RESETTLEMENT OF VICTIMS OF FORCED EVICTIONS AND PROPRIETORY RIGHTS IN LAND

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Declaration

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

Signed: ....

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

Signed: ....

Harrison Mbori.

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Abstract

Kenya's urban settlement is currently riddled with the challenge of informal settlements. The informal settlers in most cases have no ownership over the land they occupy. This denies the informal settlers other rights that are intrinsically connected with the land including the right to housing, to food, to water and to shelter. Problems arise when these informal settlements are to be demolished as the settlers who have lived in an area for long periods of times usually have no other place to move to.

Kenyan courts have relied on Article 43 of the Kenyan 2010 Constitution to hold that forced evictions must culminate in the relocation and the resettlement of the victims The Court of Appeal in the case Kenya Airports Authority v Mitu Bell 2016, however, noted that Article 43 cannot be used to confer prescriptive rights in the land of another person. As such a lacuna exists as to how resettlement is to be done without granting of prescriptive rights in land. This study thus seeks to give practical solutions that ensure that the victims are relocated, and at the same time are not given prescriptive rights in land.

List of Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
SERI	Socio-Economic Rights Institute of South Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations Human Rights Commission

List of Legal Instruments

Constitutions

Constitution of Kenya (2010).

Acts of Parliament

Community Land Act (Act No. 27 of 2016).

Land Act (Act No. 6 of 2012).

Land Registration Act (Act No. 3 of 2012).

Limitations of Actions Act (Act No. 21 of 1968).

Matrimonial Properties Act (Act No. 49 of 2013).

Bills of Parliament

Evictions and Resettlement Bill (2012).

International Laws

International Covenant on Civil and Political Rights, 16 December 1966, UNTS vol. 999, p. 171.
Universal Declaration of Human Rights, 10 December 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71.

List of Cases

Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security & 3 Others (2011).
Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (2016) eKLR.
Kepha Omondi Onjuro & others v Attorney General & 5 others (2015) eKLR.

*Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2012) eKLR.

1. <u>CHAPTER ONE</u>

Introduction

1.1 Background

Urban settlement in Kenya is riddled with the problem of increasing informal settlements.[1] Thus, as the country experiences rapid urbanization, there exists a proportionate increase in the number of informal settlements that exists.[2] What is a common thread in all these areas, is the fact that the informal settlers don't have any ownership over the pieces of land they occupy and thus they have no formal right of ownership.[3] This causes unprecedented problems as the dwellers of these places have no way of realizing the other rights that are intrinsically connected with land, including the right to housing ,the right to education, the right to water and the right to food.[4]

Notably, forced evictions usually leaves the victims destitute and homeless as in most cases no plans for resettlement of the victims are made.[5] This problem is exemplified especially when the evictions procedures are not followed [6] and when the evictions are carried out using excessive force.[7]

The courts have used the right to housing [8] to impose a duty of the state to provide alternative accommodation and resettle the people who have been evicted. Key among these cases include *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other* where the court held that when people have been evicted, the government needs

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[1] Mutisya E, 'Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements' 2 *International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies 2,* 2011, 197.
[2] Mutisya E, 'Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements', 197-198.
[3] Matu D, 'Walking the Tight Rope: Balancing the property rights of Individuals with the Right to Housing of Informal Settlers' 1(2), *Strathmore Law Review* 2016, 95.
[4] Kariuki F, Ouma S & Ngetich R, *Property Law,* 1 ed, Strathmore University Press, Nairobi, 2016, 192.
[5] Chaudhry S, 'Development-Induced Displacement and Forced Evictions' 41 *Studies in Transnational Legal Policy Journal* 3, 2010, 13.
[6] -< https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23410&LangID=E > Accessed on 1/Jan/ 2019.
[7] Powlowski M, 'Making Public Health Motivated Evictions Consistent with the Right to Housing' 9 *Quinnipiac Health Law* 1, 2006, 271.
[8] Article 43, *Constitution of Kenya* (2010).

to have made adequate provisions for alternative accommodation[9] and resettlement of victims.[10] The ruling in the *Satrose case* was in line with the ruling in *Ibrahim Sangor Osman v Minister Of State For Provincial Administration & Internal Security & 3 Others* which held that the evictions of residents from their informal settlements without proper provision for them to get alternative resettlement was a violation of their rights.[11] The court in *Kepha Omondi Onjuro & others v Attorney General & 5 others* agreed with *Satrose* as it held that it would be inhumane for the state to evict informal settlers who have lived in a place for a long time without providing them with alternative accommodation.[12]

The above streak of endless goals in favor of resettlement was broken by the Court of Appeal in

Kenya Airports Authority v Mitu Bell which held that the right to housing under Article 43 of the Constitution[13] could not confer prescriptive rights in the land of another and as such the government could not be said to have a duty under the article to make sure that the people in the informal settlements are resettled in or are given alternative accommodation.[14]

The ruling in *Mitu Bell* has brought a new issue to the plethora of complexities. On the one hand, it would be inhumane to cast out on the streets the people who were living in informal settlements and on the other it would be wrong to assume that the informal settlers are to be given prescription rights in land that they have not acquired. This study shall thus try and propose practical methods to resolve the stalemate.

1.2 Statement of the problem

Evictions procedures should culminate in the resettlement of the victims especially in instances where the victims have no other place to go.[15] While there exists a need to resettle the victims whom have been evicted, Kenyan laws and policies are silent on how the resettlement is to take

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[9] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2012) eKLR *Para* 84.

[10] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2012) eKLR para 91.

[11] *Ibrahim Sangor Osman v Minister of State For Provincial Administration & Internal Security & 3 Others* (2011) eKLR Page 7.

[12] *Kepha Omondi Onjuro & others v Attorney General & 5 others* (2015) eKLR Para 139.

[13] Article 43, *Constitution of Kenya* (2010).

[14] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

[15] *United Nations, 'Basic Principles and Guidelines on Development based Evictions and Displacement'* 2010, para 52.

place. As such there a conflict as to what quantum of rights the victims of forced evictions will be given in the resettlement areas

1.3 Justification/Significance of the study

The study of the resettlement of people in informal settlements is clearly not a new discussion. Informal settlements present problems that cannot be wished away.[16] This is despite the fact that Kenya and Nairobi have a lot of informal settlers.

In Kenya, no work or authorship has sought to give practical solutions which can be employed to resettle victims without giving them prescriptive rights in land. As such this study's recommendation will be important for the purposes of solving the problems in informal settlements.

1.4 Objectives of the study

The main objective of the study is to investigate and come up with appropriate methods of resettling the victims of forced evictions without giving them prescriptive rights. To achieve the main objective, this study shall investigate the other sub-objectives The specific objectives include;

1. To assess the current legal framework on resettlement of victims of forced evictions in Kenya and internationally.
2. To evaluate duty of the state to resettle victims of forced evictions in Kenya
3. To assess the doctrine that social economic rights cannot confer proprietary rights or prescriptive rights in Kenya

1.5 Hypothesis

The study shall test the following hypothesis;

1. The current legal framework on Forced Evictions is insufficient as it is silent on whether to provide ownership rights or possessory rights.

[16] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2012) eKLR

2. That right to housing confers a duty on the state to resettle victims of forced evictions.
3. While there is a duty to resettle, social economic rights cannot be used to confer prescriptive rights in the land.
4. There exist appropriate methods for the resettling victims of forced evictions.

1.6 Research Questions

This dissertation proposes to investigate the following questions;

1. What is the current legal framework on the resettlement of victims of forced evictions in Kenya?
2. Does the state have a duty to resettle informal settlers in instances where forced evictions have happened?
3. Can the right to housing entitle one to get prescriptive rights in land under the Kenyan 2010 Constitution?
4. What possible and practical methods can the state use to resettle victims without giving them prescriptive rights in land?

