

ASSESSMENT OF THE ROLE OF THE GOVERNMENT IN PROVIDING ADEQUATE HOUSING FOR VULNERABLE ELDERLY PERSONS

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DECLARATION

I, NYAKERUMA LINDA KERUBO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or a diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

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

Signed:

Anne Kotonya

ABSTRACT

This paper examines the role of the government in providing adequate housing for vulnerable elderly persons. This is conducted by analysing how the Government of Kenya has complied with international law and standards that provide for adequate housing for vulnerable groups, specifically elderly persons. Vulnerable elderly persons for the purpose of this study are those unable to access adequate housing on account of having no family, or having been abandoned by their families, have become homeless. In addition, vulnerable elderly persons in the context of this study include those unable to afford the high costs of housing, those residing in inaccessible locations, elderly persons living under uninhabitable conditions, those whose homes lack basic services such as heating and lighting and those who lack security of tenure. Article 43(1) of the Constitution protects the right to accessible and adequate housing and article 57(d) provides that the State shall take measures to ensure elderly persons receive reasonable care and assistance from the State and their family. This paper thus examines to what extent this right has been adopted within Kenya by examining current legislation and governmental reports dating post 2010, when the Constitution was adopted. Doctrinal research is the methodology used in this study, through analysis of international, regional and domestic legislation as well as case law to provide a legal framework protecting the right to adequate housing for older persons. Desktop review is employed in this research by examining State reports, international law and standards, national law, surveys and research conducted by international bodies.

Factors that restrict the elderly from accessing their right to adequate housing are discussed as well as the role of the State in addressing them. The paper notes that there is need for families, communities as well as the State to play an active role in providing adequate housing for elderly members of society. The study further proposes that the State should exercise its constitutional obligation to provide necessary assistance to the elderly members of society who are left destitute, and without family to care for them, by establishing residential homes for the elderly in all counties. With regards to CESCR general comment no.4, this study recognises that adequate housing does not merely consist of a physical structure, but should also entail affordable costs, accessible location, habitable conditions, availability of services and security of tenure. Finally, this study offers recommendations that the State should undertake and concludes that it is necessary that the State adopt the recommendations discussed to ensure the dignity of elderly persons is upheld through protection of their right to adequate housing.

LIST OF ABBREVIATIONS

ACHPR - African Charter on Human and People's Rights

CESCR - Committee on Economic, Social and Cultural Rights

CRPD - Convention on Rights of Persons with Disabilities

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

IDPs - Internally Displaced Persons

KNCHR – Kenya National Commission on Human Rights

MIPAA - Madrid Plan of Action on Ageing

NGEC - National Gender and Equality Commission

VIPAA - Vienna International Plan of Action on Ageing

UDHR – Universal Declaration of Human Rights

LIST OF CASES

Moi Educational Centre Co Ltd v William Musembi and 16 others [2017] eKLR

Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR

Republic of South Africa & others v Irene Grootboom & others (CCT/00) [2000] ZACC 19

LIST OF INSTRUMENTS

International instruments

International Covenant of Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

Committee on Economic, Social and Cultural Rights General Comment No. 4

Vienna Convention on the Law of Treaties

Universal Declaration of Human Rights

Convention on the Rights of Persons with Disabilities

Convention on the Elimination of all Forms of Discrimination against Women

African Charter on Human and People's Rights

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa

the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Kenyan legislation

Constitution of Kenya, 2010

Persons with Disabilities Act (No. 14 of 2003)

National Social Security Fund Act (No. 45 of 2013)

Retirement Benefits Act (No. 3 of 1997)

The Environmental Management and Co-ordination Act (Act No.8 of 1999)

Social Assistance Act (No. 4 of 2013)

Kenya National Commission on Human Rights Act (No.14 of 2011)

Housing Act (CAP 117)

National Gender and Equality Commission Act (No. 5 of 2011)

1. CHAPTER ONE: INTRODUCTION

1.1. Introduction and background

It is projected that the population of persons aged sixty-five years and above will reach 1.5 billion worldwide by the year 2050.¹ This will be twice as many older persons as children under five.² The State has taken measures to ensure the rights of older persons are addressed. This is in accordance with the constitutional right of older persons to fully participate in the affairs of society, to pursue their personal development, to live in dignity and respect free from abuse and to receive reasonable care and assistance from their family and the State.³

The Kenyan government has put in place specific social protection programmes that target older adults. For example, the Inua Jamii National Safety Net Programme provides a cash transfer amount of four thousand Kenyan shillings bi-monthly to Kenyan citizens aged seventy and above⁴ subject to the following conditions. That the recipient is not receiving a pension, is not enrolled in another cash transfer programme and that such a recipient has been residing in a particular location for more than a year.⁵ The Health Insurance Subsidy Programme provides financial health protection for vulnerable groups such as the elderly through the National Health Insurance Fund.⁶ The National Social Security Fund provides retirement benefits for persons who have contributed to the provident funds or the pension funds during employment.⁷ The Retirement Benefits Authority established under the Retirement Benefits Act supervises, establishes and manages retirement benefits schemes.⁸ Even with these advances, a gap still exists regarding housing for the elderly particularly for those without children or family members to care for them.⁹ The existing institutions that care for destitute elderly are operated by faith-based organisations and

¹ United Nations, Department of Economic and Social Affairs, Population Division (2019). World Population Prospects: Highlights (ST/ESA/SER.A/423), 2019, 16.

² United Nations, Department of Economic and Social Affairs, Population Division (2019). World Population Prospects 2019: Highlights (ST/ESA/SER.A/423) 2019, 16.

³ Article 57 *Constitution of Kenya* (2010).

⁴ <http://www.socialprotection.or.ke/national-safety-net-program/125-older-persons-cash-transfer-opct> on 20th August 2019

⁵ Ministry of Labour and Social Protection, State Department for Social Protection <http://www.socialprotection.go.ke/faqs/> on 15 July 2019.

⁶ Ministry of Health: Scaling Up Public Health Programs for Universal Health Coverage - <http://www.health.go.ke/4205-2/> on 15 July 2019.

⁷ Section 18 *National Social Security Fund Act* (No. 45 of 2013).

⁸ Section 5(a) *Retirement Benefits Act* (No.3 of 1997).

⁹ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 3.

private institutions,¹⁰ while the government plays a minimal role towards funding them.¹¹ No laws currently regulate how such institutions are run.¹² As a result, there have been some adverse consequences such as reports of elder abuse. A report conducted by the National Gender and Equality Commission (NGEC) in Narok identified key perpetrators of elder abuse.¹³ Three percent of the perpetrators were care givers while seven percent were service providers within the institutions.¹⁴ It is therefore necessary to have in place legislation that regulates the operation of such institutions by prohibiting abuse and defining what constitutes abuse. It is also necessary to have such legislation provide avenues for reporting such instances.

The Care and Protection of Older Members of Society Bill of 2018 has been drafted. It outlines obligations of the national and county governments with respect to the rights of older members of society. It also provides for the care of older members of society by the family and community as well as the establishment of homes and safety standards required in such homes. Presently, the bill has passed the second reading in the process of becoming law.¹⁵

Adequate housing does not simply entail a physical shelter, but such a shelter should be adequate and should adhere to reasonable standards of sanitation.¹⁶ Hence, in addition to adequate housing for the destitute elderly, subsequent chapters will address other housing needs of vulnerable elderly persons. Vulnerable elderly persons in the context of this research paper are those unable to enjoy all aspects of adequate housing including accessibility, affordability, security of tenure, availability of services and habitability.

¹⁰ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 21.

¹¹ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 18.

¹² National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 9.

¹³ National Gender and Equality Commission, *Whipping Wisdom, Rapid Assessment on Violence Against Older Persons in Kenya*, Embu, 2014, 15.

¹⁴ National Gender and Equality Commission, *Whipping Wisdom, Rapid Assessment on Violence Against Older Persons in Kenya*, Embu, 2014, 15

¹⁵ <http://kenyalaw.org/kl/index.php?id=7937>.

¹⁶ Article 43 1(b) *Constitution of Kenya* (2010).

1.2. Problem statement

The Constitution states that the State shall take measures to protect the rights of older persons to live in dignity and respect free from abuse and to receive reasonable care and assistance from their families and the State.¹⁷ Moreover, it provides that every person has the right to accessible and adequate housing.¹⁸ However, NGEC discovered that homes for the elderly in Kenya are few and have little resources thereby depend heavily on non-governmental organisations for funds.¹⁹ Of the counties visited for the audit, none had government residential homes for older members of society.²⁰ Besides insufficient homes, there exist other factors that make elderly persons vulnerable to inadequate housing including living in informal settlements, inaccessible buildings, expensive costs of housing, remote locations of homes and natural calamities. This contravenes the right to adequate housing in its totality as established in general comment no. 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which takes into account factors such as affordability, habitability and location of housing.²¹ Protecting the right to adequate housing also ensures that other human rights integrally linked to sufficient housing are attainable.²² This research thus examines the extent to which the Government of Kenya has complied with international standards regarding the right to adequate housing for the elderly. It consequently determines measures that should be undertaken to remedy the situation where adequate housing is inaccessible.

1.3. Research objectives

- II. To determine the role that the State has to play in regards to housing for the elderly in Kenya as established through legislation.
- III. To establish whether the existing laws on housing for the elderly in Kenya are sufficient.
- IV. To establish whether the existing laws in Kenya on housing for the elderly are in line with international standards.

¹⁷ Article 57, *Constitution of Kenya* (2010).

¹⁸ Article 431(b), *Constitution of Kenya* (2010).

¹⁹ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 17-18.

²⁰ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 21.

²¹ *CESCR General Comment No.4: The right to Adequate housing (Art.11(1) of the Covenant)*, 13 December 1991, 8.

²² *CESCR General Comment 4*, 7.

- V. To examine factors that prevent the elderly from accessing their right to adequate housing within Kenya.

1.4. Hypothesis

The Government of Kenya needs to play a larger role to adequately provide decent housing for the vulnerable elderly population unable to access it.

1.5. Research questions

- I. What is the role of the Government of Kenya in providing adequate housing for the elderly?
- II. Are the existing laws on housing for the elderly in Kenya sufficient?
- III. Has the Government of Kenya complied with international standards regarding access to housing for the elderly?
- IV. What factors within Kenya prevent the elderly from accessing their right to adequate housing?

