability: housing should be affordable for all members of society. The state has an obligation to ensure that the neediest members of society are not locked out of the system because of high costs.
d) Habitability: the housing must be able to meet all the needs of the occupants, protecting them from the elements and disease vectors. This is a key issue and especially where slum dwellings are concerned.
e) Accessibility: all members of society, including traditionally marginalized groups, should have access to housing.
f) Location: the housing should be in the vicinity of other necessary facilities. For example schools, employment sites and hospitals.
g) Cultural adequacy: cultural identity should be promoted through housing policy

Having defined what adequacy means in the context of the right to housing, the next question is, is the Kenyan government expected to ensure the right to adequate housing immediately or progressively subject to resource limitations. One possible approach would be adoption of the minimum core requirement propounded by the ESCR committee in general comment no. 3.

As already mentioned, economic and social rights should be realized progressively subject to available resources. However, according to the ESCR committee, some aspects of the rights are capable of immediate implementation. The State has an obligation to give effect to the minimum

essential level of each right. It has been argued that this minimum essential level of realization is the beginning of the progressive realization of ICESCR provisions.[21] The concept of a minimum core is therefore relevant to the notion of progressive realization and is therefore inextricably linked to the nature of state obligations. The minimum core obligation is defined as follows:

"The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*… it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[22]

The minimum core is a useful starting point in ascertaining the realization of the right to housing. However states are not bound to adopt the minimum core content of rights and it is instructive to note that the South African court has expressly rejected this requirement and opted instead for a reasonableness inquiry. In the seminal **Government of South Africa and Others v. Irene Grootboom [23]** (hereinafter "*Grootboom case*"), the Court suggests that the difference in the language of section 26 of the South African constitution on the one hand, and that in article 11(1) of the ICESCR on the other, creates two different rights, and that therefore the minimum core standard is an inappropriate test for use in assessing the constitutionality of South African government housing policy. While the Covenant provides a right to adequate housing, the constitutional right is one of access to adequate housing. The Covenant requires that all appropriate steps be taken by States Parties; the Constitution requires reasonable measures. A

[21] A R Chapman and Sage Russell 'Introduction' in Core Obligations: Building a Framework for Economic, Social and Cultural Rights (eds.) Insentia Antwerp, Oxford, New York (2002) page 15

[22] Committee on Economic Social and Cultural Rights, 'General Comment No. 3, The Nature of States Parties Obligations' U.N. Doc. E/1991/23 annex III at 86 (1990) paragraph 10

[23] 2001 (4) SA 46 (CC)

minimum core standard for constitutional rights, the Court noted, would impose a complex and time-consuming task each time economic and social rights are brought before courts and is therefore inappropriate to adopt, though that standard may at times be useful for the court to consider when assessing reasonableness.

The Kenyan government clearly has an obligation to provide adequate housing to its citizenry, as provided for by the various international covenants to which Kenya is a signatory, and by the 2010 constitution which explicitly provides for a right to adequate housing. The indicators of adequacy as posited by the ESCR committee must be adhered to in order to ensure the right is a meaningful one and not a mere manifesto right. The hope is that the constitutional court will develop a body of jurisprudence that clarifies exactly what standards the government will be held to in provision of this right and especially whether the minimum core obligation is appropriate for the Kenyan context.

2. FORCED EVICTIONS AND COURTS: THE ROLE TO BE PLAYED BY THE KENYAN CONSTITUTIONAL COURT IN UPHOLDING THE RIGHT TO ADEQUATE HOUSING SPECIFICALLY IN THE CONTEXT OF FORCED EVICTIONS

2.1. What is a forced eviction?

The term "forced evictions" is defined as the non-consensual permanent or temporary removal against their will of individuals, families and/or communities from the homes and land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.[24] The recently developed Basic Principles and Guidelines on Development-based Evictions and Displacement[25] build on General Comment 7 as well as on the United Nations Comprehensive Human Rights Guidelines on Development-based Displacement.[26] The Basic Principles define forced evictions as “acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common

[24] Committee on Economic, Social and Cultural Rights, Office of the High Commissioner on Human Rights, General Comment No. 7 The Right to Adequate Housing (Art.11.1): Forced Evictions: 20/05/97 para. 3.
[25] Report of the UN Special Rapporteur on adequate housing, Miloon Kothari, E/CN.4/2006/41, 14 March 2006. http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/59/PDF/G0611859.pdf?OpenElement
[26] UN Comprehensive Human Rights Guidelines on Development-Based Displacement, 1997, adopted by the Expert Seminar on the Practice of Forced Evictions, Geneva E/CN.4/Sub.2/1997/7

property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection."