1.7 Literature review

This section shall seek to canvas the existing literature through the use of themes. Two themes shall be used. The first theme that shall seek to show that the current problem of informal settlers is directly linked to the systematic alteration of Kenya's traditional tenure systems. The second theme shall canvas the causes of informal settlement and shall show that resettlement of forced evictions victims is necessary for the purposes of the protection of human rights.

I. Systematic alteration of Kenyans traditional land tenure systems as a cause of informal settlements

The current problem of informal settlements is necessarily attributed to the land tenure systems in Kenya. This is premised on the fact that informal settlers solely exist because they lack formal

rights in the land they occupy.[17] However, formal rights don't just exist in a vacuum, they are created and maintained by the underlying tenure system.

Kenyan's current tenure system is one that is inherited from the colonial rule that occurred in Kenya.[18] Pre-independence, Kenya's land tenure systems were initially communal with land being held as commons by the communities that occupied them.[19] The Kenyan traditional land tenure system begins to change drastically when colonization begins to happen. With this changes, western notions of property begin to bring in an era in which Kenyan land and its tenure systems faces expropriation, subversion and destruction.[20]

The era of subversion and destruction of tenure systems begins with the alienation of Kenyan land.[21] The first trace of alienation of Kenyan land can be seen from the Arabs who came to Africa as traders and ended up occupying the 10 Mile Coastal Strip.[22] This Coastal Strip was later transferred from the Sultan to the British government.[23] The second phase of land alienation was characterized by the British government vesting in itself land in not only land along the coastal strip but also land in the interior part of Kenya.[24]

After alienation, a dual system of land tenure begins to emerge.[25] This is premised on the fact that Kenya begins to see parts of its land being vested in white settlers and private corporations which are granted freehold and lease hold titles, while the Africans are pushed into native trust reserves.[26] In the native reserves, African land tenure systems still exists, though this tenure systems are killed by the Swyneton plan.[27]

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[17] Matu D, 'Walking the Tight Rope: Balancing the property rights of Individuals with the Right to Housing of Informal Settlers' 1(2), *Strathmore Law Review* 2016, 95.
[18] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion' 1 *University of Nairobi Law Journal,* 2009, 5.
[19] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 5.
[20] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 5.
[21] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 5.
[22] Republic of Kenya, *The Final Report of the Truth Justice and Reconciliation Commission of Kenya*, 2013, 172-175.
[23] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 5.
[24] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 3.
[25] Adholla M & Oluoch W. 'Security of Tenure and Land Productivity in Kenya', in Bruce W, and Adholla M, (eds) S*earching for Land Tenure Security in Africa*, Kendall/Hunt Publishing Co, Dubuque, 1993, 123.
[26] Adholla M & Oluoch W. 'Security of Tenure and Land Productivity in Kenya', 123.
[27] McAuslan P, *Land Law Reform in Eastern Africa Traditional or Transformative?* Glass House book Routledge, New York, 2013, 20.

Tenure systems in the native reserves begin to change and are abrogated after the Swynerton Plan is released.[28] The plan proposes that individual tenure be issued to even in the native reserves in a bid to harmonize and unify the laws governing land.[29] This necessitated a plethora of laws which culminated in the formation of the Registered Land Ordinance of 1962 which has formed the basis of the current land tenure system in Kenya.[30]

In general, the advert of colonization in Kenyan led to the abrogation of Kenyan traditional tenure systems [31] in favor of a tenure system that advocates for privatization and individualization of the tenure systems.[32] The postcolonial government adopted and continued the colonial approach by institution of laws that protected individualization and privatization with little or nothing being done to address the inequalities that result from privatization.[33]

Individualization is the root cause of informal settlement. This is because informal settlers exist because they lack the formal rights[34] which were not needed under the African way of holding property.[35] Had the traditional tenure systems been allowed to continue, then informal settlers would have access to land. This abrogation of traditional property holding system is built on a supremacist ideology that seek to suppress and subvert African property regime.[36] With this, African property regimes were declared inefficient for the purposes of management of land.[37] This is despite the fact that this tenure system ensured that all people got access to the use of land.[38] As such, the supremacist ideology must itself be questioned as it might be the cause of most land problems in Kenya.

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[28] McAuslan P, *Land Law Reform in Eastern Africa Traditional or Transformative?,* 20.
[29] McAuslan P, *Land Law Reform in Eastern Africa Traditional or Transformative?,* 20.
[30] McAuslan P, *Land Law Reform in Eastern Africa Traditional or Transformative?,* 20.
[31] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 6. See also McAuslan P, 'Land Law and the Making of the British Empire' in Elizabeth C *Modern Studies in Property Law,* Hart Publisher, Oregon, 2007,261-262.
[32] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 6. See also McAuslan P, *Land Law Reform in Eastern Africa Traditional or Transformative?,* 14.
[33] McAuslan P, *Land Law Reform in Eastern Africa Traditional or Transformative?,* 14, 244.
[34] Matu D, 'Walking the Tight Rope: Balancing the property rights of Individuals with the Right to Housing of Informal Settlers', 95.
[35] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 5.
[36] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 6.
[37] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 7.
[38] Okoth O, 'The Tragic African Commons: A century of expropriation, suppression and subversion', 7.

II. Causes of Forced Evictions and the Need for Resettlements

The prevalence of informal settlements in Kenya has been justified by under two major reasons. The first reason being that the Kenyan has faced systematic urbanization, which has caused people to move from their rural home to come to the cities in such of the greener pastures.[39] With this movement, the population of in the urban areas has steady increased resulting in informal settlements. This coupled with the fact that most people in informal settlement have no employment or earn exceedingly low incomes, has contributed to the increasing informal settlement.[40]

While the above is true, there is an underlying problem that seems to have also contributed to the increased informal settlement. This is the lack of proper urban planning.[41] This problem has arisen because of the fact urban planning in Kenya has remained a challenge and will remain a challenge up until key and relevant stake holders are consulted.[42]

Forced evictions are in most cases characterized by the lack of resettlement, which should be done immediately after the completion of the eviction.[43] This is despite the fact that there exists a host of international instruments conferring the right to housing to people living in these informal settlements.[44] While this study does not go as far as to declare that the norm against arbitrary forced evictions has achieved customary international law status as has been proposed,[45] this study

[39] Mutisya E & Yarime M, 'Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements'1 *International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies* 1, 2011, 1-6.
[40] Mutisya E & Yarime M, 'Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements',1-6.
[41] -< https://apsdpr.org/index.php/apsdpr/article/view/131/175 > On 17 December 2019.
[42] -< https://apsdpr.org/index.php/apsdpr/article/view/131/175 > On 17 December 2019.
[43] Ojenda P, 'In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa'51 *Journal of African Law* 5, 2007, 179.
[44] Grabowska J, 'Forced Evictions: Racial Persecution and Social Exclusion of the Roma Minority in Romania' 56 *Columbia Journal of Transnational Law* 1,2018, 871.
See also Romero S, 'Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe' 5 *Northwestern Journal of International Human Rights* 2, 2007, 281.
[45] Marco Simons, 'The Emergence of a Norm against Arbitrary Forced Relocation' 35 *Columbia Human Rights Law Review journal* 2, 2002, 116.

recognizes that the forced evictions result in violations on the right to housing and other rights that are intrinsically connected to land.[46]

As a point of departure, there is a need for the government to provide alternative accommodation and resettle victims.[47] This is because evictions are in most times characterized by unnecessary violence and which causes adverse repercussions on the victims who most times tend to be children and women.[48] It has also been proposed that for purposes of reducing the adverse effects of forced evictions, evictions should first and foremost be done as a matter of last resort.[49] If it is established that an eviction must occur, then the victims should be resettled so that no one is left worse off than they had come in.[50]