1.6. Justification of the research

The elderly are considered to be among the vulnerable groups within society.²³ The State and public officers thus have a duty to address their needs²⁴ as this would ensure that all elderly persons have access to decent housing and can live in dignity as established in the Constitution.²⁵ The State also has a legal obligation to support the elderly as the State is required to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.²⁶ The State is yet to fulfil this as there is currently no legislative measure taken in regards to passing laws to regulate institutions caring for the elderly. This present situation goes against the moral obligation of the State to support the elderly and contravenes the national values enshrined in the Constitution of Kenya that uphold human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.²⁷ This research explores gaps in the law such as non-compliance with international standards that leave the elderly unable to access adequate housing. It also provides recommendations towards improving access to adequate housing for the elderly and explores some of the factors that predispose the elderly to inadequate housing.

²³ Article 21(3), *The Constitution of Kenya* (2010).

²⁴ Article 21(3), *The Constitution of Kenya* (2010).

²⁵ Article 28 *The Constitution of Kenya* (2010).

²⁶ Article 21 (2), *The Constitution of Kenya* (2010).

²⁷ Article 10 (2)(b), *The Constitution of Kenya* (2010).

1.7. Theoretical framework

This study is based on the theory of justice by John Rawls. The theory presupposes that justice is the first virtue of social institutions.²⁸ These institutions are important because they determine how basic rights, opportunities, income and wealth are distributed.²⁹ Rawls argues that no matter how efficient laws and institutions are, they are to be abolished or reformed if they are unjust.³⁰ Such institutions could include the government, specifically the legislature which is in charge of making laws as well as international law, treaties and conventions which form part of the laws of Kenya.³¹ This theory is applicable to this research because it safeguards the protection of the vulnerable elderly from the lack of formulation and implementation of suitable laws and practices without which they are unable to access adequate housing. Rawls states that principles of justice are chosen behind a veil of ignorance.³² This veil ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or social circumstances.³³ There exist two principles. The first principle requires equality in the assignment of basic rights and duties³⁴ while the second holds that social and economic inequalities are just only if they result in compensating benefits for everyone, in particular the disadvantaged members of society.³⁵ The Constitution defines a marginalised group as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4) ³⁶ which includes age. The second principle of justice thus requires that necessary measures are taken to ensure the vulnerable elderly are able to access adequate housing as effectively as other groups of people. Vulnerable elderly persons in this study are those who are either destitute, or those who live in homes that do not satisfy all aspects of adequate housing as previously discussed.

Rawls further explains that rules are important in aiding protection of social and individual goods within society and that an injustice is tolerable only where it is necessary to avoid an even greater

²⁸ Rawls J, *Theory of justice*, revised edition, Harvard University Press, United States of America, 1971, 3.

²⁹ Croucher R, 'A Rawlsian basis for core labour rights', 33(2) *Comparative Labour Law and Policy Journal* (2012), 10.

³⁰ Rawls, *Theory of justice*, 3.

³¹ Article 2 Constitution of Kenya (2010).

³² Rawls, *Theory of justice*, 11.

³³ Rawls, *Theory of justice*, 11.

³⁴ Rawls, *Theory of justice*, 13.

³⁵ Rawls, *Theory of justice*, 13.

³⁶ Article 260, *Constitution of Kenya* (2010).

injustice.³⁷ Therefore, the theory of justice would propound that the State has a duty to review existing laws and determine whether they are sufficient enough to ensure elderly persons in need of proper shelter are accommodated. Moreover, it has a role to play by having laws in place that are comprehensive enough to ensure proper housing for the elderly is available and accessible. This ensures that both social and individual³⁸ goods are attainable as the vulnerable elderly are empowered along with other classes of persons in obtaining adequate housing. International law that provides for adequate housing for marginalised groups such as the elderly is to be complied with in Kenya to ensure justice is available to all groups of people as the theory of justice propounds. Factors that prevent the elderly from accessing their right to adequate housing should also be addressed by the government as per the first principle of justice that requires equality in assignment of basic rights including the right to adequate housing.

1.8. Literature review

A critical evaluation on the right to housing in Kenya³⁹ looks into the role of the government in providing housing to Kenyan citizens including vulnerable groups such as the elderly and children. It notes the provision in the fourth schedule of the Constitution of Kenya that states the national government's role is to provide a housing policy while the county government's role is to provide housing. Regional and international instruments such as the African Charter on Human and People's Rights (ACHPR) and the Universal Declaration on Human Rights (UDHR) are stated in as far as they relate to the right to housing. While this research focuses on the right to housing from a broader perspective, this paper focuses specifically on the vulnerable elderly and the challenges unique to them in accessing adequate housing.

The national policy on older persons and ageing in Kenya⁴⁰ was first established in 2009 and later reviewed and aligned in accordance with the 2010 Constitution in January 2014. It presents a framework that addresses the unique challenges faced by older persons in Kenya. The framework is comprised of thematic issues to do with poverty and sustainable livelihood, health, HIV and AIDS, community and family, education, training and infrastructure. The policy recognises that housing for elderly persons is inadequate, and that existing housing lacks regulatory standards. It

³⁷ Rawls, *Theory of justice*, 4.

³⁸ Rawls, *Theory of justice*, 4.

³⁹ Kinuthia D, 'A critical evaluation on the right to housing in Kenya' Unpublished LLM Thesis, University of Nairobi, 2017.

⁴⁰ Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014.

proposes that the government promote investment in housing with universal design from an early age as well as make consideration for vulnerable older persons in public housing schemes. The policy however does not expressly provide insight as to the regulation and establishment of institutions that care for the elderly neither does it exhaustively address factors that predispose the elderly to inadequate housing.

The audit of residential institutions of older members of society in Kenya by the National Gender and Equality Commission⁴¹ was conducted by the Commission pursuant to Article 59 (4) and (5) of the Constitution to promote gender equality and freedom from discrimination for vulnerable groups of people in society including the elderly. In addition, Section 8 of the National Gender and Equality Commission Act mandates the commission to conduct audits on the special interest groups. It was thus revealed that there exist very few faith-based and private institutions that care for older members of society in Kenya. The audit was conducted in six counties in Kenya none of which have a government home for elderly members of society. The main challenge faced by such institutions is lack of sufficient funding. While it is noted that Kenyan culture maintains that the care of the elderly is the duty of family members, a difficulty arises when there are no family members to care for them following changing value systems where young people leave their parents in search of better lives. In addition, family obligations and work pressure has led to lower prioritising of the care of their elderly parents. These factors contribute to elderly people moving to these homes. While a growing number of older persons can afford to plan for old age in retirement homes, those willing are small but numbers are expected to rise as their children spend more time in their careers. The audit pays most attention to private and faith-based institutions that care for older persons but does not explore other factors that leave the elderly unable to access adequate housing.

The rights of older persons (protection and gaps under human rights law)⁴² working paper highlights gaps in international human rights instruments such as ICESCR and the International Covenant on Civil and Political Rights (ICCPR). Both offer generic protection as they are indirect in regards to the ageing population. ICESCR does not expressly refer to older persons. The

⁴¹ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016.

⁴² Fredvang M and Biggs S, ‘The rights of older persons; Protection and gaps under human rights law, Social policy Working Paper no. 16, 2012 - <https://social.un.org/ageing-working-group/documents/fourth/Rightsolderpersons> -on 2nd July 2019.

committee however released general Comment No. 6 on the economic, social and cultural rights explaining the reasoning behind not directly referring to the elderly due to the problem of demographic ageing not being as pressing then as it is today. It identifies a weakness of human rights law as governing the behaviour of state entities rather than individuals and the private sector within the states. The Convention on Rights of Persons with Disabilities (CRPD) is determined to be the most relevant to older persons as Article 3 of the Convention promotes dignity and non-discrimination. Article 25 of the CRPD protects the right of older persons to access health services and Article 28 of the CRPD provides for social protection including housing and poverty reduction programs. Article 13 of the CRPD mentions age-sensitive assistance and article 26 expounds on habitation. While Kenya is signatory to the mentioned conventions, compliance is yet to be achieved in as far as the role of the State to provide sufficient housing for the elderly is concerned. The working paper broadly covers the rights of older persons while this study concentrates on the right to adequate housing for the vulnerable elderly.

A journal article, “eldercare, is legislation of family responsibility the solution?”⁴³ recognises the moral duty of families to care for their elderly parents in Hong Kong. However, in other regions such as the United States of America, adult children are required by law to support their elderly in various ways among which is by ensuring they have access to adequate housing. Elderly parents rejected a similar legislation in Hong Kong as they were concerned about how such a law may influence family harmony. The article suggests that such a law may be beneficial only where family support has broken down while the children are able to provide support. It is also feared that the filial responsibility law may contribute to elder abuse. Countries that have such a law rarely have them enforced as parents are unwilling to bring lawsuits against their children. It presents other solutions other than legislations to encourage family members to support their elderly. For example, in Hong Kong, tax incentives are available to adults who direct a part of their salary to their parents. This article gives an international perspective on the care of the elderly. It mainly focuses on financial support. Families that live with their elderly parents get loans to enable them to design their homes in a way that is convenient for the elderly. While this article is not particularly relevant to the Kenyan jurisdiction, it gives insight as to how other jurisdictions have established their legal systems to care for their elderly in terms of providing adequate housing.

⁴³ Ting G and Woo J, ‘Elder care: is legislation of family responsibility the solution?’ 4(2) *Asian Journal of Gerontology and Geriatrics* (2009).

*Moi Educational Centre Co Ltd v William Musembi and 16 others*⁴⁴ is an eviction case in which residents were evicted from their houses which were later demolished. The residents maintained they had not received any notice and that eviction of children and the elderly violated Article 57, 53 and 21 of the Constitution, especially because alternative shelter was not provided. It was held that the appellant is under no obligation to provide alternative accommodation, as the evictees failed to heed notice. Moreover, the appellant's counsel quoted the Grootboom case⁴⁵ from South Africa stating that it is the duty of the State to provide adequate and accessible housing for people of all economic levels of society. This case puts into perspective that the State has an imperative to provide housing to vulnerable groups such as the elderly which it is yet to do effectively.