The international community has repeatedly affirmed that "forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing.[27] Forced evictions also lead to violations of other economic, social and cultural rights, as people may no longer be able to access clean water, food, sanitation, work, health and education. They have catastrophic consequences on people's lives, and drive victims deeper into poverty.

The ICCPR prohibits forced eviction under Article 17, which recognizes, *inter alia*, the right to be protected against "arbitrary or unlawful interference" with one's home. The Human Rights Committee, which monitors compliance of the ICCPR, addressed forced eviction in Kenya in 2008, finding that forced eviction "arbitrarily interferes with the Covenant rights of the victims of such evictions, especially their rights under article 17 of the Covenant" and that the Government "should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made.[28]

In the exceptional l circumstances where forced evictions are necessary, these must be carried out in accordance with international human right standards. The committee on ESCR urges all governments to put into place appropriate procedural protection and due process in order to ensure that the human rights of evictees are upheld.[29] This includes, for example;

(a) An opportunity for genuine consultation with those affected;

(b) Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;

---

[27] Commission on Human Rights, Resolution 1993/77, UN Doc. (10 March 1993); Commission on Human Rights, Resolution 2004/28, UN Doc. (16 April 2004).

[28] Committee on Economic, Social and Cultural Rights, Concluding Observations: Kenya, UN Doc. E/C.12/KEN/CO/1 (1 December 2008) at para. 31

[29] Committee on Economic, Social and Cultural Rights, Office of the High Commissioner on Human Rights, General Comment No. 7 The Right to Adequate Housing (Art.11.1): Forced Evictions: 20/05/97 para. 15

(c) Information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;

(d) Especially where groups of people are involved, government officials or their representatives to be present during an eviction;

(e) All persons carrying out the eviction to be properly identified;

(f) Evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;

(g) Provision of legal remedies; and

(h) Provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

However, despite these guidelines, forced evictions continue to occur on a large scale in virtually all countries in all parts of the world, Kenya included. This has led to an increase in the role played by the courts, and especially constitutional courts as guardians of the bill of rights, and by extension protection of human rights. The South African jurisprudence to this effect shows that where the government reneges on its obligations to uphold human rights including the right to adequate housing, the courts can and should step in to assist those in most desperate need.

2.2 The incidence of forced evictions in Kenya

Forced evictions are alarmingly common in Kenya and occur in a legal vacuum that needs to be remedied in order to prevent any other or further violations of the right to housing. The six or so laws that relate to housing do not have any provisions on how forced evictions should be carried out. The issue of forced evictions is not identified as a housing-related challenge in either the National Housing Policy or the proposed Housing Bill. It is only the National Land Policy that has specific policy targets relating to forced evictions namely, the need for legislation to control the problem. In the absence of a reasonable legal or policy framework, most forced evictions in Kenya are usually carried out with brutal consequences for the victims. Affected persons are usually not adequately consulted and do not receive adequate and reasonable notice of

impending evictions. Under such circumstances, there is no requirement for state agencies or private actors to ensure that affected people are not rendered homeless and shielded from other kinds of human rights violations. In light of this it is left to the courts to determine whether forced evictions result in violations of the right to adequate housing and to determine what redress the victims should receive.