The above position has been accepted by the Committee on Economic, Social and Cultural Rights (CESCR) whom in General Comment number seven, said that forced evictions should never result into people being rendered homeless rather that the government should always make sure that they resettle the people whom have fallen victims of forced eviction.[51] This is line with general comment number four of CESCR which stipulated that even people living in informal settlements requires some minimum form of tenure that should be offered to them.[52]

It is for the above reasons that we have procedural safeguards which forced evictions are supposed to adhere to.[53] Key among those procedures safeguards is the stipulation of the role of the government not only in carrying out procedurally correct evictions but also in making sure that they resettle anyone who has been evicted.[54] This is primarily because victims of forced evictions have a right to adequate housing.[55]

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[46] Thiele B, 'Litigating against Forced Evictions under the American Convention on Human Rights' 21 *Netherlands Quarterly of Human Rights journal* 3, 465.
[47] Otiso K, 'Forced Evictions in Kenyan Cities' 19(1) *Singapore Journal of Tropical Geography,* 2003, 253.
[48] Otiso K, 'Forced Evictions in Kenyan Cities' 253.
[49] Otiso K, 'Forced Evictions in Kenyan Cities' 253.
[50] Otiso K, 'Forced Evictions in Kenyan Cities' 253. See also *United Nations High Commissioner for Human Rights (UNHCHR) Fact Sheet No. 25 on Forced Evictions and Human Rights,* 1993.
[51] *CESR General Comment No. 7, The right to adequate housing (Art.11.1): forced evictions* 20 May 1997.
[52] *CESCR General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant),* 13 December 1991.
[53] Malcolm L & Jean P, 'Dignity in the Rubble? Forced Evictions and Human Rights Law*'* ESCR-Net*,* 10.
[54] Wyk J, 'The Role of Local Government in Evictions' 14 *Potchefstroom Elec. Law Journal* 3*,* 2011, 66.
[55] Leigha C, 'Forced Evictions, Homelessness, and Destruction: Summer Games: Olympic Violations of the Right to Adequate Housing in Rio De Janeiro' 8 *Notre Dame J. Int'l & Comp. L.* 3*,* 2018, 43-44.

The above literature reveals a position that has been accepted under the South African Courts and policies.[56] Both the courts and the policies seem to be singing in unison when they say that when homelessness ensues after forced evictions, then the government is supposed to make sure that the people are provided alternative accommodation based on the fact that the South African Constitution has afforded them a right to adequate housing.[57]

While it is important to make sure that people are provide alternative accommodation or resettled after forced evictions, it is also important to make sure that the resettlement places meet certain standards.[58] For example the resettlement areas need to provide the victims access to employment opportunities in order to prevent them from going back to the place where they lived prior to the eviction.[59]

The literature above traces the informal settlements to colonial heritage. It is also apparent that the forced evictions have adverse effects to the right to adequate housing of the people living in informal settlement. It is also clear that after forced evictions have occurred it is prudent for the state to make sure that the people are subsequently resettled. However, the form of the resettlement is yet to be discussed in the Kenyan context.

1.8. Research Methodology

To achieve the objectives of this research and for the purposes of achieving a holistic study, this research shall exploit both secondary sources of information and primary sources of information.

This study will mainly be done through the use of desktop research. In this research a lot of effort shall be devoted to the use of journal articles, books, International laws, cases, articles and any other texts available. This method of research shall be aimed at getting to principles that have been developed over time.

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[56] SERI Institute of South African, '*Evictions and Alternative Accommodation in South Africa; An Analysis of the Jurisprudence and Implications for Local Government'* 2013, 39.
[57] SERI Institute of South African, '*Evictions and Alternative Accommodation in South Africa; An Analysis of the Jurisprudence and Implications for Local Government'* 2013, 39.
[58] SERI Institute of South African, '*Evictions and Alternative Accommodation in South Africa; An Analysis of the Jurisprudence and Implications for Local Government'* 2013, 39.
[59] Chi M, Rao R, Joynes E, & Anna C, 9 'Forced Eviction and Resettlement in Cambodia: Case Studies from Phnom Penh' *Washington University Global Studies Law Review* 39, 2010, 41.

This study shall also use primary sources of information. The primary sources of information shall largely be characterized by the use of interviews with stakeholders; including the ministry of housing, human rights experts and other private organizations that are involved in the resettlement of victims of forced evictions. This research methodology will be used to test the practicality of principles developed. The methodology shall also be instrumental in the coming up with practical solutions to the problem at hand.

1.9 Limitations of the Study

This study has faced the limitation of time constrain. This study has been carried out as part of the course work for the Bachelor of Law degree which is offered at Strathmore. This Study has thus been forced to conform to the prescribed period which have proved to be very limiting.

2.0 Conclusion

This chapter sought to introduce the problem and give a proper background to the problem. This has been achieved by having an introduction to the problem and giving the necessary background to the problem. The chapter then moved on to provide the objectives and research question in a bid to provide the breakdown of how the problem would be tackled. The chapter has further provided a hypothesis to the problem and given a thematized literature review. The chapter also detailed the research methodology employed and finished by detailing the limitations of the study.

2 CHAPTER TWO

Theoretical Framework

2.1 Introduction

A problem with informal settlement discourse in Kenya, is the fact that the problem has not been contextualized within the already existing theories of law. This is despite the fact that, such contextualization is necessary, if not absurdly important for the purposes of having a meaningful study on the problem. This chapter shall thus devote its effort to providing a theoretical underpinning to the problem at hand.

The chapter shall focus on three theoretical underpinnings. The first theory shall be legal positivism. This theory shall be used to justify the study's interpretation of the law especially in relation to the question of whether social economic rights can be used to confer proprietary rights in the land of another. The second theory shall be the Utilitarian Theory of Law. This theory shall be used to show justify the reason why it is the legislator who has to engineer the law and not the judiciary.

I. Legal Positivism

Legal positivism is a legal theory of the law which states that the existence of the law is more a factor of the pervading social circumstances than a factor of the merits of the specific law.[60] In this regards, legal positivism holds that the law is not a creature of logic but more a creature of the prevailing social facts.[61]

For example, John Austin posited that the law is a command of the sovereign which is backed by a sanction.[62] He held that the law sovereign was identifiable by the habitual obedience of the people and the fact that the sovereign was not subject to the another sovereign.[63] Austin conceded

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[60] Green L & Adams T, 'Legal Positivism' Stanford Encyclopedia of Philosophy, 2003.
[61] Green L & Adams T, 'Legal Positivism' Stanford Encyclopedia of Philosophy, 2003.
[62] Wilfrid R, 'Legal Positivism of John Austin and the Realist Movement in American Jurisprudence' 66 *Cornell Law Review* 5, 1981, 991.
[63] Wilfrid R, 'Legal Positivism of John Austin and the Realist Movement in American Jurisprudence' 991.

that there were some laws that emerged from subordinates, however he intimated that the subordinates made laws precisely because the sovereign allowed the subordinates to make the said law.[64] In this regard, the law then becomes a command made by a sovereign and backed by a sanction.[65] Under this Austinian conception the law exists because the sovereign wills that the law be created in that manner. As such, the existence of the law is less a question of the merits of the law but more a question of the prevailing social facts which in this case could be the sovereign. Logic had nothing to do with the creation of this law.[66]

The positivist thesis doesn't proposes that the law's merits or its logic is unimportant, rather, the positivist thesis notes that the laws' logic and its merits do not inform what kind of laws will exists.[67] Rather what informs what kind of law has been made is the pervading social facts that are existent in that society. As such, whether a certain norm is reasonable, good or wise doesn't make the said norm to be law. Further, whether the law be unjust, bad or unreasonable is not a sufficient reason to think that the norm is not law.[68]

This theory of law has been adduced for a very specific reason. The theory is important to understand the approach that this study has taken with regard to the Court of Appeal's decision in the *Mitu Bell* Case. This study has approached the *Mitu Bell* decision as the pervading law in issues of resettlement of forced evictions. While this study contends that the decision is not logic proof, this study approaches the decision as the law in this area and seeks to provide solutions despite the case being what many scholars would characterize as a bad decision. Further, this is the mode of interpretation of the law that has been adopted by the author in this study.

