

Strathmore University

Law School

**AN ASSESSMENT OF THE ELEMENTS OF AFFORDABILITY AND
ACCESSIBILITY OF THE RIGHT TO HOUSING TO INFORMAL
WORKERS AS A NEGLECTED DISADVANTAGED GROUP IN KENYA.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School.

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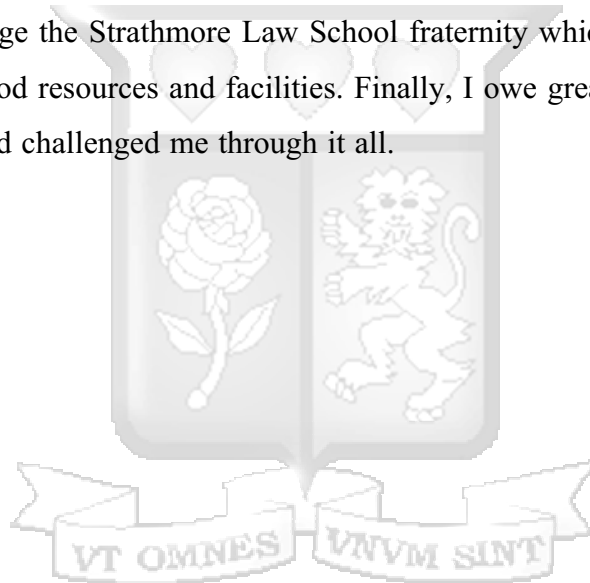
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Unless the Lord builds the house, the builders labour in vain. Unless the Lord watches over the city, the guards stand watch in vain ~ Psalms 127: 1. My deepest gratitude is to God Himself who gave me the strength, wisdom and determination to carry out this project. I am nothing without His grace and mercy. I am also grateful to my parents and siblings who have been a consistent source of encouragement, guidance and joy. They have truly walked faithfully with me throughout this journey.

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DECLARATION

I, **OMBAJO NICOLE ADIHAMBO ABIGAIL**, 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 part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 26/04/2024

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

Signed: 

Dr. Lynette Osiemo.

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ABSTRACT

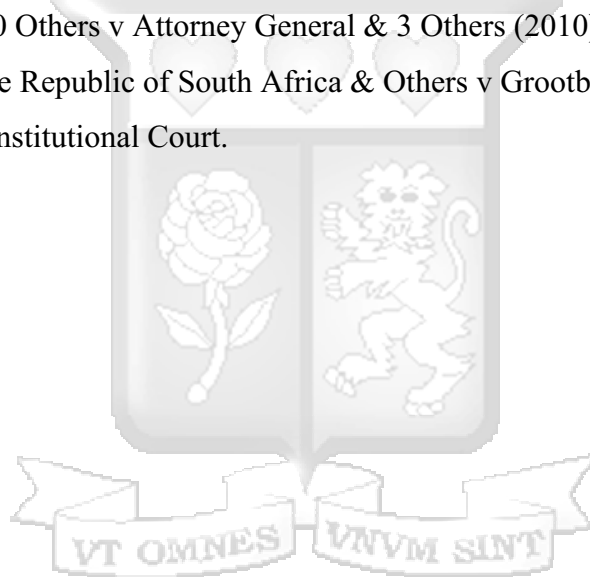
The 2010 Constitution of Kenya strongly advocates for the protection and enjoyment of human rights. To illustrate, it highlights socio-economic rights in the extensive chapter on the Bill of Rights, which were not comprehensively established in the repealed constitution. The right to housing is a basic need that is required for the well-being of man. Article 43 (1)(b) establishes that every person has a right to adequate housing and reasonable standards of sanitation. In response to this, the government launched the Affordable Housing Program (AHP) to provide affordable housing for all. One of the aims of this program is to reduce the growth of informal settlements by providing affordable housing especially for low-income earners. However, it is observed that in drafting this policy, only data from the formal sector of employment was considered when coming up with the rates for rent or purchase of such housing. The specific needs of informal workers were sidelined in this matter.

Kenya is also party to the International Covenant on Cultural and Socio-Economic Rights. Article 11.1 of this Covenant acknowledges that every person has the right to an adequate standard of living including housing. It also expects State Parties to take appropriate steps to ensure realization of the same. This study will show that Kenya has been unable to form normative content on what exactly adequate housing entails. This is despite CESCR General Comment No. 4 outlining standards that give guidance on what adequate housing entails. It will also show that the AHP does not satisfy the standards of accessibility and affordability thereby qualifying informal workers as a neglected disadvantaged group in the realization of the right to housing. They are known to live in deplorable living conditions because majority of them face several vulnerabilities that avert their ability to efficiently satisfy their basic needs. Housing under the AHP is too expensive and therefore not affordable or accessible for this group.

This study will reveal the vulnerabilities experienced by informal workers in the country. Additionally, it will analyze Kenya's approach in interpreting this right thus proving that the country lacks normative content on what the right to housing entails and will suggest that the standards set under CESCR General Comment No. 4 should be used as a guide. A persuasive comparison from South Africa will be used to encourage the use of the Reasonableness Approach in adjudicating socio-economic right.

LIST OF CASES.

1. Communication of Kenya & 5 others v Royal Media Services Limited & 5 others (2015) eKLR.
2. David Kariuki Ngari & another v Judicial Service Commission & another, Law Society of Kenya & 2 Others (Interested Parties) (2020) eKLR.
3. Kenya Airports Authority v Mitu-bell Welfare Society & 2 Others (2016) eKLR.
4. Law Society of Kenya v Attorney General & 2 Others (2016) eKLR.
5. Mitu-Bell Welfare Society v Attorney General & 2 Others (2013) eKLR.
6. Mitu -Bell Welfare Society v Kenya Airports Authority & 2 Others (2021) eKLR.
7. Musa & another v Kenya Railways Corporation & 2 Others (2022) eKLR.
8. Paul Mungai & 20 Others v Attorney General & 3 Others (2010) eKLR.
9. Government of the Republic of South Africa & Others v Grootboom and Others (2000) South African Constitutional Court.



LIST OF LEGAL INSTRUMENTS

International Instruments

1. International Covenant on Economic Social and Cultural Rights
2. CESCR General Comment No. 4

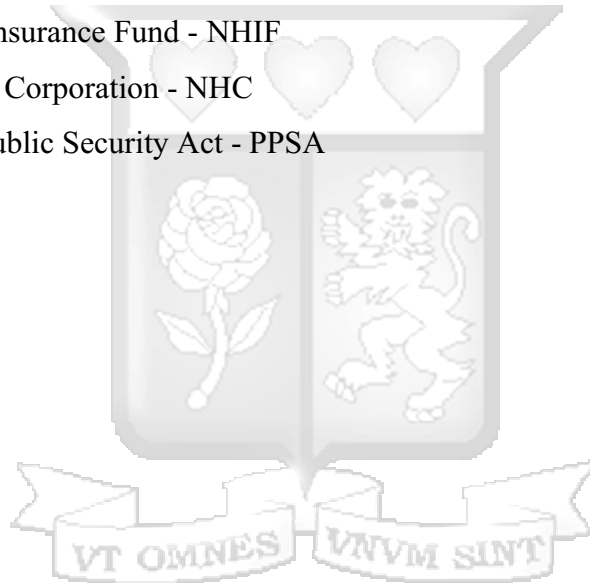
Domestic Instruments

1. Constitution of Kenya, 2010.
2. Independence Constitution of Kenya, 1963.
3. National Housing Cooperation Strategic Plan (2019 - 2023).
4. Preservation of the Public Security Act.
5. Public Order Act.



LIST OF ABBREVIATIONS

1. Affordable Housing Program – AHP
2. Committee on Economic, Social and Cultural Rights - CESCR
3. Gross Domestic Product - GDP
4. International Covenant on Economic, Social and Cultural Rights - ICESCR
5. International Labour Organization - ILO
6. Kenya African Democratic Union - KADU
7. Kenya African National Union - KANU
8. Kenya National Human Rights and Equality Commission - KNHCR
9. Kenya People’s Union - KPU
10. National Health Insurance Fund - NHIF
11. National Housing Corporation - NHC
12. Preservation of Public Security Act - PPSA



CHAPTER 01: INTRODUCTION

1.1. Background

Housing is recognized as a basic human need which is required for the fulfilment of human life.¹ Article 43 (1)(b) of the Kenyan Constitution acknowledges that every person has the right to accessible and adequate housing and reasonable standards of sanitation.² Additionally, Article 21(c) places a fundamental duty on the State to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.³ Of special mention is the positive duty to ‘fulfill’ which requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right.⁴

Kenya is a signatory to the International Covenant on Economic, Social and Cultural Rights⁵ (ICESCR) which has binding force. Article 11.1 of this Covenant states inter alia, that party states should recognize the right to housing and ensure the realization of this right.⁶ The CESCR General Comment No. 4 provides an authoritative interpretation of this article.⁷ It states that for housing to be adequate it must fulfill the following criteria; Legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.⁸ For this study, affordability and accessibility are the most relevant.

The National Housing Cooperation (NHC) is the principal government - implementing agency concerned with realizing the right to adequate housing.⁹ However, it is noted that in the National Housing Cooperation Strategic Plan (Strategic Plan), there was no reliance on the ICESCR and

¹Stewart, ‘A Basic Needs Approach to Development. In: *Planning to Meet Basic Needs*’. Palgrave Macmillan, London, 1985, 1 < https://doi.org/10.1007/978-1-349-17731-8_1 > on 17 February 2023

² Article 43(1)(b), Constitution of Kenya, (2010).

³ Article 21 (c), Constitution of Kenya, (2010)

⁴ General Comment 14, paragraph 33.

⁵ Kenyalaw.org. (2013). *International Covenant on Economic, Social and Cultural Rights | Treaties Database*. [online] Available at: <http://kenyalaw.org/treaties/treaties/873/International-Covenant-on-Economic-Social-and-Cultural> [Accessed 10 Jan. 2023].

⁶ *Article 11.1*, International Covenant on Economic, Social and Cultural Rights, (1966).

⁷ *Paragraph 8*, CESCR General Comment 4, (1991), E/1992/23.

⁸ *Paragraph 8*, CESCR General Comment 4, (1991), E/1992/23.

⁹ National Housing Corporation, National Housing Corporation Strategic Plan (2019-2023), 2019, iii.

more specifically, the CESCR General Comment No. 4. The normative content of the right to adequate housing is therefore lacking.

The Strategic Plan seeks to develop 500,000 housing units in Kenya especially for low – income earners. This group of earners usually faces great difficulties in affording housing from private developers in the market due to their highly competitive prices.¹⁰ This is to eradicate the growth of informal settlements in urban areas which arise from the housing deficit¹¹ caused by an influx of rural-urban migration. It is known that the informal sector contributes 77% of the total workforce in Kenya¹², majority of who live in informal settlements. The Strategic Plan has developed income levels which inform how houses should be priced. The lowest income level is the Social Level meant to cater to individuals who earn between Kshs. 0 and Kshs. 19,999.¹³ However, it is noted that this was informed by data collected from the formal employment sector.¹⁴ The Strategic Plan was designed to benefit members who live in informal settlements in a bid to eradicate the growth of such areas.

The Strategic Plan also defined affordable housing as that which does not exceed 30% of the household income.¹⁵ Informed by this plan, the Affordable Housing Program(AHP) is a housing program under the NHC which indicates that it provides social housing for purchase at Kshs. 840,000 or to be rented at Kshs. 3,200.¹⁶ Assuming that this represents the recommended 30% of the household income, it would mean that the minimum wage for this to be practical would be Kshs.10,667. However, every 9 out of 10 informal economy workers work in informal microenterprises which pay an average monthly wage of Kshs. 3,525 and therefore ‘affordable’

housing is not accessible to them.¹⁷

¹⁰ National Housing Corporation, National Housing Corporation Strategic Plan (2019-2023), 2019, 11.

¹¹ National Housing Corporation, National Housing Corporation Strategic Plan (2019-2023), 2019, 4.

¹² Murunga, J., Muriithi, M.K. and Wawire, N.W., ‘*Estimating the size of the informal sector in Kenya*’. *Cogent Economics & Finance*, 9(1). 2021, 3 < <https://www.tandfonline.com/doi/pdf/10.1080/23322039.2021.2003000> > on 5 January 2023.

¹³ National Housing Corporation, National Housing Corporation Strategic Plan (2019-2023), 2019, 8-9.

¹⁴ National Housing Corporation, National Housing Corporation Strategic Plan (2019-2023), 2019, 12.

¹⁵ National Housing Corporation, National Housing Corporation Strategic Plan (2019-2023), 2019, 8-9.

¹⁶ Munda C, ‘President Ruto’s Low-Cost Homes Price and Payment Plan Revealed.’ *Business Daily*, 2023. <<https://www.businessdailyafrica.com/bd/economy/president-ruto-s-low-cost-homes-price-and-payment-plan-revealed--4402452>. > on 23 December 2023.

¹⁷ ILO, Kenya. *The Informal Economy in Kenya*. 2021, 65,
<https://www.ilo.org/empent/Publications/WCMS_820312/lang--en/index.htm> on 1 January 2023.



Under General Comment 4 of the CESCR, the standard of accessibility requires that disadvantaged groups should be given priority in the realization of the right to adequate housing.¹⁸ Individuals who live in informal settlements face the sad reality of lacking decent housing and access to critical services such as water, electricity, security, proper sanitation among others.¹⁹ In this regard, these individuals are the most disadvantaged when it comes to housing and so housing policies should be made to alleviate this burden. Informal workers earn wages too low to acquire housing through the Affordable Housing Program. The standards of affordability and accessibility of housing have been greatly compromised.

