REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 584 OF 2014

In the matter of alleged denial, infringement of and threat to Rights and Fundamental Freedoms under Articles 26(1), 27(1)(2)(4), 28, 29(c)(d)(f), 31, 35(1)(a)(b), 40(1)(a)(b), (3), 43(1)(b),(3),47(1)(2), 53(1)(b),(c)(d), 54(1)(a) & 57 of the Constitution of Kenya, 2010

and,

In the matter of Articles 2(5)&(6), 3(1),10(1),19,20,21(1)(2)(3),22(1)(2),23(1)(3), 24(1)(3),25(a),26(1),27(1)(2)(4),28,29(c)(d)(f),31,35(1)(a)(b),43(1)(a)(b)(3),47(1)(2),53(1) (b)(c),54(1)(a) and 57 of the Constitution of Kenya, 2010

and

In the matter of Rules 10(1),11(1) &(1) & 13 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules, 2013

and

In the matter of Section L of the Government of Kenya Code of Regulations, Revised, 2006

and

In the matter of Article 25 of the Universal Declarations of Human Rights

and

In the matter of Article 11 of the International Covenant on Economic, Social and Cultural Rights

and

In the matter of Article 27 of International Convention on the Rights of the Child

and

In the matter of Article 26 of the Convention on the Rights of Persons with Disabilities

BETWEEN

Justus Mathumbi..……..1st Petitioner

Timothy Wanyanga..2nd Petitioner

Mary Emuria...3rd Petitioner

David M. Mutisya..4th Petitioner

Gilbert Meme...5th Petitioner

Rosemary A. Abayo...6th Petitioner

David Odhiambo...7th Petitioner

Judith A. Bicko..8th Petitioner

Michael K. Mwangi..9th Petitioner

Gertrude Angote..10th Petitioner

(Suing on their own behalf and o behalf of 327 occupiers/tenants of Starehe and Shauri Moyo Government Estates, Nairobi and their 200 School going Children)

and

The Cabinet Secretary, Ministry of Land, Housing and Urban Development..1st Respondent

The Inspector -General, The National Police Service..................................2nd Respondent

The Hon. Attorney General...3rd Respondent

and

Katiba Institute..*Amicus Curiae*

JUDGMENT

1. The first to ninth Petitioners aver that they reside at Starehe and Shauri Moyo Government Estates in Nairobi. They bring this Petition, on behalf themselves and **327** persons, formerly and presently residing in the said estates.

2. The tenth Petitioner is an advocate of the high Court of Kenya and the Executive Director of Legal Advice Centre, Kituo Cha Sheria, a Human Rights Non-Governmental Organization dealing with provision of Legal Aid and Protection and promotion of Human Rights in Kenya particularly for the poor and marginalized. It presents this Petition on behalf of the occupiers and or tenants of the said estates pursuant to Article 22 **(2) (c)** of the Constitution.

3. The first Respondent is the Cabinet Secretary, Ministry of Lands, Housing and Urban Development, the Ministry charged with the responsibility of providing policy direction and coordinating all matters related housing and urban development. The second Respondent is the Inspector General of Police. His mandate stems from Article **245** of the Constitution.

4. The third Respondent is the honourable Attorney General of the Republic of Kenya and the Principal Government legal adviser pursuant to Article **156** of the Constitution.

5. Katiba Institute, the *Amicus Curiae,* is a non-profit making and non-partisan organization, dedicated to the faithful implementation of the Constitution and the promotion of a culture of constitutionalism through adherence to the principles of rule of law, human rights including economic, social and cultural rights.

The Petitioners case

6. The Petitioners aver that they became occupiers/tenants of the first Respondent in the above estates by virtue of being civil servants working in various Ministries of the National Government. They aver that rent for the said houses is deducted from their monthly salaries and submitted to the said Ministry. They further aver that the said houses are meant for the low grade civil servants whose housing allowances range between **Ksh.3,000/=** and **Ksh. 5,000/=** per month. Also, they aver that they live in the said houses with their families among them school going children, and that they have been paying the market rent.

7. The Petitioners also aver that on **2nd** September 2014, they received notices to vacate dated **29th** August 2014 entitled *"Proposed Re-development of Starehe Government Estate, Nairobi"* and *"Proposed Redevelopment of Shauri Moyo Government Estate, Nairobi,* to the effect that the said estates had been earmarked for redevelopment by the first Respondent in partnership with the private sector. They aver that they were required to vacate the said premises by **30th** November 2014 to give way for the said re-development.