II. Utilitarian Theory of Property

This theory was propounded by Jeremy Bentham. Bentham propounds this theory at a time in which the pervading theory of natural law had already been dethroned.[69] In essence, Jeremy Bentham sought to provide a scientific or rational standard for the existence of the law that did

[64] Wilfrid R, 'Legal Positivism of John Austin and the Realist Movement in American Jurisprudence' 991.
[65] Wilfrid R, 'Legal Positivism of John Austin and the Realist Movement in American Jurisprudence' 991.
[66] Wilfrid R, 'Legal Positivism of John Austin and the Realist Movement in American Jurisprudence' 991.
[67] Green L & Adams T, 'Legal Positivism' Stanford Encyclopedia of Philosophy, 2003.
[68] Green L & Adams T, 'Legal Positivism' Stanford Encyclopedia of Philosophy, 2003.
[69] Sprankling J, *Understanding Property Law,* Carolina Academic Press, Calorina, 2012,

not depend on the idea of nature and morality.[70] With this, Bentham sought to follow the cue of the scholar Hume who proposed that only a theory that was built on utility could fill in the gap that was left after the debunking of Natural Law.[71]

The Utilitarian theory that Jeremy Bentham proposed was initially credited to the scholar Priestley.[72] The theory propounds that the law was a tool that was used to maximize the happiness of the maximum number of people.[73]

The Utilitarian theory can be used to justify private property. [74]Under this conception, property ought to be used as a means to an end, the end being the maximization of the happiness of the greatest number of people. [75]As such, private property exists for the purposes of maximizing the overall happiness or utility of the maximum number of people.[76]

In creation of these law, regard needs to be had to the utility calculus. The utility calculus is the mode in which this maximum happiness for the maximum number of people would be calculated. [77]Basically, Jeremy Bentham posited that the maximum happiness could be calculated by having the sum of the individual pleasures or pains that people in a society felt.[78] If the resultant pleasure was more than the resultant pain, then the law could assume that the said thing was a good tendency.[79] However, if the resultant pain was more, then law could assume that the said tendency was a bad tendency.[80]

Of key importance to this study is the fact that the utility calculus was to be performed by the legislator. [81]In essence, the role of the legislator in making of laws including property laws was to

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[70] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 9th Eds, Sweet & Maxwell, London, 2014, 199.
[71] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 199-201.
[72] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 199-201.
[73] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 199-201.
[74] Sprankling J, *Understanding Property Law,* LexisNexis, San Francisco, 2012, 18.
[75] Sprankling J, *Understanding Property Law,* 18-19.
[76]Sprankling J, *Understanding Property Law,* 18-19.
[77] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 199-201.
[78] Sprankling J, *Understanding Property Law,* 18-19.
[79] Read D, 'Utility Theory From Jeremy Bentham to Daniel Kahneman' Department of Operational Research, London, Working Paper No: LSEOR 04-64, 2004, - < http://eprints.lse.ac.uk/22750/1/04064.pdf > on 30 January 2020.
[80] Read D, 'Utility Theory From Jeremy Bentham to Daniel Kahneman' Department of Operational Research, London, Working Paper No: LSEOR 04-64, 2004, - < http://eprints.lse.ac.uk/22750/1/04064.pdf > on 30 January 2020. Read D, 'Utility Theory From Jeremy Bentham to Daniel Kahneman' Department of Operational Research, London, Working Paper No: LSEOR 04-64, 2004, - < http://eprints.lse.ac.uk/22750/1/04064.pdf > on 30 January 2020.
[81] Sprankling J, *Understanding Property Law,* 18-19.

do what is essential to the happiness of the maximum number of people. If this utility calculus was affected, then the resultant effect was a proportionate sum of evil, which the legislator ought to avoid.[82]

Bentham further observed that property was creature of the law.[83] In this regard, Bentham posited that property and the law are born together and die together. If one takes away the law, the property also dies together with the law. [84] In this regard, then property relations are a creature of the law made by a legislator for the purposes of the maximization of the greatest good for the greatest number of people.[85]

This theory has been tendered for two reasons. Firstly, the theory is from a positivistic school of thought.[86] Under this school of thought, the law ought to be interpreted as is, without the need to rely on the moral persuasions. This thinking is instructive on the interpretation of the law adopted in this study.

Secondly, this theory provides that the measuring of the greatest happiness for the greatest number of people is to be done by the legislator.[87]This is premised on the fact that it was the role of the legislator to weigh the total pain versus the pleasure and with this make a determination of what laws were to be made.[88] In this regard, then the legislator becomes the key decider in the property relations that result in a society on the basis of this utility calculus.[89] With this, the role of the legislator in the formulation of the property relations becomes exemplified.

Conclusion

This chapter has provided two key legal theorems. The first theorem provided is the theory of legal positivism. This theorem has been used to show that this study has sought to interpret the law as is. This theory is also instructive in the understanding of the ruling of the Court of Appeal in the

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[82] Read D, 'Utility Theory From Jeremy Bentham to Daniel Kahneman' Department of Operational Research, London, Working Paper No: LSEOR 04-64, 2004, - < http://eprints.lse.ac.uk/22750/1/04064.pdf > on 30 January 2020.
[83] Sprankling J, *Understanding Property Law,* 18-19.
[84] Sprankling J, *Understanding Property Law,* 18-19.
[85] Sprankling J, *Understanding Property Law,* 18-19.
[86] Sprankling J, *Understanding Property Law,* 18-19.
[87] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 199-201.
[88] Read D, 'Utility Theory From Jeremy Bentham to Daniel Kahneman' Department of Operational Research, London, Working Paper No: LSEOR 04-64, 2004, - < http://eprints.lse.ac.uk/22750/1/04064.pdf > on 30 January 2020.
[89] Maxwell F, '*Lloyd's Introduction to Jurisprudence*' 199-201.

Mitubell Case. The second theory that has been used is the utilitarian theory of law. This theory has been tendered to show that the regulation of property relations is the domain of the legislator. This view will be especially be instructive in understanding the view adopted by the study in latter chapters.

3 CHAPTER THREE

Legal Framework Regulating Resettlement of Victims of Evictions

3.1 Introduction

The previous chapter sought to provide a theoretical justification for this work. It established legal positivism and the utilitarian theory of law as the theoretical underpinnings that this work was going to rely.

This chapter seeks to examine the legal framework surrounding the duty to resettle victims of forced evictions. This chapter shall seek to answer the question of whether there is indeed a duty on the state to make sure that the victims of forced evictions are resettled by being provided alternative accommodation. Following the decision of the court of Appeal in *Mitu Bell*, the duty to resettle is not an obvious one. This is because the Court of Appeal's holding that structural interdicts cannot confer social economic rights.

This chapter seeks to provide some context of what the state ought to do in instances where forced evictions are happening in a bid to establish the states duty to resettle the victims. To answer this question, this chapter shall begin by laying out a small definition of forced evictions and shall proceed to give justifications for evictions. the chapter shall then proceed to analyze the current domestic and international legal framework around the duty to resettle. The chapter shall then conclude.

3.2 Definition of forced evictions and Justification for forced evictions.

General Comment number 7 of CESCR on The Right to Adequate Housing defines forced evictions, "as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[90] This definition has been adopted by the

[90] *CESR General Comment No. 7,* Para 3.

Kenyan Evictions and Resettlement Bill 2012, which again defines forced evictions as the,“ as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”[91] While the bill is not binding the definition that has been adopted is indicative of the intention that parliament intends to adopt after the passing of the bill to law.