Enhancing the realisation of enforcement of socio-economic rights in Kenya, the minimum core obligation and the supervisory jurisdiction of the courts⁴⁶ recognises that socio-economic rights in Article 43 of the Constitution have taken a back seat in their realisation compared to civil and political rights. The paper recommends that courts should adopt a strong supervisory jurisdiction to ensure their judgements in socio-economic rights litigation are complied with and implemented. It notes cases in which an order given by the courts was complied with late or not at all. The elderly who are made destitute as a result of being evicted from their homes, would benefit from compliance of court orders to resettle them, and would thus have the right to accessible and adequate housing granted.

The various works of literature discussed above address the problem of housing for the elderly in various ways. However, none of them deliberately examine whether the Kenyan government plays a sufficient role as established in law to support the vulnerable elderly. For instance, by addressing their impediments to accessing adequate housing. Moreover, the formulation and passing of comprehensive legislation that would provide necessary housing assistance to vulnerable elderly persons in need is not addressed neither is the compliance of Kenya to international laws that provide for housing of the elderly.

⁴⁴ *Moi Education Centre Co. Ltd v William Musembi & 16 others* [2017] eKLR.

⁴⁵ *Republic of South Africa & others v Irene Grootboom & others* (CCT/00) [2000] ZACC 19.

⁴⁶ Khakula A, 'Enhancing the realisation and enforcement of socio-economic rights in Kenya: The minimum core obligation and the supervisory jurisdiction of the court' 11(2) *The Law Society of Kenya Journal* (2015).

1.9. Research design and methodology

This research employs doctrinal research as it conducts a critical review of legislation and principles⁴⁷ related to access to adequate housing specifically for vulnerable elderly persons. It is conducted by desk top review through which primary sources of data such as domestic, regional and international laws are analysed to present a legal framework on adequate housing for the elderly. The study also analyses surveys and research conducted by international bodies and non-governmental institutions as well as State reports that address the right to housing for the elderly population. The research assesses how the Kenyan government has responded to providing adequate housing for the vulnerable elderly following the adoption of the new Constitution in 2010, that introduced socio-economic rights including the right to adequate housing. Thus, this study is based on historical research.⁴⁸ This is because it focuses mainly on data within the Kenyan jurisdiction containing past events⁴⁹ between the year 2010 to the present. The justification behind the use of doctrinal research for this study, is that it provides a practical review of existing laws and standards that determine what rights are owed to the elderly, in regards to access to housing and the role that the government is required to perform. This will protect the right of the vulnerable elderly to adequate housing. An advantage of the use of doctrinal research includes its practical utility,⁵⁰ owing to the fact that it assesses current legislation and standards concerning law and principles on adequate housing. It is also useful because it explores gaps and inconsistencies⁵¹ in housing law as well as tests the soundness⁵² of housing legislations concerning elderly persons. However, some disadvantages of using doctrinal research in this study is that prevailing factors outside law⁵³ that affect the ability of elderly persons to access adequate housing are not addressed. Moreover, social facts that affect elderly persons may be disregarded during this research leading to recommendations that may be inadequate as it is limited to legal instruments.⁵⁴

⁴⁷ Vibhute K, Aynalem F, *Legal research methods*, Justice and Legal System Research Institute, Ethiopia, 2009, 26.

⁴⁸ Letts L, Wilkins S, Law M, Stewart D, Bosch J, & Westmorland M, *Guidelines for critical review of qualitative studies based on guidelines for critical review*, Form-Qualitative Studies, 2007, 5.

⁴⁹ 'Guidelines for Critical Review of Qualitative Studies Based on Guidelines for Critical Review,' Form-Qualitative Studies, 2007, 5.

⁵⁰ Vibhute K, Aynalem F, *Legal research methods*, 80.

⁵¹ Vibhute K, Aynalem F, *Legal research methods*, 81.

⁵² Vibhute K, Aynalem F, *Legal research methods*, 81.

⁵³ Vibhute K, Aynalem F, *Legal research methods*, 84.

⁵⁴ Vibhute K, Aynalem F, *Legal research methods*, 84.

1.10. Assumption

Since the promulgation of the 2010 Constitution, the State has not taken sufficient measures to ensure vulnerable elderly persons can access adequate housing. This is especially true regarding homeless elderly persons and elderly persons unable to access all aspects of adequate housing.

1.11. Limitations

This study addresses the right of elderly persons to access adequate housing following Article 57 of the Constitution of Kenya that charges the State with a duty to offer reasonable care and assistance to older persons.⁵⁵ Such elderly persons are the vulnerable who are left homeless, as well as elderly persons who are unable to access all the required aspects of adequate housing. The Constitution states that every person has a right to accessible and adequate housing⁵⁶ and that the State shall provide appropriate social security to persons unable to support themselves and their dependants.⁵⁷ Based on the above provisions, this study is limited to resources within the Kenyan jurisdiction that are dated post 2010 when the new Constitution was adopted.

1.12. Chapter summary

This research paper begins with chapter one which contains an introduction, a description of the problem statement, a discussion on the theoretical framework and a review of literature related to the study problem. It analyses the existing literature and highlights gaps that are in turn addressed by this paper. It finds that compliance of Kenyan law with international law and standards concerning accessible adequate housing for the vulnerable elderly is not sufficiently addressed in other written works in the literature review, concluding that the State is required to play a larger role to ensure adequate housing is available for the elderly. A current legal framework for elderly persons in relation to the right to adequate housing is presented in chapter two by analysing domestic, regional and international laws as well as international standards, noting the lack of international legislation that solely addresses the needs of elderly persons. The place and use of soft law as a means of providing guidelines of practice concerning provision of adequate housing for older persons is discussed, as well as the responsibility placed on governments to provide adequate housing for elderly persons.

⁵⁵ Article 57 (d), *Constitution of Kenya* (2010).

⁵⁶ Article 43 1(b), *Constitution of Kenya* (2010).

⁵⁷ Article 43 (3), *Constitution of Kenya* (2010).

The compliance of Kenya with international laws and standards that provide for housing of elderly persons is assessed in chapter three, finding that compliance in certain areas is yet to be achieved. This is followed by recommendations to the problem. The sufficiency of local laws in place is also discussed noting gaps in the law. The paper maintains that more can be done by the State to ensure adequate housing is available for elderly persons

Factors that prevent the elderly from accessing the right to adequate housing and the role of the government in addressing them is discussed in chapter four. The findings are that informal settlements, inaccessible buildings, natural calamities, remote locations of housing and lack of affordable housing are some of the impediments to accessing adequate housing for the elderly. The paper acknowledges the various interventions carried out by the State and assesses their sufficiency. Finally, the paper offers recommendations that the State can adopt to improve access to the right to adequate housing for elderly persons in chapter five. It finds that adopting certain bills and protocols as law would protect this right. Further, the possibility of having in place affordable housing targeted towards elderly persons is discussed as well as the role of the State in progressively realising socio-economic rights including the right to adequate housing.

2. CHAPTER TWO: LEGAL FRAMEWORK FOR THE RIGHT TO HOUSING FOR VULNERABLE ELDERLY PERSONS

2.1. Introduction

This chapter examines the current legal framework in place, identifying provisions protecting the right to adequate housing for vulnerable elderly persons. This includes all elderly persons whose enjoyment of adequate housing is curtailed. It analyses local, regional and international law and guidelines that provide for and support the right to adequate housing for elderly persons. General rules of international law form part of the laws of Kenya.⁵⁸ Hence, treaties and conventions ratified by Kenya⁵⁹ are of relevance. The UDHR being among the earliest declarations adopted worldwide enshrines the right to an adequate standard of living along with the right to access food, clothing, housing, medical care and social security in the event of circumstances beyond one's control such as old age.⁶⁰ Subsequent conventions have put in place similar requirements for the protection of the vulnerable in society such as the elderly as detailed in this chapter. United Nations documents on ageing are analysed as well within the framework of other international strategies.

2.2. Binding and non-binding frameworks

The legal framework discussed herein consists of international and regional human rights instruments as well as soft law. Human rights treaties that are in force are legally binding to state parties and must be performed by them in good faith.⁶¹ The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if so agreed.⁶² However, states that are member parties to a treaty have an obligation not to defeat the objects and purpose of a treaty pending the entry into force of the treaty upon having consented by any of the methods stated above.⁶³ The treaties discussed in this chapter are thus legally binding in Kenya unless stated otherwise.

⁵⁸ Article 2(5), *Constitution of Kenya* (2010).

⁵⁹ Article 2(6), *Constitution of Kenya* (2010).

⁶⁰ Article 25(1), Universal Declaration of Human Rights, December 10th 1948.

⁶¹ Article 26, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

⁶² Article 11, *Vienna Convention on the Law of Treaties*.

⁶³ Article 18, *Vienna Convention on the Law of Treaties*.

Soft law is comprised of quasi-legal instruments and does not legally bind the state parties.⁶⁴ These include non-binding resolutions, declarations, and guidelines created by governments and private organisations.⁶⁵ Regardless, soft law steps in when binding norms are unavailable or less desirable and thus can be more efficient and cheaper to abide by.⁶⁶ Despite soft law not being law,⁶⁷ it is of importance within the general framework of international legal development such that particular attention needs to be paid to it.⁶⁸ The use of soft law including recommendations, guidelines, codes of practice or standards, is significant in signalling the evolution and establishment of guidelines which may be eventually converted into legally binding rules.⁶⁹ It may be advantageous that states reach agreements with each other, which are not intended to be binding, and thus subject them to legal implementation.⁷⁰ These agreements reflect a political determination to act in a certain way and are more flexible and easier to adhere to.⁷¹ Subsequently, the soft law discussed in this chapter merely acts as guidelines that states are urged to follow albeit lacking coercive measures. Additionally, the lack of a legal framework that comprehensively addresses the rights of the elderly⁷² particularly in regards to adequate housing necessitates the use of soft law as a guiding principle.

⁶⁴ Druzin B, 'Why does soft law have any power anyway' 7 *Asian Journal of International Law* (2016), 361.

⁶⁵ Druzin B, 'Why does soft law have any power Anyway', 361.

⁶⁶ Diehl P and Ku C, 'The dynamics of international law' 105 *The American Journal of International Law* (2011), 846.

⁶⁷ Shaw M, *International Law*, 6ed, Cambridge University Press, New York, 2008, 117

⁶⁸ Boyle A and Chinkin C, *The making of international law*, Cambridge University Press, United Kingdom, 2009 211.

⁶⁹ Shaw, *International law*, 117.

⁷⁰ Shaw, *International law*, 118.

⁷¹ Shaw, *International law*, 118.

