



Strathmore University
Law School

**WALKING THE TIGHT ROPE – BALANCING PRIVATE PROPERTY RIGHTS
OF INDIVIDUALS AND THE RIGHT TO HOUSING OF INFORMAL SETTLERS**

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A dissertation presented in partial fulfilment of the Bachelor of Laws degree
Strathmore Law School, Strathmore University

JANUARY 2016

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ACKNOWLEDGEMENTS

The completion of this research has been a result of the combined efforts of many and I am greatly indebted to all those who contributed towards its timely completion.

I would like to specially thank Dr. Elizabeth Gachenga for her insightful remarks and comments on various drafts of this project. I must say it was not easy especially the first time I had to repeat my second chapter but luckily you have been very patient with me. I truly appreciate all the suggestions for ideas during our initial interactions. Additionally, I would like to thank Mr Osogo Ambani for his ideas during the defence of my research proposal. Your ideas went a long way in helping to structure and contextualise my project in a better way.

I sincerely appreciate the support from my family and the concern about the completion of this project. I hope to make you proud on the completion of this course of study.

To Strathmore Law School and the faculty members for the great opportunity to be a student in the pioneer class and the encouragement to be a better student each day, receive my deepest gratitude.

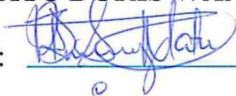
Most importantly, to God Our Father for giving me the gift of life and the great privilege of being able to study law.

DISSERTATION DECLARATION FORM

The work presented in this dissertation is, to the best of my knowledge and belief, original except as otherwise acknowledged. I hereby declare that I have not submitted this writing, either in full or in part, for a degree at this or any other institution.

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ABSTRACT

The purpose of this research is to show the conflict that arises between the right to property for owners of land and the right to housing of the informal settlers on these lands. The main objective of this research is to investigate the concept of illegal forced evictions and the legal framework that surrounds the practices that render such evictions against the principle of human dignity and the right to accessible and adequate housing in the context of informal settlements. There will be an attempt to show cause for the current homelessness situation that has been brought about by past and present irregular and illegal land allocation.

The research method used is the doctrinal research method which involves itself with the analysis of legal rules and formation of doctrines. The framework that regulates forced evictions in Kenya and the right to housing in the informal settlement sector has been investigated and the obligations of the state with regards to the right to housing and the protection of property analysed.

This research has come to the conclusion that a lot remains to be done to change the culture of impunity that is usually the case during evictions. Too many rights are violated. Too many people are injured and humiliated. They are in desperate need of a court system that can correct the imbalance that seems to favour the right to property. There is a need to come up with solutions that are innovative and that can lead to justice and positive transformation of society.

LIST OF ABBREVIATIONS

COHRE	Centre on Housing Rights & Evictions
ICESCR	International Covenant on Economic, Social and Cultural Rights
CESCR	Committee on Economic, Social and Cultural Rights
ESCRs	Economic, Social and Cultural Rights

LIST OF CASES

1. *East London Western Districts Farmers' Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 751-76B.
2. *Eaton v B. C. & M. R. R. Co.*, (1872) 51 New Hampshire, 511.
3. *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another*, High Court Petition No. 102 of 2011.
4. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
5. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).
6. *Kepha Omondi Onjuro & Others v Attorney General & 5 others* [2015] eKLR.
7. *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC).
8. *Mitubell Welfare Society v Attorney General and 2 Others* Petition No.164 of 2011.
9. *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and another* 2001 (4) SA 385 (W).
10. *Modderklip Boerdery (Edms) Bpk v President van die RSA en andere* 2003 (6) BCLR 638 (T).
11. *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street. Johannesburg v City of Johannesburg* (2008) ZACC 1.
12. *Port Elizabeth Municipality v Various Occupiers* (2005) (1) SA 217 (CC).
13. *Rail Commuters Action Group v Transet Limited t/a Metrotrail* 2005 2 SA 359 (CC), 2005 4 BCLR 301 (CC).

14. *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).
15. *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
16. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).
17. *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council*, High Court of Kenya, Nairobi, Petition 66 of 2010 (2011) KLR 1, 9.
18. *Wilson v Ward Lumber Co.* (1895) 67 Federal Reporter, 677.

I. INTRODUCTION

i. Background

a. Historical Background

Those who live in informal settlements have no positive right under current Kenyan law to reside on the land they occupy. In almost all cases, they have no alternative option since informal settlements represent the only means by which they can realise their human rights, including work and housing.¹

In the *Satrose Ayuma* case,² the first petitioner and other residents of Muthurwa estate were evicted from the premises on the basis that the premises were to be used for development of houses for the Kenya Railways staff. The respondents had been informally settling in the premises even though the ownership to the title of the land was vested with one of the respondents.

Similarly, the residents of Kibera and Mukuru slums were at the receiving end of the menace that is forced eviction when they had to clear from land that was to be used for the railway reserve.³

The Centre on Housing Rights & Evictions (COHRE) received various reports of evictions from all over the country. These include: the eviction of over 120 families by Administration Police from purportedly private lands at Ndundori in Lanet, Nakuru, even though no court order authorised the police to do so (29 May 2005); the demolition of 30 houses in Kibagare settlement, Uthiru estate on 16 July 2005, leaving 140 residents – including children – destitute and homeless.

On 27 July 2007, over 1000 households in Mukuru settlement were evicted following an alleged court order to pave the way for private development. It was then discovered that the court order affected fewer than 20 people, which meant the eviction of those who were not party to proceedings was clearly illegal.

On 2 September 2006 in Komora settlement within Savannah area, at around 6.30 am, two lorry loads of policemen in riot gear and another 100 hired youths descended on the village

¹ Submission to the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of Pre – Sessional Working Group Discussion (Kenya), 4.

² *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).

³ *Kepha Omondi Onjuro & others v Attorney General & 5 others* [2015] eKLR.

destroying and burning the structures. The alleged owner of the land had purportedly given a seven day notice to the residents to vacate but there was no court order to justify the involvement of the police officers. Most of the residents had stayed there from the 1960s. Over 600 families including school going children, women, the elderly and the sick were forced to stay in the cold for a number of days.⁴

Evictees in these brief examples have human rights. They have the right to housing and the right to be protected from forced evictions. When the evictions are carried out, the evictees are left homeless and forced evictions have been deemed to be, prima facie, incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.⁵ At times, the notice supposedly given is too short and does not afford the possible evictees a chance to salvage their property or even find alternative housing. A lot of women and children are most affected. Children are left without places to go to school and interact with other children and may even be separated from their families in the chaos that usually ensue during the evictions.

The government is usually seen as protecting the land owners from which the evictees are forced out when it sends its agents (police officers or other municipal officials) to carry out the raids that usually leave thousands of people and their families homeless. This same protection by the government is also seen when the courts issue orders to evict persons from land without finding alternative land for the evictees to settle on.

b. Legal Background

Kenya has signed and ratified the international law instrument that deals with economic, social and cultural rights- ICESCR. The Covenant, in article 11 (1), has recognised that everyone has the right to an adequate standard of living for himself and his family and this has been written to include the right to housing.

In Kenya's legal regime, the right has been enshrined in the constitution where it has been stated that every person has the right to accessible and adequate housing.⁶ The

⁴ Submission to the United Nations Committee on Economic, Social and Cultural Rights by Kenya, 7.