8. The Petitioners further aver that on **1st** October 2014 their committee met the first Respondent and it was resolved that the eviction would be halted until such a time when alternative housing is found for them. They further aver that on **6th** October 2014, the Cabinet Secretary informed them that they were required to vacate by **30th** November 2014, which was extended to **31st** December 2014, and notices to that effect were served upon them.

9. The Petitioners also aver that they were not opposed to the proposed re-development, but their concern was that they be provided with alternative housing before vacating. The Petitioners also aver that on **16th** October, 2014, they were served with a further notice to vacate. Further, they also averred that on the same day, the first Petitioner was arrested and detained at Kamukunji Police Station for close to **7** hours for alleged incitement charges. They also aver that on **24th** November 2014, the first Petitioner was woken up by persons accompanied by Police officers and private security guards who vandalized his house and removed his household goods purporting to be executing a court order.

10. The first Petitioner avers that he was targeted for eviction for being in the forefront fighting for alternative housing, and that he has since been rendered homeless. He also avers that he was subjected to inhumane/degrading treatment. The petitioners further aver that the Respondents deployed security officers in the said area, causing unnecessary intimidation/tension in the area.

11. The Petitioners also aver that on **29th** October 2014, the first Respondent wrote a letter offering them first priority to purchase or rent the said houses upon completion of the project and in the same communication, the Petitioners were reminded that they had agreed to vacate and were furnished with forms to sign signifying acceptance to vacate. Further, they aver that there was no indication that they would be allocated houses in the proposed developments unlike others in Shauri Moyo Area C who were allocated new houses upon vacating.

12. The Petitioners also aver that no environmental, economic and social impact assessment has been done on the premises prior to issuance the quit notices nor is there a resettlement plan, nor are there adequate consultations on all feasible alternatives.

13. The Petitioners also aver that they had committed their income; and, that the Ministry had indicated that it would consider waiving rent for some months; and, that that they live with over 200 school going children, and that they are unable to afford other houses, and as per the applicable regulations, they can only be called upon to vacate the house only if alternative accommodation has been provided to them nor can they be evicted except for non compliance with the regulations.

14. On record is a supplementary affidavit sworn by the first Petitioner filed on **5th** September 2017 in which he avers that the alleged eviction was brutal and annexed a video recording of the alleged eviction he claimed to have recorded using his mobile phone device.

15. As a consequence of the foregoing averments, the Petitioners pray for:-

> *a. **AN ORDER OF CERTIORARI** do issue to bring into this honourable court and quash the Vacation Notices dated **29th** August 2014, **16th** October 2014 and **29th** October 2014 issued by the 1st Respondent and/ or officers of the 1stRespondent's Ministry.*
>
> *b. **A DECLARATION** that the demolition of the 1st Petitioner's house number LG436A, destruction of his personal property, robbing of his **Kshs. 215, 000** in cash and his forced and violent eviction from the said house without being provided with alternative accommodation/ housing is a violation of the 1stPetitioner's fundamental rights and freedoms to inherent dignity, security of the person, accessible and adequate housing, reasonable standard of sanitation, prohibition against forced eviction, right to life, right to own property, right to fair administrative action, right to privacy, equality and freedom from discrimination and his children's right to freedom from all forms of violence as guaranteed under Articles 26(1), 27(1) (2) (4), 28, 29 (c)(d)(f), 31, 35 (1)(a)(b), 40 (1)(a)(b), (3), 43 (1), 47 (1)(2), 53 (1) (b), (c), (d) as read with Articles 20 (5) and 21 (1), (2) and (3) of the Constitution of Kenya.*
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> *c. **A DECLARATION** that the issuance of the vacation notices to the Petitioners without involving them in the process of arriving at that decision and without providing them with adequate information to that effect is a violation of the Petitioner's right to access information and the right to fair administrative action as guaranteed under Articles 35 (1), (a) and (b) and 47 (1) and (2) of the Constitution of Kenya.*
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> *d. **A DECLARATION** that the issuance of the vacation notices to the Petitioners requiring them to vacate the suit premises without providing them with alternative housing/accommodation is a threat to the Petitioners' rights to accessible and adequate housing, reasonable standard of sanitation as guaranteed under Article 43(1) (b) and (e) of the Constitution of Kenya.*
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> *e. **A DECLARATION** that the issuance of the vacation notices to the Petitioners requiring them to vacate the suit premises without providing them with alternative housing/ accommodation is a threat to the Petitioners' children's rights to free and compulsory basic education and to their basic nutrition, shelter and healthcare and the right against being treated in a cruel and inhuman manner and being subjected to all forms of violence as guaranteed under Article 53 (1) (b), (c) and (d) of the Constitution of Kenya*
>
> *f. **An ORDER OF PERMANENT INJUNCTION** do issue restraining/ prohibiting the 1stRespondent, her servants, agents, and/ or such persons claiming under her or working under her instructions from terminating, varying and/or altering the tenancy of the Petitioners with the Ministry of Land, Housing and Urban Development particularly the Petitioners' tenancy with regard to the suit premises.*
>
> *g. **An ORDER OF PERMANENT INJUNCTION** do issue restraining/ prohibiting the 2ndRespondent, his servant, agents, from deploying, commanding or assigning police officers and/ or administration police as security to the 1stRespondent to oversee the demolition, eviction, termination of allocated houses, transfers or in any other way to oversee the alienation of the suit premises.*
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> *h. **An ORDER OF PERMANENT INJUNCTION** do issue restraining the Respondents jointly and severally, their servants, agents, and / or such persons claiming under them or working under their instructions from demolishing, evicting the Petitioners, relocating, transferring the Petitioners or in any other way interfering with the suit premises.*
>
> > *i. **An ORDER OF MANDATORY INJUNCTION** do issue compelling the Respondents to forthwith jointly and severally;*