⁷² Rodriguez D and Martin C, 'The international human rights status of elderly persons' 18(4) *American University International Law Review* (2003), 917.

2.3. International legislation and standards

While there exist human rights treaties that address the matter of adequate housing for the elderly, the rights of the elderly are yet to receive the international legal attention they deserve in as far as a comprehensive legal instrument is concerned.⁷³ Nonetheless, a number of international treaties do provide for the right to adequate housing for elderly persons. ICESCR maintains that state parties are to guarantee that the rights in the Covenant are executed without any discrimination regardless of the individual's status.⁷⁴ This includes the right to an adequate standard of living, as well as adequate housing.⁷⁵ In its preamble, ICCPR recognises the dignity and equal inalienable rights of all members of the human family and is cognisant of the fact that these rights derive from the inherent dignity of the human person. Further, ICCPR maintains that all persons are entitled to equal protection of the law and prohibits any kind of discrimination based on race, religion or any other status.⁷⁶ While it does not expressly refer to the elderly, they are included among those in any other status. Thus, the elderly deserve protection in law which is a gap yet to be addressed by national legislation in as far as regulation of care facilities is concerned.

The CRPD urges member states to ensure that persons with disabilities, including the elderly with mobility challenges are able to access housing among other essential services such as transportation.⁷⁷ State parties also recognise the right of persons with disabilities to an adequate standard of living including adequate housing.⁷⁸ This is particularly beneficial to a number of the elderly who develop various forms of disability as a result of old age.

The Convention on the Elimination of all Forms of Discrimination Against Women provides for adequate living conditions in relation to housing⁷⁹ as well as the right to social security in cases of retirement, unemployment, sickness, invalidity and old age.⁸⁰ The United Nations Vienna International Plan of Action on Ageing (VIPAA) is the first specific international instrument on ageing guiding the fundamental thinking and formulation of age-related policies and

⁷³ Rodriguez D and Martin C, 'The international human rights status of elderly persons', 917.

⁷⁴ Article 2(2), *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966.

⁷⁵ Article 11(1), *International Covenant on Economic, Social, and Cultural Rights*.

⁷⁶ Article 26, *International Covenant on Civil and Political Rights*, 16 December 1966.

⁷⁷ Article 9(1), *Convention on the Rights of Persons with Disabilities*, 23 June 1973.

⁷⁸ Article 28(1), *Convention on the Rights of Persons with Disabilities*.

⁷⁹ Article 14(h), *Convention on the Elimination of all Forms of Discrimination against Women*, 22 June 1979.

⁸⁰ Article 11(e), *Convention on the Elimination of all Forms of Discrimination against Women*.

frameworks.⁸¹ It argues that adequate housing improves the quality of life of any age group and even more importantly the elderly whose homes are the central point of their activities.⁸² Moreover, it states that housing for the elderly must be viewed as more than mere shelter, also having psychological and social significance which should be taken into account.⁸³ In turn, national policies should help the aged to continue living in their own homes for as long as possible by making adaptations to their homes to ease movement.⁸⁴

The United Nations documents that provide guidelines aimed at providing adequate housing for the elderly include the United Nations Principles for Older Persons which provides that older persons should have access to shelter and community support from both the family and community.⁸⁵ They should also be able to reside at home for as long as possible.⁸⁶ Additionally, older persons should be able to utilise appropriate levels of institutional care providing protection, rehabilitation, social and mental stimulation in a humane and secure environment.⁸⁷ The United Nations Proclamation on Ageing urges states to formulate appropriate national policies and programmes for the elderly.⁸⁸ It urges states to view older persons as contributors to their societies rather than burdens.⁸⁹ Families are to be supported in providing care and all family members are encouraged to co-operate in caregiving⁹⁰

The Madrid Plan of Action on Ageing (MIPAA) puts primary responsibility on national governments to put the Plan into action by developing and implementing policies to promote and ensure the good health of the elderly and to make services and housing available and accessible.⁹¹ Article 10 of the political declaration of (MIPAA) recognises the potential of older adults in furthering development through reliance on their experience and wisdom. MIPAA emphasizes the importance of proper housing and a surrounding environment that is accessible and safe as this promotes good health and wellbeing.⁹² It also highlights the issue at hand regarding housing in

⁸¹ Gersen J & Posner E, 'Soft law: Lessons from Congressional practice' 61(3), *Stanford Law Review* (2008), 573-627.

⁸² United Nations Vienna International Plan of Action on Ageing, 1983, para. 64.

⁸³ United Nations Vienna International Plan of Action on Ageing, 1983, para. 65, recommendation 19.

⁸⁴ United Nations Vienna International Plan of Action on Ageing, 1983, para. 65, recommendation 19(a).

⁸⁵ United Nations Principles for Older Persons, 16 December 1991, para. 1.

⁸⁶ United Nations Principles for Older Persons, 16 December 1991, para 6.

⁸⁷ United Nations Principles for Older Persons, 16 December 1991, para. 13.

⁸⁸ United Nations Proclamation on Ageing, 16 October 1992, para. 2(a).

⁸⁹ United Nations Proclamation on Ageing, 16 October 1992, para. 2(d).

⁹⁰ United Nations Proclamation on Ageing, 16 October 1992, para.2(k).

⁹¹ Rodriguez D and Martin C, 'The international human rights status of elderly persons', 949.

⁹² United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid,2002, para. 95.

developing countries where following urbanisation, a growing number of persons ageing in urban areas lack affordable housing and services while at the same time, those ageing in rural areas are isolated from their extended families.⁹³

2.4. Regional legislation and standards

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa was adopted by the African Union assembly in 2016⁹⁴ in conformity to the requirement in the ACHPR to formulate special protocols or agreements to supplement the provisions of the Charter.⁹⁵ It provides that state parties are required to enact or review existing legislation to ensure residential care is optional and affordable for older persons.⁹⁶ Besides, the state parties are also required to ensure that older persons in residential care facilities are provided with care that meets the national minimum standards provided such standards comply with regional and international standards.⁹⁷ The protocol is yet to be ratified in Kenya. The ministry of labour and social protection is however working towards getting it ratified and is collecting public views on the protocol.⁹⁸ Its ratification and subsequent compliance in Kenya would lead to comprehensive legislation on residential care facilities which is presently lacking. This would greatly improve the health and well-being of vulnerable older persons.

The Banjul Charter maintains that every individual is equal before the law⁹⁹ and is entitled to equal protection of the law.¹⁰⁰ This right extends to the right to adequate housing for all groups of persons including the elderly. The Banjul Charter also provides for special measures of protection in keeping with the physical and moral needs of the aged.¹⁰¹ The Protocol to the African Charter on the Rights of Women in Africa also places an obligation on states to have in place special

⁹³ United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid, 2002, para. 96.

⁹⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of older persons in Africa, Assembly/AU/Dec 589(XXVI) of January 2016.

⁹⁵ Article 66, ACHPR, June 27, 1981.

⁹⁶ Article 11(1), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of older persons in Africa*.

⁹⁷ Article 11(2), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of older persons in Africa*.

⁹⁸ <http://www.socialprotection.go.ke/> on 10 September 2019.

⁹⁹ Article 3(1), ACHPR.

¹⁰⁰ Article 3(2), ACHPR.

¹⁰¹ Article 18(4), ACHPR.

protection of elderly women.¹⁰² Additionally, it provides that state parties are to ensure that women have equal access to housing and acceptable living conditions whatever their marital status.¹⁰³

The Kigali Declaration Conference called upon member states to develop a protocol for the rights of people with disabilities and the elderly.¹⁰⁴ This obligation was adhered to following the formulation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa. Although the formulation of this protocol is a step in the right direction, only four member states have signed it and none has ratified it according to Dr Prafulla Mishra, the African regional director of HelpAge international.¹⁰⁵ The African Union Policy Framework and Plan of Action on Ageing states that "member states recognise the fundamental rights of older persons and commit themselves to abolish all forms of discrimination based on age, that they undertake to ensure that the rights of older persons are protected by appropriate legislation, including the right to organise themselves in groups and to representation in order to advance their interests."¹⁰⁶ This requires states to formulate appropriate legislation to ensure the elderly have access to adequate housing as a basic need.

2.5. Domestic legislation

The Constitution of Kenya recognises that every person is equal before the law and has the right to equal protection and equal benefit of the law.¹⁰⁷ This is attributed to the fact that every person has inherent human dignity and the right to have that dignity respected and protected.¹⁰⁸ The national values and principles of governance include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.¹⁰⁹ A marginalised group is a group of people, who because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)¹¹⁰ among which is age.

¹⁰² Article 22, *the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, July 11 2003.

¹⁰³ Article 16, *the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

¹⁰⁴ African Union, "Ministerial conference on Human Rights in Africa," Kigali declaration, Kigali, 8 May 2003, para. 20.

¹⁰⁵ HelpAge International, 'Ratify protocol on older people's rights, HelpAge global network urges African leaders,' 29 January 2018, <https://www.helpage.org/newsroom/latest-news/ratify-protocol-on-older-peoples-rights-helpage-global-network-urges-african-leaders/> on 11 September 2019.

¹⁰⁶ African Union, Policy Framework and Plan of Action on Ageing, 2002, Para. 4.1 (1).

¹⁰⁷ Article 27(1), *Constitution of Kenya* (2010).

¹⁰⁸ Article 28, *Constitution of Kenya* (2010).

¹⁰⁹ Article 10(2)(b), *Constitution of Kenya* (2010).

¹¹⁰ Article 260, *Constitution of Kenya* (2010).

State organs and public officers are thus charged with a duty to address the needs of vulnerable groups within society including older members of society.¹¹¹ The State also has a duty to take measures to ensure the rights of older persons to fully participate in the affairs of society, to pursue their personal development, to live in dignity and respect free from abuse and to receive reasonable care and assistance from their family and the State¹¹² are met. Consequently, every person has the right to accessible and adequate housing and to reasonable standards of sanitation.¹¹³ These provisions highlight the obligations that the government has towards the elderly in regards to adequate housing.

The national government is in charge of providing a housing policy¹¹⁴ while the county government is tasked with planning and development in regards to establishing housing.¹¹⁵ While the Kenya vision 2030 outlines plans on improving housing by providing low cost housing and easy access to adequate finance for developers and buyers,¹¹⁶ it does not specifically cater to social housing initiatives targeted toward the care of the elderly such as retirement homes which would accommodate the aging population and the unique challenges they face.