⁵ Para 18, UN Committee on Economic Social and Cultural Rights General Comment 4, UN Doc E/1992/23, adopted on 12 December 1991.

⁶ Article 43 (1) (b), The Constitution of Kenya, 2010.

Commission on Human Rights has termed forceful evictions as acts which grossly violate Human Rights.⁷ The term forced evictions has been used to mean the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.⁸

Based on the above mentioned examples of cases of forced evictions, it is arguable that any evictions that are carried out without due regard to the Constitutional requirements are illegal. Those that lack the proper involvement of all the persons to be affected and adequate notice of the evictions (in case evictions are the only option) are totally illegal and against the whole substratum of human rights. However, the Basic Principles and Guidelines on Development Based Evictions and Displacement have excluded from prohibition forced evictions which are carried out both in accordance with the law and in conformity with the provisions of international human rights treaties.⁹

However, there is a prevalence of informal settlements due to the lack of state mechanisms to address the core issues that result in the occurrence of these types of settlements and hence the evictions of the informal settlers does no good and it only results in the evictees gathering elsewhere and forming more informal settlements.¹⁰

Internationally, it has been recognised that every person has the right to own property either alone or in communion with others and not to be arbitrarily deprived of this property.¹¹

Locally, the right to property has been codified in the Constitution where it has been stated that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. In addition to this provision, the Constitution goes on to prohibit the enactment of legislation that would deprive, limit or restrict in any way the enjoyment of such property.¹² Property for

⁷ Commission on Human Rights Resolution 1993/77, para. 1.

⁸ UN General Comment No. 7, The right to adequate housing (art. 11 (1) of the Covenant on Economic, Social and Cultural Rights): Forced evictions, para. 3.

⁹ Basic Principles and Guidelines on Development Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), 3.

¹⁰ Fact Sheet No. 25, 10.

¹¹ Article 17, Universal Declaration of Human Rights.

¹² Article 40, Constitution of Kenya, 2010.

purposes of this discussion is limited to the interests in land resources as alluded to in the interpretation section of the Constitution.¹³

Therefore, seeing as the right to housing and the right to property are both legitimate rights, it is necessary that there is a balance between these rights especially with regard to their enforcement in lands which house informal settlements. It is imperative that justice is done and the poor are protected from the adversities of homelessness while it is also pertinent that the owners of land are guaranteed protection of the property they own.

ii. Research Problem

Internationally, it has been noted that every person needs security of tenure to a certain degree and there is a need for protection against forceful evictions, harassment and other threats that take place in the process.¹⁴ Forceful evictions would seem to go against the objective of these rights and standards set internationally and adopted locally. The other dimension to this problem is that many of the times, the land from which the evictions take place may be private property. Every person has the right to enjoy their property without undue external interference.

The problem therefore, is that the courts have been unable to carry out an effective balance between the two rights and seem to lean towards the right to property and hence the prevalence of evictions from informal settlements.

iii. Objectives of the Research

The main objective of this research is to investigate the concept of illegal forced evictions and the legal framework that surrounds the practices that render such evictions against the principle of human dignity and the right to accessible and adequate housing in the context of informal settlements that are sometimes located on private land.

These objectives will be met by the following research questions:

1. What is the international and national framework on protection from forceful evictions?
2. What is the international and national framework on protection of the right to own land, property and protection from deprivation of this right?

¹³ Article 260, Constitution of Kenya, 2010.

¹⁴ UN General Comment No. 7 on the right to housing, paragraph 1.

3. What is the extent to which a balance between the above two rights can be achieved?

iv. Outline of chapters

Chapter two of this research paper will consist in an analysis of the legal theories that support the analysis of the issues identified in the research.

Chapter three will encompass a review of the legal framework that ought to regulate evictions in Kenya. An analysis shall be made of the international framework and a study of whether these measures have been adopted in the municipal jurisdiction and whether or not they have been effective.

Chapter four will consist in an analysis for the justifications for private property. It shall investigate the framework governing the right to property in Kenya and under international law.

Chapter five shall conclude this research and will seek to find out if there have been any measures that have since been adopted to ensure reduction of the forced evictions problem and whether the government has any mandate to provide for land to its citizens or should this be strictly under the realm of economics and money. If so, how would the courts be able to balance the rights of private land owners with those of possible evictees who settle into land they have no legal title to? Lastly, proposals and recommendations shall be given to correct the current flurry of evictions and resulting situations of homelessness.

II. THEORETICAL FRAMEWORK

Much regard and debate has been had on the issue of recognition of Human Rights and these have been codified in various international law instruments. These include: the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the International Convention on the Elimination of all forms of Racial Discrimination (1965) and the Convention on the Rights of the Child (1989).¹⁵

The idea that has been said¹⁶ to be behind these and other human rights instruments in the world is that there is something about each and 'every human being, simply by virtue of being a human being' that dictates that certain choices should be made while others should be totally abandoned. The concept of every human being having human rights by being a human being has been alluded to in the 1948 Declaration to the effect that no discrimination is to be exercised in the acquisition of any of the freedoms and rights therein. The relevant attribute upon which each and every human being possesses human rights is the inherent dignity of each and every member of the human family.¹⁷

Economic, Social & Cultural Rights are defined as the rights concerned with the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for the members of a particular society.¹⁸ These rights are aimed at ensuring that human beings have the ability to obtain and maintain a decent standard of living consistent with their human dignity.¹⁹

The protection of social and economic rights is embedded on the principle of dignity which affirms that people who are deprived of these rights are denied of the opportunity to live their lives with dignity.²⁰

¹⁵ See generally, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> on 4 February, 2015.

¹⁶ Michael J. Perry, *The Idea of Human Rights: Four Inquiries*, 13.

¹⁷ Article 2, Universal Declaration of Human Rights (1948).

¹⁸ O'Connell P, *Vindicating socio-economic rights: International standards and comparative experiences*, Routledge Research in Human Rights Law , (2012), 3.

¹⁹ Viljoen F, 'The justiciability of socio-economic and cultural rights: Experience and problems' in Donders Y & Volodin V (eds) *Human rights in education, science and culture: Legal developments and challenges*, Ashgate, UNESCO (2007), 53 - 54.

²⁰ De Vos P, *Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence*, (2001) *Acta Juridica*, 64.

i. Progressive realisation of ESCRs

The 2010 Kenyan constitution²¹ has prescribed that these rights can only be materialised over the course of time and depending on the resources available for those purposes.²² Progressive realisation would then require that states strive to fulfil, observe, protect and promote these rights to the fullest extent possible even in the midst of financial challenges as is often the case in developing nations. Countries with more money therefore have a greater duty to ensure that these rights are realised. **The determinant for a country's success is the collective rights that are actually enjoyed by the people as measured against the resource capabilities of the State in question.**²³

Even though states are given the leeway to progressively achieve their mandate towards ESCRs, this by no means, implies that States are completely exempted from carrying out their duties. This cannot consequently be employed as a tactic for non-compliance with obligations.²⁴ As noted by Sepúlveda, progressive realisation entails twin obligations; that of ensuring that there is continuous improvement of the situation that the right seeks to protect and the abstinence from deliberately employing retrogressive measures to the fulfilment of ESCRs.²⁵

In *Mitubell Welfare Society v Attorney General and 2 Others*,²⁶ Ngugi J stated as follows:

“The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations. **Article 21 and 43 require that there should be 'progressive realization' of social economic rights, implying that the State must begin to take steps, and I might add, be seen to take steps, towards realization of these rights.**”

²¹ Article 21 (2), Constitution of Kenya, 2010.