1.2. Problem Statement

The Kenyan government has launched the AHP which is aimed towards providing affordable housing to citizens in a bid to reduce informal settlements. However, the State lacks normative content on what the right to adequate housing entails. This obscurity makes it difficult in examining whether this right has been adequately realized. In determining the affordability of such housing, the government has not established the wage earnings of informal workers who occupy majority of informal settlements. Consequentially, these affordable housing schemes are too expensive to such workers which leads to the continuity of informal settlements. The prime purpose of these housing schemes is thus defeated. Informal workers are at the most peril in the realization of this right and as a result, they resort to informal settlements and are subjected to harsh living conditions since they cannot afford adequate housing. This defeats the prime purpose of the AHP.

This study will examine whether the right to housing is being realized by the State as per the standards of adequate housing under CESCR General Comment No. 4, specifically those of affordability and accessibility, while focusing on informal workers as a disadvantaged group.

¹⁸ Paragraph 8(e), CESCR General Comment 4, (1991), E/1992/23.

¹⁹ Ouma C ,Karakayacı O. 'View of The Role of Changing Housing Policies in Housing Affordability and Accessibility in Developing Countries: The Case of Kenya. ', 2019, 1, <https://www.ijcua.com/index.php/ijcua/article/view/164/296> on Accessed 5 Jan. 2023.

1.3. Research Objectives

1. To examine how important the realization of the right to housing is in Kenya, which practices Transformative Constitutionalism.
2. To examine the legitimacy of the Judiciary in adjudicating socio-economic rights in terms of democracy and separation of powers.
3. To establish whether informal workers are a neglected disadvantaged group realization of the right to housing.
4. To identify what approach Kenya has taken in the interpretation of Article 43(1)(b) of the Kenyan Constitution.

1.4. Research Questions

1. How important is the realization of the right to housing in Kenya, as a country that practices Transformative Constitutionalism?
2. Does the Judiciary have validity in adjudicating socio-economic rights in terms of democracy and separation of powers?
3. Are informal workers a neglected disadvantaged group in the realization of the right to housing?
4. What approach has Kenya taken in the interpretation of Article 43(1)(b) of the Kenyan Constitution?

1.5. Hypothesis

It is hypothesized that informal workers are a neglected disadvantaged group in the enjoyment of enjoying the right to housing in Kenya. Statistics show that 54.7% of Kenya's population live in informal settlements.²⁰ In an effort to reduce the presence of informal settlements in urban areas which are as result of the deficiency of affordable housing, the government has developed the AHP. However, Kenya has failed to clearly define what is meant by 'accessible' and 'adequate' housing. This means that there is no clear guideline of what constitutes the same and furthermore, there is no way to determine if the AHP is providing accessible and adequate housing. As a result, informal workers are forced to live in informal settlements because they cannot afford the houses under the AHP and thus cannot access them.

²⁰ United Nations Human Settlements Program (UN-Habitat). *UN-Habitat Support to Sustainable Urban Development in Kenya: Addressing Urban Informality*. 2016. 3.

1.6. Justification

There is a rising influx of informal settlements in Kenyan urban areas.²¹ Informal workers are greatly neglected in the assessment of whether the right of housing is being realized in an affordable and accessible manner. Consequently, these workers are unable to afford adequate and accessible housing. This sheds light on why it may be necessary to rely on the standards stated in the ICESCR Comment 4 to act as a basis of examining how well the right to adequate housing is being realized. These standards may act as a reference for accountability to the State in realizing this right.

This study is useful to law makers who will be informed about the significance of adopting the standards set in the CDESCR Comment 4. Additionally, it will guide policy makers such as members of the Executive in the Ministry of Lands, Housing and Urban Development, on how to formulate policies which will promote the realization of this right to individuals. The study will give guidance to Kenyan researchers who research on socio-economic rights by showing the relevant connection between the right to housing and informal workers as a disadvantaged group. This serves as a good reference point since the intertwining of these two aspects has barely been discussed in the Kenyan context. Furthermore, the study would be helpful to human rights organizations such as the Kenya National Commission on Human Rights whose mandate includes the research and monitoring of the compliance of human rights norms and standards. They will be better informed about determining whether the right to housing is properly achieved.

1.7. Conceptual Framework

1.7.1. The Basic Needs Approach to Development.

The traditional understanding of development was based on economic growth, and conventionally measured in terms of Gross National Product. The 1960s and 1970s saw high rates of economic growth which was not directly proportional to economic development.²² It was observed that even

²¹ Ren, Guo, Zhang, Kisovi, Das, 'Population Density and Spatial Patterns of Informal Settlements in Nairobi, Kenya', MDPI, 2020, 2.

²² Keeton GR, 'The basic needs approach: A missing ingredient in development theory? *Development Southern Africa*, 1(3-4), Taylor and Francis online 1984, 276. <

<https://www.tandfonline.com/doi/citedby/10.1080/03768358408439092?scroll=top&needAccess=true&role=tab>> - accessed on 15 Feb 2023.

in those countries where there was rapid economic growth, poverty, squalor, and malnutrition had greatly increased.²³

The Basic Needs Approach to Development is a response to the traditional understanding of development which acknowledges that economic development cannot be successful if *all* members of the society do not have access to basic needs that propel them towards economic productivity. It seeks to redefine economic development from simply economic growth to improvement of the welfare of man. The rationale behind this approach is that all human beings should have access to life-sustaining needs which empower individuals to explore opportunities of self-actualization. Economic development is therefore a necessary requirement for the improvement of the quality of life.²⁴ The purpose of development is to develop man himself and not just things otherwise, anything that affects the growth or wellbeing of man is inconsistent with the fulfillment of development.²⁵

The main objective of this approach is to create opportunities for the full physical, mental and social development of the individual.²⁶ The content of basic needs has been considered to include material needs such as food, water, health, clothing and most relevantly, shelter.²⁷ Accordingly, it is paramount to grant access of these needs to the poorest members of society to ensure resultant economic productivity.

1.7.2 The informal worker as a vulnerable person

Informal workers differ from formal workers in that they do not enjoy certain legal protections provided under national labour legislation, income taxation or other employment benefits like

²³ Cornia, 'Development strategies for the 1980s: Old myths and new ideas.' UNCTAD, Geneva 1982, 2.

²⁴ Todaro M, 'Economic development in the Third World'. Longman, New York, 1981, 62.

²⁵ Ghai, Godfrey, Lisk, 'Planning for basic needs in Kenya.' ILO, Geneva, 1979, 66.

²⁶ Streeten, 'World Bank Reprint Series: Number Sixty-two Basic Needs: Premises and Promises.' Journal of Policy Modeling, 1979, 136 <

<https://documents1.worldbank.org/curated/en/912301468190752919/pdf/REP62000Basic00remises0and0promises.pdf>> on 20 February 2023.

²⁷ Stewart, 'A Basic Needs Approach to Development. In: Planning to Meet Basic Needs'. Palgrave Macmillan, London, 1985, 1 < https://doi.org/10.1007/978-1-349-17731-8_1> on 17 February 2023.

advance notice of dismissal, severance pay, paid annual or sick leave.²⁸ These benefits, which are available to formal workers, may cushion them from economic and social vulnerabilities. As a result, the informal employment sector is characterized by low productivity, low investments, poor working conditions, long and uncertain working hours, low wages, poor market conditions and poor institutional support which generally deteriorates their standard of living.²⁹

It is observed that the informal sector is mainly occupied by vulnerable groups such as women, the elderly and even the illiterate who are generally known to have poor bargaining power and representation in fighting for their rights. Studies reveal that these workers are at the highest risk of poverty. Due to the characteristics mentioned, the informal sector perpetuates poverty since it does not have facilities or systems that can mitigate them whose effect on poverty reduction is negative.³⁰

1.8. Literature Review

Majority of Kenyan scholars rely on the definition of adequate housing as provided by the CDESCR General Comment 4. It is observed that this definition is often used to compliment Article 43(1)(b) of the Kenyan Constitution. Perhaps this is because the Article fails to conclusively define what exactly is meant by ‘accessible’ and ‘adequate’ housing. For example, Kinuthia recognizes that there is no legislation in Kenya that gives the nature, scope and content of the right to housing³¹ and so he acknowledges that the right to housing is understood in light of both international and national legal instruments.³²

²⁸ OECD/ILO, ‘*Tackling Vulnerability in the Informal Economy*’ OECD Publishing Press, Paris, 2019, 26 <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_711804.pdf> on 20 February 2023.

²⁹ Agarwal & Dhakal, ‘*Impact of informal sector on poverty and employment in Nepal – Micro-level study of Chitwan District*’, Paper presented at the International conference, ‘The informal sector and Informal Employment: Statistical measurements, economic implications and public policies’, Hanoi, Vietnam, 2010, 5.

³⁰ Thi, Hieu, Giang, Ngoc, Nguyen, Truong, Quan, ‘*DOES THE INFORMAL ECONOMY MITIGATE POVERTY AND HOW DOES IT WORK? THE CASE OF VIETNAM*’, Mekong Research Network, 2014, 4 <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/54695/IDL-54695.pdf>> accessed on 27 Feb 2023.

³¹ Kinuthia, D.N, ‘*A Critical Evaluation Of The Right To Housing In Kenya*’ (Doctoral dissertation, University of Nairobi). 2018, 41, <<http://erepository.uonbi.ac.ke/handle/11295/104548>> on 5 January 2023.

³² Kinuthia, D.N, ‘*A Critical Evaluation Of The Right To Housing In Kenya*’ (Doctoral dissertation, University of Nairobi) 2018, 44 <<http://erepository.uonbi.ac.ke/handle/11295/104548>> on 5 January 2023

1.8.1. On the attitude of the courts in interpreting socio-economic human rights.

Githiru gives account of the pre-2010 constitutional regime which was characterized by the serious derogation of human rights which sparked a referendum to facilitate the promulgation of the 2010 Constitution.³³ Mbondenyei and Ambani reveal that the 2010 Constitution greatly differs from the repealed constitution in that it contains an expansive chapter on the Bill of Rights which accounts for socio-economic rights, which were non-existent in the previous constitutional order.³⁴ Additionally, the 2010 Constitution contains a general limitation clause in contrast to the previous regime which had numerous drawback clauses which limited human rights. Theoretically, the 2010 Constitution was considered to be the tool that would facilitate the transformation of the society from the pre-2010 era.

Klare opines that transformative constitutionalism is '*an enterprise of inducing large-scale social change through nonviolent political processes grounded in law*'.³⁵ He is also of the view that the best interpretation of the constitution is that which is committed to large-scale, egalitarian social transformation.³⁶ Biltichz states that a key dimension of transformative constitutionalism has been the inclusion of justiciable socio-economic rights.³⁷ Klare mentions that adjudication is the most reflective and grounded in reasoned argument and justification. It is also most constrained and structured by text, rule and principle, over other methods of law-making.³⁸ Liebenberg makes it clear that social justice should inform the interpretation of rights claims.³⁹ Therefore, adjudication

³³ Githiru F, '*Transformative Constitutionalism, Legal Culture and the Judiciary under the 2010 Constitution of Kenya*', University of Pretoria, 2015, 22-27.

³⁴ Ambani, Mbondenyei, '*A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights*' SSRN, 2015, 22-26 < <http://dx.doi.org/10.2139/ssrn.3049832> > on 27 January 2023.

³⁵ Klare K, '*Legal Culture and Transformative Constitutionalism*', South African Journal on Human Rights, 14:1, 1998, 150. < <https://doi.org/10.1080/02587203.1998.11834974> > on 28 February 2023.

³⁶ Klare K, '*Legal Culture and Transformative Constitutionalism*', South African Journal on Human Rights, 14:1, 1998, 151. < <https://doi.org/10.1080/02587203.1998.11834974> > on 28 February 2023.

³⁷ Bilchitz D, '*Socio-Economic Rights and Expanding Access to Justice in South Africa: What Can Be Done?*', The Global South and Comparative Constitutional Law, Oxford Academic, Oxford, 2020, 3.

³⁸ Klare K, '*Legal Culture and Transformative Constitutionalism*', South African Journal on Human Rights, 14:1, 1998, 147. < <https://doi.org/10.1080/02587203.1998.11834974> > on 28 February 2023.

³⁹ Liebenberg S, '*Needs, Rights and Transformation: Adjudicating Social Rights*,' Stellenbosch Law Review, Stellenbosch, 2006, 6.

has the power to bring affirmative strategies which have the great potential of transformation through shedding light on the hardships faced by the poor and the marginalized.⁴⁰

However, Stewart observes that the adjudication of socio-economic rights can be complex. On one hand, courts may go too far in giving normative clarity on a certain right such that they end up over formulating government policies, giving orders that may be unattainable for implementation by the government.⁴¹ On the other hand, she acknowledges that courts should go through the process of formulating the substantive meaning of a specific right rather than giving a generic standard. This would allow for the customized consideration of the poor, marginalized and vulnerable. Finally, Stewart states that adjudication of these rights should be on a balancing act. She thus proposes a comprehensive methodology in the interpretation of socio-economic rights which includes grammatical, contextual, teleological, historical and comparative interpretation with the inclusion of expert advice if need be.⁴²

Hogan posits that in the adjudication of socio-economic rights, courts perform functions such as considering budgetary implications and prioritizing expenditure or generally dealing with policies that are conventionally the mandate of the Legislature.⁴³ He also argues that this could be dangerous because more power may be given to the Judiciary thus distorting the balance of the separation of powers.⁴⁴ However, Nolan proposes that the doctrine of separation of powers should be applied in collaboration with other principles such as the rule of law and constitutional supremacy. This means that in adjudication, courts should strive to uphold the supremacy of the

⁴⁰ Liebenberg S, '*Needs, Rights and Transformation: Adjudicating Social Rights*,' Stellenbosch Law Review, Stellenbosch, 2006, 6.