i. Repair the 1st Petitioner's house being house number LG436A located in the suit premises.

ii. Reinstate the 1st Petitioner to his previously allocated house being house number LG436A at their own costs.

iii. Refund the Kshs. 215, 000 to the 1st Petitioner that he (the 1st Petitioner) lost when he was violently evicted from his house.

j. ***An ORDER OF MANDATORY INJUNCTION*** *do issue compelling the Respondents to forthwith jointly and severally;*

k. Furnish the Petitioners and this Honorable Court with all relevant written information containing details of;

i. The status of the suit premises and its entire history.

ii. Reasons/ decisions for the intended eviction/ demolition of the Petitioners from the suit premises, vacation notices and/ or any other order/ authority authorizing the demolition and/ or eviction of the Petitioners from the suit premises.

iii. Information exhibiting any efforts or plans by the Respondents to provide alternative housing/ accommodation/ shelter to the Petitioners.

iv. Information exhibiting a holistic and comprehensive environmental, economic and social impact assessment carried out on the suit premises.

v. Information exhibiting a resettlement plan of the Petitioners should there be need for them to vacate the suit premises.

vi. Information relating to the proposed redevelopment plan of the suit premises including the nature of the building/ structure to be constructed, time frame within which the said project is expected to be completed and the approximate rent that would be payable per unit/ house once the project is completed.

vii. Information relating to architectural and building plans of the proposed project to be undertaken in the suit premises.

viii. Reinstate the 1st Petitioner to his previously allocated house being house number LG436A at their own costs.

ix. Provide the Petitioners with alternative housing, accommodation, or shelter.

i. General damages for the violation of the 1st Petitioner'sconstitutional rights and fundamental freedoms in prayer (b) above.

m. Exemplary damages for the brutal, violent, highhanded, oppressive and arbitrary violation of the 1st Petitioner's fundamental rights and freedoms.

n. General damages for the threat to the Petitioners' fundamental rights and freedoms in prayer (c), (d) and (e) above.

o. Interest on prayer (k), (l) and (m).

p. Costs of this Petition.

16. On behalf of all the Petitioners, the first Petitioner gave oral evidence, essentially reiterating the contents of the averments in the Petition and supporting affidavits.

First Respondent's Replying Affidavit

17. **Mariamu elMaawy**, the first Respondent's then Principle Secretary, swore the Replying Affidavit filed on **10th** March 2015. She averred that:-

a. that the re-development of the Shauri Moyo and Starehe Estates is in pursuit of Policy and is meant to effect Articles ***42*** *and* ***43*** *of the Constitution, and that the Petitioners were given adequate notice, and were involved at every stage. Also, the Ministry gave them an undertaking that they will be given preferential treatment once construction is completed in house allocation;*

b. that the relationship between the Petitioner and Respondents is that of a Tenant and Landlord, and that the Petitioners are entitled to house allowance in lieu of the Respondents providing a house.

c. the demolition of the two states and their redevelopment is meant for the benefit of the wider public and/or in public interest;

d. the circumstances informing the Petition have no basis on any violations.

18. She further averred that the Government purposes to deal with the housing deficiency in Kenya as contained in several sessional papers

by encouraging an integrated and participatory approach to slum upgrading, creating a Housing Development Fund to be financed through the budgetary allocations and development partners, promoting research on the development of low cost building materials and construction techniques, promoting the harmonization of laws that govern urban development to facilitate more cost effective housing development; facilitating increased investment by the formal and informal private sector, in the production of housing for low cost and middle income urban dwellers.