²² Chenwi L, ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’, *De Jure Law Journal* (2013), 743.

²³ Fukuda-Parr S, Lawson-Remer T & Randolph S, ‘Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment’, (2008) Department of Economics Working Paper Series 22 (University of Connecticut), 7.

²⁴ The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/Cn.4/1987/17, Annex; reproduced in the *Human Rights Quarterly*, 9 (1987), 122 – 135; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, guideline 8.

²⁵ Sepulveda M, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), 319.

²⁶ Petition No.164 of 2011 (emphasis added).

Alston has argued that the legal implication of terming ESCRs as rights is that there must arise from them some minimum entitlements whose absence would render that a violation under the ICESCR.²⁷ These minimum entitlements are to be accorded, as a matter of priority, to the most vulnerable members of the society.²⁸ The CESCR noted that if the ICESCR were to be read in a manner as not to establish a minimum core obligation, it would be largely deprived of its *raison d'être*. Consequently, it must be noted that any evaluation as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.²⁹ The challenge, as identified by Young, is in the application of the concept of minimum core where basic questions have gone unanswered. These questions include: whether the minimum core is country or region specific? Is the minimum core of one country the same as that of the other? Is it context specific or does it employ an overall or generalised application mode? And even more importantly, who gets to decide what it is?³⁰ This notwithstanding, the minimum core approach has been hailed as being able to facilitate the courts' more stringent evaluation of the state's defences for non-realisation of minimum obligations of the most vulnerable members of society and the ability of the courts to give a more detailed timeline of compliance.³¹

ii. The use of the reasonableness approach to ESCRs

The issue at hand when the courts apply the reasonableness approach is whether the policies and directives employed by the government are reasonably capable of facilitating the realisation of the socioeconomic rights in question. The Court's approach is designed to allow government a margin of discretion to contend that the specific policy choices adopted have given effect to ESCRs:³²

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could

²⁷ Alston P, 'Out of the abyss: The challenges confronting the new United Nations Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly*, 352-353.

²⁸ Rosa S & Dutschke M, 'Child rights at the core: A commentary on the use of international law in South African court cases on children's socio-economic rights, (A Project 28 Working Paper, May 2006, Children's Institute, University of Cape Town), 13.

²⁹ General Comment No. 3, para 10.

³⁰ Young K G, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', 33 *The Yale Journal of International Law* (2008), 114 – 115.

³¹ Bilchitz D, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* Oxford University Press (2007), 142.

³² Liebenberg S, 'Socio-Economic Rights: Revisiting The Reasonableness Review/Minimum Core Debate' in Woolman S & Bishop M (eds) *Constitutional Conversations*, PULP, 2008, 305.

have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.³³

In the same vein, O'Regan J asserted that **the purpose of the reasonableness standard was to show that the court required that the duty holder of the right in question performs their obligations with reasonableness. There was need to balance between ensuring that the State (the duty holder in this case) carried out its constitutional mandate and leaving the State with the freedom to choose the most appropriate form of action to take.**³⁴

Alston and Quinn have written that the State must take steps towards ensuring the realisation of ESCRs and this has been espoused as an immediate obligation.³⁵ The obligation requires that the State undertakes deliberate, concrete and targeted steps aimed at, and capable of fully realising of these rights.³⁶

The South African Constitutional Court (SACC) has rendered its opinion on the reasonableness criteria and it has been held to encapsulate a set of various criteria that must be evaluated before the measures taken by the state can be deemed to have been reasonable in its quest to fulfil its obligation. These measures must be comprehensive, coherent and coordinated, and must also be properly conceived and implemented; be inclusive, balanced, flexible and make appropriate short-, medium- and long-term provisions for people in desperate need or in crisis situations, whose ability to enjoy all human rights is most in peril; clearly set out responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation; be tailored to the particular context in which they are to apply and take account of the different economic levels in society; be continuously reviewed to corresponding changes in society; be transparent and have its contents made known appropriately and effectively to the public; and allow for meaningful or reasonable

³³ Government of the RSA v Grootboom 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC), para 41.

³⁴ Rail Commuters Action Group v Transet Limited t/a Metrotrail 2005 2 SA 359 (CC), 2005 4 BCLR 301 (CC), para 87.

³⁵ Alston P & Quinn G, 'The nature and scope of state parties obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987), 159-160.

³⁶ ICESCR General Comment No. 3, *The Nature of States Parties' Obligations (Article 2, Para. 1, of the Covenant)*, paras. 2 & 4; Article 21 (2), Constitution of Kenya, 2010.

engagement with the public or affected people and communities.³⁷ The court noted that these factors were not exhaustive and more had to be considered varying on a case to case basis.³⁸

iii. Conceptual Framework

This thesis shall adopt an integrated approach to analyse the extent to which a balance between the right to property and the right to housing has been carried out by the courts. It shall incorporate the progressive realisation mechanism to analyse whether states have done anything to achieve the obligations set in law for the guaranteeing of the right to housing within the context of the conflict that arises with the right to private property; whether the policies and directives issued by the government to try and protect and promote these rights have been reasonable in the specific context and whether any failure by the State to progressively and reasonably achieve its obligations with regards to housing is what has led to the persistent forced evictions and the seeming favour of the land owners.

It shall be restated the importance of the use of the purposive rule of interpretation with regards to the Bills of Rights and especially the ESCRs in the quest to realise the transformative potential of the Constitution.³⁹ This shall be with immense reflection on Kenya's historical injustices especially with land resources and reckless allocation that caused many to be left landless and land to belong only to a chosen few.⁴⁰ This integrated approach also involves viewing of the Bill of Rights with generosity and with the possibility of the widest possible application. This has been endorsed by the courts in Kenya where the court in the *Federation of Women Lawyers* case⁴¹ held that the Bill of Rights has to be interpreted in such a way that gives the maximum benefit of the rights protected therein considering the social conditions, experiences and perception of the

³⁷ Chenwi L, 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' (2010), 5.

³⁸ *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC), para 44.

³⁹ Orago N W, 'Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution', Doctor of Law thesis, Faculty of Law of the University of the Western Cape, South Africa, 16 August 2013, 272 – 273.

⁴⁰ Syagga P, 'Public land, historical land injustices and the new Constitution', Society for International Development (SID) Constitution Working Paper Series No. 9, 11.

⁴¹ *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another*, High Court Petition No. 102 of 2011.

people of this country.⁴² The Constitution, at various instances, indicates this growing need to ensure that the rights are interpreted and enforced in a manner that brings greatest benefit to the benefit holders and that promotes the dignity of individuals and communities.⁴³

There is then the right to property which seemingly conflicts with the right to housing in the case of informal settlements. Every person has the right to own property of any description and anywhere in the country.⁴⁴

Blackstone famously stated that:

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁴⁵

Kameri – Mbote contends that to determine the effectiveness of the property system in Kenya, there needs to be an evaluation of various social relationships and how they have been impacted upon by the institution of property and whether social dimensions that greatly affect its efficiency are adequately considered. She employs the use of four criteria to determine this evaluation: stability, predictability, justice and fairness.⁴⁶ This is important in analysing the effect of proposed evictions on the relationship between the private land owners or the government and the evictees. Further, these four markers may also prove useful in addressing the various competing interests at play – the right to enjoy private property and the right to housing and the freedom from evictions.