⁴¹ Stewart, '*Adjudicating Socio-Economic Rights under a Transformative Constitution Adjudicating Socio-Economic Rights Under a Transformative Constitution.*' Penn State International Law Review, Volume 28, Article 13, 2010, 507

<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1225&context=psilr> > on 25 February 2023.

⁴² Stewart L, '*Adjudicating Socio-Economic Rights under a Transformative Constitution Adjudicating Socio-Economic Rights Under a Transformative Constitution.*' Penn State International Law Review, Volume 28, Article 13, 2010, 509

<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1225&context=psilr> > on 25 February 2023.

⁴³ Hogan G, '*Directive Principles, Social and economic Rights and the Constitution*', Irish Jurist, Volume. 36, 2001, 174, 189.

⁴⁴ Hogan G, '*Directive Principles, Social and economic Rights and the Constitution*', Irish Jurist, Volume. 36, 2001, 174, 189.

constitution while ensuring that the other branches of government are performing their constitutional obligations through judicial review. Therefore, judicial intervention in government policy making is necessary for the fulfillment of constitutional obligations.⁴⁵

1.8.2. On reliance of data collected from informal workers.

In assessing the affordability of government housing schemes in Kenya, Kenyan scholars often rely on statistics of wages of individuals who work in the formal employment sector. To illustrate, Syagga comes to the conclusion that public housing schemes are not affordable to the low and middle level formal sector employees in Nairobi. It is noted that 60% of Kenyan urban citizens live in slums and other squatter settlements in squalid unsanitary conditions⁴⁶ thus showing that since housing is unaffordable, individuals resort to living in these informal settlements. If the current housing sector is unaffordable to individuals who are expected to afford housing, one can only imagine how much worse it is for informal workers who earn significantly less than formal workers.

Charlton and Kihato attribute previous policy shifts in housing to the fact that there was a lack of rigorous interrogation of the needs of the poor in the South African context. They further explain that the impact of housing programs on the livelihoods and economic activity of poor beneficiaries was not considered.⁴⁷ This implies the danger that lies in failing to account for the needs of those at most peril. Satrosamita asserts that developing housing schemes for ‘low-income people’ is too broad a term. This has promoted the neglect of informal workers.⁴⁸ This categorization needs to be as specific as possible in order to cater of the needs of the relevant parties. According to him, ‘informal workers’ is the most suitable specific term.⁴⁹ He identifies that these individuals suffer

⁴⁵ Nolan, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal.’ 2007. 15
<<https://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf>> on 1 Mar. 2023.

⁴⁶ Syagga, P, ‘AN ASSESSMENT OF THE AFFORDABILITY OF PUBLIC HOUSING BY THE LOW / MIDDLE LEVEL FORMAL SECTOR EMPLOYEES IN NAIROBI ABSTRACT.’, [online] Academia.edu, 2018, 1 -
<https://www.academia.edu/37162140/AN_ASSESSMENT_OF_THE_AFFORDABILITY_OF_PUBLIC_HOUSING_BY_THE_LOW_MIDDLE_LEVEL_FORMAL_SECTOR_EMPLOYEES_IN_NAIROBI_ABSTRACT> on 7 Jan. 2023.

⁴⁷ Charlton & Kihato, “*Reaching the Poor: An analysis of the influences on the evolution of South Africa's housing program*” in Udesh Pillay et al (eds) *Democracy and Delivery: Urban Policy in South Africa* 2006, 267.

⁴⁸ Sastrosasmita, Sudaryono & Amin, ‘Housing needs of informal sector workers: The case of Yogyakarta, Indonesia.’ *Habitat International - HABITAT INT.* 14. 1990. 75

⁴⁹ Sastrosasmita, Sudaryono & Amin, ‘*Housing needs of informal sector workers: The case of Yogyakarta, Indonesia.*’ *Habitat International - HABITAT INT.* 14. 1990. 75.

from the lack of customized housing programs due to the requirement of formal collateral and reluctant policy action which in turn perpetuates their low housing capabilities.⁵⁰

Dawson and McLaren assess the right to adequate housing in South Africa while relying on data from both the formal and informal employment sector. According to CESCR General Comment No. 4, the right to housing entails: legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy. Dawson and McLaren however propose indicators that differ from the CESCR General Comment No. 4 to assess the right to housing. They include i) Access which examines accessibility and affordability while considering the lowest income deciles, ii) Adequacy which examines the access of basic services such as water from housing locations and iii) Quality which analyzes the impact on one's quality of life as a result of housing.⁵¹

1.9. Contribution

This study will add much needed benefit to the discussion revolving around the elaborate and specific realization of the right to housing in Kenya. It is unique because it insists on the reliance of using the standards stated in the CESCR General Comment No. 4 to act as a basis of examining how well the right to adequate housing is being achieved. Additionally, it will focus on informal workers who are an often neglected disadvantaged group in the realization of the right to housing. In doing so, this study will discuss the significance of adopting the reasonableness approach in Kenya to cement the need of having the standards set under CESCR Comment No. 4 acting as a reference point for accountability to the State in realizing this right. This is yet to be discussed in the Kenyan context.

1.10. Methodology

This study will rely on the use of qualitative sources to inform the arguments that will be made. It will provide information on how the right to housing is currently realized, who is the most

⁵⁰ Sastrosasmita, Sudaryono & Amin, *'Housing needs of informal sector workers: The case of Yogyakarta, Indonesia.'* Habitat International - HABITAT INT. 14. 1990. 77.

⁵¹ Dawson & McLaren, *'Monitoring the right of access to adequate housing in South Africa An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to housing'*, Studies in Poverty and Inequality Institute, 2014, 59 -<http://spii.org.za/wp-content/uploads/2018/02/Working-Paper-8_Monitoring-the-right-to-adequate-housing-in-SA.pdf > on 3 January 2023.

disadvantaged in this realization, amongst others. Books, articles, journals, and reports will constitute the secondary sources of data used. Primary sources such as relevant case laws, the National Housing Strategic Plan, the AHP, the Constitution, and other relevant statutes will be referred to.

The study will also apply a deductive approach. It will introduce a general premise and then gradually lead to specific conclusions. For example, the general premise here is that the right to housing is not being sufficiently realized. In answering questions such as how, to who, why and others, specific conclusions will be made accordingly. Examples include, whether informal workers are the most disadvantaged in enjoying the right to housing, whether the Judiciary is a legitimate body in adjudicating socio-economic rights and more. Additionally, a policy analysis will be conducted to examine the policies made by the government which are relevant to the right to housing such as the AHP. To compliment this, a doctrinal analysis will be carried out to reveal how the right to housing is practically interpreted in Kenya. It will show that there is no practical guideline of what exactly ‘adequate’ and ‘accessible’ housing is.

The study also pays special attention to informal workers. A philosophical analysis through the lens of equity will be used to justify why this group of people need extra support in the provision of this right therefore improving their ability to afford adequate and accessible housing. Equity is a solution for addressing imbalanced social systems. Furthermore, the law can promote justice which will propel equity to fix these systems in a manner that is long-term and sustainable enough for future generations.

1.11. Limitations of the study

In Kenya, comprehensive research and data concerning informal workers is yet to be carried out. This information would include their population, how much they earn and the vulnerabilities they face. Often times, such information has been generated from workers in the formal employment sector. The government of Kenya should conduct rigorous research on the same while prioritizing on informal workers in order to better inform the policies that are draft. Secondly, there is little jurisprudence in Kenya on the normative content that makes up the right to adequate housing. This makes it difficult to adequately guarantee and safeguard this right since there is no guideline that

could inform the same. The Judiciary and the State as a whole may adopt the standards of adequate housing as provided under CESCR General Comment No.4 to better protect the right to adequate housing.

1.12. Chapter Breakdown

Chapter 1 is an introductory chapter which provides a good base for arguments that will be made in consequent chapters. It highlights the key areas of discussion.

Chapter 2 discusses the significance of the actualization of socio-economic rights in Kenya. Kenya has adopted transformative constitutionalism which greatly influences the understanding of socio-economic rights.

Chapter 3 examines the legitimacy of the Judiciary in adjudicating socio-economic rights through the lenses of democracy and the separation of powers. It elaborates on how involved courts can be in the adjudication of these rights.

Chapter 4 establishes the vulnerability of informal workers in the realization of the right to housing. It reveals the challenges and hardships faced by these workers in the realization of this right.

Chapter 5 then examines the practical approach of courts in the interpretation of Article 43(1)(b) of the Kenyan Constitution. It also proposes an ideal approach that would result in better realization of this right.

This study will conclude with Chapter 6 which will contain the conclusion and the recommendations.

CHAPTER 02: THE REALIZATION OF THE RIGHT TO HOUSING IN KENYA UNDER TRANSFORMATIVE CONSTITUTIONALISM.

Introduction

According to Karl Klare, Transformative Constitutionalism is an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.⁵² It further means a long-term project of constitutional enactment, interpretation, and enforcement committed (in the historical context of conducive political developments) to transforming a country's political and social institutions and power.⁵³ Kenya adopted this Transformative Constitutionalism through the promulgation of the 2010 Constitution. On the 10th anniversary of the 2010 Kenyan Constitution, Issa Shivji, a revolutionary socialist and Tanzanian law professor gave a keynote address titled 'Do Constitutions Matter? The dilemma of a radical lawyer'.⁵⁴ The following was part of the opening paragraph of the address:

Revolutions make constitutions. No constitution envisages its own death for that is what a revolution entails. But constitutions matter. Some of the finest constitutions have been erected on ugly socio-economic formations wrought with extreme inequalities and inequities. South Africa and Kenya are examples. But constitutions do matter. Constitutions rarely herald fundamental transformations. They are the product of major transformations to consolidate the new status quo.⁵⁵

It is then important to identify what status quo Kenya was transforming from, and what Kenya is transforming to, with the implementation of the 2010 Constitution.

2.1. The State of Human Rights protection pre-2010

The Independence Constitution was adopted after Kenya gained its independence in 1963. It heavily adopted the rules, culture and practices of the colonial master.⁵⁶ To illustrate, the basis for

⁵² Klare, 'Legal Culture and Transformative Constitutionalism', 1998, 150.

⁵³ Klare, 'Legal Culture and Transformative Constitutionalism', 1998, 150.

⁵⁴ On the 10th anniversary of the 2010 Constitution, Issa Shivji, a Tanzanian Law Professor gave a keynote address in the Katiba @ 10 Webinar Series: Celebrating 10 years of the Kenya Constitution.

⁵⁵ Mutunga W, "Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?" The Transnational Human Rights Review 8, no.1, 2021, 30, <
<https://doi.org/10.60082/2563-4631.1097>. > on 10 November 2023.

⁵⁶ Mutua M. "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." *Human Rights Quarterly*, vol. 23, no. 1, 2001, 2, <
<http://www.jstor.org/stable/4489325> > 20 November 2023.

its structure was the Westminster model. It included a bi-cameral parliament, Executive, independent Judiciary, a head of state, multi-party democracy all of which are similar to English system.⁵⁷ This model was adopted by many of the former British colonies.⁵⁸ This was already problematic because the Constitution represented the interests and values of the Crown more than it did the people of Kenya since it adopted many elements of the British system of government. Kenya did not have autonomy in establishing its own model of government at the time. In 1964, Daniel Arap Moi dissolved the opposition party Kenya African Democratic Union (KADU) and joined the ruling party Kenya African National Union (KANU) headed by Jomo Kenyatta who was the head of state at the time. The lack of an official opposition party gave way for Jomo Kenyatta to create a highly centralized, authoritarian republic, reminiscent of the colonial state.⁵⁹

This was demonstrated through the enactment of Preservation of Public Security Act (PPSA) in 1966, which readopted colonial detention laws. Through this Act, the government detained those who would critique it or those who fought for democratic change.⁶⁰ In 1969, then Vice President Oginga Odinga, attempted to form an opposition party known as the Kenya People's Union (KPU) but Jomo Kenyatta outlawed it and detained all its principal leaders thus arbitrarily limiting democracy.⁶¹ In 1978, Jomo Kenyatta passed away and Daniel Arap Moi, who was the Vice President of Kenya at the time, ascended into presidency.

In 1982, he advocated for the amendment of Section 2A of the Constitution thus converting Kenya from a multi-party state to a single-party state.⁶² The absence of an opposition was a threat to democracy because there was no organ to keep the government accountable for its actions. This was just the beginning of Moi's centralization and personalization of power which laid the

⁵⁷ Madden A.F, 'Not for export': The Westminster model of government and British colonial practice', SSRN, 2008, 3.

⁵⁸ Rene Peter, "The Westminster Model and the Destabilizing of Democracy in the Caribbean", Walden University – Scholar Works, 2022, 1.

⁵⁹ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." 97,

⁶⁰ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." *Human Rights Quarterly*, 99-100.

⁶¹ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." 97.