NGEC is charged with conducting audits on special interest groups including the elderly.¹¹⁷ It has fulfilled this obligation by carrying out an audit of residential institutions of older members of society in selected counties of Kenya in 2016,¹¹⁸ and has subsequently presented recommendations to both the county and national government.¹¹⁹ The National Social Assistance Authority is tasked with a number of functions among which is to identify and provide social assistance to persons in need of it,¹²⁰ as well as to construct or acquire, maintain and operate residential institutions for people in need of social assistance.¹²¹ The Authority categorises the various persons in need including poor elderly persons.¹²² Such elderly persons should have attained the age of 65 years

¹¹¹ Article 21(3), *Constitution of Kenya* (2010).

¹¹² Article 57, *Constitution of Kenya* (2010).

¹¹³ Article 43 1(b), *Constitution of Kenya* (2010).

¹¹⁴ Fourth Schedule, *Constitution of Kenya* (2010).

¹¹⁵ Fourth Schedule, *Constitution of Kenya* (2010).

¹¹⁶ Kenya Vision 2030, A Globally Competitive and Prosperous Kenya, October 2007.

¹¹⁷ Section 8(m), National Gender and Equality Act (2011).

¹¹⁸ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016.

¹¹⁹ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, 22-23.

¹²⁰ Section 4(a), Social Assistance Act (No.24 of 2013).

¹²¹ Section 4(d), Social Assistance Act (No.24 of 2013).

¹²² Section 17(b), Social Assistance Act (No.24 of 2013).

and above, having been neglected or abandoned, without any ascertainable means of support, and living or begging on the street,¹²³ in order to qualify for assistance.

The Kenya National Commission on Human Rights (KNCHR) works with NGECE to ensure efficient mechanisms for referrals and collaboration.¹²⁴ This enables both commissions to work together toward promoting the interests of the elderly. KNCHR also acts as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights, except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination.¹²⁵

¹²³ Section 21, Social Assistance Act (No.24 of 2013).

¹²⁴ Section 8(h), Kenya National Commission on Human Rights Act (No.14 of 2011).

¹²⁵ Section 8(f), Kenya National Commission on Human Rights Act (No.14 of 2011).

3. CHAPTER THREE: COMPLIANCE OF KENYA WITH INTERNATIONAL LAW ON HOUSING

3.1. Introduction

This chapter investigates international human rights instruments as well as recommendations and guidelines that establish the right to adequate housing for the vulnerable elderly. The instruments ensure that the vulnerable elderly can fully enjoy all the aspects of adequate housing. It examines the compliance of Kenya with international laws and guidelines that provide for the right to adequate housing for the elderly. While chapter two focused on the international, regional and domestic framework in place, this chapter assesses whether Kenya has complied with the set standards and whether the current domestic laws in place comprehensively address the housing needs of the elderly. It analyses United Nations documents on ageing that are considered within the framework of other international strategies and plans. The analysis of soft law which is not legally binding, is useful in this chapter, as there is currently a lack of a comprehensive international instrument that adequately addresses the housing needs of the elderly.¹²⁶ Furthermore, rights relating to older persons relies on soft law which is used extensively as a policy tool on the international level.

3.2. Residential care

The Banjul Charter on Human and People's Rights was entered into force in Kenya on October 21st 1986.¹²⁷ it is thus binding upon Kenya which is a member state to the Charter, and thus must be performed in good faith.¹²⁸ It provides for the right to special measures in keeping with the physical or moral needs of the elderly.¹²⁹ Provision of adequate housing in form of residential care fulfils both the physical and moral needs of the elderly as it promotes their good health and well-being.¹³⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons is the most extensive African regional legislation formulated on the rights of the elderly. This is on account of its formation having been preceded by recommendation (1) (a) contained in paragraph 4.1 of the African Union Policy Framework and Plan of Action on ageing which calls

¹²⁶ Rodriguez D and Martin C, 'The international human rights status of elderly persons', 917.

¹²⁷ <http://kenyalaw.org/treaties/treaties/11/African-Banjul-Charter-on-Human-and-Peoples-Rights> on 18 November 2019.

¹²⁸ Article 26, *Vienna Convention on the Law of Treaties*.

¹²⁹ Article 18(4), ACHPR.

¹³⁰ United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid, 2002, para. 95.

for the elaboration and adoption of “an additional Protocol to the African Charter on Human and Peoples’ Rights relating to the rights of Older Persons.” It provides that state parties are required to enact or review existing legislation to ensure residential care is optional and affordable for older persons.¹³¹ The state parties are also required to ensure that older persons in residential care facilities are provided with care that meets the national minimum standards provided such standards comply with regional and international standards.¹³² This Protocol is yet to be ratified in Kenya. The Ministry of Labour and Social Protection is however striving to get it ratified and is in the process of collecting public views on the Protocol.¹³³ MIPAA considers situations where formal community care systems are poorly co-ordinated and proposes that residential care could be the most suitable option. It thus states that affordable care options should be available from family care to institutional care and stresses that the elderly person should be involved in making the choice.¹³⁴ VIPAA identifies a concerning trend that those who give the most direct care to the elderly are often the least trained.¹³⁵ It thus provides that those who work with the elderly at home or in institutions should receive basic training for their tasks.¹³⁶

Within Kenya, the only domestic legislation that offers housing for the vulnerable elderly is the Social Assistance Act. It defines residential institutions as living accommodation that offers either temporary or continuing accommodation for persons in need. The National Social Assistance Authority is tasked with constructing, acquiring, maintaining and operating residential institutions for people in need of social assistance¹³⁷ including poor elderly persons.¹³⁸ In order to qualify for assistance, they must be sixty five years and above and must have been neglected or abandoned without any ascertainable means of support while living or begging on the street.¹³⁹ While the Social Assistance Act provides for housing of the destitute elderly, it does not expound on what the key aspects required to operate residential institutions are. However, the Care and Protection of Older Members of Society Bill contains additional crucial provisions. These absent provisions

¹³¹Article 11(1), *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of older persons in Africa*.

¹³²Article 11(2), *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of older persons in Africa*.

¹³³ <http://www.socialprotection.go.ke/> on 10 September 2019.

¹³⁴ United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid, 2002, para. 104.

¹³⁵ United Nations Vienna International Plan of Action on Ageing, 1983, para. 60.

¹³⁶ United Nations Vienna International Plan of Action on Ageing, 1983, para 60, recommendation 7(b).

¹³⁷ Section 4(d), Social Assistance Act (No. 24 of 2013).

¹³⁸ Section 17(b), Social Assistance Act (No. 24 of 2013).

¹³⁹ Section 21, Social Assistance Act (No. 24 of 2013).

include the registration and licensing of the residential institutions,¹⁴⁰ compliance to standards of operation and safety regulations that such institutions should adhere to¹⁴¹ as well as the continuous training of personnel at the facilities.¹⁴² The Care and Protection of Older Members of Society Bill which is currently in the second reading stage¹⁴³ of the parliamentary process will address such gaps that are left out in the Social Assistance Act.

While some institutions, specifically those that are faith-based offer free residential care for the vulnerable elderly,¹⁴⁴ private run institutions can be expensive with some solely admitting persons who can afford the cost.¹⁴⁵ NGEAC is charged with conducting audits on the status of special interest groups including the elderly.¹⁴⁶ The Commission audited residential homes for older persons and found that the government still plays a minimal role as none of the counties audited had in place a government residential home.¹⁴⁷ The Commission thus recommended that the national government establish at least one residential home in every county to take care of the vulnerable elderly who are neglected and abandoned by their family members.¹⁴⁸

While residential care is an option for some, many Africans still consider this to be taboo as well as a rejection from the family of the person.¹⁴⁹ For this reason, community care is a better housing option for the elderly who are opposed to the idea of residing in residential institutions.

¹⁴⁰ http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2018/CareandProtectionofOlderMembersofSocietyBill_2018 on 15 September 2019.

¹⁴¹ The Care and Protection of Older Members of Society Bill, 2018

¹⁴² The Care and Protection of Older Members of Society Bill, 2018

¹⁴³ <http://kenyalaw.org/kl/index.php?id=7937> on 20 October 2019.

¹⁴⁴ Kimamo C and Kariuki P, 'Taking care of the aged in Kenya: The changing trends' 3(1) *Medcrave Online Journals, Gerontology and Geriatrics* (2018), 13.

¹⁴⁵ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties* 21.

¹⁴⁶ Section 8(m), *The National Gender and Equality Commission Act* (No.15 of 2011).

¹⁴⁷ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties* 21.

¹⁴⁸ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties* 22.

¹⁴⁹ Kimamo C and Kariuki P, 'Taking care of the aged in Kenya: The changing trends', 13.

3.3. Community care for the elderly

The Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa urges state parties to provide incentives to family members who provide home care for older persons as well as strengthen traditional support systems to enhance the ability of communities and families to care for older persons.¹⁵⁰ Similarly, MIPAA requires the integration of the elderly within their communities by assisting families to share accommodation with older family members who desire it.¹⁵¹

For instance, persons caring simultaneously for their parents, their own children and their grandchildren require greater support as recognised in MIPAA.¹⁵² The Protocol as well as MIPAA anticipates the particular housing requirements of the elderly, and accordingly contains provisions necessary for addressing such housing needs. Following a lack of the particular provisions discussed being implemented in Kenya, it is crucial that the Protocol be adopted. In addition, the recommendations in MIPAA discussed above should be complied with in Kenya.

3.4. Public housing for the elderly

VIPAA provides recommendations aimed at governments in relation to housing and living environments. It maintains that, "housing for the elderly must be viewed as more than mere shelter. In addition to the physical, it has psychological and social significance, which should be taken into account."¹⁵³ Likewise, the general comment no.4 of the Committee on Economic, Social and Cultural Rights (CESCR) states that the right to housing shouldn't be interpreted in a restrictive manner as merely having a roof over one's head, rather it should include the right to adequate privacy, adequate security, adequate location, adequate lighting and ventilation and adequate space all at a reasonable cost and irrespective of income.¹⁵⁴ The Constitution of Kenya is cognisant of this as it provides that housing should be adequate.¹⁵⁵

VIPAA encourages governments to formulate national policies that enable the elderly to live in their own homes by making necessary modifications to their homes where it is feasible and

¹⁵⁰ Article 10(1)(2), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of older persons in Africa*.