The majority of recent forced evictions in Kenya have been carried out in forest areas. Government officials have blamed settlers and tribal people in Kenya's forests for Kenya's increasing deforestation and the environmental damage. One of the most controversial evictions ever carried out in the history of Kenya is the Mau forest eviction justified on the grounds of protecting the forest cover and important water catchment areas. The Mau debate pitted the Government, or some members of the Government, on the one side, and title owners of land in the Mau forest on the other, among them prominent politicians and average working class Kenyans. Forced evictions resulted in massive human rights violations and a public outcry at the manner in which the evictions were carried out.[30] There have been numerous other incidences of forced evictions since then, a large number taking place in informal settlements throughout the country. Nairobi alone has an estimated 199 informal settlements and there is therefore a disheartening abundance of cases from which to analyze the incidence of forced evictions. Residents of Kibera, Mukuru, Korogocho, Mitumba, Kiambiu and Huruma as well as Kahawa West , Soweto and Deep Sea have at one time or another been faced with looming forced evictions. Many reasons have been advanced for carrying out forced evictions in Kenya. In February 2004, various Kenyan ministries announced the planned evictions that threatened over 300,000 residents of Kibera- Nairobi's largest informal settlement. The evictions were justified on the grounds that the informal settlements were illegally situated either on dangerous public land (near rail and power lines) or on land reserved for future road construction (the construction of a bypass by the ministry of roads and construction).[31] Remarkably, given the scale of this mass eviction, there has been no work on the bypass road, the officially-stated reason for the demolition.

[30] Dr. J.M. Migai Akech, 2006 " Background Paper For Environmental and Land Law Reports"
[31] Centre on Housing Rights and Evictions (COHRE), Listening to the poor: Housing rights in Nairobi, Kenya (April 2006)

Additionally, Government-implemented evictions in other parts of Kenya have continued unabated since 2006; and, the Government has only occasionally intervened to ensure that evictions carried out by private individuals comply with international human rights standards. Thousands of Kenyans have been subjected to forced evictions in various parts of the country. Evictions have been characterized by violence, destruction of property and schools, a lack of adequate resettlement, and, in some cases, a blocking of aid for the evictees.

Under the old constitution, forced evictions were challenged as a violation of the right to property enshrined in sections 70 and 75 of the constitution. Specifically, Sec 70 (c) provided for "protection for the privacy of his home and other property and from deprivation of property without compensation." This proved inadequate and in most cases the victims of evictions were unable to get adequate redress for the violation. With the promulgation of the new constitution however, aggrieved persons have a more tangible right to adequate housing with the corresponding right to be free from forced evictions.

2.3 The burgeoning role of the Kenyan Constitutional courts

Although economic and social rights are in their youthful stage in the jurisprudence of the Kenyan constitutional courts, the sheer number of cases brought before the court relying on the sec 43 economic and social rights provisions of the 2010 constitution signal that if nothing else, more and more citizens are aware of their rights and are ready to use the machinery of the judiciary to seek redress in cases of violation.

In the context of the right to adequate housing, there has been an influx of cases challenging forced evictions on the ground that this is a violation of the right as enshrined in the constitution. The encouraging thing is that the courts have responded in a positive manner to hold the culprits accountable. For example, in **Susan Waithera & 4 Others v the Town Clerk, Nairobi City Council and 2 others [2011] KLR (www.kenyalaw.org) High Court at Nairobi** Musinga (J)was adamant that "Eviction should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land,

as the case may be is available." The High Court ruling followed a petition filed by five petitioners on behalf of thousands of residents living in Nairobi's informal settlements namely Kaptagat, Dam and Ndumbuini in Kitsuru location, Maasai, Consolata in Parklands location and Kabete Native Industrial Training and Development in Kabete. The residents were challenging the demolition of their premises by the Nairobi City Council. Some of the residents had lived in the informal settlements for over forty years. The court rejected the City Council's argument that it had carried out the evictions as part of its duty to control developments in the City of Nairobi and stated that the protection of the residents' fundamental rights as guaranteed under the Constitution superseded the duty of the City Council to plan and control developments in the city.