19. She also averred that the Government through Sessional Paper number **3** of 2009 acknowledges that many Kenyans live as squatters, in slums and other squalid conditions, and it appreciates through the development of more housing units and their attendant infrastructure, which policies are now anchored in the Constitution, particularly Articles **42** and **43**. Further, she averred that in an attempt to align the Ministry's objective to the intendment of the said provisions, and specifically the object of providing a healthy living environment, providing adequate housing and sanitation, ensuring access to clean and safe water in adequate quantities is achieved, hence the first Respondent in co-ordination with various other relevant government departments has embarked on various housing development projects across the nation.

20. **elMaawy** further averred that the Ministry has a projection of developing 300,000 modern housing units across the country including mixed use urban re-development of old, dilapidated, unserviceable and low-occupation capacity buildings, and that the project is designed to benefit all cadres of civil servants under various schemes including tenant-purchase agreements or tenancy arrangements. She further averred that the Ministry had identified estates it intends to develop 10,000 housing units with a bigger population capacity. Also, she averred that the proposed housing re-development is intended to assist civil servants to own houses or access rental housing units at affordable rates.

21. **elMaawy** averred that the Petitioners are all public servants and their relationship with the government to the suit premises is that of tenant and landlord, hence, the Respondents have no obligation statutory or constitutional to provide houses to civil servants and in any even the Petitioners are entitled to monthly house allowances.

22. Also, she averred that the Petitioners do not fall under the categories of officers entitled to rent-free housing in addition to a supplementary house allowance under the regulations, and that the Petitioners were granted a two month rent payment exception and notices to vacate after lengthy consultations with the Petitioners and their representatives, and that the process of re-development has commenced in earnest which was included in the National Priority List of Public Private Partnership Projects by the National Treasury. She further averred that granting the orders sought will prejudice the progressive realization of Article **42** and **43** Rights.

23. The Respondents did no adduce oral evidence but relied on the above Affidavit. Counsel for both parties filed written submissions which they adopted.

Issues for determination

24. Upon careful analysis of the above facts, I find that the following issues fall for determination, namely:-

a. Whether the Respondents violated the Petitioners constitutional rights as alleged.

b. Whether this Petition raises any constitutional issues.

c. Whether the Petitioner are entitled to any of the relief sought in the Petition.

Whether the Respondents violated the Petitioners constitutional rights as alleged.

25. The Petitioners counsel submitted that the Petitioners claim is hinged on a violation of their fundamental freedoms under the Constitution, namely, Articles **43, 53** and **54** of the Constitution. He argued that forced evictions constitute gross violations of a range of internationally recognized human rights including the right to adequate housing, food, water, health, education, work, security, of the person, security of the home, freedom from cruel, inhuman and degrading treatment and freedom of movement; and that Kenya lacks legislation governing evictions.

26. To buttress his argument, he cited UN general comment No. **7** of the Committee on Economic, Social and Cultural Rights, and relevant international conventions describing the acts complained of as forced evictions and highlighted the obligations of the State in cases of forced evictions. He also submitted that Respondent has not discharged the burden under Article **24** to justify the limitation.[1]

27. He cited several cases dealing with evictions among them *Mitu-Bell Welfare Society vs A.G. & 2 Others*[2]where the Court held that demolitions challenged in the said petition were illegal, *Tswelopele Non-Profit Organization & Others vs Twhwane Metropolitan Municipality*,[3] which also dealt with forceful evictions, and *Ibrahim Sangor Osman vs Minister of State for Provincial Administration & Internal Secutity & 3 Others*[4] where the court issued mandatory injunction compelling respondents to return the Petitioners to the land they had been evicted from.

***Amicus Curiae's* Submissions**

28. Counsel for the *amicus curiae* citing Article **43(1) (b)**[5] submitted that the government has an obligation to provide alternative housing to the Petitioners, [6] and pointed out the need for a law to govern evictions.[7] Counsel argued that the proper procedure was not followed in issuing the notices, and urged the court to balance the right to property with the right to housing.

29. The Respondents counsel argued that the quit notices were issued in accordance with the law, and that the instance case arises from an employer employee relationship, hence it does not fall within the ambit of forced evictions. Counsel cited the regulations governing housing

for government employees.

30. It is common ground that all the Petitioners are civil servants and by virtue of their employment, they were allocated government houses. It undisputed that they are paid house allowance as clearly reflected in their payslips exhibited in their documents and the Rent is deducted directly from their payslips. The Petitioners are tenants, hence the relationship with the government is that of landlord/tenants.