From the above, forced evictions constitute the act of uprooting people from a place they occupy, against their will and without the proper legal process being followed.[92] The forced evictions are most times characterized by the fact that they are not accompanied by provision of adequate and alternative accommodation or are marred with illegality and undue procedures that make the evictions inhumane and contrary to human dignity.[93]

The practice of forced evictions has mostly occurred in the context of informal settlements .[94] The practice can be noted to have far reaching consequences not only to the rights to housing of the people whom have been evicted [95] but also to the other rights that are intrinsically connected to land including the right to education, the right to water and the right to food among other rights.[96]

In most instances, forced evictions are usually justified by the evictors as being carried out in pursuance of some public good.[97] The public goods that are usually used in this justification usually include the beautification of cities, decongestion of the city, protection of public health and safety, building of infrastructure, improving the living conditions of the citizens among other reasons.[98] In Kenyan the justification that has been offered in most cases for demolition of

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[91] Section 2, *Evictions and Resettlement Bill* (2012).
[92]Miloon K, ‘The United Nations Speaks out on Forced Evictions’ 5 *Development in Practice Law Journal* 1, 1995, 65.
[93] Ojenda P, ‘In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa’, 173.
[94] Sudeshna C, ‘Children's Role in Humanizing Forced Evictions and Resettlements in Delhi’ 17 *Children, Youth and Environments law* 1, 2007, 199-200.
[95] Sudeshna C, ‘Children's Role in Humanizing Forced Evictions and Resettlements in Delhi’ 199-200.
[96] Kariuki F, Ouma S & Ngetich R, *Property Law,* 1 ed, Strathmore University Press, Nairobi, 2016, 192.
[97] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights,* Habitat International Coalition, Amsterdam,1995,27.
[98] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights,* Habitat International Coalition, Amsterdam,1995,27.

informal settlements is demolition for purposes of building of important and strategic infrastructure like roads and railways.[99]

The nobility of the reasons for forcefully evicting people is not in doubt. In fact, the justifications for forced evictions in most times fall within the public interest category.[100] However, since the forced evictions usually have far and reaching consequences on the people whom are affected,[101] then the state ought to make sure that some of those far reaching consequences are neutralized by making sure that people are provided some alternative accommodation upon eviction.[102] This will go a long way in making sure that the people in informal settlements get some sort of security of tenure in the lands that they occupy.[103]

3.3 International Legal Framework on Forced Evictions

International law in a bid to cut down on forced evictions has come in to regulate the practice of forced evictions. The International Covenant on Economic, Social and Cultural Rights adopted in 1966 and entering into force in 1976,[104] had been termed as the single most important formulation of the protection against forced evictions.[105] The convention in Article 11 stipulates that;

> *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent*.[106]

The Universal Declaration of Human Rights in Article 25 notes that;

> *Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary*

[99] -< http://ohrh.law.ox.ac.uk/rude-awakening-for-over-20000-residents-of-kibera-in-kenya/ > on 29 June 2019.
[100] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights,* 27.
[101] *CESR General Comment No. 7,* Para 4.
[102] Wyk J, 'The Role of Local Government in Evictions', 10.
[103] *CESCR General Comment No. 4.*
[104] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS 993.
[105] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights, 39.*
[106] Article 11, *International Covenant on Economic, Social and Cultural Rights.*

social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[107]

In respect to the Universal Declaration of Human Rights, it is important to note that the declaration are non- binding.[108] While this study does not go as far as to declare that the Declaration has achieved customary international law status, some scholars opined that the Universal Declaration of Human Rights has achieved customary international law status noting that even though the convention is only a declaration, the achievement of Customary International Law status has given the convention a binding nature.[109] It is also important to note that the Universal Declaration of Human Rights, has continued to be an inspiration to the both International laws and National laws.[110] With this, the Declaration has some weight in terms of the definition it offers despite the fact that it is non-binding.

The International Convention on Civil and Political Rights[111] (ICCPR) in Article 17 stipulates that no one shall be subjected to arbitrary or unlawful interference with his or her home [112] The ICCPR further stipulates that all persons are entitled without discrimination, to equal protection before the law.[113] By protecting people's homes from unlawful interference and giving them equal protection under the law, the ICCPR has taken steps to protect people from forced evictions as the people in informal settlements cannot be evicted without carrying out due process.[114]

CESCR's in General Comment No. 7 stipulates in recognition of the harmful repercussions of forceful evictions, that before forceful evictions occur, the following procedural safeguards should be implemented[115];

I. There must consultation with the people who are affected.

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[107] Article 25, *Universal Declaration of Human Rights*, 28 July 1951, 2545 UNTS 189.
[108] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights, 39. See also* Glendon M, 'The Rule of Law in the Universal Declaration of Human Rights' 2 *Northwestern Journal of International Human Rights* 1, 2004, 5.
[109] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights, 39.*
[110] Scott L, *When Push Comes to Shove: Forced Evictions and Human Rights, 39.*
[111] *The International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171.
[112] Article 17, *The International Covenant on Civil and Political Rights.*
[113] Article 17, *The International Covenant on Civil and Political Rights.*
[114] Matu D, 'Walking the Tight Rope: Balancing the property rights of Individuals with the Right to Housing of Informal Settlers', 105.
[115] *CESR General Comment No. 7,* Para 15.

II. There must be notice which must be issued at a reasonable time before the evictions is done.
III. Information about the eviction must be provided to the people who are bound to be affected by the eviction process.
IV. There must also be government officials or representatives of the government and other neutral parties during the eviction.
V. The person carrying out the evictions must be properly identified.
VI. The evictions must be done during the day and must be done in proper weather.
VII. Finally, there must be legal aid to persons who are in need of the aid.[116]

Of importance to this study is the fact that, the General Comment notes that the state should not carry out evictions that in the end will leave people homeless and vulnerable to other human rights violations.[117] Rather the General Comment recommends that when the state carries out evictions, resettlement procedures must ensue.[118]

In the United Nations' 'Basic Principles and Guidelines on Development based Evictions and Displacement', the United Nations puts in place procedural safeguards similar to those that have been adopted by CESCR in General Comment number 7.[119] Unlike General Comment Number 7, the guidelines further stipulate that the forced evictions should never result in homelessness, rather all forced evictions should culminate in the resettlement and reallocations of the victims.[120] The guidelines further continue to put in place a criteria that the all new resettlement places must meet.[121] The criterial stipulates that the new settlement areas must have;

(a)security of tenure;

[116] *CESR General Comment No. 7,* Para 15.
[117] *CESR General Comment No. 7,* Para 16.
[118] *CESR General Comment No. 7,* Para 16.
[119] *United Nations, 'Basic Principles and Guidelines on Development based Evictions and Displacement'* 2010, para 45 to 51.
[120] *United Nations, 'Basic Principles and Guidelines on Development based Evictions and Displacement'* 2010, para 43.
[121] *United Nations, 'Basic Principles and Guidelines on Development based Evictions and Displacement'* 2010, para 52.

(b)must have essential services including facilities for cooking, heating, portable water, garbage disposal, and emergency services.;

(c) affordable housing;

(d)must be habitable in the sense that they provide the habitants of the houses adequate space, protection from harsh weather conditions and provide physical safety for the occupants;

(e) facilities that ensure that the housing is accessible to disadvantaged groups;

(f) access to employment places and other amenities including health care and schools;

(g) culturally appropriate housing.[122]

Notably, the Guidelines unlike the General Comment have been heavily relied on in the Kenyan jurisprudence. The guidelines featured in the *Satrose Case*[123], *Kepha Case*[124] before the Court of Appeal in the *Mitubell Case* rejected the guidelines and declared that they are inapplicable in Kenya[125] a move that has been described as sloppy.