⁶² Adar K, Muniya I, "Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001", *African Studies Quarterly*, Volume 5, Issue 1, 2001, 2, -< <https://asq.africa.ufl.edu/wp-content/uploads/sites/168/Volume-5-Issue-1.pdf> > on 18th November 2023.

blueprint for dictatorship and human rights violations.⁶³ The Parliament, under his influence, enacted laws such as the Public Order Act inter alia, which gave him the power to suspend the rights of individuals guaranteed by the Constitution.⁶⁴ Further amendments included the removal of the security of tenure of the judges of the High Court and Court of Appeal which instilled fear in judges when carrying out their duties. Additionally, he was empowered to appoint the chief justice and judges upon the recommendations of the Judicial Service Commission, whose members were appointed by the President.⁶⁵

The Executive also compelled the Chief Justice to send out circulars to judges in order to instruct them on how to rule on certain sensitive matters.⁶⁶ Resultantly, the Executive, through Daniel Moi, had an overarching influence over the Legislature and Judiciary thus limiting the concept of checks and balances. Even private lawyers were intimidated and were unable to represent those whose rights had been violated. For example, Gibson Kamau Kuria, a lawyer, was detained by the state for filing a *habeas corpus* petition on behalf of Mirugi Kariuki who had previously been detained.⁶⁷ John Khaminwa, another lawyer, was also arrested for representing a political detainee.⁶⁸

Legal systems are greatly compromised where the Judiciary, the defender of rights, is not free from coercion. Due to the amendments mentioned above, the Judiciary was subservient to the Executive and could no longer protect the rights and freedoms of the people especially during Daniel Moi's era. While adjudicating on human rights, courts took on a strict and formalistic approach when interpreting the same. In the case of *Paul Mungai & 20 others v Attorney General & 3 others*,⁶⁹ the learned judge reasoned that the right to life enshrined under Section 71 of the Independence Constitution was limited only to mere human existence.⁷⁰ The limitation of rights connected to the right to life was not relevant. In my view, this reasoning is contrary to the characteristic of

⁶³ Adar K, Munyae I, "Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001", 2.

⁶⁴ Adar K, Munyae I, "Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001", 3.

⁶⁵ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." 115.

⁶⁶ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." 115.

⁶⁷ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya." 115.

⁶⁸ Mutua M, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya.",102.

⁶⁹ *Paul Mungai & 20 others v Attorney General & 3 others* (2005) eKLR.

⁷⁰ Kariuki Lawrence, "Protecting the Right to Housing in Kenya: An analysis of legal framework, challenges and recommendations" The Platform, 2023. -<<https://theplatform.co.ke/protecting-the-right-to-housing-in-kenya-an-analysis-of-legal-frameworks-challenges-and-recommendations/>. > on 15 November 2023.

interdependence of human rights where one right cannot exist without another.⁷¹ For one to fully enjoy the right to life, they should also enjoy the right to adequate housing, clean environment, security and more. Such jurisprudence was frustrating to the enjoyment of human rights since the Independence Constitution did not include socio-economic rights in the first place. An aggrieved party therefore had little to no chance in receiving redress for the violation of their rights. Detention, political trials, extra-judicial killings, torture, arbitrary arrests and police brutality soon became common during Daniel Moi's rule.⁷²

2.2. The State of Human Rights protection post 2010.

The people of Kenya then actualized their desire to enjoy democracy that was free from the above mentioned human rights violations, through the promulgation of the 2010 Constitution. This supreme law of the land, is envisioned to strengthen the likelihood of accountability for past human rights violations and guarantees that they will not reoccur and advocates reparations for victims of such violations.⁷³ Naturally, the Bill of Rights of the 2010 Constitution consists of some salient features that were previously non-existent in the Independence Constitution. This was meant to encourage the protection and enjoyment of human rights unlike the previous Constitution.

Firstly, the Bill of Rights contains an exhaustive catalogue of entitlements. It envisages first generation rights which are civil and political rights that impose restraints on the exercise of state power and are thus negative rights.⁷⁴ Second generation rights are socio-economic rights which were absent from the Independence Constitution.⁷⁵ These are needed for the enjoyment of basic necessities in the life of a citizen. They impose a positive duty on the state for their fulfillment. Article 43(1)(b) of the Constitution is a socio-economic right which espouses the right to adequate housing and proper sanitation. Third generation rights are solidarity rights which reflect the

⁷¹ Unicef.org. "What Are Human Rights?" 2019. -<<https://www.unicef.org/child-rights-convention/what-are-human-rights>> on 15 November 2023.

⁷² Adar K, Munyae I, "Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001", 6.

⁷³ Akech M, 'Institutional Reform in the New Constitution of Kenya', International Center for Transitional Justice, 2010, 7.

⁷⁴ Ambani J, Mbondenye M, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights', 23.

⁷⁵ Ambani J, Mbondenye M, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights', 20.

enjoyments of rights either on an individual level or collective level for a group of people.⁷⁶ The inclusion of these three generations of rights implies that human rights are interrelated, interdependent, interconnected and equal in status.⁷⁷ The existence of one requires the acknowledgement of another.

Secondly, the Bill of Rights contains an expansive non-discrimination clause.⁷⁸ Articles 27(4) and 27(5) prohibit discrimination on grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁷⁹ This is an improvement from the Independence Constitution which prohibited discrimination only on grounds of race, tribe, place or origin or residence or other local connection, political opinion, colour, creed or sex.⁸⁰ This expansion reduces the possibility of citizens being discriminated against thus promoting the enjoyment of rights by the people.

Thirdly, the Bill of Rights has regard for substantive equality. This requires the law to ensure the equality of outcomes. It is based off the philosophy that justice is attained when equals are treated equally. This motivates initiatives like affirmative action as a form of social engineering to change society's perception about certain groups of people, in order to achieve equality of all. A transformative constitution needs to have an overarching dedication to equality and specifically, comprehending a redistributive conception of equality.⁸¹ For this to take place, there needs to be an examination of the individual in the context of their social and economic situation, the impact of inequality on vulnerable groups and the provision of remedial measures to uplift the disadvantaged groups.⁸²

⁷⁶ Ambani J, Mbondenyei M, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights', 23.

⁷⁷ Ambani J, Mbondenyei M, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights', 24.

⁷⁸ Ambani J, Mbondenyei M, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights', 24,

⁷⁹ Article 27(4)(5), Constitution of Kenya (2010).

⁸⁰ Section 70 and 80(3), Independence Constitution of Kenya (1963)

⁸¹ Klare, 'Legal Culture and Transformative Constitutionalism', 153 – 154.

⁸² Mwenda M, 'The Context of Transformative Constitutionalism in Kenya', 3.

Fourthly, the Bill of Rights has a centralized general limitation clause.⁸³ In the Independence Constitution, human rights were limited in two ways. There was a general limitation clause that applied to majority of the rights. It stipulated that human rights would be limited for the greater benefit of public health, security, and morality.⁸⁴ Furthermore, particular rights had clauses that limited the rights through internal limitations. Take for instance the freedom of movement guaranteed under Section 25(1) of the Independence Constitution. It highlighted that no person shall be deprived of their right to move freely or reside in any part of Kenya. This made the enjoyment of rights very difficult. However, Section 25(3) stated that this right shall be limited for the imposition of restrictions on the acquisition of property and upon the movement of persons or residence within Kenya, among others. The 2010 Constitution on the other hand only has one general limitation clause which states that a right may be limited in a reasonable and justifiable manner based on human dignity, equality and freedom and other factors.⁸⁵ This greatly reduces the risk of arbitrary derogation of human rights as was experienced in the pre-2010 era.

Fifthly, the Bill of Rights includes viable enforcement apparatuses. In order to promote the protection of human rights, there are specialized human rights institutions that have been adopted. Article 59 of the 2010 Constitution establishes the Kenya National Human Rights and Equality Commission (KNHCR) which is a National Human Rights Institution. Such institutions are state-mandated bodies, independent of government, with a broad constitutional or legal mandate to protect and promote all human rights at the national level.⁸⁶ A few of its functions include, to promote respect for human rights and develop a culture of human rights in the Republic,⁸⁷ to monitor, investigate and report on the observance of human rights in public and private institutions⁸⁸, on its own initiative or on the basis of complaints about alleged abuses of human rights, investigate and take steps to secure appropriate redress where human rights have been

⁸³ Ambani J, Mbondenyi M, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights', 32.

⁸⁴ Sections 19 1(a), 20 2(a), 22 5(a), 23 2(a), 24 2(a), 25 3(b), Independence Constitution (1963).

⁸⁵ Article 24(1), *Constitution of Kenya* (2010).

⁸⁶ ENNHRI -. "About National Human Rights Institutions - ENNHRI," July 16, 2019. [https://ennhri.org/about-nhris/#:~:text=National%20Human%20Rights%20Institutions%20\(NHRIs,economic%2C%20social%20and%20cultural%20rights](https://ennhri.org/about-nhris/#:~:text=National%20Human%20Rights%20Institutions%20(NHRIs,economic%2C%20social%20and%20cultural%20rights).

⁸⁷ Article 59(2)(a), *Constitution of Kenya* (2010).

⁸⁸ Article 59(2)(d), *Constitution of Kenya* (2010).

violated⁸⁹ and acting as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.⁹⁰

It is evident that this commission plays a pivotal role in the protection and promotion of human rights in Kenya in ideal circumstances. For instance, the Commission is carrying out programs which involve internally displaced persons and forced evictions.⁹¹ KNHCR works with the relevant national and county government structures, development partners, international actors, regional actors and the humanitarian sector for this purpose.⁹² It also carries out documentation and dissemination of its findings to targeted actors with the aim of seeking accountability and protection of human rights.⁹³ Furthermore, the commission undertakes advocacy and targeted sensitization on the protection of human rights of displaced persons.⁹⁴

It is noted that a transformative constitution is one which encourages the broad interpretation of its articles. Article 259(1) of the 2010 Constitution stipulates that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles,⁹⁵ advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights,⁹⁶ permits the development of the law⁹⁷ and lastly, contributes to good governance.⁹⁸ Additionally, Article 20(4) requires that judicial authorities should interpret the Bill of Rights based on human dignity, equality, equity, freedom and in the spirit, purport and object of Bill of Rights.⁹⁹ Section 3 of the Supreme Court Act also identifies one of the objects of the Act being to enable important constitutional and other legal matters, including matters relating to the transition from the former

⁸⁹ Article 59(2)(e), Constitution of Kenya (2010).

⁹⁰ Article 59(2)(g), Constitution of Kenya (2010).

⁹¹ Knchr.org. “Displacement and Forced Evictions,” 2022. <https://www.knchr.org/Our-Work/Displacement-and-Forced-Evictions>.

⁹² Knchr.org. “Displacement and Forced Evictions,” 2022. <https://www.knchr.org/Our-Work/Displacement-and-Forced-Evictions>.

⁹³ Knchr.org. “Displacement and Forced Evictions,” 2022. <https://www.knchr.org/Our-Work/Displacement-and-Forced-Evictions>.

⁹⁴ Knchr.org. “Displacement and Forced Evictions,” 2022. <https://www.knchr.org/Our-Work/Displacement-and-Forced-Evictions>.

⁹⁵ Article 259(1)(a), Constitution of Kenya (2010).

⁹⁶ Article 259(1)(b), Constitution of Kenya (2010).

⁹⁷ Article 259(1)(c), Constitution of Kenya (2010).

⁹⁸ Article 259(1)(d), Constitution of Kenya (2010).

⁹⁹ Article 20(4), Constitution of Kenya (2010).

to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.¹⁰⁰ This represents the adoption of multi-disciplinary and inter-disciplinary approaches to the implementation of the Constitution.¹⁰¹ Judicial officers are thus encouraged to consider non legal phenomena such as Kenya’s historical, social, economic, cultural, religious, theological, philosophical, technological and political contexts in interpreting the Constitution.¹⁰² Formalistic interpretation is therefore discouraged in court jurisprudence. Such interpretation involves viewing the Constitution as a mere statute, devoid of the non-legal considerations incorporated into it.¹⁰³

A Transformative Constitution also acknowledges and upholds the sovereignty, supremacy and centrality of the people.¹⁰⁴ The preamble of the 2010 Constitution starts with the phrase ‘We the people of Kenya’. In addition the very first article mentions that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.¹⁰⁵ Article 1(3) goes further to state that the sovereign power of the people is delegated to the Legislature, Executive and the Judiciary.¹⁰⁶ This means that the authority of these state organs is derived from the people and that decisions should be made in consideration of them. State organs, state officers and public officers are bound to adopt the national values and principles of governance. Of notable mention are participation of the people, democracy, human rights, transparency and accountability, social justice, non-discrimination and protection of the marginalized.¹⁰⁷ It is evident that the people are at the center of the Constitution and that all systems of governance should benefit the common good of the people. The participation of the people in decisions is extremely important in affirming the will of the people. In the case of *Communication Commission of Kenya & 5 others v Royal*

¹⁰⁰ Section 3(d), Supreme Court Act (2011).

¹⁰¹ Mutunga W, “*Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?*”, 30.

¹⁰² Mutunga W, “*Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?*”, 30.

¹⁰³ Paragraph 40(b), *Lichete v Independent Electoral and Boundaries Commission & another; Attorney General* (2022) eKLR.

¹⁰⁴ Mutunga W, “*Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?*”, 30.

¹⁰⁵ Article 1(1), Constitution of Kenya (2010).

¹⁰⁶ Article 1(3), Constitution of Kenya (2010).

¹⁰⁷ Article 10(2), Constitution of Kenya (2010).