31. Being a tenancy relationship created by dint of employer-employee relationship, like any other legal relationship, the same can be terminated in accordance with the law governing such tenancies. The undisputed circumstances of this case are that the government decided to re-develop the houses, modernize them, and increase the units to create more houses. It issued notices to vacate as the law demands and even went an extra mile and offered to forego some rent for some months and made a promise that it would to give the occupants first option to either buy or rent upon completion of the project.

32. In my view, the Petitioners misconstrued their legal relationship with the government, or misinterpreted the law governing Tenant-Landlord relationships, particularly service tenancies and thought that the government was under an obligation to provide them with alternative houses yet they are still earning house allowances. They deliberately confused their situation with informal settlements or situations whereby the government opts to acquire properties subject to compulsory acquisition or situations whereby citizens have lived in a parcel of land for decades and the government decides to evict them from the land.

33. This confusion is discernible from the authorities and international instruments citied by the Petitioners advocates and counsel for the *amicus curiae*. The said authorities some of which I referred to above and international instruments deal with forced evictions as opposed to the legal rights of a tenant whose tenancy has been terminated in conformity with the law. Even counsel for the Petitioners drew a parallel with the City of Johannesburg, South Africa. However, the South African situation is not comparable at all to the case before me which is simply a tenant-landlord relationship.

34. In 2011, the City of Johannesburg lodged a policy document entitled 'Consolidated Town Planning Scheme, 2011."[8] The purpose of a town planning scheme is to *inter alia* guarantee the right to sustainable cities, (understood as the right to urban land, housing, environmental management, urban infrastructure and service delivery, transportation and public services, to work and leisure for current and future generations; democratic administration by means of participation of both the individual property owner and representative associations of the various segments of the community in the formulation, execution and monitoring of urban development projects, plans and programs; cooperation between governments, private initiative and other sectors of society in the urbanization process, planning and sustainable development of the Municipality, correcting the distortions of historical planning systems and their negative effects on the environment without negating the complexities of the City; management of land use, in order to enable and facilitate efficient, effective and compatible urban development, effective environmental management, simplification of the legislation concerning subdivisions, land use, occupation and building regulations.

35. In order to deal with the problem of informal urban settlements, the City of Johannesburg adopted an "Informal Settlement Formalization and Upgrading Program" in April 2008.[9]The regularization approach addresses elements such as legal recognition, land use, lay out plans, building structures, desirable harmonious development of the built environment, provision of services, elimination of dangerous nuisance uses and protection of value of the land.

36. The City of Johannesburg, in an attempt to give recognition to informal settlements and incorporate them within the legal framework of the City and make residents' full citizens, has developed an innovative and untried approach of rezoning the areas as 'special for transitional residential settlement.'[10] It puts the settlements on a trajectory towards full legalization of tenure rights, while recognizing their occupational rights. It introduces land use management rules for urban governance.[11] Most importantly, it is inclusionary and will remove illegality to make residents' legal citizens of the City.[12]

37. Clearly, the Johannesburg recognition of informal settlements is totally different for the facts of this case. Here we are not dealing with slum dwellers or upgrading a settlement and recognition land ownership. This case deals with tenant-landlord relationship, termination f the tenancy and tenants who are paid house allowance. I find it appropriate to make some crucial observations on the relevancy of the authorities cited.

38. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[13]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...." *(Emphasis added)*

39. The ratio of any decision must be understood in the background of the facts of the particular case.[14] A case is only an authority for what it actually decides, and not what logically follows from it.[15] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[16]

40. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[17]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[18] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[19] My plea is to keep the path of justice clear of obstructions which could impede it.

41. The authorities and instruments cited the Petitioners counsel and counsel for the *amicus curiae* relate to forced evictions. The Petitioners fall into the category of tenants described in law as *"service tenants"* a general term which describes an occupier who also happens to be employed by her/his landlord. Such tenancies can be terminated either, upon the termination of employment or by issuance of a notice. Upon termination as was done in the present case, the employer has no obligation either under the Constitution, statutory law of the common law to provide alternative accommodation to the employees. The employees entitlement is their house allowance. It follows that the alleged violation of the Petitioners' constitutional rights does not and cannot arise in the circumstances of this case. They employer discharged its obligations under the law by serving notices as required which notices are not disputed. Upon the expiry of the notices the Petitioners became illegal occupants in the said premises, hence, the eviction was lawful.

Whether this Petition raises constitutional issues

42. I am alive to the fact that every case has a constitutional underpinning, be it criminal or civil. However, it is important to point out that not every dispute ought to be presented as a constitutional Petition unless it raises constitutional issues. As demonstrated by the above facts, this is a case of termination of service tenancies. That is legal relationship governing the Petitioners and their employer. Notices to vacate are admitted to have been served. It is not disputed that the Petitioners continue to earn house allowances as per their respective job groups.

43. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[20] The issues raised in this case can be resolved by interpreting the facts and the relevant statute. Clearly, the issues in this case do not raise constitutional questions at all.

44. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[21] The issues stated above fall in the realm of service contracts and the manner in which service contracts can be terminated.

45. The question of what constitutes a constitutional question was ably illuminated Justice O'Regan***[22]*** recalling the South African Constitutional Court's in *S vs. Boesak****[23]*** thus:-

> "*The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of ....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State...................., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,.............., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."****[24]***

46. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[25] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

47. It is my finding that this Petition does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do no not fall anywhere close to violation to constitutional Rights.

48. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim.

Whether the Petitioner are entitled to any of the relief sought in the Petition

49. The Petitioners seeks orders of *certiorari* to quash the Notices to vacate dated **29th** August 2014, **16th** October 2014 and **29th** October 2014 issued by the 1st Respondent and/ or officers of the 1stRespondent's Ministry.

50. *Certirari* is a Judicial Review remedy and the rules governing grant of Judicial Review orders must apply. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

51. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Such decisions can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** The decision to terminate service tenancy has not been shown to be illegal or *ultra vires.*

52. The grant of the orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. I find that the petitioners have not satisfied the grounds for this court to grant orders sought.

53. The Petitioners also seek a declaration that the issuance of the notices to vacate without involving them in the process of arriving at the decision and without providing them with adequate information to that effect is a violation of their right to access information and the right to fair administrative action guaranteed under Articles 35 (1), (a) and (b) and 47 (1) and (2) of the Constitution of Kenya. The Petitioners counsel cited *Occupiers of 51 Olivia TRoad, Berea Township,* and *197 Man Street,Johannesburg vs City of Johannesburg*[26] where the court upheld the need for engaging meaningfully. Counsel for the *amicus curiae* submitted that the Petitioners are entitled to information and participate in consultations in relation to the proposed re-development.[27]

54. I find the above argument totally unsupported by the pleadings and the evidence. It is on record that notices to vacate were served. It is averred that the Petitioners appointed a committee of seven persons to engage the first Respondent on their behalf. It is averred that the committee met the representatives of the first Respondent and discussed the issue. It is admitted that a decision was made that they will vacate. It is averred that at this point the Petitioners distrusted their Chairman. The first Petitioner also testified that they met the then Cabinet Secretary at her office. It is also admitted that the Cabinet Secretary visited the site. It is admitted that the first Respondent went to the extent of offering rent waiver in writing if the Petitioners agreed to vacate. It is undisputed that the first Respondent promised to grant the Petitioners the first priority to buy or rent the units if they agreed vacate. In fact the Petitioners conceded that they were supplied with forms to sign signifying acceptance of the foregoing which they refused. I fail to comprehend how in view of the foregoing admissions, the Petitioners can now turn around and accuse the first Respondent of not involving them in the discussions. For avoidance of doubt, a landlord in a service tenancy as in this case or in any other tenancy is not obligated to seek and obtain the consent of a tenant prior to issuing a notice to terminate the tenancy. The only requirement is for the notice to comply with the law, the absence of which has not been proved in this case.

55. The Petitioners also seek a declaration that the issuance of the notices to vacate without providing them with alternative housing/accommodation is a threat to their rights to accessible and adequate housing, reasonable standard of sanitation as guaranteed under Article **43(1) (b)** and **(e)** of the Constitution and a threat to the Petitioners' children's rights to free and compulsory basic education and to their basic nutrition, shelter and healthcare and the right against being treated in a cruel and inhuman manner and being subjected to all forms of violence as guaranteed under Article **53 (1) (b), (c)** and **(d)** of the Constitution.

56. As stated above, the Petitioners are service tenants. They admit having been served with notices to vacate. They are or were being paid house allowances. Hence, the first Respondent was under no legal duty to furnish them with alternative accommodation.

57. The Petitioners also pray for an injunction restraining/ prohibiting the 1stRespondent, its servants, agents, and/ or such persons claiming under her or working under her instructions from terminating, varying and/or altering the tenancy or demolishing the houses or deploying police officers to oversee the intended demolition. The Petitioners also invite this Court to grant a mandatory injunction to compel the Respondents to forthwith jointly and severally; Repair the 1stPetitioner's house, Reinstate him to his house at their own costs, Refund the Kshs. **215, 000**/= to him that he alleges to have lost when he was evicted.

58. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.[28]An applicant must also show he has a right legal or equitable, which requires protection by injunction.[29] In all fairness, the Petitioners have nor established a basis for the court to grant the injunction sought. Further, the alleged loss of **Ksh. 215,000/=** or the alleged destruction of the first Petitioners property was not proved at all.