Realistically speaking while the guidelines seem to have set a criterion that is good on paper, the ability of a state like Kenya to provide alternative housing that meets the above criteria is very much in doubt. This is because the kind of housing that already exists is likely not to meet the criteria set out in the guideline. Further, the Kenyan state and perhaps other states in the global south do not have an abundance of amenities such as school and hospital. Thus, requiring a State like Kenya to provide housing that has access to a school, or a hospital might be a tall order. This thus brings out a deeper question of how likely are states are to meet these tall requirements. A progressive approach is thus required in the realization of those guidelines as one cannot call upon

[122] *United Nations, 'Basic Principles and Guidelines on Development based Evictions and Displacement'* 2010, para 52.
[123] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2012) eKLR.
[124] *Kepha Omondi Onjuro & others v Attorney General & 5 others* (2015) eKLR.
[125] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

the State to do the what is impossible.[126] This is the only way by which the guidelines can be attained.

Notably, the Kenyan 2010 Constitution stipulates in Article 2(6) that any treaty or conventions that has been ratified by Kenya shall forms part of Kenyan law.[127] As such any treaties that Kenya has ratified forms part of Kenya law. Kenya has ratified the International Covenant on Economic, Social And Cultural Rights[128] and the International Covenant on Civil and Political Rights.[129] This means that the provisions of the two laws are applicable in Kenya.[130] By virtue of this ratification, both instrument are binding on Kenya and form part of Kenyan laws.

From the elucidation of international law just presented, it is apparent that forced evictions must always culminated in the resettlement of victims of forced evictions. It is also clear that it is the state to make sure that this resettlement occurs.

3.4 Kenyan Law

The Kenyan 2010 Constitution has Article 43(b) which stipulates that every person has the right to adequate housing.[131] This is the provision that has been used in the litigation of the question of whether the state has a duty to resettle victims of forced evictions with the diverse opinions of the courts resulting. Like any other social economic rights, there is a need for the progressive realization to the right to housing as this right has budgetary constraints to the government.[132]

Under the Kenyan Law, Kenya has the Evictions and Resettlement Bill 2012.[133] The bill was is sponsored by Shakeel A. Shabbir, with its first reading being carried out on 12th September 2012.[134]

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[126] Mbazira C, 'A path to realizing economic, social and cultural rights in Africa? A critique of New Partnership for Africa's Development' 4 *African Human Rights Journal* 36, 2004, 36.
[127] Article 2(6), *Constitution of Kenya,* 2010. See also Kabau T and Ambani J, 'The 2010 Constitution and the Application of International Law In Kenya: A Case of monism or regression to dualism?' *African Nazarene University Law Journal* (2013), 37.
[128] - < http://kenyalaw.org/treaties/treaties/873/International-Covenant-on-Economic-Social-and-Cul > on 1 July 2019.
[129] <http://kenyalaw.org/treaties/treaties/159/International-Covenant-on-Civil-and-Political-Rights > on 1 July 2019.
[130] Kabau T and Ambani J, 'The 2010 Constitution and the Application of International Law In Kenya: A Case of monism or regression to dualism?', 37.
[131] Article 43(b), *Constitution of Kenya* (2010).
[132] Mbazira C, 'A path to realizing economic, social and cultural rights in Africa? A critique of New Partnership for Africa's Development' 36.
[133] *Evictions and Resettlement Bill* (2012).
[134] -< http://kenyalaw.org/kl/index.php?id=525 > on 23rd September 2019.

The bill is yet to have its second reading though almost seven years have lapsed since the bill had its first reading. As such since the bill is not yet law, it is not binding on the State[135].

The provisions are strikingly similar to the provisions in General Comment No.7, with section 6 providing that before any evictions are done, there must be a resettlement action plan in place.[136] The bill further puts in place procedures that should be followed before an eviction occurs and procedures to be followed after an eviction occurs.[137] The bill also puts up mechanisms for monitoring of evictions procedures.

The bill although a good document, fails to shed light on the practical and salient aspects of resettlement. The bill doesn't say how the resettlement are going to occur and what rights the victims are going to be given in the property they are going to be resettled on after they have been evicted. The bill might thus not have the anticipated success in solving the problems of forced evictions.

As previously noted, the bill is not yet law and thus the bill is at best a guideline of what should happen. Perhaps the face of the bill will receive a face lift after the bill has been subjected to the motions of parliamentary procedures.

3.5 Conclusion

This chapter sought to provide a legal framework both under International law and also under Kenyan law. This chapter has demonstrated that there exists a robust international mechanism, that governs procedures of forced evictions and provides for alternative accommodation. It has been submitted that some of those provisions have been brought into the Kenyan sphere by virtue of Article 2 of the Kenya 2010 Constitution. This chapter has also established that under Kenyan law, there exists constitutional provisions that provide for the right to housing. This chapter has also shown that while Kenya has the bill, the bill is insufficient to address the problem that this study is grappling with.

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[135] Matu D, 'Walking the Tight Rope: Balancing the property rights of Individuals with the Right to Housing of Informal Settlers', 105.
[136] Section 6, *Evictions and Resettlement Bill* (2012).
[137] *Evictions and Resettlement Bill* (2012).

From the legal framework just provided, it is apparent that the eviction procedures should not result in the rendering of people homeless. Rather, the procedure should culminate in the resettlement of the victims of forced evictions. The state thus has a duty to make sure that the evictions conducted by the state culminate in the resettlement of the victims.

4 CHAPTER FOUR

Right to Housing and the Proprietary Rights in Land.

4.1 Introduction

The previous chapter sought to evaluate the states duties in relation to the provision of alternative accommodation. That chapter established that indeed the state has some duties in relation to forced evictions and more so, the duty to resettle victims of forced evictions. The next step for this study is to make an evaluation of whether the right to housing can provide one with proprietary rights. This is important because this was one of the contentions that the Court of Appeal in the *Mitu Bell Case*.

The main objective of this chapter shall be to demonstrate that the Right to Housing as a social economic right, cannot confer proprietary rights in the land of another person. To demonstrate this, the chapter shall begin by breaking down the recognized means of acquisition of interests in the property. This is important as it will provide an analysis of the current modes of acquisition of property. The chapter shall then discuss the enforcement of social economic rights in the context of right to housing by highlighting the jurisprudence in Kenya. The chapter shall provide a way forward in a bid to reconcile the cautions approach adopted by the Court of Appeal and the duty to resettle victims of social evictions.

4.2 Modes of Acquisition of Proprietary Rights in land under Kenyan Law

Under Kenyan law, it is recognized that there exists certain ways of acquiring interests in the property.[138] Section 7 of the Land Act list modes of acquisition of title to include; allocation of land acquisition by way of an adjudication process, compulsory acquisition by the state, prescription settlement programs, transmissions; transfers, long term leases exceeding twenty one years created or any other manner prescribed in an Act of Parliament.[139]

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[138] Ojenda T, *Principles of Conveyancing in Kenya,* Law Pub Africa, 2008, 64.
[139] Section 7, *Land Act* (Act No. 6 of 2012).

Title once acquired can be held either as public land, private land and community land.[140] Under the community land title holding system, community as a whole is the unit that is vested with the ownership of the property.[141] Section 2 of the Act has defined Community a distinct group that shares any of the following characteristics; "(a) common ancestry; (b) similar culture or unique mode of livelihood; (c) socio-economic or other similar common interest; (d) geographical space; (e) ecological space; or (f) ethnicity." Under this mode of holding title groups are able to hold property together upon showing of any of these characteristics. This innovation is important as it provides for a means through which groups such as informal settlers can hold property as they would be sharing the common interest.

Acquisition of interests in the land of another can be achieved way of a purchase and sale agreement.[142] Under this mode of acquisition, the vendor transfers the property in the land to the buyer who then acquires the ownership interest in the property at hand.[143] This mode has been recognized under the Land Act 2012[144] and the Land Registration Act 2012.[145] As previously noted, informal settlers have no formal rights in the land they occupy because they don't seek to acquire the property they occupy by this mode or the modes in section 7 of the Land Act.