⁴² Federation of Women Lawyers case, 9 & 17.

⁴³ Articles 19 (2); 20 (3) (b); (5) (b); 259 (1), Constitution of Kenya 2010.

⁴⁴ Article 40, Constitution of Kenya 2010; Article 260 of the Constitution of Kenya 2010 describes property to include: (a) land, or permanent fixtures on, or improvements to, land; (b) goods or personal property; - these delineations are most paramount as evictions tend to affect the fixed structures on the land and the personal belongings of those being evicted.

⁴⁵ Blackstone W, *Commentaries on the Laws of England* in Four Books, vol. 1 (1753) ed George Sharswood, 304 - Available at http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf on 1 December 2015.

⁴⁶ Kameri – Mbote P, ‘The Land Question in Kenya: Legal and Ethical Dimensions’, in Gachenga E, Franceschi L, Akech M and Lutz D (eds), *Governance, Institutions and the Human Condition*, SUP, 2009, 222 – 223.

To reach a sustainable balance between the rights to private property and the right to housing, I shall rely on the principle of transformative justice as the ultimate lens through which I shall analyse government action taken to achieve its obligation, to evaluate the resulting judgments from the courts and whether they have played any part in transforming society for the better – whether or not the judges have been alive to the situation on the ground and have not just done a mere analysis of the black letter law.

Transformative justice, in this paper, is defined as transformative change that emphasizes local agency and resources, the prioritisation of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level... it entails a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns. It is not the result of a top-down imposition of external legal frameworks or institutional templates, but of a more bottom-up understanding and analysis of the lives and needs of populations.⁴⁷

In the event that gross violations of human rights occur during these illegal forced evictions (which is usually the case), transitional justice mechanisms may be employed to reduce further effects of these gross violations.⁴⁸ However, it has been noted that transitional justice has short comings in terms of its practice where the state has tended to have excessive control over the process and has left out the participation of local movements and those who have been affected by human rights violations.⁴⁹ The chief error of leaving out the local communities raises question of legitimacy, participation and ownership in the outcomes of seeking reparation through the transitional justice mechanism.⁵⁰ It is therefore not the best lens through which we can analyse the cases decided by the judges.

Thus, it has been suggested that there is a need to go beyond the normative approaches to transitional justice (which includes the human rights approach). The human rights approach to transitional justice has been held to emphasise the roles of the judicial service and other human rights institutions rather than on the needs of the victim and the process

⁴⁷ Gready P & Robins S, 'From Transitional to Transformative Justice: A New Agenda for Practice', 8 *The International Journal of Transitional Justice*, (2014), 340.

⁴⁸ Olsen T, Payne L and Reiter A, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', 32 *Human Rights Quarterly*, No. 4, (November 2010), 981.

⁴⁹ Gready P & Robins S, 'From Transitional to Transformative Justice' (2014), 339 & 343.

⁵⁰ Lundy P and McGovern M, 'Whose Justice? Rethinking Transitional Justice from the Bottom up' 35 *Journal of Law and Society*, (2008), 266.

has been seen as one to which the victims are subject rather than participating in its growth and practice.⁵¹

Transformative justice should be holistic in seeking to use a wider range of approaches. Going forward, it is to integrate both social and economic policies that promote social justice, as well as grassroots-driven approaches that impact directly on communities.⁵²

Pursuant to this analysis, I shall ask some questions:

1. Have the informal settlers settled on private land? What protections are given to this type of property?
2. Does the government have an obligation to compensate the land owners in case it acquires the land for the settlers? Can it legitimately allow for informal settlers to remain on private land?

iv. Research Methodology

A research design will be adopted in the quest to complete the research on the conflict of the rights to private property and the implementation of the right to housing for squatters who informally settle on land in which they have no legal title. This method will be the doctrinal research method which involves itself with the analysis of legal rules and formation of doctrines.⁵³ The analysis of legal rules in this case shall be geared towards the investigation of the framework that regulates forced evictions in Kenya and the right to housing in the informal settlement sector. It shall also analyse the obligations of States with regards to the right to housing and the protection of property.

Even though an analysis of the law will be carried out, it is important to note that the law does not always have the answers to the practical problems that are in society.⁵⁴ Therefore in this case, it is imperative that the fundamental research method is applied as a supplement to the solution of the problem that arises in the analysis of the black-letter law (where a study of the law and its rules does not provide a solution to a certain social phenomenon). Here, an analysis of the law and its application is carried out within a

⁵¹ McEvoy K, 'Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice' (2008), in McEvoy K, and McGregor L (eds). *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, London: Hart Publishing.

⁵² Gready P & Robins S, 'From Transitional to Transformative Justice' (2014), 345.

⁵³ Chynoweth P, 'Legal Research' in Andrew Knight and Les Ruddock (editors), *Advanced Research Methods in the Built Environment* (Blackwell Publishing, 2008), 29.

⁵⁴ Chynoweth P, 'Legal Research'.

particular social context.⁵⁵ The specific context in this case is the evictions from informal settlements.

⁵⁵ Consultative Group on Research and Education in Law, Law and Learning: *Report to the Social Sciences and the Humanities Research Council of Canada* (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) as cited in Hutchinson, Terry C. & Duncan, Nigel (2012) *Defining and describing what we do: doctrinal legal research*.

III. THE LEGAL FRAMEWORK REGULATING FORCED EVICTIONS

i. Introduction

This purpose of this chapter is to carry out a review of the legal framework that regulates evictions in Kenya. An analysis shall be made of the international framework and a study of whether these measures have been adopted in the municipal jurisdiction and whether or not they have been effective. Prior to this, however, I shall briefly discuss forced evictions, its definition under international law and the various rights it affects. The next section shall attempt to decipher the right to housing that is usually the right most directly affected by the forceful evictions. This shall be in line with the integrated approach adopted above that shall look at the various obligations that the government has towards the protection of the right to housing for its citizens and as a result, protect them from forceful evictions.

Forced evictions have been defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.⁵⁶ This practice inevitably affects the rights of persons. The rights affected include other rights and not solely restricted to the right to housing, and this is due to the fact that human rights are interdependent.⁵⁷ The practice of forced evictions that is contrary to the required laws in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing.⁵⁸

Forced evictions are carried out in both developed and developing countries, in all regions of the world. Often these are large-scale evictions, where entire communities of tens or even hundreds of thousands of people are removed. Most of the victims are usually the indigent living in informal settlements. The effect on the lives of those evicted is devastating, leaving them without homes and subject to deeper poverty, discrimination and social exclusion. Such communities are invariably evicted against their will, and in most cases, without any compensation or alternative housing.⁵⁹

⁵⁶ General Comment No. 7, para 3.

⁵⁷ General Comment No. 7, para 4.

⁵⁸ Commission on Human Rights Resolution 2004/28.

⁵⁹ Forced Evictions - Towards Solutions?, Second Report of the Advisory Group on Forced Evictions to the Executive Director of UN-HABITAT, 1.