*Media Services Limited & 5 Others*¹⁰⁸, the court highlighted the importance of public participation as follows:

Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.¹⁰⁹

An independent Judiciary is another characteristic of Transformative Constitutions. The following are ways in which the independence of the Judiciary is upheld under the 2010 Constitution. Firstly, judges are appointed by the Judicial Service Commission (JSC) which is an independent state organ. It is mandated to promote and facilitate the independence and accountability the Judiciary and the effective and transparent administration of justice.¹¹⁰ These judicial appointees are assented to by the President who simply participates in the process of their recruitment. The assenting of the President is more of a ceremonial act more than it is a substantive.¹¹¹ The JSC also seeks the participation of the public in their decisions regarding the suitability of candidates during appointment.¹¹²

Conclusion

It is important to understand Kenya’s historical context when it comes to the enjoyment and protection of human rights. Only then can one appreciate why the 2010 Constitution made such drastic changes on human rights. It is therefore critical for the right to adequate housing to be interpreted broadly and faithfully for the benefit of the people. The Preamble of the Constitution

¹⁰⁸ *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others*, 2015, eKLR.

¹⁰⁹ *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others*, 2015, eKLR.

¹¹⁰ Article 172(1), Constitution of Kenya (2010).

¹¹¹ *Law Society of Kenya v Attorney General & 2 others*, 2016, eKLR.

¹¹² Paragraph 114, *David Kariuki Ngari & another v Judicial Service Commission & another, Law Society of Kenya & 2 Others (Interested Parties)* (2020) eKLR.

states inter alia ‘We, the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.’ This explains why it is problematic for there to be a lack of the normative content on adequate housing as will be explained in subsequent chapters. The danger that lies here is regression back to a culture where human rights were grossly violated. Article 43(1)(b) should therefore be interpreted in the spirit of Transformative Constitutionalism.



CHAPTER 03: THE LEGITIMACY OF THE JUDICIARY IN ADJUDICATING SOCIO-ECONOMIC RIGHTS

Introduction

Many have argued that the Judiciary is illegitimate when it comes to adjudicating over socio-economic rights. Primary concerns over the same is that the Judiciary lacks democratic legitimacy since judicial officers are appointed rather than elected by the people. The other concern is that in reviewing actions and decisions made by other arms of government, the Judiciary may interfere with the doctrine of separation of powers. This chapter will discredit these claims by proving that indeed socio-economic rights are justiciable and the Judiciary is legitimate in safeguarding the same.

3.1. Primary concerns about the Justiciability of Socio-Economic Rights by Courts

3.1.1. Democratic Legitimacy

One of the national values and principles of good governance that bind all State organs, State officers and public officers is democracy, according to Article 10(2)(a) of the Constitution of Kenya. This is a form of government in which the sovereign power resides in and is exercised by the whole body of free citizens; as distinguished from a monarchy, aristocracy or oligarchy.¹¹³ Many thus argue that courts are not democratically legitimate to adjudicate over socio-economic rights because they are not elected by the people. For example, magistrates and judges are appointed by the Judicial Service Commission¹¹⁴ unlike members of Parliament who are voted into office by citizens.¹¹⁵

Proponents of the democratic illegitimacy argument concerning the adjudication of socio-economic rights often argue that since these rights are positive duty bearing rights, they require the State to do a certain act which requires the investment of the country's revenue.¹¹⁶ They submit that the Judiciary lacks the expertise to handle matters of budgetary implications and resource

¹¹³ Black's Law Dictionary, 2nd Edition.

¹¹⁴ Article 166, *Constitution of Kenya* (2010).

¹¹⁵ Article 97(1)(a), *Constitution of Kenya* (2010).

¹¹⁶ Nolan A, Langford M, 'The Justiciability of Socio-Economic Rights: An Updates Appraisal' 12.

allocations but more so¹¹⁷, they do not represent the will of the people. Therefore, only the Legislature and the Executive can formulate and review policies on socio-economic rights. This line of reasoning may be disputed as follows. Article 1(1) of the 2010 Constitution states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Article 1(3) goes on to mention that this sovereign power is delegated to the Legislature, Executive and most notably, the Judiciary. This means that in safeguarding the rights enshrined in the Constitution, the Judiciary also represents the will of the people. Additionally, it derives its authority from the people as per Article 159(1).

It is possible to find that the interests of the majority party or political coalition are represented in the laws and policies formed by the Legislature and the Executive. This may leave minorities at impending danger of human rights violations. The Judiciary ensures that the rights and interests of these minorities are safeguarded.¹¹⁸ Through judicial review, their rights are protected because they often have no voice in championing their rights.

3.1.2 Separation of Powers

The doctrine of separation of powers requires that the three branches of government are kept distinct in order to provide for a system of checks and balances because these arms have certain mechanisms that may be used to prevent tyranny from another.¹¹⁹ Article 165 3(d) of the 2010 Constitution empowers the High Court of Kenya to hear any question on whether any law is inconsistent with of the Constitution¹²⁰ and whether anything that is said to be done under the authority of the Constitution or in contravention with the Constitution. This is pursuant to the system of checks and balances.¹²¹

Montesquieu's doctrine of pure separation of powers submits that the doctrine is made of two elements. First is institutional separation of powers which means that institutions are categorized distinctly and no personnel should be part of more than one of these institutions. Second is

¹¹⁷ Nolan A, Langford M, 'The Justiciability of Socio-Economic Rights: An Updates Appraisal',13.

¹¹⁸ Yusuf S, 'The Rise of Judicially Enforced Economic, Social and Cultural Human Rights - Refocusing Perspectives', Seattle Journal for Social Justice, Volume 10, Issue 2, 2012, 761 - 762.

¹¹⁹ Black's Law Dictionary, 9th Edition.

¹²⁰ Article 165 3(d)(ii), *Constitution of Kenya* (2010).

¹²¹ Article 165 3(d)(ii), *Constitution of Kenya* (2010).

functional separation of powers which means there should be strict distinction between the functions of these institutions and that no two institutions shall perform the same function.¹²² However, this strict separation is impractical because all branches of government work interdependently implying collaboration of different branches in the performance of certain functions. This argument usually forms the basis for those who believe that the Judiciary should not adjudicate over socio-economic rights as will be discussed below.

Judicial review is the power of the courts to examine the actions of the Legislature, Executive and administrative arms of the government to determine whether these actions are consistent with the constitution. Where they are not, such actions are declared unconstitutional and are therefore null and void.¹²³ This principle may be manifested in two ways; judicial activism and judicial restraint.

Judicial activism is the philosophy of judicial decision-making whereby judges allow their personal views about public policy among other factors to guide their decisions.¹²⁴ Article 259 (1) of the Constitution of Kenya requires that the constitution should be interpreted in a manner that promotes its purposes, values and principles and contributes to good governance among others. This encourages judicial activism since the interpretation can take into consideration the changing needs of Kenyans rather than on strict adherence to laws.¹²⁵ At its core, this is not a negative concept since it promotes the broad interpretation of the Constitution. Nonetheless, the issue that culminates is the fear of courts going too far beyond their constitutional limits. This may result in tyranny because the Judiciary is the only body with the power of declaring actions of other organs unconstitutional. Due to this flow of power to courts, the common concern is that they move into the realm of the functions of the other branches of government such as considering budgetary implications.¹²⁶ This is incorrect because the court has to evaluate the decisions of other arms of government to determine if they are unconstitutional or not.

¹²² Asher E, “*Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?*”, *Journal of Law, Policy and Globalization*, Volume 35, 2015, 96-<<https://core.ac.uk/download/pdf/234650094.pdf>. > on 1 December 2023.

¹²³ Encyclopedia Britannica, “*Judicial Review | Definition, Forms, & Facts | Britannica.*” In *Encyclopedia Britannica*, 2023, -<<https://www.britannica.com/topic/judicial-review>. > on 1 December 2023.

¹²⁴ Black’s Law Dictionary, 9th Edition.

¹²⁵ Cheruiyot K, ‘*Judicial Activism, Judicial Restraint and Constitutional Interpretation in Kenya: The Post-2010 Era*’ SSRN, 2021, 5 -<<http://dx.doi.org/10.2139/ssrn.4032620> > on 1 December 2023.

¹²⁶ Nolan A, Langford M, ‘*The Justiciability of Socio-Economic Rights: An Updates Appraisal*’ 14.

Judicial restraint on the other hand requires that every arm of government acts within its constitutional bounds when exercising its constitutional powers. This is also anchored on the doctrine of the separation of powers so as to prevent courts from encroaching into the discharge of constitutional functions by other arms of government.¹²⁷ Courts should thus limit the exercise of their own power and hesitate to strike down laws and actions from the Legislature and Executive unless they are truly unconstitutional.¹²⁸ On constitutional interpretation, Article 259(1)(b) of the Constitution requires that it may be interpreted in a manner that advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights. One may reasonably infer the restraint implied in this article since it binds constitutional interpretation to the aforementioned. Nevertheless, judicial restraint should not be done in a manner that underwhelms the constitutional duty of courts. They should not remain numb to reasonably assessing violations of human rights just because they fear reviewing the decisions and actions of the other arms of government.

In my view, it is not a mistake for Article 259 of the Constitution of Kenya to account for both constitutional interpretations which takes into consideration the progressive values and needs of the people and set constitutional standards for its interpretation. This gives the courts the freedom to use judicial activism and judicial restraint in a way that promotes human rights devoid of the shortcomings of both concepts as discussed. Courts should thus balance avoiding unjustified interference in the functions of other arms and working towards fulfilling their constitutional mandate.¹²⁹ In doing so, they shall not negatively impact the separation of power doctrine and socio-economic rights shall be adequately safeguarded.

Conclusion

The third line of the Kenyan national anthem states ‘Justice be our shield and defender’. Naturally, Article 159 of the Constitution of Kenya establishes the Judiciary as the independent custodian of justice in Kenya. In promoting access to justice, socio-economic rights as justiciable. The Judiciary

¹²⁷ Cheruiyot K, ‘*Judicial Activism, Judicial Restraint and Constitutional Interpretation in Kenya: The Post-2010 Era*’ 5.

¹²⁸ Asher' E, “*Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?*”, 101.

¹²⁹ Asher' E, “*Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?*”, 102.

acts under the authority of the people and carries out judicial activism and judicial restraint appropriately for their benefit. This is done in a manner that affirms the democracy of the people and abides by the separation of powers.



CHAPTER 04: ASSESSING THE VULNERABILITY OF INFORMAL WORKERS IN THE ENJOYMENT OF THE RIGHT TO ADEQUATE HOUSING.

Introduction

The informal employment sector consists of individuals with jobs that are not subject to labour legislation, income taxation, social protection or entitlement to certain employment benefits such as advance notice of dismissal, severance pay, sick leave and more. This is as defined by the International Labour Organization (ILO). This may be as a result of practice or as a matter in law. It could be caused by the non-declaration of the jobs by employees, jobs lasting a short period of time, working hours or wages are below a specific threshold or lack of application of the law and regulation in practice.¹³⁰ The chapter reveals the vulnerability of informal workers, the challenges they face in accessing the right to adequate housing and how existing policies are insufficient in mitigating the same.

4.1. The Basic Needs Approach to Development.

The Basic Needs Approach to Development redefines economic development from economic growth and statistical measures of output, to the development of man and his welfare.¹³¹ The approach as first introduced by the International Labour Organization (ILO) in 1976.¹³² Prior to this, development was strongly focused on economic growth as the best way to eradicate poverty. It prioritized the growth of incomes in a modern, organized and large scale industrial activity manner. Economic growth was not an end in itself but an indicator of development.¹³³ There were three justifications in support of this. Firstly, it was believed that the gains from economic growth would trickle down to the poor by raising demand for labour, productivity, wages and lowering prices. Secondly, it was assumed that governments were democratic and would prioritize the needs of the poor by extending benefits of economic growth through policies such as progressive tax. Lastly, it was argued that capital, infrastructure and the productive capacity of an economy should be multiplied and the benefits shared out mainly to the rich. In so doing, they would have the

¹³⁰ OECD/ILO, 'Tackling Vulnerability in the Informal Economy,' 156.

¹³¹ Keeton G R, 'The Basic Needs Approach: A Missing Ingredient in Development Theory?' 278.

¹³² Keeton G R, 'The Basic Needs Approach: A Missing Ingredient in Development Theory?' 279.

¹³³ Streeten P, 'From growth to Basic Needs', Finance & Development - International Monetary Fund, 1979, 28, - < <https://www.elibrary.imf.org/downloadpdf/journals/022/0016/003/article-A009-en.xml> > on 17 December 2023.

incentive to innovate, save, invest and the accumulated wealth would eventually benefit the poor.¹³⁴

Unfortunately, these justifications were wrong. Development through economic growth was indeed increased however, governments did not take proper corrective action to reduce poverty which led to greater inequality between the rich and the poor. Growth was so prioritized on large-scale manufacturing that other sectors in the economy were neglected. As a result, even higher rates of unemployment, poverty, squalor, and malnutrition were observed before this approach was adopted.¹³⁵ The approach was unsuccessful in poverty reduction¹³⁶ such that it necessitated a shift in the approaches of development. Following the World Employment Conference 1976 held in Geneva the ILO suggested that strategies, national plans and policies should explicitly include employment and the satisfaction of the basic needs of each country's population as a priority objective.¹³⁷ The full name of the conference was the 'Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of Labour'. It was concerned with discussing issues of employment in the perspective of satisfying basic needs. In other words, problems to do with employment were to be solved through prioritizing basic human needs.

According to this approach, the idea is not to simply develop things but to develop man himself. A human being has certain basic needs such as food, clothing, health, education and most relevant to this study, shelter. Therefore any growth that disrupts these needs hinders development.¹³⁸ It also recognizes that if the poor remain deprived of what is needed for an economically productive life, they can neither contribute to nor benefit from economic growth. Overall development is dependent on the contribution of all sections of the society and thus cannot take place if the majority of the population is impoverished.¹³⁹

¹³⁴ Streeten P, 'From growth to Basic Needs', 1979, 29.