¹⁵¹ United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid, 2002, para 34 (e).

¹⁵² United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid, 2002, para 44 (e).

¹⁵³ United Nations Vienna International Plan of Action on Ageing, 1983, para 65, recommendation 19.

¹⁵⁴ *CESCR General Comment 4*, 7.

¹⁵⁵ Article 43 1(b), *Constitution of Kenya* (2010).

appropriate so as to enable easier mobility.¹⁵⁶ Similarly CESCRC general comment no. 4 elaborates on the accessibility of housing asserting that housing law and policy should fully take into account the special housing needs of disadvantaged groups including the elderly.¹⁵⁷ The Persons with Disability Act provides that persons with disabilities are entitled to a barrier free and disability friendly environment to enable them to have access to buildings, roads and other social amenities, as well as assistive devices and other equipment to promote their mobility.¹⁵⁸ This includes the elderly who are disabled. Following the adoption of the new Constitution that establishes devolution,¹⁵⁹ a Persons with Disabilities (amendment) Senate Bill 2019 currently in the first reading stage¹⁶⁰ has been formulated to define the role of county governments and national governments in relation to disability rights. The amendment to Section 21 of the Act provides that the county government shall not approve the construction of a building or any premises if the plans for the construction do not include an access way for persons with disabilities.¹⁶¹ Passing this Act into law would ensure that accessibility as an aspect of adequate housing established in the 2010 Constitution is considered.

The CRPD requires that state parties ensure persons with disabilities can access public housing programmes.¹⁶² This includes the elderly suffering from disability. In addition, MIPAA proposes that there should be equitable allocation of public housing for older persons.¹⁶³ The Housing Act gives the cabinet secretary the mandate to make prescriptive regulations as required.¹⁶⁴ In compliance to this, the Housing Fund Regulations of 2018 was established by the cabinet secretary for transport, infrastructure, housing, urban development and public works. It provides that a person in Kenya shall qualify for the affordable housing scheme on condition that they are a Kenyan citizen of 18 years of age and above, have registered and remitted their contribution to the scheme and are a first time home owner under the affordable housing scheme.¹⁶⁵ There are however no exceptions made to ensure that equitable allocation of public housing for the elderly is observed.

¹⁵⁶ United Nations Vienna International Plan of Action on Ageing, 1983 para. 65 recommendation 19(a).

¹⁵⁷ *CESCRC General Comment 4*, 8(e).

¹⁵⁸ Section 21, Persons with Disabilities Act (No. 14 of 2003).

¹⁵⁹ Article 6, *Constitution of Kenya* (2010).

¹⁶⁰ <http://kenyalaw.org/kl/index.php?id=9129> on 1 November 2019.

¹⁶¹ Persons with Disabilities Bill, 2019.

¹⁶² Article 2(d), *Convention on the Rights of Persons with Disabilities*.

¹⁶³ United Nations Political Declaration and Madrid International Plan of Action on Ageing, Madrid, 2002, para. 98(e).

¹⁶⁴ Section 24, Housing Act (CAP 117).

¹⁶⁵ Section 14, Housing Fund Regulations, 2018.

3.5. Formulation of national policies

The United Nations Proclamation on Ageing urges states to formulate appropriate national policies and programmes for the elderly.¹⁶⁶ Kenya has complied with this by having in place a national policy on older persons and ageing that provides a comprehensive framework to guide different sectors and agencies involved in development issues pertaining to the elderly.¹⁶⁷ The policy recognises that housing in both rural and urban settings is inadequate while those that are operational do not address the needs of older persons.¹⁶⁸ It recognises that infrastructural policies do not consider the needs of the elderly as they lack regulatory standards.¹⁶⁹

3.6. Enforcement of socio-economic rights

The Kigali Declaration on Human Rights in Africa urges member states and regional institutions to accord the same importance to economic, social and cultural rights as civil and political rights.¹⁷⁰ The repealed 1963 Constitution of Kenya provided for civil and political rights.¹⁷¹ However, socio-economic rights were not established. The 2010 Constitution enshrines socio-economic rights in Article 43 of the Constitution of Kenya.¹⁷² The right to adequate and accessible housing along with reasonable standards of sanitation is included among these rights.¹⁷³ While the recognition of socio-economic rights is commendable, a challenge arises in enforcement of such rights due to poor compliance with decisions of the constitutional court, in socio-economic rights litigation by the executive arm of the government.¹⁷⁴ In the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*,¹⁷⁵ the judge argues that there should be progressive realisation of social economic rights implying the State must take steps towards realisation of these rights. The judge further recognises that the State has a positive obligation to ensure access by its citizens to socio-economic rights, in particular the right to adequate housing, is made possible by taking positive steps to ensure access by citizens. It is also added that the government has a negative obligation to withhold from doing anything that impairs the enjoyment of these rights.

¹⁶⁶ United Nations Proclamation on Ageing, 16 October 1992, para, 2(a).

¹⁶⁷ Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014, 1.

¹⁶⁸ Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014, 12.

¹⁶⁹ Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014, 12.

¹⁷⁰ African Union, “Ministerial conference on Human Rights in Africa,” Kigali declaration, Kigali, 8 May 2003, para. 4.

¹⁷¹ The Constitution of Kenya 1963 Chapter 5 (Bill of Rights).

¹⁷² Article 43, *Constitution of Kenya* (2010).

¹⁷³ Article 43 1(b), *Constitution of Kenya* (2010).

¹⁷⁴ Khakula A, ‘Enhancing the realisation and enforcement of socio-economic rights in Kenya,’ 12.

¹⁷⁵ *Mitu-Bell Welfare Society v Attorney General & 2 others* [2013] eKLR.

3.7. Illegal evictions

ICESCR provides that state parties to the covenant, which Kenya is among, have a duty to ensure an adequate standard of living, including adequate food, shelter, clothing and the continuous improvement of living conditions is enforced.¹⁷⁶ CESCR general comment no.4 further provides that illegal evictions should be compensated and that court-ordered injunctions should be a legal remedy against planned evictions or demolitions.¹⁷⁷ In addition, instances of forced evictions can only be justified in exceptional circumstances and in accordance with relevant principles of international law.¹⁷⁸ This is particularly relevant where older persons are illegally evicted from their homes. In *Moi Educational Centre Co Ltd v William Musembi and 16 others*,¹⁷⁹ the High Court had previously ruled that the forced eviction of the elderly persons violated Article 57 of the Constitution of Kenya. The judge however ruled that the appellant was not required to compensate the evictees as previously held in the High Court judgement. He attributed this to the fact that in awarding compensation for the specific damages the evictees claimed to have suffered, the court did not inquire into the nature of the loss and did not give the evictees an opportunity to prove their damage. The State and appellant as well were not given an opportunity to test the evictees claims. However, the Court of Appeal judge held that the forced eviction and demolition of their houses without a Court order is in violation of their human dignity and the right to security of the person. The right to compensation as discussed in CESCR general comment no. 4 is exercised in the event of illegal evictions, if a court grants appropriate relief including an order for compensation.¹⁸⁰

¹⁷⁶ Article 11(1), *International Covenant on Economic, Social, and Cultural Rights*.

¹⁷⁷ *CESCR General Comment 4*, 17.

¹⁷⁸ *CESCR General Comment 4*, 18.

¹⁷⁹ *Moi Education Centre Co. Ltd v William Musembi & 16 others* [2017] eKLR.

¹⁸⁰ Article 23(3)(e), *Constitution of Kenya* (2010).

4. CHAPTER FOUR: IMPEDIMENTS TO ADEQUATE HOUSING FOR THE ELDERLY

4.1. Introduction

Chapter three analysed Kenya's compliance with international standards that provide for adequate housing for the vulnerable elderly. This chapter highlights factors that prevent the elderly from accessing adequate housing. It also reviews the sufficiency of interventions taken by the government to remedy the situation. It recognises that the government has a responsibility to ensure that the elderly can access adequate housing as it determines the distribution of rights, opportunities, and wealth.¹⁸¹ The theory of justice requires that compensating benefits are made available where social and economic inequalities exist. Therefore, this chapter highlights housing inequalities affecting some of the elderly who are vulnerable because they are unable to fully enjoy all aspects of adequate housing. It thus focuses on the responsibility of the government to mitigate such housing inequalities. This chapter recognises that human rights are interdependent, indivisible and interrelated and as a result, the violation of the right to adequate housing affects the enjoyment of other human rights such as the right to enjoy social services and the right to receive healthcare.¹⁸²

4.2. Informal settlements as a result of rural-urban migration

There has been an unprecedented increase in the growth of the urban population following a large population of Kenyan citizens opting to migrate from rural to urban centres.¹⁸³ This has led to the emergence of slums as demand for housing has increased.¹⁸⁴ Slum settlements present a number of challenges such as insufficient living space, lack of clean water, inadequate sanitation and lack of security of tenure due to their informal nature.¹⁸⁵ The National Policy on Older Persons and Ageing in Kenya found that some elderly persons in urban areas had been reduced to begging on the streets for sustenance and lived in slum-dwellings under very poor conditions.¹⁸⁶ This contravenes the right that every person has to reasonable standards of sanitation¹⁸⁷ and to clean

¹⁸¹ Croucher R, 'A Rawlsian basis for core labour rights', 10.

¹⁸² Office of the United Nations High Commissioner for Human Rights, United Nations Habitat, *The Right to Adequate Housing*, 2015, 9.

¹⁸³ Muraguri L, 'Kenyan government initiatives in slum upgrading', 44 *Open Edition Journals* (2011), 119.

¹⁸⁴ Muraguri L, 'Kenyan government initiatives in slum upgrading', 119.

¹⁸⁵ Office of the United Nations High Commissioner for Human Rights, United Nations Habitat, *The Right to Adequate Housing*, 2015, 20.

¹⁸⁶ Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014, 15.