The laws of Kenya recognize other interests that can be seen to exist in land. The first of these interests includes charges.[146] In this mode, the chargor acquires some rights including the right of resale upon the registration of a charge on another's land. By this, the chargee is a said to have acquired interest in the chargor's land.[147]

Another mode of acquisition of interests in the land of another would be by way of adverse possession as per the provisions of section of the Limitations of Actions Act.[148] This occurs in instances where a person who is not an owner of the property begins squatting on the land for a period of 12 years. The squatter after the said period gets title in the property. Informal settlers

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[140] Article 61, *Constitution of Kenya* (2010).
[141] Section 4, *Community Land Act* (Act No. 27 of 2016).
[142] Lacy F, 'Land Sale Contracts in Bankruptcy'21 *UCLA Law Review* 2, 1973, 477.
[143] Lacy F, 'Land Sale Contracts in Bankruptcy' , 477.
[144] *Land Act* (Act No. 6 of 2012).
[145] *Land Registration Act* (Act No. 3 of 2012.
[146] Section 78, *Land Act* (Act No. 6 of 2012).
[147] Section 96, *Land Act* (Act No. 6 of 2012).
[148] Section 7, *Limitations of Actions Act* (Act No. 21 of 1968).

cannot rely on this means of acquisition of property as all the property they occupy is owned by the government and one cannot adversely acquire land from the government.[149]

Kenyan law has recognized matrimonial property as a means of acquisition of property in the land of a spouse. In this mode, the spouse acquires some interest in the land of the spouse on the basis that they are married to one another.[150]

Finally, the law allows one to acquire interests in the land of another person by way of transmission. The transmission occurs by way of operation of the law, which is more prominent in instances where the owner of the property has either died or has been declared bankrupt by the law.[151]

The above represents a summary of the recognized modes of acquisition of proprietary interests in the land of another that are recognized under the Land Act the Land Registration Act and the Community Land Act. It is apparent that informal settlers don't acquire any interests by either of the methods listed above.

However, Section 7 of the Land Act provides that parliament is at liberty to reengineer property relations in bid to create new modes of conferring interests in property to people.[152] As such, parliament is at liberty to say for example that the victims of forced evictions after resettlement shall be vested with lease holds which shall vest in the informal settlers as a community under the Community Land Act. Such a declaration would not only be in-line with section 7 of the Land Act,[153] but would also be in-line with the doctrine of separation of powers which confers parliament with the competency to make laws.[154]

[149] Section 7, *Limitations of Actions Act* (Act No. 21 of 1968).
[150] *Matrimonial Properties Act* (Act No. 49 of 2013).
[151] *Land Act* (Act No. 6 of 2012).
[152] Section 7, *Land Act* (Act No. 6 of 2012).
[153] Section 7, *Land Act* (Act No. 6 of 2012).
[154] Article 94 *Constitution of Kenya* (2010).

4.2 Right to Housing cannot confer Proprietary Rights

When Africa experienced a wave of democracy, most African countries adopted new constitutions.[155] As a strikingly similar feature in all the new constitutions was the fact that all the constitutions had social economic rights embedded in them.[156] Kenya was not left behind as in the 2010 Constitution, Kenya introduced a host of social economic rights including the right to housing, to the highest at attainable health, to be free from hunger and to have adequate food of acceptable quality, to be in a clean and safe environment, to social security and finally to education.[157]

Key to this study, is the right to accessible and adequate housing, as the protections against forced evictions are enshrined wholly in this right. In Kenya particularly, this right to housing has been the hot bed for litigation especially concerning cases to do with forced evictions. As such, the protections against forced evictions, and the duty of the state to resettle people who have been evicted is enshrined in this right of adequate housing.

As a point of departure, it is now an accepted fact that social economic rights are justiciable. This is a departure from the olden view.[158] The olden view held that social economic rights including the right to adequate housing required great financing to fulfil and that the social economic rights were usually drafted in such vague terms that the rights could not be viewed as justiciable in any respect.[159] Currently, there is some agreement and consensus that though social economic rights have some budgetary effects, this does not bar the rights from being justiciable.[160]

The justiciability of social economic rights means that there exists in place court mechanism which are mandated with the powers to check whether there has been any compliance with the social

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[155] Danwood M, 'A Full Loaf Is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' 49 *Journal of African Law* 2, 2005, 207.
[156] Danwood M, 'A Full Loaf Is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' 207.
[157] Article 43, Danwood M, 'A Full Loaf Is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' ,207.
[158]Michael K, 'The Justiciability of Economic, Social and Cultural Rights' 14 *Commonwealth Law Bulletin* 4, 1425-1426.
[159] Michael K, 'The Justiciability of Economic, Social and Cultural Rights', 1425.
[160] Michael K, 'The Justiciability of Economic, Social and Cultural Rights', 1425.

economic rights in question.[161] As such, courts have power under social economic rights to make determinations that will have budgetary constraints.

The Kenyan courts have used the right to housing to hold that in cases of forced evictions, alternative accommodation must be provided to the people who have been evicted. The leading case law on this point is the *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* which involved a parcel of land that belonged to the Kenya Railways was inhabited by residents of Muthurwa Estate. The residents had been evicted from the land at 5.00 am in the morning. The petitioners had gone to the court to affirm that their rights had been violated and one their rights being the right to adequate housing had been violated. The court on this point noted that

> *that the person responsible must provide just compensation for any damage incurred during eviction and sufficient alternative accommodation and must do so immediately upon evictions. At the very minimum, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilitate*[162]

With this in mind the court held that; "*in this case, I must therefore agree with the Petitioners that their eviction from the suit premises without a plan for their resettlement would increase levels of homelessness and this Court must strive to uphold the rights of the Petitioners and especially the right to be treated with dignity.* [163]"

The Kenyan High Court had held a similar thing in the case *Ibrahim Sangor Osman v Minister of state for provincial administration & internal security & 3 others* where the court had noted in the dicta that

> *There was no indication that they would be moved to some alternative settlement…..No such settlement was eventually provided. The Petitioners were merely thrown out, as it*

[161] Michael K, 'The Justiciability of Economic, Social and Cultural Rights', 1425.

[162] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2016) eKLR Para 82.

[163]*Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 other (*2016) eKLR Para 81.

were, without care about where they were going. The eviction threw them into an open, hostile and shelter-less environment where there was no single basic necessity of life.[164]

And for this reason, among many other reasons the court noted that the rights of the petitioners had been violated.

The court in *Kepha Omondi Onjuro & others v Attorney General & 5 others* noted that it would have been inhumane for the court to evict people from places where they had lived without providing them alternative accommodation.[165]

In the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* where the court noted that;

> *Proprietary rights to land cannot be acquired in the name of enforcement of socioeconomic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socioeconomic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation.*[166]

With this, the Court of Appeal held that the use of Right to Housing cannot be used by the court as a way to confer proprietary rights to people who did not have them initially. As such, social economic rights cannot be used to confer proprietary rights.

The Court of Appeal ruling in *Mitu Bell* is quite different from the other decisions that have been presented. Notably, the decision in *Mitu Bell* was argued on the basis of a structural interdict which is quite different from the other decisions which did not involve structural interdicts. Structural interdicts are orders issued by the court ordering a person to do something.[167] Further, it is

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[164] *Ibrahim Sangor Osman v Minister Of State For Provincial Administration & Internal Security & 3 Others* (2011) eKLR Page 7.

[165] *Kepha Omondi Onjuro & others v Attorney General & 5 others* [2015] eKLR Para 139 and para 142.