59. The Petitioners seek a order of mandatory injunction compelling the Respondents to furnish the Petitioner with the information listed in prayer **(j)** of the Petition. This issue is not pleaded in the body of the Petition at all but pops up for the first time in the prayers. It was not canvassed in evidence either. There is no basis at all to grant the said order.

60. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court***[30]***where Vickery J said this of the principles of good pleading:-

> *"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.*
>
> **. . .** *Elegance is the simplicity found on the far side of complexity.*
>
> *While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced*.
>
> *Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.*
>
> *Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination*.***[31]*** *(Emphasis supplied)*

61. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party or the Court is unable to ascertain with precision the causes of action and the material facts that are alleged.

62. In any event, even if the issue had been pleaded, There is no evidence that the Petitioner ever requested the information in question from the first Respondent or any of the Respondents and was denied. The holding in *Kituo Cha Sheria & another vs. Central Bank of Kenya & 8 others**[32]** is* relevant:-

> "*There must be a request for information before a party entitled to that information can allege violation. Even where a citizen is entitled to seek information under Article **35(1),** he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief.*"

63. The Petitioners also seeks general damages. None has been proved. Section **107 (1)** of the Evidence Act[33]provides that *"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."* Sub-section (2) provides that *"when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

64. Interestingly, the Petitioners argued that *no environmental, economic and social impact assessment has been done on the premises prior to issuance the quit notices* nor is there a resettlement plan, nor are there adequate consultations on all feasible alternatives. I find the above argument totally misguided and a clear misapprehension of the law governing environmental, social and impact assessments.

65. The Petitioners are clearly misguided on this issue. The term "environmental impact assessment" (EIA) is defined in EMCA to mean "a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment."[34] On the other hand, EMCA defines SEA as "a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives."[35] The International Association for Impact Assessment (IAIA) defines an environmental impact assessment as "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."[36]

66. The purpose of the assessment is to ensure that decision makers consider the environmental impacts when deciding whether or not to proceed with a project.[37] EIAs are unique in that they do not require adherence to a predetermined environmental outcome, but rather they require decision makers to account for environmental values in their decisions, and to justify those decisions in light of detailed environmental studies and public comments on the potential environmental impacts.[38] Hence, EIA is designed to ensure that planning decisions involving significant effects on the environment are taken by bodies with full information as to the relevant factors.

67. The innovation behind the EIA and SEA process is the systematic use of the best objective sources of information and emphasizes on the use of best techniques to gather information.[39] The ideal EIA and SEA would involve a totally bias free collation of information about environmental impact, produced in a coherent, sound and complete form, considering impact in an integrated manner. It should then allow the decision maker and members of the public to scrutinize the proposal, assess the weight of predicted effects and suggest modifications or mitigation where appropriate.[40] Thus, environmental assessment is both a technique, and a (physical and social) scientific process.

68. The environmental impact assessment must identify the direct and indirect effects of a project on the following factors:- human beings, the fauna, the flora, the soil, water, air, the climate, the landscape, the material assets and cultural heritage, as well as the interaction between these various elements. The developer (the person who applied for development consent or the public authority which initiated the project), must provide the authority responsible for approving the project with the following information as a minimum:- a description of the project (location, design and size); possible measures to reduce significant adverse effects; data required to assess the main effects of the project on the environment; the main alternatives considered by the developer; the main reasons for the alternative chosen; and, a non-technical summary of this information.

69. On the other hand, NEMA Guidelines define Strategic Environmental Assessment (SEA) as "a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programs (PPP) and evaluate the inter-linkages with economic and social considerations." SEA is a family of approaches that uses a variety of tools, rather than a single, fixed, prescriptive approach. The SEA process extends the aims and principles of Environmental Impact Assessment (EIA) upstream in the decision-making process, beyond the project level, when major alternatives are still possible. As NEMA states in its guidelines, "SEA is a proactive approach to integrate environmental considerations into the higher levels of decision-making."[41]

70. Hence, during a SEA process, the likely significant effects of a Policy, Plan, or Program (PPP) on the environment are identified, described, evaluated, and reported. The full range of potential effects and impacts are covered, including secondary, cumulative, synergistic, short, medium, and long-term, permanent, and/or temporary impacts.