Although the ownership or possession of the lands by the prospective evictees is usually illegal, there is usually transfer of this land from the poorer members of society to the middle class or the very rich people in order to present the opportunity for more investment by the later groups at the expense of the former.⁶⁰

ii. International law regulating the practice of evictions

One result of the promulgation and implementation of the Constitution in 2010 was the concept of application of the general rules of international law and any treaties and conventions ratified by Kenya which are now to be part and parcel of the legal framework of Kenya in the various legal fields.⁶¹

The International Covenant on Civil and Political Rights (ICCPR)⁶² prescribes for individual freedom against “arbitrary or unlawful interference” with the home, and provides also that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.⁶³

Despite the fact that the right to housing has been emphasised as a separate, distinct and important right, it is not until the 1987 International Year of Shelter for the Homeless that there was a clear and more prominent emphasis on the problem that is forced eviction within the UN system and this has led to a growth and development of regulations and principles with regards to the subject.⁶⁴

One of the most important documents published was the General Comment No. 7 that essentially gave a summary on the various obligations of the state. The General Comment established five major criteria for regulation of forced evictions: substantive justification, consultation or alternatives, due process, the right to alternative accommodation and non-discrimination.⁶⁵

⁶⁰ Satterthwaite D, ‘Evictions: Enough violence, we want justice’ (1994) 6 *Environment and Urbanisation*, April 1994, 3.

⁶¹ Article 2((5) & (6), Constitution of Kenya, 2010; Kabau T and Ambani J O, ‘The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?’, *Africa Nazarene University Law Journal*, 37.

⁶² Adopted and opened for signature, ratification and accession on by UN General Assembly resolution 2200 A (XXI), 16 December 1966 (entered into force on 23 March 1976).

⁶³ Article 17, Covenant on Civil and Political Rights.

⁶⁴ Langford M and du Plessis J, ‘Dignity in the Rubble? Forced Evictions and Human Rights Law’, 11.

⁶⁵ Juma L, ‘Nothing but a mass of debris: Urban evictions and the right of access to adequate housing in Kenya’, *African Human Rights Law Journal*, 2012, 493.

One of the key things that the State is required to do in the case that persons are facing evictions is to ensure that alternative housing is provided to them who would inevitably end up with no shelter or roof over their heads and no other means of living a dignified life.⁶⁶

Additionally, the comment also calls for appropriate measures of protection and due process in the event that evictions are carried out. The procedures recommended are:

- i) an opportunity for *genuine consultation* with those affected;
- ii) *adequate and reasonable notice* for all affected persons prior to the scheduled date of eviction;
- iii) *information on the proposed evictions*, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected especially where groups of people are involved,
- iv) government officials or their representatives and neutral parties are to be present during an eviction;
- v) all persons carrying out the eviction to be properly identified;
- vi) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- vii) provision of *legal remedies*; and
- viii) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.⁶⁷

Juma notes that stemming from the legal definition of the term forced evictions is a two-pronged objective clause: the prevention of evictions and the protection of evictees.⁶⁸ The prevention of evictions has been identified with the term legal security of tenure which the Committee on the Implementation of the ICESCR described as a factor that ought to be taken into consideration when determining whether or not there is adequacy in housing and by implication the regulation of the extent to which evictions could have a bearing on security of tenure and the right to housing.

⁶⁶ General Comment No. 7, para 13; *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council*, High Court of Kenya, Nairobi, Petition 66 of 2010 (2011) KLR 1, 9.

⁶⁷ General Comment No. 7, para 15 (emphasis mine); Basic principles and guidelines on development-based evictions and displacement, Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, paras 37-59.

⁶⁸ Juma L, 'Nothing but a mass of debris', 492.

General Comment No. 4 has opined that regardless of whether an individual is occupying any house or piece of land as a rental (public and private) accommodation, or on a lease, as an owner, as part of emergency housing and informal settlements, every person should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.⁶⁹

With regards to protection of evictees objective the Commission on Human Rights, stated that the practice of forced evictions violated human rights and particularly the right to housing.⁷⁰ Additionally, this resolution recommended evictions which are determined to be lawful are carried out in a manner that does not violate any of the human rights of those evicted.⁷¹

As for local legislation, the Eviction and Resettlement Bill⁷² has provided as mandatory some requirements that are to be met during the procedure of evictions. It is worth noting that the regulations contained therein cannot be upheld as the Statute has not been passed in parliament and this has caused increased injustice with regards to the practice of evictions in this country due to the lack of a legislative mechanism to govern the conundrum that has become forced evictions. However, this could be a direction as to possible future action on evictions in Kenya.

iii. Justifications given for forced evictions

Leckie notes that:

Virtually no eviction is carried out without some form of public justification seeking to legitimize the action. Many of the rationale behind the eviction process are carefully designed to create sympathy for the evictor, while simultaneously aiming to portray the evicted as the deserved recipient of these policies – a process

⁶⁹ General Comment No. 4, para 8 (a).

⁷⁰ Commission on Human Rights Resolution 1993/77, para 1.

⁷¹ Preamble to Resolution 2004/28.

⁷² The Evictions and Resettlement Bill, 2014.

appropriately labelled 'bulldozer justice' by the retired Indian Supreme Court Justice Krishna Iyer.⁷³

The public interest is often advertised as the justification for the mass dislocation of people. For instance, of the Rainbow Town eviction of July 2000, the Rivers State government stated that "the interest of the public" demanded the demolition of the settlement.⁷⁴ The government of Zimbabwe on its part claimed that operation Murambatsvina, in which some people were forced to destroy their own homes at gunpoint, was intended to eradicate illegal, unhealthy homes and settlements and to stop illegal trading.⁷⁵ In Kenya, the eviction of the Ogiek from the Mau Forest has been justified by the government as necessary to protect water catchment areas.⁷⁶

That said, "wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness."⁷⁷

The prohibition of forced evictions is a legal measure that can be taken immediately and is not dependent on resources. Lack of title and residency in informal settlements are often used as a justification for forced evictions. However, respect for human rights is independent from a particular status, including ownership. A state unable to fulfil the right to adequate housing for all should consider various solutions, including allowing people to provide some level of housing on their own, even if this is done through the creation of informal settlements. States are also obliged to take immediate measures aimed at

⁷³ Leckie S, 'When Push Comes to Shove: Forced Evictions and Human Rights', *Habitat International Coalition*, 1995.

⁷⁴ Amnesty International, *Nigeria: Making the destitute homeless – forced evictions in Makoko, Lagos State*, Index number: AFR 44/001/2006 (24 January 2006), 15- available at <https://www.amnesty.org/en/documents/afr44/001/2006/en/> accessed on 23 November 2015.

⁷⁵ Tibajjuka A K, 'Report of the Fact - Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe' (July 2005), 12.

⁷⁶ Amnesty International, Centre on Housing Rights and Evictions, Kenya Land Alliance, Hakijamii Trust and the Kenya National Commission on Human Rights, *Nowhere to go: Forced Evictions in Mau Forest, Kenya*, Briefing Paper April 2007, 9; Report of the Government Task Force on the Conservation of the Mau Forest Complex, March 2009, 35.