¹⁸⁷ Article 43(1)(b), *Constitution of Kenya* (2010).

and safe water in adequate amounts.¹⁸⁸ The situation further violates CESCR general comment no.4 which highlights habitability as a necessary aspect of adequate housing, stating that residents should have adequate space free from cold, damp heat, structural hazards and other threats to health.¹⁸⁹ The government has responded to the situation in a number of ways including by launching the Kenya Informal Settlement Improvement Project in 2011.¹⁹⁰ To date, the programme is still in the process of being implemented¹⁹¹ and has achieved major strides. It has enhanced security of tenure by issuing titles and approving development plans as well as by improving water, sanitation and infrastructure.¹⁹² Programmes such as these serve the elderly living in informal settlements by ensuring they are not illegally evicted as they can acquire title to their land. However, there is still need for the government to take extra measures following the poor state of housing structures that also lack access to clean water and electricity.¹⁹³ The Ministry of Land, Housing and Urban Development recommends that the government adopt a Slum Upgrading Act to address specific issues such as access to credit¹⁹⁴ by residents in informal settlements. The credit can be utilised to improve their housing structures. The elderly as well as other groups of persons would stand to benefit from this. In addition, adopting these measures would demonstrate that the State is performing its responsibility to take legislative, policy and other measures including setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.¹⁹⁵

4.3. Inaccessible buildings

There is a higher incidence of disability among older adults as a result of accumulation of health risks such as chronic illnesses, injury or disease experienced over the years.¹⁹⁶ It is further projected that by 2050, the global population of older persons will have reached nearly 2.1 billion.¹⁹⁷ With this forecast in mind, it is crucial that the Kenyan government take steps to ensure the increasing number of elderly persons have access to adequate housing. The CRPD, which

¹⁸⁸ Article 23(1)(d), *Constitution of Kenya* (2010).

¹⁸⁹ *CESCR General Comment 4*, 8(d).

¹⁹⁰ Muraguri L, 'Kenyan government initiatives in slum upgrading', 121.

¹⁹¹ <http://www.housingandurban.go.ke/project/jet-hotels/> on 15 November 2019.

¹⁹² <http://www.housingandurban.go.ke/project/jet-hotels/> on 15 November 2019.

¹⁹³ Republic of Kenya, Ministry of Housing, 'Background Document: The National Slum Upgrading and Prevention Policy' 2013, 5.

¹⁹⁴ Republic of Kenya, Ministry of Housing, 'Background Document: The National Slum Upgrading and Prevention Policy' 2013, 13.

¹⁹⁵ Article 21(2), *Constitution of Kenya* (2010).

¹⁹⁶ <https://www.un.org/development/desa/disabilities/disability> on 19 November 2019.

¹⁹⁷ <https://www.un.org/development/desa/disabilities/disability> on 19 November 2019.

Kenya has ratified, provides that State parties are required to facilitate the personal mobility of persons with disabilities at an affordable cost and in a manner of their choice. This could include installing necessary assistive structures in homes for the disabled elderly, which would aid in their free mobility. In addition, CESCR general comment no. 4 provides that housing law and policy should take into account housing needs of special groups such as the elderly and the physically disabled as accessibility is an aspect of adequate housing.¹⁹⁸ The Government of Kenya is thus required to introduce into its housing policy the construction of houses that are modified to allow the free movement of the disabled elderly which it is yet to do. The Persons with Disabilities Act provides that all public buildings shall adapt to suit persons with disability five years after the act has been enacted.¹⁹⁹ Despite more than five years passing from the date the act was enacted, there are still instances where public buildings lack ramps or elevators to accommodate the free movement of the disabled,²⁰⁰ among whom may include elderly persons. Private buildings are not required by law to have accessible features for the disabled²⁰¹ presenting a need for an amendment of the act to better reflect the vision of the 2010 Constitution that provides that persons with disabilities are entitled to have reasonable access to all places.²⁰²

4.4. Natural calamities that cause destruction of housing

Floods have a negative impact on people, assets and livelihoods. It causes the destruction of settlements and housing as has been experienced in various areas within Kenya including Tana river area.²⁰³ There has also been a history of internally displaced persons (IDPs) within Kenya caused by a variety of factors among which are natural disasters that may have been triggered by climate change.²⁰⁴ A national policy on the prevention of internal displacement, protection and assistance to IDPs in Kenya was drafted in 2009 in response to the widespread displacement that had occurred at the time. A second national stakeholder forum was held in 2010 to allow for review and consultation of the policy. The policy noted that disadvantaged groups of people including the

¹⁹⁸ CESCR General Comment 4, 8(e).

¹⁹⁹ Section 22, *Persons with Disabilities Act* (No. 14 of 2003)

²⁰⁰ <https://www.standardmedia.co.ke/article/2000038467/building-for-the-disabled> on 19 November 2019.

²⁰¹ Ngulu J, 'The Kenya's Persons with Disabilities Act, Act No. 14 of 2003: A case for compliance of the Act with the Constitution of Kenya, 2010 and international law' Unpublished LLM Thesis, University of Nairobi, December 2012, 107.

²⁰² Article 54(c), *Constitution of Kenya* (2010).

²⁰³ Owuor P, 'The disaster profile of Kenya' 2(3) *University of Oviedo Emergency and Disaster Reports Journal* (2015), 19.

²⁰⁴ Republic of Kenya, 'National Policy on the prevention of internal displacement, protection and assistance to internally displaced persons (IDPs) In Kenya, 2011, 7.

elderly and persons living with various forms of disability had experienced loss of homes, livelihoods and community ties as a result of evictions, political conflicts and natural calamities.²⁰⁵ The policy thus provides that the disadvantaged among a displaced population shall be entitled to the protection and assistance required by their condition and to treatment that takes into account their special needs.²⁰⁶ The government also vowed to protect the right owed to IDPs to an adequate shelter²⁰⁷ by providing IDPs with equal and unimpeded access to social housing and poverty alleviation programmes.²⁰⁸ To alleviate the impact and occurrences of natural calamities, the government committed to refrain from activities such as deforestation that promote the occurrence of natural disasters, to provide necessary data on disaster risks and to plan extensively so as to be prepared for natural disasters which are more often than not foreseeable.²⁰⁹ The measures taken demonstrate that the State is performing its responsibility to take legislative, policy and other measures including setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.²¹⁰

4.5. Unfavourable location of housing

CESCR general comment no.4 expounds on what adequate housing consists of. It provides that adequate housing must be in a location that is in close proximity to social facilities such as healthcare services and that housing should not be established on sites that are polluted.²¹¹ However, within urban populations in Kenya, especially slum regions, high levels of outdoor air pollution is emitted from vehicles and neighbouring industries negatively affecting the health of the residents.²¹² Due to a weaker immune system and an extended length of time spent exposed to harmful industrial pollution, the elderly are more susceptible to respiratory complications such as

²⁰⁵ Republic of Kenya, 'National Policy on the prevention of internal displacement, protection and assistance to internally displaced persons (IDPs) In Kenya, 2011, 14.

²⁰⁶ Republic of Kenya, 'National Policy on the prevention of internal displacement, protection and assistance to internally displaced persons (IDPs) In Kenya, 2011, 14.

²⁰⁷ Republic of Kenya, 'National Policy on the prevention of internal displacement, protection and assistance to internally displaced persons (IDPs) In Kenya, 2011, 37.

²⁰⁸ Republic of Kenya, 'National Policy on the prevention of internal displacement, protection and assistance to internally displaced persons (IDPs) In Kenya, 2011, 53.

²⁰⁹ Republic of Kenya, 'National Policy on the prevention of internal displacement, protection and assistance to internally displaced persons (IDPs) In Kenya, 2011, 25.

²¹⁰ Article 21(2), *Constitution of Kenya* (2010).

²¹¹ *CESCR General Comment 4*, 8(f).

²¹² Kinney P, Gichuru M, Volavka N, Ngo N, Ndiba P, Law A, Gachanja A, Gaita S, Chillrud N, Sclar E, 'Traffic impacts on PM2.5 air quality in Nairobi' 14(4) *Environmental Science & Policy* (2011), 369-378.

asthma, cardiovascular complications and lung disease.²¹³ Thus, their exposure to air pollution may lead to higher morbidity and mortality.²¹⁴ The government has responded to the situation by putting in place strict air quality regulations in the 2015 amendment of the Environmental Management and Coordination Act of 1999 which was assented to on 27th May 2015.²¹⁵ It provides that the cabinet secretary, on the recommendation of the National Environment Management Authority, shall determine measures necessary to reduce sources of air pollution by requiring the redesign of plants or use of technology that meets the required standards.²¹⁶ Moreover, any person convicted of polluting the environment in any manner shall pay any compensation or restitution as determined by a competent court upon application by injured third parties.²¹⁷ These measures will ensure that elderly persons affected by pollution have access to adequate housing as they will have access to a clean environment that is unpolluted.

Moreover, some regions within Kenya are located in inaccessible locations and do not have permanent healthcare facilities nearby. For example, in parts of Samburu like many other parts in Northern Kenya, impassable roads make it impossible for the locals to obtain urgent medical care.²¹⁸ The residents in such areas including the elderly thus face numerous medical issues such as malaria, eye infections, tetanus, and diarrhoea.²¹⁹ The Constitution of Kenya provides that every person has the right to the highest attainable standard of health including the right to health care services.²²⁰ The equalisation fund collected by the national government is thus utilised to provide water, health facilities and electricity to marginalised areas to bring the quality of services generally enjoyed by the rest of the nation to those areas.²²¹ In addition to the equalisation fund, the State should take other measures to effectively perform its responsibility to take legislative, policy and other measures including setting of standards, to achieve the progressive realisation of

²¹³ Avis W and Khaemba W, Vulnerability and air pollution, University of Birmingham & African Centre for Technology Studies May 2018, <https://www.asap-eastafrica.com/> on 27 November 2019.

²¹⁴ Hoek G, Krishnan R, Beelen R, Peters A, Ostro B, Brunekreef B and Kaufmann J, 'Long-term air pollution exposure and cardio- respiratory mortality: a review' 43 *Environmental Health Journal* (2013), 1.

²¹⁵ <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%208%20of%201999> on 27 November 2019.

²¹⁶ Section 78 (c), The Environmental Management and Co-ordination Act (Act No.8 of 1999)

²¹⁷ Section 93, The Environmental Management and Co-ordination Act (Act No.8 of 1999)

²¹⁸ Oyaro K, Taking health services to remote areas, *African renewal*, December 2016 <https://www.un.org/africarenewal/magazine/december-2016-march-2017/taking-health-services-remote-areas> on 27 November 2019.

²¹⁹ Oyaro K, Taking health services to remote areas, *African renewal*, December 2016 <https://www.un.org/africarenewal/magazine/december-2016-march-2017/taking-health-services-remote-areas> on 27 November 2019.