In **Satrose Ayuma and 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme, petition 65 of 2010 (Nairobi),** residents of Muthurwa faced imminent eviction from their homes without provision of alternative housing. They brought the matter before the high court of Nairobi and argued that the proposed evictions by the respondents violated not only their right to adequate housing enshrined in article 43 (b) but was also a violation of their right to inherent dignity protected by article 28 of the constitution. Even though the court acknowledged the fact that the land in question was private and not public land, the issue remained that it would be a violation of the evictees' fundamental right to adequate housing to evict them without providing alternative accommodation, and thus a temporary injunction was issued restraining the respondents from carrying out any other or further evictions. The **Grootboom case** was cited with approval in the judgment as support for the finding that since Kenya lacks appropriate legal guidelines on exactly how evictions should be carried out, the South African jurisprudence should be used to provide illumination on the content of the right to adequate housing and especially in the context of forced evictions.

In **Ibrahim Sangor Osman and Others v. the Hon. Minister of State for Provincial Administration & Internal Security and Others,Constitutional Petition No. 2 of 2011 (Garissa)** about 1,222 individuals, evicted from their homes located in six communities commonly known as the Medina Location of Garissa municipality brought a constitutional petition to the high court. The Petitioners, including children, women, and the elderly, were violently removed from public land that they had occupied since the 1940s. Their homes were

demolished by officials of the provincial administration and the Municipal Council of Garissa, resulting in their social and economic dislocation. Petitioners did not receive any written notice nor did the Respondents consult with them prior to their eviction. In ruling for the petitioners, the High Court recognized the justiciability of economic and social rights and held that in this case the right to adequate housing of the petitioners as provided for in section 43(b) had been violated. The Court stressed that any treaty ratified by Kenya is part of Kenyan law basing its decision not only on the new Kenyan Constitution but also on articles 11 and 26 of the International Covenant on Economic, Social and Cultural Rights and articles 16 and 18 of the African Charter on Human and People's Rights. A permanent injunction compelling the State to return petitioners to their land and to reconstruct their homes and/or provide alternative housing and other facilities including schools was awarded and even more generously each of the petitioners received Kshs 200,000 (approx. $2,000) in damages.

The cases before the courts so far have been brought in the context of forced evictions. While upholding the right to adequate housing, the courts have skirted around the issue of whether the government has a positive obligation to provide adequate and affordable housing to its citizenry, a most crucial question in a country where more than 60% of the inhabitants live in informal or slum dwellings which do not meet the criteria of adequacy set out by the ESCR committee. Put another way; is it possible for the numerous slum dwellers to petition the court for an order requiring the government to henceforth provide adequate housing to them? Perhaps this is a concession by the court of the realities that the maximum available resources in the Kenyan context are incapable of ensuring “adequate housing” for all those who need it. Regardless, these high court rulings signal the dawn of a new day in Kenyan Constitutional jurisprudence. For the first time ever individuals are boldly relying on the constitutional provisions on the right to adequate housing in order to assert their fundamental rights and to seek redress for any violations. The response of the courts has so far has been to unequivocally acknowledge the justiciability of economic and social rights and to rely on international law as well as the jurisprudence of other Constitutional courts, especially the Constitutional Court of South Africa, to hold violators of the right to adequate housing to account. However, the road ahead remains treacherous and the Kenyan courts have a long way to go in straddling the delicate balance between ensuring that the right to adequate housing and all other economic and social rights are

respected, promoted and fulfilled, while at the same time acknowledging that resource constraints will always be a factor in the analysis.

Undoubtedly, even in the Kenyan context "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[32]

2.4 Selected jurisprudence of the constitutional court of South Africa

To date South Africa remains the leading country in Africa on social and economic rights jurisprudence, and provides a possible path to be followed by the fledgling constitutional courts of most African countries, Kenya included. At the end of apartheid in 1994, the African National Congress ran on a political platform of "housing for all," a welcome promise for South Africans living in deplorable situations, a direct consequence of hundreds of years of white minority rule. Despite that promise, and the inclusion of the right to access to adequate housing in the new constitution, little changed after the ANC's landslide victory. However, In October 2000, the country's highest court handed down a landmark social and economic rights case, **Government of the Republic of South Africa and Others v. Grootboom and Others.** This case has proved to be a powerful tool for communities involved in evictions proceedings, not just in South Africa, but in comparative jurisdictions as well. The willingness of the judiciary to push the envelope, coupled with an emerging international consensus on the importance of economic and social rights has set the stage for the courts in these kinds of cases to rule in favor of the evictees whose rights are violated.