⁷⁷ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001), para 63.

conferring legal security of tenure on those persons and households currently lacking such protection, in genuine consultation with them.⁷⁸

iv. What constitutes the right to housing?

The Committee charged with monitoring the implementation of the ICESCR has held the view that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Instead it should be seen as the right to live somewhere securely, peacefully and with dignity. This approach is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. The inherent dignity of the human person from which the rights in the Covenant are said to derive requires that "housing" be interpreted so as to be alive to a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring to adequate housing and not just to housing.⁷⁹

The Kenyan Constitution prescribes that every person has the right to accessible and adequate housing.⁸⁰ The Court in *Susan Waithera Kariuki v the Town Clerk, Nairobi City Council*⁸¹ acknowledged that the Constitution was inadequate to the extent that it lacked a precise definition or description of what the concept 'adequate housing' referred to.

Several factors have been identified that are required for consideration in order to determine whether housing is adequate or not. These are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.⁸² Legal security of tenure embodies the benefits in the bundle of rights that would, presumably, shield an owner of property from forced eviction. The idea seems to be that all persons should have some form of security that guarantees them legal protection against forced eviction. This means that the right to housing places a positive obligation on states to ensure that informal settlements are secure

⁷⁸ The UN-Habitat and the United Nations Human Rights Office of the High Commissioner, 'Forced Evictions', Fact Sheet No. 25, 9.

⁷⁹ General Comment No. 4, para 7.

⁸⁰ Article 43 (1) (b), Constitution of Kenya, 2010.

⁸¹ *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others* [2011] eKLR, Petition Case No. 66 of 2010, 5.

⁸² General Comment No. 4, para 8.

places of residence and that persons living there are protected.⁸³ The lack of secure tenure has been identified by the Government of Kenya as the greatest danger to persons living in informal settlements.⁸⁴

⁸³ Juma L, 'Nothing but a debris', 482.

⁸⁴ Amnesty International, *Kenya - The unseen majority: Nairobi's two million slum dwellers* (2009).

IV. THE RIGHT TO PROPERTY

The focus of this chapter will be to investigate the international and national framework on protection of the right to own land, property and the mechanisms that ensure protection from deprivation of this right. It shall be my aim to show the need for protection of private ownership of land that has been acquired after investments by individual persons and their right to reap the benefits of their investment. As a precursor to this discussion, I shall endeavour to elaborate on some of the jurisprudential justifications for property.

i. Property defined/ land as property

Property has a diverse number of meanings that can be ascribed to it. To the ordinary person, property is simply just a thing represented in the physical *res*.⁸⁵ It was thus defined as:

“... any external object over which the right of property is exercised. In this sense it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in.”⁸⁶

Legally, property can be seen as a mental concept, an expectation that the property owner has of being able to enjoy a certain advantage from that which is possessed. This expectation can only be strong and permanent by guarantee of the law.⁸⁷ To this end, the owner of private land is only able to enjoy his land if the law can guarantee the protection of this right.

Blackstone wrote that property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.⁸⁸ Hohfeld on his part stated that the legal concept that is property was not comprised only of rights but also entailed powers and privileges.⁸⁹

Conversely, property has also been conceived as a set of interests or bundle that can be enjoyed by the holder.

⁸⁵ Kameri – Mbote P, Odote C, Musembi C and Kamande W, *Ours by Right: Law, politics and Realities of Community Property in Kenya*, Strathmore University Press, Nairobi, 2013, 29; Corbin A, ‘Comment: Taxation of Seats on the Stock Exchange’ 31 *Yale Law Journal*, 429.

⁸⁶ *Wilson v. Ward Lumber Co.* (1895) 67 Federal Reporter, 677.

⁸⁷ Bentham J, *Theory of legislation*, by Hildreth R (Translator), 112 – 113, available at <https://archive.org/details/legislation00bentuoft> on 3 December 2015.

⁸⁸ Blackstone W, *Commentaries on the Laws of England*, 304.

⁸⁹ Hohfeld W, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) Yale Law School Faculty Scholarship Series, Paper 4378, 717.

“The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing.”⁹⁰

Property is now, more and more, primarily seen as an amalgamation of various legal relations between persons and only consequentially as relating to certain physical objects. There is no fixed meaning of property.⁹¹ Honoré posited that the bundle of rights existed as incidents of ownership or property. These incidences include: the right to possess, use, manage, to the income of the thing, capital, security, transmissibility and absence of term, prohibition of harmful use and the liability to execution and the incident of residuary.⁹²

Bell and Parchomovsky have argued that only assets which have the capacity to enhance social welfare through stable ownership should be brought under the ambit of the law.⁹³ This is important for the consideration of land as property, particularly in Kenya where it is a key economic and social factor that caters to the needs of many⁹⁴ and has been at the centre of violence that has rocked the country.

In light of this noted prominence of land utility in Kenya, it is worth noting the words of the scholar Epstein who stated that the right to property embraced the idea of the right to exclude.⁹⁵ The right to exclude has even been argued to be the *sine qua non* of the property rights legal framework; without it, there is essentially no right to property.⁹⁶ This may be a justification for the prevalence of the need of private land owners to want to evict informal settlers from their lands because they deem this to be a power that comes with the right to property that they hold due to their ownership of the land. Property rights are good against the world⁹⁷ and may hence be employed as a basis to evict any persons from lands that are privately owned.

⁹⁰ *Eaton v B. C. & M. R. R. Co.*, (1872) 51 New Hampshire, 511.

⁹¹ Merrill T and Smith H, ‘What Happened to Property in Law and Economics?’ 111 *The Yale Law Journal* (2001), 357 – 358; Merrill T, ‘Property and the Right to Exclude’ 77 *Nebraska Law Review* (2014), 737.

⁹² Honoré A, ‘Ownership’ in Guest A G (ed), *Oxford Essays on Jurisprudence*, OUP, 1961.

⁹³ Bell A and Parchomovsky G, ‘A Theory of Property’ 90 *Cornell Law Review* (2005), 563.

⁹⁴ The Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Land, Government Printer, (June 2004) (The Ndung’u Report), xvii.

⁹⁵ Epstein R, *Takings: Private Property and the Power of Eminent Domain*, Harvard University Press (1985), 65.

⁹⁶ Merrill T, ‘Property and the Right to Exclude’, 730.

⁹⁷ Dorfman A, ‘The society of property’ 62 *University of Toronto Law Journal*, Number 4 (Fall 2012), 563.

Property exists for many reasons but essentially to govern the conflicts that arise in the set of legal relationships between various persons in relation to things. The property regimes mediate the various conflicting interests by allocating exclusive rights.⁹⁸ A property law system urges decision makers (land owners) to consider not only their self – interests but also the needs and concerns of other individuals.⁹⁹

ii. Protection of the right to property

a. International Law & Regional Human Rights Instruments

International law instruments that have been ratified by Kenya are part of the law of the country by virtue of article 2 (6) of the 2010 Constitution. Other general principles of international law are also part of the municipal law by virtue of article 2 (5) of the 2010 Constitution.