¹³⁵ Cornia, 'Development strategies for the 1980s: Old myths and new ideas.' UNCTAD, Geneva 1982, 2.

¹³⁶ Streeten P, 'From growth to Basic Needs', 1979, 28.

¹³⁷ ILO, 'Declaration of Principles and Program of Action adopted by the Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of Labour', 1976, 191.

¹³⁸ Ghai D, Khan A, Lee E, Alfathan T, 'The Basic Needs Approach to Development: Some Issues Regarding Concepts and Methodology', ILO, Geneva, 1977, 6.

¹³⁹ Keeton G R, 'The Basic Needs Approach: A Missing Ingredient in Development Theory?' 279.

The Preamble of the 2010 Constitution states that ‘We the people of Kenya, committed to nurturing and protecting the well-being of the individual, the family, communities and the nation, adopt, enact and give this Constitution to ourselves and to our future generations’. To reiterate, the access to basic needs should therefore be at the forefront of economic development. The well-being of man has a direct effect on the economic output they can produce. Economic development can no longer neglect considerations on the welfare of man.

4.2. The Informal Worker as a Vulnerable Person.

The informal employment sector contributes 77% of the total workforce in Kenya.¹⁴⁰ Informal workers often face higher risks which have a greater effect on their living conditions.¹⁴¹ These risks vary from low productivity, poor social protection, poor legal protection and occupational health risks. Additionally, they have a direct impact on the quality of basic needs which can be accessed. These vulnerabilities should be used to craft contextualized policies to mitigate them for informal workers.

4.2.1 Low productivity

The term productivity had different understandings. Economists define labour productivity as the output per hour worked. It is based on the efficiency used to exploit labour resources in the economy. Output is increased where there is increased productivity. This in turn increases the Gross Domestic Product (GDP) of a country. On the other hand, a business owner understands productivity as the total output per input unit. This is important because he/she may want to maximize on profit as much as possible which means that there must be increased productivity. To maximize on profit, one of the measures may include reducing expenses as much as possible which may sometimes mean reducing wages. Lastly, a worker may understand productivity as conforming to the expectations of their employer in anticipation of a reward like salaries or bonuses. Therefore working quicker, longer and with fewer mistakes makes their employer happy which results in bonuses and promotions.¹⁴² These three understandings are helpful in understanding why economic output is dependent on the maximization of profits. Economists

¹⁴⁰ Murunga J, Muriithi M.K, Wawire N.W, ‘Estimating the Size of the Informal Sector in Kenya’, 2021, 3.

¹⁴¹ OECD/ILO, ‘Tackling Vulnerability in the Informal Economy,’ 68.

¹⁴² Quay Asia, ‘Low Productivity in the Informal Sector’, Quay Asia, 2017

-<<https://quayasia.com/2017/12/17/the-informal-sector-considering-productivity/>> on 20 December 2023.

believe that increased productivity is needed for economic success. Business owners then require their employees to fully exert themselves in their work. Since employees have the lowest bargaining power, they are at the mercy of their employers and are willing to persevere strenuous working conditions to get high salaries or bonuses.

Low productivity is a distinguishing feature of the informal sector. The sector majorly consists of physical and unskilled labour which usually does not require educational qualifications. Individuals who lack formal education requirements often resort to the informal sector.¹⁴³ which encourages low productivity due to limited acquisition of skills. Another problem is the poor advancement in technology which makes production slow and cumbersome. Unpredictable terminations also reduce productivity since the workers can lose their jobs at any moment. This is attributable to inadequate regulatory oversight and labor protection. It is even estimated that two informal workers are needed to produce the same output produced by one worker in the formal employment sector.¹⁴⁴

Resultantly, low productivity leads to low wages which increases the risk of poverty. It is revealed that a monthly average wage of Kshs. 3,527 is paid to workers in informal enterprises.¹⁴⁵ These are well below the statutory minimum wage rates of Kshs. 15,201.¹⁴⁶ Low wages in turn affects the standard of living of these workers thus making them more vulnerable in accessing quality basic needs.

4.2.2. Poor Legal Protection.

The informal employment sector is usually not subject national labour legislation, income taxation, entitlement to social protection or other employment benefits such as advance notice of dismissal, severance pay, paid annual and sick leave. This is because they are often not recognized, registered, regulated or protected under labour legislation.¹⁴⁷ Since formal workers are recognized

¹⁴³ OECD/ILO, 'Tackling Vulnerability in the Informal Economy,' 33.

¹⁴⁴ OECD/ILO, 'Tackling Vulnerability in the Informal Economy,' 18.

¹⁴⁵ Federation of Kenyan Employers, ILO, 'The Informal Economy in Kenya', 35.

¹⁴⁶ Minimum Wage Gazette Notice, 2022, 2.

¹⁴⁷ International Labour Organization, 'Sixth Item on the Agenda: The Informal Economy', International Labour Conference - Provisional Record, 19th Session, Geneva, 2002, 53. -

<<https://www.ilo.org/public/english/standards/realm/ilc/ilc90/pdf/pr-25.pdf> > on 23 December 2023.

and registered as per the law, they have better access to the aforementioned benefits as compared to informal workers. Additionally, informal enterprises have low levels of unionization as revealed in the fact that only 0.5% of informal micro-enterprises, 3% of informal medium enterprises and 6.5% of informal small enterprises are unionized.¹⁴⁸ Since the employment status of informal workers is ambiguous under the law, it is very difficult for their rights to be recognized and protected. It does not help that there are low levels of unionization that limits key measures such as collective bargaining. Consequently, informal workers are most likely to be taken advantage of in their working conditions and ultimately the wages that they are paid.

4.2.3. Occupational health risks

ILO estimates that 2.78 million people lose their lives from work-related accidents or diseases. Additionally, 317 million people sustain occupational injuries resulting in a loss of 4% of the global GDP.¹⁴⁹ Informal workers are often exposed to harsh working conditions such as toxic fumes, dust, high temperature, chemicals and explosives, all without proper protective gear which result in diseases and sometimes even death. Attached to these working conditions are high economic and social costs that are usually not prioritized. Informal workers are especially endangered because they lack adequate health insurance to cater for the health implications that may arise from their work. This directly affects how well they can do their work and the wages they receive. The following describes an experience that is commonly shared by many informal workers in terms of the occupation health risks that are encountered. Michael Karegu, a spray painter was interviewed about the health risks he goes through while conducting his work as an informal worker. His answer was that:

“We expose ourselves to toxic paint everyday with no protection, not by choice but there is nothing we can do. Those things [protective gear] are very expensive and they do not last that long. The industry owner or foreman will fire you if you start demanding protection. I have breathing complications but doctors gave me medication and advise me to stop painting. But I cannot. Stopping will be a death sentence for my family.”¹⁵⁰

¹⁴⁸ Federation of Kenyan Employers, ILO, ‘The Informal Economy in Kenya’, 34.

¹⁴⁹ OECD/ILO, ‘*Tackling Vulnerability in the Informal Economy*,’ 75.

¹⁵⁰ Wasike A, ‘Kenyan risk health to earn living in the informal sector’, aa.com, 2021

-< <https://www.aa.com.tr/en/africa/kenyans-risk-health-to-earn-living-in-the-informal-sector/2231174> > on 17 December 2023.

4.3. Examining the standards of Affordability and Accessibility for the Informal Worker.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was created in mind of the obligation of states under the Charter of the United Nation, to promote universal respect for, and observance of, human rights and freedoms.¹⁵¹ Kenya assented to this covenant on the 1st of May 1972.¹⁵² Article 11.1 of the covenant stipulates that State Parties 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. Furthermore, they will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.¹⁵³

The CESCR General Comment No. 4 provides an authoritative interpretation of the above article.¹⁵⁴ It identifies that this right to housing should include legal security of tenure, availability of services, material, facilities and infrastructure, habitability, location, cultural adequacy and most relevantly, affordability and accessibility. The standard of affordability requires that the personal or household financial costs associated with housing should allow the attainment and satisfaction of other basic needs without threatening or compromising them. Furthermore, states are expected to ensure that the percentage of these costs commensurate with income levels. They should also establish housing subsidies and housing finance for those who are unable to afford adequate housing. The standard of accessibility mandates that housing should be accessible to those who are entitled to it. Disadvantaged groups should be granted full and sustainable access to housing. Housing law and policy should prioritize special housing needs of these groups.

The National Housing Corporation (NHC) is a State Corporation established under Section 3 of the Housing Act Cap 117. It is the principal government - implementing agency concerned with realizing the right to adequate housing.¹⁵⁵ The National Housing Corporation Strategic Plan 2019

¹⁵¹ Preamble, International Covenant on Economic, Social and Cultural Rights (1966).

¹⁵² Un.org. "UNTC," International Covenant on Economic, Social and Cultural Rights, 2024. - https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3+chapter=4+clang=en > on 27 December 2023..

¹⁵³ Article 11.1, International Covenant on Economic, Social and Cultural Rights. (1966)

¹⁵⁴ Paragraph 8, CESCR General Comment 4, (1991), E/1992/23.

¹⁵⁵ National Housing Corporation, National Housing Corporation Strategic Plan (2019 - 2023), 2019, iii.

– 2023 aims to develop 500,000 housing units for low - income earners as their main target audience. his category of earners usually faces great difficulties in affording housing from private developers in the market due to their highly competitive prices. The aim of the Plan is to eradicate the growth of informal settlements in urban areas which arise from the housing deficit caused by the influx of rural to urban migration. The Plan thus has set out three income levels which serve as a pricing guide for housing for through the Affordable Housing Program (AHP) which is discussed in the Plan. The lowest income level under the Plan is the Social Level which covers individuals who earn between Kshs. 0 and Kshs. 19,999, Low Cost Level from Kshs. 20,000 to Kshs. 49,999 and Mortgage Gap Level from Kshs. 50,000 to Kshs. 149,999.¹⁵⁶ However, it is noted that these levels were developed from data collected from the formal employment sector¹⁵⁷ and therefore fail to highlight the income levels earned by informal workers.

It is observed that neither the Housing Act nor the Plan make direct reference to the ICESCR Article 11.1. None of these documents sufficiently define what constitutes adequate housing provided for under Article 43 (1)(b) of the Constitution of Kenya. Granted, the NHC defines affordable housing as adequate and decent housing provisions to the low and moderate income segments of a population who would otherwise be unable to access directly from the market.¹⁵⁸ In addition, housing costs should not exceed 30% of the household income and not cause undue income pressure while compromising the attainment of other basic needs.¹⁵⁹ The housing plans available are the Social Housing Plan, Affordable Housing Plan and Market Plan. The former is the cheapest with a one-bedroom house valued at Kshs. 840,000. This house can be owned through a monthly payment of Kshs. 3,200.¹⁶⁰

If Kshs. 3,200 represents the maximum 30% of income spent on housing for it to be affordable, it would mean that the income earned would be Kshs. 10,667. However, informal workers working in micro, small and medium informal enterprises earn a monthly wage of Kshs. 3,525, Kshs. 4,975

¹⁵⁶ National Housing Corporation, National Housing Corporation Strategic Plan (2019 - 2023), 2019, 8-9.

¹⁵⁷ National Housing Corporation, National Housing Corporation Strategic Plan (2019 - 2023), 12.

¹⁵⁸ National Housing Corporation, National Housing Corporation Strategic Plan (2019 -2023),9.

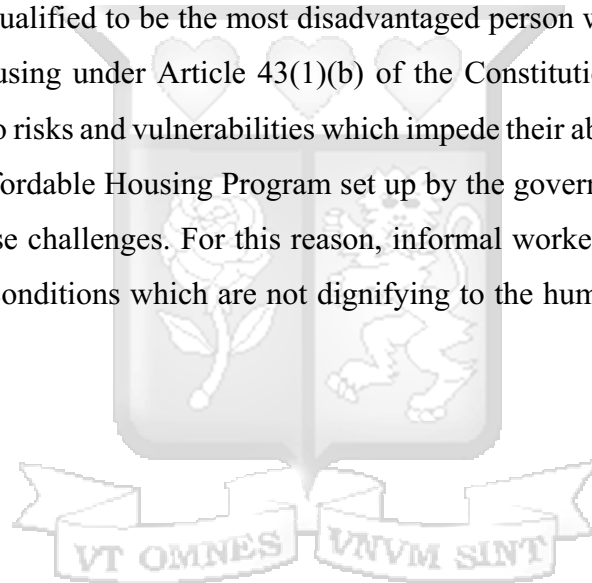
¹⁵⁹ National Housing Corporation, National Housing Corporation Strategic Plan (2019 -2023),9.

¹⁶⁰ Munda C, 'President Ruto's Low-Cost Homes Price and Payment Plan Revealed.' Business Daily, 2023. <<https://www.businessdailyafrica.com/bd/economy/president-ruto-s-low-cost-homes-price-and-payment-plan-revealed--4402452>. > on 23 December 2023.

and Kshs. 2,082 respectively with 9 out of 10 informal workers working in micro informal enterprises. Housing is therefore not affordable and is not accessible by informal workers who earn low wages. 60% of the population living in urban areas live in informal settlements.¹⁶¹ These individuals are forced to live in informal settlements such as slums which have poor living standards. They are exposed to communicable diseases like water borne and vector borne diseases like bilharzia and typhoid due to inadequate sanitation, lack of potable water, poor sewage and garbage collection services. They are also subjected injuries which are linked to poor quality and overcrowded housing through accidental fires and high rates of insecurity.¹⁶²

Conclusion

The informal worker is qualified to be the most disadvantaged person when it comes to enjoying the right to adequate housing under Article 43(1)(b) of the Constitution of Kenya. Their work makes them susceptible to risks and vulnerabilities which impede their ability to satisfy basic needs such as housing. The Affordable Housing Program set up by the government does not efficiently address and mitigate these challenges. For this reason, informal workers are often forced to live under deplorable living conditions which are not dignifying to the human person.