Briefly, in the **Grootboom case** Mrs. Grootboom and the other respondents had applied for low-cost housing while leaving in an informal squatter settlement, Wallacedene, under deplorable conditions. After no assistance was forthcoming, they decided to take matters into their own

[32] **Soobramoney v Minister of Health, KwaZulu-Natal** 1998 (1) SA 765 (CC) at para. 17

hands. About 900 people moved towards land, privately owned, which had been earmarked for low-cost housing. When their housing was demolished, they applied to the high court. Their argument was predicated on the right to housing under Section 26 and on the right of children to "basic nutrition, shelter, health and social services" under Section 28(1) (c). Two judges of the Court then rendered an opinion stating that there had been no section 26 (right to access to adequate housing) violation. The state had limited resources, and section 26 only requires the government to take measures "within its available resources" to "progressively implement" the right of access to adequate housing. The judges were convinced that a rational housing policy was in place and was implemented to the extent that the government had the resources to do so. However, the judgment held that there had been a breach of section 28(1) (c) which is an unqualified right for every child to basic shelter. Where parents are unable to shelter their children, the court said, the obligation falls to the state. When the matter was heard by the Constitutional court it examined the obligations under Section 26 of the Constitution, and came to the conclusion that Article 26 provided for three distinct rights. First, the general right of access to adequate housing- a positive obligation, though with negative undertones; Secondly, an obligation upon the state to take reasonable measures within available resources leading to the progressive realization of the right, and, thirdly, the obligation upon the state to prevent arbitrary evictions. In pointing out that the Government had a responsibility to 'unlock the system' and thereby remove the barriers that exist to people attaining their right to housing on their own, the Court demonstrated both the 'positive' and 'negative' obligations of this right.[33] While there was a substantial amount of engagement with international law, the Court refused to follow the "minimum core" approach. The first problem was textual- while the Covenant spoke about "all appropriate measures" for a "right of adequate housing", South Africa's Constitution provided for "reasonable steps" to be taken to secure access to housing. The Court held that this approach did not explain the diversity of needs in the context of adequate housing, or the difference between those who could pay for housing or not. As such, the Court opted for a "reasonableness" approach stressing that it would confine its examination to whether the government had taken reasonable measures or not. This reasonability approach would encompass not only the policy but also its implementation; ensuring every step of this process had to be in consonance with the

[33]Elizabeth Wickeri, Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa, available at http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf

Constitution. An essential aspect of reasonability concerned a substantive criterion; the Court held that the policy could only be reasonable if it incorporated the needs of the most marginalized communities. Effectively then, the Court accepted that the government could make these decisions, but required an explanation from the government as to why it had taken the decisions that it had. Hence, while the rights of the children had not been violated, the Government was found to breach the obligations under Section 26 of the Constitution, and was required to take steps to ensure the right of the poor, especially those who were in most desperate need.

More recently in **Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004**], a case involving a small group of people, some 68 people, including 23 children, who had been unlawfully occupying some vacant, unused and private land, having built 29 shacks in the jurisdiction of the municipality of Port Elizabeth. Responding to a petition signed by 1600 people in the neighborhood, including the owners of the property, the Municipality sought an eviction order against the occupiers in the South Eastern Cape Local Division of the High Court (High Court). The High Court held that the occupiers were unlawfully occupying the property and that it was in the public interest that their unlawful occupation be terminated. This ruling was reversed by the Supreme Court and the matter then went to the constitutional court. Ruling in favor of the evictees, the court held that the judiciary's "new task", is to manage "the counter positioning of conventional rights of ownership against the new, equally relevant, right not to be arbitrarily deprived of a home, without creating hierarchies of privilege." the fact that there was no evidence that either the Municipality or the owners of the land needed to evict the occupiers in order to put the land to some other productive use, and the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this was a relatively small group of people who appeared to be genuinely homeless and in need, persuaded the court that it was not just and equitable to order the eviction of the occupiers. Interestingly, the court urged the parties to turn to mediation before submitting the dispute to litigation. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarizing litigation can better be used to facilitate an outcome that

ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZASCA 47** a community of 86 desperately poor people living in a disused industrial property were threatened with eviction by the new property owners, respondents in this case. The occupiers argued that they could not be evicted unless and until the City of Johannesburg discharged its constitutional obligation to provide them with temporary alternative accommodation. In respect of people evicted by private landowners, the City argued that it had no duty beyond applying to the provincial authorities for funding for a project to be implemented in terms of the Emergency Housing Policy. Since the provincial authorities had rejected its application for assistance, the City argued that it had discharged its obligations towards the occupiers. The occupiers should, the City told the court, be evicted. The High Court rejected this proposition and declared the City's housing policy unconstitutional because it unfairly discriminated between people evicted from state-owned land and those evicted from private land. It granted the eviction and ordered the occupiers to vacate the property by no later than 31 March 2010, but simultaneously directed the City either to provide the occupiers with temporary accommodation or to pay each of the occupiers' households R850 per month towards the cost of finding their own alternative accommodation. The occupiers cross-appealed against the eviction order, and against the order that the City make payments towards their rent. The occupiers argued that the payments directed by the High Court would not protect them from becoming homeless upon eviction, as there was little accommodation available for R850 per month. The Supreme Court of Appeal declared the City of Johannesburg's housing policy 'irrational, discriminatory and unconstitutional' and directed the City to provide temporary emergency accommodation to the occupiers.

The constitutional court took an interesting approach In **Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg [2008] SACC 1.** 400 persons who lived in buildings declared 'unsafe' and 'unhealthy' challenged their eviction. The Court decided to issue an interim order requiring the parties to 'engage meaningfully' with each other. The logic of interrelated rights set forth in Grootboom was further enunciated. the Constitutional Court required that the discussion carry on through a two-way process, carried out 'reasonably and in

good faith' which required that parties be aware of the consequences of their living where they were, and also of the obligations that the city owed to them. The court relied on the ruling in the **St. Elizabeth Port Authority case** urging that. "The procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavor to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents."

The cases I have used for this analysis are by no means exhaustive. Since its establishment in 1994 the court has heard numerous cases on the right to adequate housing as enshrined in section 26 of the South African constitution. Acknowledging the major challenges in terms of limited resources the court has developed a jurisprudence that calls for respect of economic and social rights while at the same time making it clear that what the constitutional right requires is not housing on demand, but a reasonable program for ensuring access to housing for poor people, including some kind of program for ensuring emergency relief. This approach ensures respect for sensible priority-setting and close attention to particular needs, without displacing democratic judgments about how to set priorities. This could be as a result of separation of powers concerns. Issues of resource allocation are the domain of the legislature and the executive, "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters."[34] Additionally, "Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role of the court, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive

[34] Soobramoney v Minister of Health, KwaZulu-Natal, 1998 (1) SA 765 (CC) para. 29

functions achieve appropriate balance."[35] In respecting this delicate balance the courts only step in whenever a policy put in place is unreasonable.

2.5 conclusions and lessons to be learnt

The role of the courts in adjudicating economic and social rights is a difficult one. "Specifying those aspects of economic, social and cultural rights which are more readily susceptible to legal enforcements requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation, to specify the conditions to be taken as complaints, to develop strategies for dealing with abuses and failures, and to provide legal vehicles, in appropriate cases, for securing the attainment of the objectives deemed desirable."[36] It therefore falls to the Kenyan courts to determine exactly what the content of a right is, what measures are required in order to respect, promote and fulfill human rights, and what remedies are available in cases of violations. The Constitution under Article 2 (5) [1] and Article 2 (6) [2] entrenches international law as part of the laws of Kenya. In carrying out these functions therefore, the courts are free to rely on international treaty bodies and international experts definitions of the content of economic and social rights. As already mentioned the courts could decide to adopt the minimum core content of rights posited by the ESCR committee in its general comment number 3 on the nature of state obligations. However, if the jurisprudence of the South African court is anything to go by, it is likely that the Kenyan court will be unwilling to go down that path because of the realities of the Kenyan context, the fact that the government is crippled by the unavailability of resources and is thus unable to provide a minimum core of any right to all those in need. However, it may be argued that for example emergency housing could be considered minimum core content conferred on the right to housing.[37]