[166] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

[167] Mbazira C, '*Litigating Socio-Economic Rights in South Africa; A Choice between Corrective and Distributive Justice'* Pretoria University Law Press, 2009, 166.

important to note that this decision has received some scathing attacks for the rejection of the idea of use of structural interdicts in the implementation of social economic rights.[168]

While solid reasons for why the court held as it did cannot be provided, it has been submitted that the decision had some flaws to it. Firstly, it has been submitted that the Courts rejection of structural interdicts was a huge set back to the implementation of social economic rights.[169] Further, it has been submitted that the Court's declaration that the United Nations Guidelines on forced Eviction are inapplicable was sloppy. This is because Kenya at the time did not have any other document to guide the Eviction Procedures.[170] Lastly the failure to consider jurisprudence from South Africa demonstrate ignorance on the fact that the Kenyan constitution was borrowed from the south African one.[171]

While the criticisms have merit, the decision had a few things it got right. The first thing that the Court of Appeal got right is the fact that the regulation of property relationships is the sole domain of the legislature and the executive but not the Judiciary.[172] Indeed, the Judiciary is tasked with the interpretation of already existing laws.[173] The Judiciary thus cannot go forth and forge relationships that have not been set forth in any laws as this lies solely in the domain of parliament. A step in this direction would only be an affront to the doctrine of separation of powers.[174] It is for this reason that section 7 of the Land Act empowers parliament with the role of defining the relationships between man and land and not the judiciary.[175]

Secondly, this decision ought to be commended as it prohibits a situation in which informal settlers gain direct rights to land by virtue of the fact that they are informal settlers. This kind of situation is dangerous as it may provide an incentive for people to become informal settlers. While this study recognizes that informal settlers are forced to live in such settlement because of lack of

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[168]-< https://ohrh.law.ox.ac.uk/turning-back-the-clock-on-socio-economic-rights-kenyas-court-of-appeal-decision-in-the-mitu-bell-case/ > On 26th September 2019. Nyawa J, 'The Role of Courts in Forging Innovative Remedies: Interrogating Kenyan Court of Appeal's Mitu Bell Judicial Myth and Formalism' SSRN, 2019, 9.
[169]Mwenda M, 'The Jurisprudence of Kenya's Court Of Appeal On Socio-Economic Rights' SSRN, 2019, 14-17.
[170] Mwenda M, 'The Jurisprudence of Kenya's Court Of Appeal On Socio-Economic Rights' SSRN, 2019, 14-17.
[171] Mwenda M, 'The Jurisprudence of Kenya's Court Of Appeal On Socio-Economic Rights' SSRN, 2019, 14-17.
[172] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.
[173] Article 160, *Constitution of Kenya* (2010).
[174] Lumumba P & Franceschi L, '*The Constitution of Kenya 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 18.
[175] Section 7, *Land Act* (Act No. 6 of 2012).

employment and poverty, this study notes that the government cannot provide a nudge to such settlers by rewarding them with the of interests in land they did not own. As such a cautious approach to solving this problem must be applied. This cautious approach can only be done by parliament and the Judiciary.

4.3 Way Forward

This dissertation has been grappling with the fact that there seems to be no guidelines as to how the alternative accommodation is going to be carried out in the event that the state has decided to forcefully evict people. The problem has been the fact that while it seems that the state under International law must resettle people after forceful evictions, this cannot be done in a manner that confers formal rights to the property they move people into. This is because as previously established by the Court of Appeal in *Mitubell*, prescriptive rights in land cannot be acquired through social economic rights which in this case would be the right to housing. As such, the state would have to find a way to confer alternative accommodation without conferring formal rights in land.

So far, this study has established that alternative accommodation or resettlement is something that is required under the International law when forced evictions have happened. This study has also shown that rights to land cannot be acquired under the guise of social economic rights in line with the ruling of the Court of Appeal in *Mitu bell.* What now remains is the coming up with appropriate methods that will try balance these two positions.

This study proposes that one way to reconcile these two and divergent views would be for the state to vest leases on the victims under the Community Land holding tenure system. This proposal fits in with the Court of Appeal decision because as the Court of Appeal noted, it is the role of parliament to engineer relationship between property and people. This role of parliament has been well recognized by the Land Act.[176] Parliament can thus come up with legislation or amend the Evictions and Resettlement Bill, to confer lease hold rights on victims of forced evictions without being in contravention with the *Mitu bell Case.*

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[176] Section 7, *Land Act* (Act No. 6 of 2012).

The leasehold can be vested in the victims as a community, as the victims of forced evictions can be deemed to be a community as they share common interests as required by section 2 of the Community Land Act. [177] However, this proposal will only work if parliament amends the Evictions and Resettlement Bill (2012) and includes such a provision.

This proposal will fit in well with the *Mitu bell Case* and at the same time provide alternative accommodation to the victims of forced evictions.

4.4 Conclusion

This chapter set out to reconcile the views adopted by the Court of Appeal in the *Mitu bell case* and the duty of the state to resettle victims of forced evictions.

This chapter has shown that indeed the Right to Housing and to an extension, the duty to be resettled after forced evictions, cannot be used as a tool to provide informal settlers with ownership rights in the property of another. This argument has been achieved by first and foremost summarizing the known modes of acquisition of interest in land. The chapter then summarized the current jurisprudence in Kenya and finished by making the argument that leases vesting in the victims as a community is the only possible reconciliation method between the position adopted by the Court of Appeal decision and the view that forced eviction must climax in the resettlement of victims of forced evictions.

[177] Section 4, *Community Land Act* (Act No. 27 of 2016).

5. <u>CHAPTER FIVE</u>

5.1 Introduction

This study has sought to come up with appropriate methods for the reconciliation of the *Mitu Bell* Case and the duty of the State to resettle victims of forced evictions. This chapter shall seek to provide an appropriate conclusion to the whole study and make recommendations.

5.2 Conclusion

This study aimed at the very end to propose an appropriate method that can reconcile the decision of the Court of Appeal in *Mitu Bell* with the duty to resettle victims of forced evictions. This conflict between the two arose from the fact that while the duty to resettle victims of forced evictions exists, such duty needed to be achieved in a manner that did not conflict with the *Mitu Bell* decision.

This study has first and foremost demonstrated that the duty to resettle indeed exist. Further, under Kenyan jurisprudence on the matter, there seems to a difference in terms of how the Court of Appeal interprets the duty and how the High Court interprets the duty. This study has also showed that while the Court of Appeal decision has some flaws to it, the decision is right when it asserts that social economic rights cannot yield proprietary rights. The paper has proposed that the two positions can be reconciled by the use of leases which on the one hand guarantee resettlement but on the other does not confer proprietary rights in land on the basis of a social economic right.

Further, the study has proposed that amendments to the Evictions and Resettlement Bill 2012, ought to be made to clarify the quantum of rights that victims of forced evictions should have. With this, this study concludes that reconciliation is possible using the practical methods proposed.

5.3 Recommendations

First and foremost, there is need to revisit the Kenyan Evictions and Resettlement Bill 2012 in a bid to make clarification of what quantum of rights should be afforded to victims of forced evictions. This is because, while the bill seems to be quite progressive in terms of having procedural safe guards and even going ahead and providing for resettlement of victims of forced evictions, the bill has not sufficiently addressed the question of what kind of rights shall be

provided to the victims of forced evictions upon resettlement. With this gap, litigation in this area is bound to continue.

The reason for this recommendation is because of the divergent views that Kenyan jurisprudence has been faced, with High Court cases such as *Satrose* and *Kepha* saying one thing, and the Court of Appeal in the *Mitu Bell* case saying another thing. If this position is clarified, then the divergent views in our courts are bound to be reconciled. As such, a review of the bill is recommended to solve this problem is highly encouraged.

Secondly, the bill needs to be passed after the appropriate problem has been addressed. This will provide a binding way forward and remove the need to rely on guidelines which are not binding. If this is done, then litigation on whether victims are entitled to resettlement will be bound to reduce and this might save the court its precious judicial time.

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