The Universal Declaration of Human Rights (UDHR) proclaimed that, “everyone has the right to own property alone as well as in association with others” and that “no one shall be arbitrarily deprived of his property.”¹⁰⁰ The International Convention on the Elimination of All Forms of Racial Discrimination stipulates a general undertaking of State parties to eliminate racial discrimination and guarantee “the right to own property alone as well as in association with others.”¹⁰¹ The International Convention on the Elimination of All Forms of Discrimination against Women requires the equal treatment of women and men in respect to ownership of property.¹⁰² In addition to the provisions enumerated above concerning property rights at the universal level, the right to property is also recognized in regional human rights instruments.¹⁰³

The African Charter on Human and Peoples’ Rights (AfCHPR) guarantees the right to property and outlines the public need and general interest of the community as legitimate

⁹⁸ Rose C, ‘Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory’ in *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994), 28.

⁹⁹ Dagan H and Heller M, ‘Conflicts in Property’ 6 *Theoretical Inquiries in Law* (2005), 37 – 39.

¹⁰⁰ Article 17, Universal Declaration of Human Rights.

¹⁰¹ Article 5 (v), The International Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1965.

¹⁰² Articles 15(2) and 16(1)(h), The International Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979.

¹⁰³ Golay C and Cismas I, ‘Legal Opinion: The Right To Property from a Human Rights Perspective’ *The International Centre for Human Rights and Democratic Development*, 5.

grounds for limiting the right. The encroachment on the right must also be in “accordance with the provisions of appropriate laws.”¹⁰⁴

b. Kenyan Law

Under Kenyan law, property is protected under the Constitution in article 40 which states that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Article 260 defines property to include land. Parliament has been barred by the Constitution from enacting any laws that would allow the State or any other person to arbitrarily deprive a person of property of any description or to limit, or in any way restrict the enjoyment of the right to property. This implicitly means that every person who has acquired land in any part of any country has the right to enjoy his property without the interference of informal settlers who encroach on these lands and subsequently begin to use the land for settlement and housing.

The question, therefore, is to inquire whether the property rights of these individuals are more important than the right to housing of these informal settlers who are usually poor people who have no money to acquire land of their own so as to prevent evictions from the land.

¹⁰⁴ Article 14, The African Charter on Human and Peoples’ Rights, adopted in 1981.

V. THE BALANCE BETWEEN PROPERTY RIGHTS AND HOUSING RIGHTS

This chapter shall conclude this research and will seek to find out if there are new measures that have since been adopted to ensure equality in land ownership and whether the government has any mandate to provide for housing to its citizens or should this be strictly under the realm of economics and money and the financial capability of the citizen. If so, how would it be able to balance the rights of private land owners with those of possible evictees who settle on land they have no legal title to? Lastly, proposals and recommendations shall be given to correct the current flurry of evictions and resulting situations of homelessness. This chapter shall meet its objectives by analysis of case law and constitutional provisions with regards to human rights and how courts have attempted to reach a balance between these two rights.

Kenyan Courts

Prof Ghai submitted in the *Satrose Ayuma Case*¹⁰⁵ that the residents of Muthurwa Estate should not have been evicted because it is against human dignity in the context of Kenya's socio-economic background, and that the Constitution promotes human dignity and that it was not right for the Respondents to claim property rights since human dignity triumphs over all other rights.¹⁰⁶ In this case, the petitioners were evicted from land owned by the respondents. They were tenants and had been on the premises a long time and had established their lives in the area in terms of social amenities necessary for survival.¹⁰⁷ The respondents wanted to change land use and begin to construct market stalls. The court noted that there were competing interests between the petitioners and the respondents as regards the suit premises.¹⁰⁸ The court went on to hold that there had been a violation of the petitioners' right to housing as the evictions had been carried out inhumanely and against the international minimum standards.¹⁰⁹ There had been inadequate notice and

¹⁰⁵ *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*, The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).

¹⁰⁶ *Satrose Ayuma Case*, para. 29.

¹⁰⁷ Sachs J in *Port Elizabeth Municipality v Various Occupiers* (2005) (1) SA 217 (CC) stated that:

“The longer the occupiers have been on the lands, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities and as such, the greater their claim to the protection of the Courts.”

¹⁰⁸ *Satrose Ayuma Case*, paras. 60 – 61.

¹⁰⁹ UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007).

insufficient consultation with the affected persons. Yacoob J noted the importance of consultations with the affected persons in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*¹¹⁰ stating that it has the potential to contribute towards the resolution of disputes and to increased understanding and care if both sides are willing to participate in the process. This statement by Yacoob J shows that the requirement by law and international standards to carry out consultations and negotiations with the possible evictees changes society from being one of impunity (where people are violently and mercilessly thrown out of their homes) to a society that is ready to uphold justice for all the parties involved.

South African Jurisprudence

Although South African cases are not binding precedents in Kenya, they are relied upon in this writing to show the experiences that the courts have had in dealing with the balancing of these rights. Their analysis provides insight of the direction that Constitutional courts tend to take when dealing with such matters.

The Constitutional Court of South Africa has been instrumental in the development of case law with regard to socio – economic rights such as the right to housing (which is the subject of this discussion).

The content of the Bill of Rights needs to be interpreted in its specific social and historical context within which it is placed.¹¹¹ Chaskalson P in *Soobramoney* similarly held:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”¹¹²

¹¹⁰ (2008) ZACC 1.

¹¹¹ *The Government of the Republic of South Africa & 3 Others v Irene Grootboom & Others*, The Constitutional Court of South Africa 2001 (1) SA 46 (CC), paras. 22, 25.

¹¹² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC), para. 8.

Based on the above quotation from the judge in the *Soobramooney* case, it can be seen that he acknowledges the transformative power of the Constitution to change the situation of the citizens of South Africa living in deplorable conditions and that unless the Constitution realises this potential, it will not have served its purpose of transformation of society as conceived by its makers. As long as society keeps being in a deplorable state, then the Constitution will have failed the test of transformation. It will only be as worthy as the paper it is written on and nothing more.

Now I turn to how the court dealt with a situation of illegal occupation of private land in order to determine how the court attempted to reach a balance between the private ownership of land and the right to housing and protection from evictions of the evictees.

In *Modderklip*,¹¹³ Modderklip Boerdery (Pty) Limited is the owner of a portion of the farm Modder East, which adjoins Daveyton Township. During the 1990s, due to overcrowding, residents of Daveyton began settling on a strip of land between Daveyton and the farm. This came to be known as the Chris Hani informal settlement. At the beginning of May 2000, about 400 persons, who had been evicted by the municipality from Chris Hani, moved onto a portion of the farm and erected about 50 shacks. By October 2000, there were about 4 000 residential units inhabited by about 18,000 persons. On 18 October 2000, Modderklip made an application for the eviction of the occupiers under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998. The application, succeeded and Marais J issued an eviction order on 12 April 2001. The occupants were given two months to vacate but they did not heed this notice.

Harms JA agreed with the finding of De Villiers J who had found that the refusal of the occupiers to obey the eviction order amounted to a breach of Modderklip's right to its property entrenched by section 25(1) of the Bill of Rights,¹¹⁴ which provides that 'no one may be deprived of property except in terms of law of general application.'¹¹⁵ The judge,

¹¹³ The judgment at the Supreme Court of Appeal of South Africa is a consolidation of two cases: One being an application for leave to appeal against the judgment of Marais J in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and another 2001 (4) SA 385 (W)* ('the eviction case'); and the second, an appeal against a judgment of De Villiers J in *Modderklip Boerdery (Edms) Bpk v President van die RSA en andere 2003 (6) BCLR 638 (T)*.