Thus, it would appear that even though the Constitutional Court of South Africa has rejected on more than one occasion the minimum core approach in favor of a reasonableness enquiry, an analysis of that same court's jurisprudence shows application of the doctrine in practice if not in theory. Arguably, the minimum core approach under accommodates the doctrine of the separation of powers, and thereby gives rise to concerns about the institutional appropriateness

[35] Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC) para. 38
[36] ICJ Bangalore Declaration and Plan of Action para. 18(2) 1995
[37] David Bilchitz, Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance, 119 SALJ 484, (2002)

and effectiveness of socio-economic rights adjudication. It seeks to define the content of socio-economic rights and this necessarily and inevitably draws the courts into formulating, rather than evaluating policy. The reasonableness approach on the other hand, is a form of judicial minimalism that is unlikely to realize lasting social reform precisely because it avoids defining socioeconomic rights. Since reasonableness forms the basis of the standard of compliance against which government's obligations are measured, this is crucial to the judiciary's role in safeguarding the interests of the poor, even as it recognizes its limited role in the constitutional order.[38]

Bilchitz believes that while using the reasonable standard, deference is not owed to the government in defining the content of a right but only in allowing it a "margin of appreciation" to decide which measures it will adopt in fulfilling its obligations. In giving effect to the right, the measures the government adopts must be reasonable in relation to the objective it seeks to achieve which is to realize that the rights enunciated in the Constitution.[39] Relying on this I would urge the Kenyan Courts to adopt a combination of the minimum core doctrine and the reasonableness enquiry in formulating its economic and social rights jurisprudence. The former will endow rights with clarity by identifying the content of the right and the obligations which the government has in as far as making the minimum core immediately available is concerned, while maintaining the reasonableness approach will allow the government to retain a margin of appreciation‖ which provides the necessary flexibility in executing court orders and attempts to balance individual and community needs against government constraints. In this way the economic rights enshrined in the constitution will be more than mere manifesto rights, but at the same time the judiciary will not interfere disproportionately with the powers conferred upon the legislature and the executive in as far as resource allocation is concerned. The South African Court itself has acknowledged that there may be cases where it is possible and appropriate to have regard to the content the minimum core of an obligation to determine whether the measures taken by the state are reasonable.[40]

---

[38]Carol Steinberg, "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" SALJ 2006

[39] Bilchitz, poverty and fundamental rights 139-148 (2007)

[40] **Grootboom** para. 33 and **Treatment Action Campaign** para. 34

I hope that as the jurisprudence of the Kenyan Court in economic and social rights issues develops, the combination of the two approaches described above will be adopted. In the context of the right to adequate housing this could mean an elucidation of the minimum core content of the right as including suitable provisions for those in most desperate need, especially the millions living in the squalor of informal settlements and slum dwellings. This will be augmented by a reasonableness enquiry every time the government purports to carry out forced evictions, involving an analysis of government policies to ensure that before evictions are carried out the evictees are consulted and given notice as well as provided with adequate alternative accommodation and/or compensation. In this way the courts will ensure that the human rights of individuals are not sacrificed at the altar of lack of available resources, an excuse which has been used time and time again by governments intent on shirking their responsibilities in as far as respecting, promoting and fulfilling human rights are concerned. Given the vigor with which the courts have embarked upon protection of economic and social rights it is my sincere belief that following in the jurisprudence of the South African Constitutional Court the Kenyan Court will soon be a paragon of the importance role courts have to play in adjudication of economic and social rights and especially in situations where there are violations of these rights.