¹⁶¹ UN-Habitat, *'A Better Quality of Life for All in An Urbanizing World'*, UN-Habitat - Kenya Country brief, 2023 - < https://unhabitat.org/sites/default/files/2023/07/kenya_country_brief_final_en.pdf. > on 23 December 2023.

¹⁶² Zerbo A, *'Vulnerability and Everyday Health Risks of Urban Informal Settlements in Sub-Saharan Africa'*, Global Health Journal, Volume 4, Issue 2, 2020, 49 -< <https://doi.org/10.1016/j.glohj.2020.04.003> > on 23 December 2023.

CHAPTER 05: EXAMINING THE APPROACH TAKEN BY COURTS IN INTERPRETING ARTICLE 43(1)(B) OF THE CONSTITUTION OF KENYA.

Introduction.

Over the past few years. Courts in Kenya have adopted transformative constitutionalism in the interpretation of socio-economic rights. Even so, the standards of what entails adequate housing are often neglected thus limiting the full enjoyment of these rights by informal workers, who qualify as a vulnerable group as discussed in the previous chapter. This chapter will discuss the landmark case when it comes to claims to do with the right to housing in Kenya and the approach used in South Africa in the enforcement of socio-economic rights that is more inclusive of vulnerable groups.

5.1. The interpretation of the Right to Adequate Housing in the Kenyan Context.

On 11th January 2021, the Supreme Court of Kenya made its first socio-economic rights ruling under the 2010 Constitution,¹⁶³ 11 years after its promulgation. This took place in the case of *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others*.¹⁶⁴ The appellant was a registered society composed of residents of Mitumba Village who had lived on the informal settlement for 19 years, near Wilson Airport. It housed about 3,000 families.¹⁶⁵ A notice was published in the newspapers informing the residents that they needed to vacate their homes in a span of seven days.¹⁶⁶ The respondent argued that the village was on property, which was public land, that belonged to the Kenya Airports Authority which was under a statutory duty to ensure air safety by clearing any informal settlements which were on the flight path.¹⁶⁷ The respondent revealed that due to the Somali war ¹⁶⁸that was going on at the time, the settlement was a security threat.¹⁶⁹ The

¹⁶³ East African Centre on Human Rights, 'Supreme Court Ruling on Socio-Economic Rights a Move in the Right Direction' EACH Rights, 2018 -<<https://eachrights.or.ke/supreme-court-ruling-on-socio-economic-rights-a-move-in-the-right-direction/>> on 24 December 2023.

¹⁶⁴ *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR.

¹⁶⁵ Paragraph 1, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁶⁶ Paragraph 8, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁶⁷ Section 39, Kenya Airports Authority Act (No, 3 of 1991).

¹⁶⁸ The Somali Civil War began in 1980s and is still on-going. It started out as resistance to the military junta which was led by Siad Barre in the 1980s. In early 2011, Kenya invaded Somali under Operation Lind Nchi to counter a series of kidnappings within the Kenyan territory carried out by the Al-Shabaab militant group.

¹⁶⁹ Paragraph 21, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

petitioner then obtained conservatory orders from the High Court to stop the demolition of their houses due to short notice of the eviction that was issued. The orders were granted although the houses were demolished.¹⁷⁰

The petitioner sought declaratory reliefs affirming that they owned the property, they were forcefully evicted and their homes demolished without arrangements of relocation which was illegal and oppressive.¹⁷¹ The High Court determined that the notice on the newspaper was unreasonable, unconscionable and unconstitutional because no proper notice had been published before it. The residents only had seven days to vacate from property from when they first were notified of the eviction.¹⁷² It also reasoned that the right to property extended to the protection of goods and personal property that had been destroyed during the demolition. The eviction and demolition was in violation of the petitioners' right to housing.¹⁷³ Due procedure was not adhered to since there lacked reasonable notice and the provision of alternative accommodation following the eviction. The High Court ruled that the petitioner was entitled to compensation for the damage caused during the demolition, relocation to another parcel of land or alternative shelter with access to education facilities, clean water, healthcare and food at the State's expense.¹⁷⁴ It also granted structural interdicts (supervisory orders) that required the respondents to furnish the court with information regarding policies and programs of shelter and access to housing.¹⁷⁵

The respondent filed an appeal to the Court of Appeal which reversed the High Court ruling.¹⁷⁶ The High Court had noted that in Kenya, there lacked legislation or guidelines for the eviction of persons who occupied land that they are not legally entitled to.¹⁷⁷ Article 2(5) of the 2010 Constitution states that the general rules of international law shall form part of the law of Kenya. The Court of Appeal however, did not apply General Comment No.7 of the CESCR on the right to adequate housing which gives guidelines on evictions. This was despite Kenya being party to

¹⁷⁰ Paragraph 8, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁷¹ Paragraph 15, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁷² Paragraph 44, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁷³ Paragraph 48, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁷⁴ Paragraph 76, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁷⁵ Paragraph 79, *Mitu-Bell Welfare Society v Attorney General & 2 Others* (2013) eKLR.

¹⁷⁶ *Kenya Airports Authority v Mitu-Bell Society & 2 Others* (2016) eKLR.

¹⁷⁷ Paragraph 40, *Mitu-Bell Welfare Society V Attorney General & 2 Others* (2013) eKLR.

the ICESCR. The court termed the covenant a ‘mere rule of international law’ which does not form part of the laws of Kenya as opposed to ‘general rules of international law’ which are enshrined under Article 2(5) of the Constitution. They argued that the Constitution is the supreme law of the land and so General Comment 7 was inconsistent with the same.¹⁷⁸ The court also came to the conclusion that since the High Court has already given its judgment, it became *functus officio* and therefore could not grant structural interdicts as a remedy.¹⁷⁹ This decision showcases the strict interpretation of the Constitution as seen in the pre-2010 era. It was retrogressive and threatened to take Kenya back to an era which curtailed the promotion of socio-economic rights.¹⁸⁰

The petitioners finally appealed to the Supreme Court. Firstly, the Court ruled on the applicability of structural interdicts. It reasoned that Article 23(3) of the 2010 Constitution uses the word ‘including’ to list the appropriate reliefs a court may grant which means that the reliefs listed are non-exhaustive.¹⁸¹ Even though structural interdicts were not listed as a relief, the High Court was still proper in granting it as a remedy.¹⁸² Secondly, it took into consideration that Article 2(5) and 2(6) should be read together.¹⁸³ The latter states that general rules of international law and treaties shall form part of the law in Kenya. The ICESCR is binding but the general comments are of persuasive in the interpretation of the articles contained in the covenant. Therefore, General Comment 7 was relevant in enforcing the right to housing. Lastly, the court ruled that since the petitioners had lived on the property for 19 years, their right to property had crystallized on the public land in question. It was determined that the petitioner’s right to housing had been violated.¹⁸⁴ The court ordered that the proceedings be remitted to the trial court with instructions that appropriate reliefs be crafted and granted in accordance with its judgment and the pleadings at the High Court.¹⁸⁵

¹⁷⁸ Paragraph 118, *Kenya Airports Authority v Mitu-Bell Society & 2 Others* (2016) eKLR.

¹⁷⁹ Paragraph 142, *Kenya Airports Authority v Mitu-Bell Society & 2 Others* (2016) eKLR.

¹⁸⁰ Mwendwa M, ‘The Jurisprudence of the Court of Appeal on Socio-Economic Rights’, SSRN, 2019, 21-22 -<
<https://ssrn.com/abstract=3379560>> on 24 December 2023.

¹⁸¹ Paragraph 118, *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR

¹⁸² Paragraph 121, *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR

¹⁸³ Paragraph 132, *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR.

¹⁸⁴ Paragraph 152, *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR.

¹⁸⁵ Paragraph 156, *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR.

This *Mitu - Bell* decision showcases transformative constitutionalism in the enforcement of socio-economic rights which has been adopted in subsequent cases on the right to housing, particularly those on forced evictions. Take for instance the case of *Musa & another v Kenya Railways Corporation & 2 Others*.¹⁸⁶ The petitioners submitted that the respondents had wrongfully demolished parts of the informal settlements of Shaurimoyo, Swahili Village and Bondeni. The respondents defended this action on account of acquiring the land for railway use. The petitioners averred that they did not have reasonable notice on the scheduled date of eviction. Additionally, the respondents failed to provide a Relocation Action Plan for the petitioners. Accordingly, the court ruled that indeed the demolitions were unlawful as per the aforementioned reasons. It found that the respondents violated the petitioners' right to adequate housing. It further ordered that the 206 petitioners were entitled to damages of Kshs. 100,000 each.

The Supreme Court recognized where the government fails to provide accessible and adequate housing to all the people, it should at least protect the dignity of those in informal settlements.¹⁸⁷ Where a State claims that it does not have the resources to implement the rights under Article 43, the State should give priority in the allocation of resources to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to the prevailing circumstances, including the vulnerability of particular groups or individuals.¹⁸⁸

Majority of the cases brought before court on claims of violation of Article 43(1)(b) are usually on forced evictions. In some instances, courts do quote General Comment No. 4 in determining what the right to housing entails. However, little attention has been given to assessing the standards of affordability and accessibility in the Kenyan context. This is because the courts usually do not rely on these standards. It has been observed that Kenyan courts struggle with giving normative content to socio-economic rights.¹⁸⁹ There is no substantive outline on what constitutes adequate housing even where General Comment No.4 outlines them on a persuasive note. This further perpetuates

the neglect of informal workers in fully enjoying the right to adequate housing. The social and

¹⁸⁶ *Musa & another v Kenya Railways Corporation & 2 Others* (2022) eKLR.

¹⁸⁷ Paragraph 153, *Mitu - Bell Welfare Society v Kenya Airports Authority and 2 others* (2021), eKLR.

¹⁸⁸ Article 20(5)(b), Constitution of Kenya (2010).

¹⁸⁹ Biegon J, 'The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues',

Judiciary Watch Report. Judicial Enforcement of Socio-Economic Rights under the New Constitution: Challenges and Opportunities for Kenya, The Kenyan Section of the International Commission of Jurists, Vol. 10, 2011,43.



economic context of the great rift between the rich and the poor continues to be neglected in the enforcement of Article 43(1)(b) thus forcing informal workers to continue living in deplorable living conditions.

5.2. The Reasonableness Approach

5.2.1. Government of the Republic of South Africa and Others v Grootboom and Others.

The Reasonableness Approach was first conceptualized in *Government of the Republic of South Africa and Others v Grootboom and Others*.¹⁹⁰ In this case, Irene Grootboom, along with most of the respondents, had been living in an informal settlement called Wallacedene. Majority of these residents lived in poverty with more than two thirds earning less than 500 Rands (Kshs. 4,204.8) a month. They faced poor living conditions such as no water, sewage and only a few houses had electricity.¹⁹¹ Many of them applied for low - cost housing from the Oostenberg Municipality but had been placed on the waiting list for many years. The living conditions became intolerable and this forced the respondents to move out of Wallacedene and onto land that was privately owned while putting up temporary structures for shelter.¹⁹² This was done without the consent of the private landowner who obtained an order of ejection against them. The respondents remained on the land because they had nowhere else to go. Unfortunately, the order was granted and their homes were bulldozed or burnt and their possessions destroyed.¹⁹³

Resultantly, the respondents went to build temporary shelter on the Wallacedene sports field. Winter rains come along causing the respondents to live in intolerable conditions since their shelters were made out of plastic. The respondents' attorney wrote to the Municipality addressing these living conditions and demanded that it should meet its constitutional obligation to provide temporary accommodation to the respondents. Dissatisfied with the municipality's response which

¹⁹⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹¹ Paragraph 7, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹² Paragraph 8, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹³ Paragraph 9, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

failed to meet these requirements, the respondents applied for an order to the High Court of South Africa to provide adequate basic temporary shelter or housing to the respondents pending the obtaining of permanent accommodation.¹⁹⁴ This was in line with Section 26 of the South African Constitution which stated that everyone has the right to access adequate housing. The court ruled in favor of the respondents and ordered the Oostenberg municipality to provide shelter. The municipality was dissatisfied with this decision and filed an appeal to the Constitutional Court of South Africa.¹⁹⁵

5.2.2. Interpretation of the right to adequate housing

Section 26 of the South African Constitution provides that (1) Everyone has the right to have access to adequate housing; (2) The state must take reasonable legislative and other measures, within its resources, to achieve the progressive realization of this right; (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.¹⁹⁶

In interpreting this section, the South African Constitutional Court valued the fact that rights must be understood in their social and historical context.¹⁹⁷ The apartheid regime had caused great disparities in wealth between the rich and the poor. This led to high levels of unemployment, inadequate social security, and poor access to water and adequate health services for the poor.¹⁹⁸ Socio-economic rights should thus be understood as against the existing legacy of social inequality. This contextual interpretation also promotes human dignity, freedom and equality. It further reasoned that the right to housing cannot exist in isolation, all socio-economic rights are interconnected.¹⁹⁹

¹⁹⁴ Paragraph 11, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹⁵ Paragraph 12, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹⁶ Paragraph 21, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹⁷ Paragraph 25, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

¹⁹⁸ Chenwi L, 'Implementation of Housing Rights in South Africa: Approaches and Strategies', *Journal of Law and Social Policy*, Volume 24, 2015.