²²⁰ Article 43 (1)(a), *Constitution of Kenya* (2010).

²²¹ Article 204, *Constitution of Kenya* (2010).

the rights guaranteed under Article 43.²²² This would ensure that elderly persons living in remote areas of Kenya enjoy the right to adequate housing.

4.6. Lack of affordable housing

There exist few quality and affordable rental options for low-income earners who cannot afford to own a home.²²³ This includes elderly persons who are forced to reside in slums.²²⁴ This situation contravenes the right to adequate housing provided for in ICESCR.²²⁵ CESCR general comment no. 4 maintains that affordability is a necessary aspect of adequate housing and that state parties should establish housing subsidies for those unable to obtain affordable housing as well as protect tenants against unreasonable rent levels or increases.²²⁶ As a remedy, the Big Four Agenda was launched to implement four priority initiatives among which is the delivery of 500,000 affordable housing units by 2022.²²⁷ However, 83% of these houses are intended for middle and upper-class income earners while only 17% goes to serve low income segments.²²⁸ The elderly that have low incomes will thus be unable to access such affordable housing units. South Africa has in place subsidies for households earning a gross income of the equivalent of thirty thousand Kenyan shillings with preference given to those above the age of forty and those with special needs.²²⁹ Adopting a similar model would better care for the elderly in Kenya by ensuring they have access to affordable housing. Moreover, it would demonstrate that the State is performing its responsibility to take legislative, policy and other measures including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.²³⁰

²²² Article 21(2), *Constitution of Kenya* (2010).

²²³ Noppen A, The ABC's of Affordable Housing in Kenya, Acumen Fund, 2013, 14 <https://acumen.org/blog/the-abcs-of-affordable-housing/> on 28 November 2019.

²²⁴ Section 78 (c), The Environmental Management and Co-ordination Act (Act No.8 of 1999).

²²⁵ Article 11(1), *International Covenant on Economic, Social, and Cultural Rights*.

²²⁶ *CESCR General Comment* 4, 8(c).

²²⁷ Parliamentary Service Commission, Eye on the 'big four' budget watch for 2018/19 and the medium plan, <http://www.parliament.go.ke/sites/default/files/2018-09/Budget%20Watch%202018.pdf>, 2018, 17.

²²⁸ <https://cytonn.com/topicals/affordable-housing-in-kenya> on 27 November 2019.

²²⁹ <https://cytonn.com/topicals/affordable-housing-in-kenya> on 27 November 2019.

²³⁰ Article 21(2), *Constitution of Kenya* (2010).

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This chapter provides a conclusion and recommendations to the problem of inadequate housing for vulnerable elderly persons whose housing circumstances do not satisfy the requirements of adequate housing. It outlines findings identified in the research. It also draws from previous discussions in chapter one to four to suggest recommendations that the State should undertake to improve access to adequate housing for elderly persons in Kenya.

5.2. Conclusion

Among the findings this study identifies, is that the current legal framework that provides for housing for elderly persons in Kenya is insufficient. This is because the current legislation has gaps such as the lack of regulation of care facilities. This predisposes vulnerable elderly persons to inadequate housing which significantly lowers the quality of their lives. In addition, the research finds that soft law is a useful means of providing guiding principles for housing of elderly persons. However, as it lacks coercive power, it notes that it is necessary to have in place an international legal framework specifically targeting the needs of elderly persons including their right to adequate housing. This legal instrument solely protecting the rights of the vulnerable elderly could be formulated by adopting existing guiding principles as law upon agreement by member states.

The study also finds that adequate housing is comprised of a number of factors such as affordability of housing, accessible location of housing, security of tenure and habitability.²³¹ It thus maintains that it is not sufficient for elderly persons to simply have a living structure but that such a structure must achieve the required standards previously outlined. The study further finds that existing laws in Kenya are not entirely in line with international standards in as far as adequate housing for elderly persons is concerned. For example, the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons which is yet to be adopted in Kenya contains a provision that requires state parties to provide incentives for family members providing home care for the elderly as discussed in chapter 3. No laws in place in Kenya provide incentives for family members caring for their elderly. It would thus be beneficial to adopt the Protocol as part of Kenyan law as families caring for their older members will have sufficient support.

²³¹ *CESCR General Comment 4*, 8.

The paper finds that various factors impede access to adequate housing for elderly persons including inaccessible buildings, lack of affordable housing and unfavourable location of housing. It then analyses the responsibility of the State as established in law in addressing the issues and concludes that the State is required to play a larger role to provide adequate remedies.

5.3. Recommendations

The State has an obligation to ensure the vulnerable elderly live in dignity and respect free from abuse.²³² It is thus necessary that the State establishes in law measures that will facilitate the same. The Care and Protection of Older Members of Society Bill²³³ serves to ensure that facilities established for the care of elderly persons observe all aspects of adequate housing ensuring they are habitable, affordable, and accessible.²³⁴ Thus expediting the parliamentary process of the bill which is currently in the second reading,²³⁵ and passing it to law would greatly benefit elderly persons in such facilities in accessing adequate housing. This would greatly improve the enjoyment of other rights connected to adequate housing. For example, elderly persons are able to receive sufficient health care within residential facilities which would not be possible if they were living under poor conditions that could further aggravate and cause health problems. The State should also regulate costs of admission to private residential care facilities to ensure it is affordable for elderly persons who chose to reside therein.

The Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa provides that state parties are required to ensure that older persons in residential care facilities are provided with care that meets the accepted standards.²³⁶ Thus, it needs to be ratified in Kenya as soon as public views have been collected.²³⁷ Doing so would ensure that residential care facilities are operating under acceptable standards and are providing quality care to the elderly living therein. This would prevent mismanagement of the institutions, thus protecting the residents from any negative effects such as abuse.

²³² Article 57(c), *Constitution of Kenya* (2010).

²³³ http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2018/CareandProtectionofOlderMembersofSocietyBill_2018 on 25 November 2019.

²³⁴ *CESCR General Comment 4*, 8(c).

²³⁵ <http://kenyalaw.org/kl/index.php?id=7937> on 28 November 2019.

²³⁶ Article 11(2), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of older persons in Africa*.

²³⁷ <http://www.socialprotection.go.ke/> on 28 November 2019.

The National Policy on Older Persons and Ageing recognises that housing in both rural and urban areas is inadequate and does not address the needs of the elderly.²³⁸ In addition, infrastructural policies do not address the needs of the elderly as they lack regulatory standards.²³⁹ Further, affordable adequate housing for low-income earners, some of whom are elderly is not available.²⁴⁰ They are thus forced to live under poor conditions in slum settlements.²⁴¹ The State has a responsibility to remedy this as it is required to provide compensating benefits²⁴² for the disadvantaged groups in society, including the elderly unable to obtain adequate housing. It is therefore important that the State sets apart affordable adequate housing programmes that are suited to the needs of the elderly earning low incomes. One way to make this possible is through upgrading slums to make them more habitable. Adopting a Slum Upgrading Act as the Ministry of Land, Housing and Urban Development recommends, would improve the conditions in slums and allow residents to easily access sufficient credit so as to develop their homes. In addition, regulating the cost of housing would greatly benefit the vulnerable elderly unable to obtain affordable housing, which mainly targets middle and high-income earners.²⁴³ It is also imperative that the State ensures the mobility of the elderly living in affordable housing is taken into consideration. This can be achieved by ensuring there are ramps or elevators in place, as well as hand rails in bathrooms to enable elderly persons living with disabilities safer and easier movement thus preventing falls. This also ensures that elderly persons can reside at home for as long as possible, and ensures housing takes into account the safety and well-being of the residents rather than serving as mere shelter.

The State is required to distribute rights behind a veil of ignorance.²⁴⁴ This means that all persons are afforded rights equally despite any advantages or disadvantages they may possess. Consistent with this is the provision in the Constitution that states every person has a right to accessible and adequate housing as well as proper sanitation.²⁴⁵ It is thus problematic that most counties in Kenya

²³⁸Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014, 12.

²³⁹ Ministry of Labour, Social Security and Services: *National Policy on Older Persons and Ageing*, 2014, 12.

²⁴⁰ Noppen A, The ABC's of Affordable Housing in Kenya, Acumen Fund, 2013, 14 <https://acumen.org/blog/the-abc-of-affordable-housing/> on 28 November 2019.

²⁴¹ <http://www.housingandurban.go.ke/project/jet-hotels/> on 15 November 2019.

²⁴² Rawls, *Theory of justice*, 13.

²⁴³ <https://cytonn.com/topicals/affordable-housing-in-kenya> on 27 November 2019.

²⁴⁴ Rawls, *Theory of justice*, 11.

²⁴⁵ Article 43 1(b), *Constitution of Kenya* (2010).

lack residential homes for the vulnerable elderly, which are established by the government.²⁴⁶ This contravenes the principle behind distributing rights behind a veil of ignorance which is that it is just that all persons attain basic rights on equal terms despite their status in society. The National government should therefore address this inequality by establishing residential homes in every county to care for the vulnerable elderly who have been neglected and abandoned by their families. Additionally, socio-economic rights, among which is the right to adequate housing, need to be progressively realised by taking deliberate steps to make them available to all persons including the vulnerable elderly. This can be achieved by ensuring judgements rendered in courts in cases involving socio-economic rights are complied with.

The Constitution provides that the State shall take legislative, policy and other measures to achieve the progressive realisation of socio-economic rights established therein.²⁴⁷ Further, State organs have a duty to address the needs of vulnerable groups in society such as the vulnerable elderly.²⁴⁸ Elderly persons who are displaced by natural calamities such as floods should thus be assisted by the State in attaining adequate housing. Social amenities such as hospitals and roads should be constructed in remote locations to ensure the elderly are able to effectively access such services. This ensures that unfavourable location does not hinder the ability of older persons to enjoy adequate housing.

Elderly persons who are mentally competent should be included in selecting where they would prefer to reside. The State along with their families should ensure that they are living in a safe and secure environment. Adopting these recommendations would improve the general well-being of older members as having access to adequate housing ensures they can in turn access other interconnected rights.

²⁴⁶ National Gender and Equality Commission, *Audit of Residential Institutions of Older Members of Society in Selected Counties of Kenya*, Nairobi, 2016, 21.

²⁴⁷ Article 21(2), *Constitution of Kenya* (2010).

²⁴⁸ Article 21(3), *Constitution of Kenya* (2010).

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