71. ***Stuart Bell & Donald McGillivray*** authoritatively state that EIA and SEA should be an *iterative* process, in which information that comes to light is fed back into the decision making process.[42] First, a truly iterative process would ensure that the very design of the project, plan, or programme would be amended in the light of the information gathered and secondly, and also ideally, it would also involve some kind of monitoring of environmental impact after consent or approval has been given.[43]

72. The argument by the Petitioner fail on the ground that a landlord does not require an environmental impact assessment to terminate a tenancy or issue notices to vacate as in this case. Such an assessment, as the above definitions suggest, is required by a project proponent prior to the commencement of a project.

73. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:-[44]

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

74. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[45] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

75. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by all the parties and I find that this Petition has no merits at all. Consequently, I dismiss this petition with no orders as to costs. For avoidance of doubt the orders granted on **12th** June 2015 are hereby discharged.

Orders accordingly.

Dated at Nairobi this **28th** day of **May** 2018

John M. Mativo

Judge

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[1] Counsel cited *Moise vs Greater Germiston Transitional Local Council*.

[2] HC Pet No. 164 of 2011.

[3] 2007 SCA 70 (RSA.)

[4] Embu H.C. Pet No. 65 of 2011.

[5] Counsel also cited *Mitubell Welfare Society vs The A.G & 2 Others* supra and *Government of the Republic of South Africa vs Grootboom* case CCT 11/00.

[6] Counsel cited ICESCR, ICCPR,CERD, CEDAW.

[7] To buttress this argument counsel cited *Susan Kariuki & Others vs A.G & Others* Pet No.66 of 2010, *June Seventeeth Enterprises Ltd vs KAU*, Pet no. 356 of 2013, *Kepha Omondi & Others vs A.G & 5 Others* {2015}eKLR,Pet No. 239 of 2014*; Rvs Cabinet Secretary,Ministry of Transport & Infrastructure & 3 Others ex parte Francis N.Kiboro & 198 Others* {2015}eKLR & *Satrose Ayuma & 11 Others vs Registered Trustees of Kenya Railways Staff Retirement Scheme & 3 Others* Pet No. 65 OF 2010.

[8]Consolidated Town Planning Scheme, 2011, City of Johannesburg Metropolitan Municipality.

[9]Development of an approach for the recognition of informal settlements and tenure in South Africa with the potential for regional applicability ,City of Johannesburg Approach, December 2009.

[10]Gemey Abrahams, From Land Rights to Property Markets-Lessons Learnt From Providing Support to the City of Johannesburg, page 16. Paper submitted to Urban Landmark Conference, August 2008, Johannesburg, South Africa. Available at https//za.linkedin.com/pub/Tanya-zack/13b_abrahams_pdf.Accessed on 29th September 2014.

[11] Ibid page 16.

[12] Ibid page 16.

[13] As observed in State of Orissa vs. Sudhansu Sekhar Misra MANU/SC/0047/1967.

[14] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986.

[15] Ibid.

[16] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59).

[17] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[18] Ibid.

[19] Ibid.

[20]http://www.yourdictionary.com/constitutional-question.

[21]Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC).

[22] In the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others,* {2002} 23 ILJ 81 (CC).

[23] {2001} (1) SA 912 (CC).

[24] 2001 (1) SA 912 (CC).

[25] Supra note 5 at paragraph 23.

[26] 2008 5 BCLR 475.

[27] Counsel cited *Association of Gaming Operators vs A.G Pet No.56 of 2014*, *LSK vs AG* Pet No. 3 of 2006,*Metropolita PSV Saccos Union & 25 Others vs County Government of NBI & 3 Others* & *Robert Gakuru & Others vs Governor Kiambu County & 3 Others*.

[28]See Bosire J in *Njenga vs Njenga*{1991} KLR 401.

[29] See Bosire J in *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*{1990} K.L.R 557.

[30] In *SMEC Australia Pty Ltd vs McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6].

[31]See also Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].

[32] {2014} eKLR.

[33] Cap 80, Laws of Kenya.

[34] See section 2 EMCA.

[35] See section 2 EMCA.

[36] International Association for Impact Assessment, *Principle of Environmental Impact Assessment Best Practice,* 1999.

[37] Stuart Bell & Donald McGillivray, *Environmental Law*, Seventh Edition, p. 431.

[38] Holder, J., *Environmental Assessment: The Regulation of Decision Making*, Oxford University Press, New York, 2004. For a comparative discussion of the elements of various domestic EIA systems, see Christopher Wood, *Environmental Impact Assessment: A Comparative Review*, 2 ed., Prentice Hall, Harlow, 2002.

[39] Ibid.

[40] Ibid.

[41] National Environmental Management Authority, NEMA SEA Guidelines, 2013.

[42] Supra note 59 at p. 433.

[43] Ibid.

[44]In *Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955

[45]{2007} 4 SLR (R} 855 at 59