¹⁹⁹ Paragraph 25, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

Section 39 of the South African Constitution obliges courts to consider international law as a tool for the interpretation of the Bill of Rights. The court noted that as much as this is required, the weight attached to the rule of international law will differ. However, where the relevant rule or principle of international law is binding in South Africa, then it will be directly applicable.²⁰⁰ South Africa became a signatory to the ICESCR in 1994.²⁰¹ Article 11.1 of the ICESCR was referenced in recognizing the right to adequate housing to all. The article provides for the right to adequate housing while Section 26 of the South African Constitution provides for the right of *access* to adequate housing.

The right of access to adequate housing regards housing as more than just bricks and mortar. It requires available land, appropriate services like provision of water and removal of sewage, financing of housing and building of the house itself. In this manner, the State must create conditions for access to adequate housing for people at all economic levels in the society through state policy. The State's primary obligation lies in unlocking the system especially for those who cannot afford to acquire adequate housing on their own. In this respect, the poor are most vulnerable and require priority.²⁰²

According to the reasonableness approach, the court will not investigate whether there are other more favorable or desirable legislative measures that the State should have taken or public money would have been better spent. Instead, the court considers whether the measures take into account the housing deficit in its social, economic and historical context. Their implementation should not exclude a significant segment of people in the society.²⁰³ Furthermore, reasonableness is connected to promoting human dignity and the provision of basic human needs. Those whose needs are the most urgent or whose ability to enjoy the right is at most peril must not be neglected. Where the

²⁰⁰ Paragraph 26, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

²⁰¹ Un.org. "UNTC," International Covenant on Economic, Social and Cultural Rights, 2024. - https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3 chapter=4 clang=en > on 27 December 2023.

²⁰² Paragraph 35, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

²⁰³ Paragraph 43, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

legislative measure fails to cater to the needs of such individuals then the reasonableness test fails.²⁰⁴ The rationale is that all human beings are valued to live a dignified life where basic human needs are attained. However, the State is expected to satisfy its positive obligations within the available resources and is not expected to do more than that which is achievable.²⁰⁵ Even though human rights may be realized progressively, State measures should make appropriate provision for short, medium and long term needs and housing crises.²⁰⁶

Accordingly, the Court declared that the State was required to devise and implement a comprehensive and coordinated housing program to progressively realize the right of access to adequate housing that was within its available resources.²⁰⁷ Furthermore, the housing program must include reasonable measures to provide relief to people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis conditions, since it had failed to properly do so.²⁰⁸ The Reasonableness Approach requires the courts to consider whether the measures taken are reasonable as opposed to whether more favorable measures could have been taken. This upholds the principle of separation of powers since in enforcing socio-economic rights, courts usually scrutinize and order changes to social and economic policy to extend access of resources to socio-economically marginalized groups. The role of drafting laws and policies is traditionally attached to the Executive and Legislature. It also brings forth the concept of challenging socio-economic rights deprivations in light of dynamic historical, social and economic contexts which may differ on a case to case basis.²⁰⁹

The Reasonableness Approach as established by the Constitutional Court of South Africa has promoted the accountability of the South African government and public governance in general. It has been used in the drafting of inclusive and responsive policies on water supply, health care

²⁰⁴ Paragraph 44, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

²⁰⁵ Paragraph 46, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

²⁰⁶ Paragraph 43, *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

²⁰⁷ Paragraph 99 2(a), *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

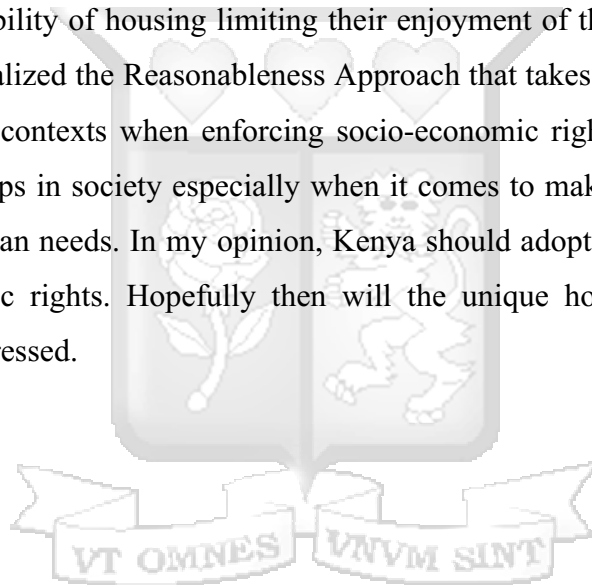
²⁰⁸ Paragraph 99 2(b), *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) South African Constitutional Court.

²⁰⁹Chenwi L, 'Implementation of Housing Rights in South Africa: Approaches and Strategies', 2015, 77.

and more relevantly, housing.²¹⁰ In adjudicating under this approach, substantive factors such as the interpretation of the relevant socio-economic right and a detailed contextual assessment of the impact of the denial of the right to the victims must be considered.²¹¹

Conclusion

It is encouraging that Kenyan courts have embraced transformative constitutionalism to the extent that the Supreme Court reversed a Court of Appeal's decision that was retrogressive and threatening to the enjoyment of the right to housing. Unfortunately, the standards that entail adequate housing enshrined under Article 11.1 of the ICESCR have not been given the attention they deserve. As a result, informal workers, who are a vulnerable group, still struggle with the accessibility and affordability of housing limiting their enjoyment of this right. South Africa on the other hand, conceptualized the Reasonableness Approach that takes into consideration social, historical and economic contexts when enforcing socio-economic rights. It also prioritizes the needs of vulnerable groups in society especially when it comes to making sure that everyone is accorded their basic human needs. In my opinion, Kenya should adopt the same approach when enforcing socio-economic rights. Hopefully then will the unique housing needs of informal workers be properly addressed.



²¹⁰ Oluwatomilola A, "South Africa's Reasonableness Test and its Rejection of the United Nations' Minimum Core Concept" Academia.edu, 27.

²¹¹ Oluwatomilola A, "South Africa's Reasonableness Test and its Rejection of the United Nations' Minimum Core Concept", 25.

CHAPTER 06: FINDINGS AND RECOMMENDATIONS.

6.1. Introduction

This chapter summarizes the overall findings discussed in this study while giving recommendations that may mitigate the issues herein. The research objectives will also briefly be addressed. This study has shown that Kenya is a state that practices Transformative Constitutionalism which is key in the purposive interpretation of human rights. Secondly, it has satisfied that socio-economic rights are justiciable and thus qualify for judicial intervention. Thirdly, informal workers have been qualified to be a neglected and disadvantaged group in the enjoyment of the right to adequate housing. Lastly, a suggestion has been made for Kenya to adopt the Reasonableness Approach in the adjudication of socio-economic rights. This approach prioritizes the needs of those who are at most peril in enjoying the right thus creating a basis of redress for informal workers.

6.2. Findings of the Dissertation.

6.2.1. Kenya embraces Transformative Constitutionalism as a tool for the purposive interpretation of the Constitution.

In an effort to prevent the pre-2010 order of narrow interpretation of human rights, the 2010 Constitution is interpreted in light of transformative constitutionalism which is concerned with driving social and political change through the law. It has been used to change the status quo characterized by the poor protection of human rights pre-2010 to an era where these rights are well safeguarded. Kenyans now benefit from a judicial system that promotes their rights whenever they have been violated. Article 20 (3)(b) of this Constitution even specifies that where the courts apply a provision in the Bill of Rights, they shall adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

6.2.2. The legitimacy of The Judiciary in adjudicating socio-economic rights in light of democracy and separation of powers.

Many have challenged the role of courts in adjudicating socio-economic rights. The contestation has been two fold; democratic illegitimacy and a breach of the separation of powers. On the former, it has been argued that since members of the Judiciary are not elected by the people, they cannot represent the democratic will of the people while presiding over matters. However, Article 159(1)

of the 2010 Constitution makes it clear that the authority of the Judiciary is derived from the people. Therefore, the people have used their democracy to grant such authority to the Judiciary. On the latter, some have also argued that the Judiciary breaches the doctrine of separation of powers when it adjudicates over socio-economic rights. They reason that matters to do with these rights should be handled by the Legislature and Executive. Nonetheless, the Judiciary acts as a system of checks and balances for these other arms. It has the mandate to review their actions to ensure that they are constitutional.

Judicial restraint guides the Judiciary to carry out its actions in accordance to the authority granted to it by the Constitution. Judicial activism on the other hand, permits judges to consider non-legal considerations which provide better context while enforcing human rights. These are used appropriately as per the bounds of constitutional supremacy to safeguard human rights. The Judiciary is the independent custodian of justice in the country therefore its mandate is to adjudicate over socio-economic rights.

6.2.3. Informal workers are highly vulnerable in the realization of the right to housing.

The Basic Needs Approach to development highlights that development should be focused on the development of man himself, rather than the development of things. However, the vulnerabilities of low productivity, poor legal protection and occupational health problems experienced in the informal employment sector greatly compromise the ability of informal workers to access basic needs such as adequate housing.

The ICESCR was drafted to promote *universal* respect for, and observance of, human rights and freedoms. Article 11.1 of the Covenant stipulates that States should recognize the right of everyone to an adequate standard of living through adequate housing. CESCR General Comment No. 4 provides an authoritative interpretation of the above article. In describing what adequate housing entails, it identifies the standards of affordability and accessibility, among others. Housing is affordable if the cost incurred allows individuals to efficiently satisfy other basic needs. Additionally, housing is accessible where disadvantaged groups are accorded full and sustainable access to proper housing resources. Article 43(1)(b) of the 2010 Constitution also highlights the right to adequate housing and reasonable standards of sanitation for all.

The Affordable Housing Program launched by the government of Kenya is aimed at providing affordable housing, which is deemed affordable only if it costs less than 30% of the household income. The cheapest one can rent a house for is Kshs. 3,200. If this represents 30% of an income, it would mean that the total income would amount to at least Kshs. 10,667. Unfortunately, informal workers are known to earn a monthly average wage of Kshs. 3,527. Housing as per the AHP is unaffordable and is therefore not accessible to majority of the informal workers, forcing them to live in deplorable living conditions in informal settlements which are cheaper to access.

6.2.4. Kenya lacks normative content on what constitutes the right to adequate housing.

The landmark case in the enforcement of Article 43(1)(b) of the 2010 Constitution was *Mitu-bell Welfare Society v Kenya Airports Authority & 2 Others*. In this case, the Supreme Court made a ruling that safeguarded the right to adequate housing for evictees of Mitumba Village by allowing them to stay on the land they were evicted from. However, the Court failed to adequately address Article 11.1 of the ICESCR, which is binding on the State. It did not define what adequate housing is even where CESCR General Comment No. 4 gives standards of what constitutes adequate housing. The study found that Kenya lacks normative content on what constitutes adequate housing.

6.3. Recommendations.

6.3.1. Adopting the standards from General Comment 4 of the ICESCR in the interpretation of Article 43(1)(b) to inform policy drafting.

The general comments of the CESCR act as authoritative and persuasive authorities in the interpretation of the different articles in the ICESCR. It appears that Kenya lacks a framework for substantive requirements that entail the right to adequate housing. General Comment 4 may act as a good reference point in providing normative content for the same. In this way, policy makers will be better informed when drafting housing policies. Additionally, Courts will have normative content that may be used to objectively analyze whether this right has been violated or not.

6.3.2. Adopting the Reasonableness Approach in adjudication of socio-economic rights

The Reasonableness Approach plays an important role in the adjudication of socio-economic rights by prioritizing the needs of those who are the most vulnerable in the enjoyment of a particular right. As has been revealed throughout this study, informal workers are a neglected group in enjoying the right to adequate housing. By adopting this approach, the Courts will identify them as such and thus grant them appropriate reliefs.

The State should also carry out detailed research on the informal employment sector in Kenya, to establish informed estimates of how many informal workers there are in the country and the rates of the wages they earn. This information will be helpful in determining the specific needs of those that work in the informal employment sector. This way, housing policies can be better drafted to satisfy these needs and mitigate challenges faced by informal workers. A more contextualized housing policy will thus be developed to promote the needs of those who are the most in need.

6.3.3. Conducting Judicial Review on the Affordable Housing Program(AHP).

As the study has revealed, the Affordable Housing Program established by the government is not affordable to many of those who work in the informal employment sector. This perpetuates informal settlements within the rural areas, the very problem that the scheme seeks to solve. A judicial review of this policy is proposed to justify that the current affordable housing policy needs to substantively define adequate housing and provide house payment schemes that can be afforded by the informal workers.

In adjudicating the right to adequate housing, the Court may adopt the Reasonableness Approach. In so doing, it may consider whether the social, economic and historical contexts of the society have been dealt with in the drafting of the AHP. Furthermore, it will prioritize on the needs who are most vulnerable in the enjoyment of this right. The study has qualified informal workers to be a neglected disadvantaged group who are vulnerable in this regard.

6.5. Conclusion

Housing is a basic need that every human being requires for survival. If adequate shelter is lacking, other areas of human life such as economic productivity, family life, safety are negatively affected. This study has demonstrated how vulnerable this group is and how housing is neither affordable

nor accessible to them thus leading to the growth of informal settlements characteristic of deplorable living conditions. The 2010 Constitution of Kenya is a transformative constitution that advocates for the widest possible enjoyment of human rights. These rights should therefore be defined widely and as clear as possible to allow for the enjoyment of rights by all. It is ideal for Kenya to use the standards set under General Comment No. 4 to provide good bearing for what the substantive requirements for adequate housing are. Socio-economic rights should also be dealt with in light of the Reasonableness Approach which prioritizes the needs of the most vulnerable. Only then can informal workers have access to the substantive enjoyment of the right to adequate housing.



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