¹¹⁴ S 25, The Constitution of the Republic of South Africa.

¹¹⁵ Modderklip Case, para. 21.

however, held that the order could not be executed – humanely or otherwise – unless the state provided some alternative land.¹¹⁶

The state failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual.¹¹⁷

The judge very aptly held that the problem was two – pronged: First, there was the infringement of the rights of Modderklip. Second, enforcement of Modderklip's rights would have impinged on the rights of the occupiers. Moving or removing them was no answer and they would have to stay where they were until other measures could be devised. Requiring of Modderklip to bear the constitutional duty of the state with no recompense to provide land for some 40,000 people was also not acceptable.¹¹⁸ Further, the judge noted that it was up to the courts to provide effective relief to those who had been adversely affected by a constitutional breach.¹¹⁹ It was held in *Fose* that the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies.¹²⁰

The final judgment in the Modderklip case is a fine example of the awareness that some judges have to the difficulties that arise between the right to housing of informal settlers and the right to enjoy private property. In finding that the eviction could not be enforced without the state providing for alternative land for settlement by the settlers, this can be termed as acceptance of the obligation of the state to provide housing, even though this may be done progressively in the face of financial difficulties or inadequacy of land. If finances and unavailability of alternative land prove to be the case, the reasonable thing may indeed be to let the settlers stay in the land they occupy as the states acquires it for a fee or finds alternative means of dealing with the situation. In this case, the judge ordered

¹¹⁶ Modderklip Case, para. 26.

¹¹⁷ Modderklip Case, para. 30; *East London Western Districts Farmers' Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 751-76B: "In our system of law, however, the bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens. The situation no doubt called for prompt action by the respondents. Such action, however, required not merely the alleviation of the lot of the refugees but simultaneously the protection of the farming community into whose midst so many distressed persons were being precipitately introduced. The respondents failed to secure the latter." (Per Hoexter JA.)

¹¹⁸ Modderklip Case, para. 41.

¹¹⁹ Modderklip Case, para. 42.

¹²⁰ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), para 69 (per Ackermann J).

for the residents to remain in the lands until alternative land was found. This would go a long way to transform society from the perpetual scene that is witnessed where settlers such as these are taken out of land and left with nowhere else to go.

The balance that was reached in this case was appropriate as it served to protect the rights of the informal settlers by letting them have a place to stay and at the same time, finding that the state had not met its obligations to protect the housing rights of the settlers. The judgment also served to protect the right to private property of Modderklip by holding that it was entitled to damages for the occupation and the declaration that the state had been in violation of Modderklip's rights.

In *Grootboom*,¹²¹ Mrs Irene Grootboom and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants were ordered to provide the respondents who were children and their parents with shelter.

Yacoob J noted that the state was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.¹²² In light of my proposal in chapter 2 to use the progressive realisation approach to the implementation of ESCRs, where the state must be seen to be doing something, the court similarly noted that the measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means.¹²³ The court noted:

“‘Progressive realisation’ shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be

¹²¹ Grootboom Case, 2001 (1) SA 46 (CC)

¹²² Grootboom Case, para. 24.

¹²³ Grootboom Case, para. 41.

examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.”¹²⁴

This statement shows that the state must make a concerted effort to provide for housing. The steps must be reasonable, they may take time but the state must begin to take those steps so desperately needed to accord justice to those who need it the most in society.

The South African Constitutional Court also noted that the State has a negative obligation in terms of the right to housing that is, not to interfere with the enjoyment of the right. This obligation had been violated when the municipality funded the eviction of the respondents earlier than the notice had indicated, without giving the victims a chance to salvage their belongings.¹²⁵ To conclude, the court held that the State must foster conditions to enable citizens to gain access to land on an equitable basis.¹²⁶

De Vos notes that in the Constitutional Court's approach to social and economic rights in *Grootboom*, lies the understanding of the role of the Bill of Rights (particularly the equality provisions and the provisions guaranteeing social and economic rights) as a transformative document aimed at addressing the deeply entrenched social and economic inequality in society.¹²⁷

It can be said from the various cases above that the balance to be reached between the right to housing of occupiers and the right to property of the individual land owners is a delicate one. The courts seem to be most interested in enforcing justice for both parties. The courts have been keen to interpret the constitution in a transformative way that changes society for the better by attempting to reduce the inequalities that exist with regard specifically to the right to housing. This transformative approach to interpretation contextualises the various legal texts and interprets them against the backdrop of the problem facing the most vulnerable groups in society affected by a specific human rights issue with the intention to transform the lives of those aggrieved by giving them effective solutions. The State has been mandated to provide alternative lands for resettlement in the case that evictions are to take place from lands it owns or from land owned privately by citizens. Ultimately, the balance can only be reached appropriately on a case to case basis.

¹²⁴ Grootboom Case, para. 45.

¹²⁵ Grootboom Case, para. 88.

¹²⁶ Grootboom Case, para. 93.

¹²⁷ De Vos P, ‘Grootboom. The Right of Access to Housing and Substantive Equality as Contextual Fairness’ 17 *South Africa Journal on Human Rights* (2001), 259.

Recommendations

1. Enactment of the Evictions and Resettlement Bill, 2014. It is important to have legislation in place that will govern the process of evictions.
2. Court judges should be more alive to the difficulties culminating from the balance to be carried out in the case that there is a conflict between housing and property rights. They should not be quick to issue eviction orders as was done by Marais J in the initial *Modderklip* case (as noted above).
3. Minimum and maximum acreage should be considered in order to avail more land for the settlement, by the government, of those who are unable to acquire their own pieces of land. This will deal with the situation where a single individual owns a lot of land which is left unutilised whilst many other persons suffer from the lack of it.
4. Additionally, Kenyan lawyers, NGOs and civil society groups should do more to participate in the bringing of such actions before our courts in order to build our local jurisprudence. These groups should be more proactive in pushing for the improvement of the utilisation of land resources and for the promotion and protection of the right to housing.

The Evictions and Resettlement Bill, 2014

The Act applies in respect of all land in Kenya¹²⁸ and it also specifically applies to evictions from private land.¹²⁹ This eliminates any sort of argument by private land owners to carry out any inhumane acts on their land.

The object and purpose of this Act is to set out appropriate procedures applicable to evictions and resettlement.¹³⁰ The implementation of the Act is to be guided by principles of protection from arbitrary evictions, protection of human rights during evictions and resettlements and the right to fair administrative action.¹³¹ Notice has to be issued and adequate consultations are mandatory.¹³²

¹²⁸ Section 3 (1), The Evictions and Resettlement Bill, 2014.

¹²⁹ Section 3 (2) (a), The Evictions and Resettlement Bill, 2014.

¹³⁰ Section 4, The Evictions and Resettlement Bill, 2014.

¹³¹ Section 5, The Evictions and Resettlement Bill, 2014.

¹³² Section 6 (3), The Evictions and Resettlement Bill, 2014.

No eviction order shall be made unless it is just and equitable.¹³³ The Bill incorporates international standards and it would be vital to pass it so that it is effective in remedying the problems that are currently facing possible evictees.

¹³³ Section 7 (6), The Evictions and Resettlement Bill, 2014.

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