REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 130 OF 2014

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ILLEGAL DEMOLITION OF RESIDENTIAL HOUSES AND BUSINESS PREMISES ERECTED ON NGARA OPEN AIR MARKET NAIROBI

BETWEEN

REPUBLIC…….....……APPLICANT

AND

CABINET SECRETARY MINISTRY OF TRANSPORT AND INFRASTRUCTURE…….....……...……1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF TRANSPORT AND INFRASTRUCTURE…….....…2ND RESPONDENT

DIRECTOR GENERAL KENYA URBAN ROADS AUTHORITY……..……..…3RD RESPONDENT

HONOURABLE ATTORNEY GENERAL..…….....…4TH RESPONDENT

FRANCIS N. KIBORO & 198 OTHERS.....EX PARTE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th May, 2014 filed the same day, the ex parte applicants herein, **Francis N. Kiboro & 198 Others** seek the following orders:

> **1. That an order of certiorari to bring into this honourable court and quash the decision of the respondents to evict and or displace the ex-parte applicants from all that area known Ngara open air market (Grogon) Nairobi to pave way for the construction of the**

intended Accra road extension (Ngara market – Kirinyaga road).

2. That an order of prohibition directed at the respondents to prohibit the respondents from demolishing ex-parte applicants residential houses and premises situate within all that area known as Ngara open air market (Grogon) Nairobi to pave way for the intended construction of Accra road extension (Ngara – Kirinyaga road).

3. That costs of this application be provided for.

***Ex Parte* Applicant's Case**

2. The application was supported by a verifying affidavit sworn by **Francis N. Kiboro**, one of the ex parte applicants on 1st April, 2014.

3. According to the deponent, the applicants are engaged in various business including food kiosks/hotel, shops, green grocery, clothes and textiles, automobile garages to name just a few while some of them are residents on the parcel of land in question having been residents for over 30 years.

4. According to him, all the ex-parte applicants pay a particular daily sum of money to the county government of Nairobi to enable them run their individual trades and this has been the position for the last 30 years.

5. However, on the 26th day of February 2014 they received notices of intended eviction from their premises allegedly due to the intended construction of what is labelled as "Accra Road Extension (Ngara market- Kirinyaga Road)" to which notice was attached a map indicating that all the applicants would be evicted from their premises without any proper discussions on the best way forward.

6. Later on the 18th day of March 2014 through *The Daily Nation* and *The Standard* newspapers the respondents published a notice stating that the intended construction of the road was to take place in 60 days' time.

7. It was the applicants' contention that as a result of the proposed road construction they would suffer displacement and stood to lose their rights to own, use or otherwise benefit from their premises permanently thus rendering them destitute yet no one from the respondents explained to them what would happen once they are evicted. It was contended that no steps had been taken by the authorities to mitigate adverse effects to compensate losses and provide developments to benefit the ex-parte applicants. In contravention of their rights, they averred that they had neither been involved in the issue herein nor had they been called to discuss the impending eviction. Whereas the Respondents in their resettlement action plan dated 26th February 2014 had set out the legal requirements necessary before the implementation of the project herein, none of them had been undertaken. It was reiterated that as a result the respondents have wilfully negated to perform their duty as provided in the aforestated plan and were thus infringing on the rights of the Applicants.

8. To the applicants, until the resettlement plan is duly effected any intended construction and or eviction of the ex-parte Applicants would be premature.

Respondents' Case

9. The application was opposed vide a replying affidavit sworn by **Josiah Mwangi Wandurua**, a Chief Sociologist with the 3rd Respondent on 2nd May, 2014.

10. According to the deponent, save for the Hon. Attorney General, the other Respondents are jointly and variously overseeing the implementation of the upcoming construction of the Nairobi eastern missing link roads which include non-motorized transport facilities to the pedestrians and its key role is to decongest traffic in Nairobi and that construction of Accra and quarry roads is a section of the missing links road. It

was also conceded that the coordination and implementation of the aforesaid project was being spearheaded by the 3rd Respondent authority, which is the state corporation established pursuant to Section 10 of the ***Kenya Roads Act***, 2007 and charged with the responsibility *inter-alia* for the management, development, rehabilitation and maintenance of urban roads within the Republic of Kenya.

11. He disclosed that pursuant to and in implementation of the aforesaid mandate the 3rd Respondent authority commenced processes way back in 2012 by which the corridor for the envisaged road was mapped out and all parties situate thereon identified and enumerated and public hearing/stakeholder meetings held. These identification and enumeration processes, it was added were various subsequently further complimented by numerous stakeholder *fora* in form of public consultative meeting convened to consult the project affected persons, to inform them and jointly progressively work on the way forward towards adopting the least disruptive and most agreeable implementation formula. Among the many meetings held were those on 21st June 2012, 25th September 2012, and 26th February 2014. The aforesaid for a, it was deposed help set out, identify and distinguish the various shades of persons affected by the project [PAPs] who included those with genuine titles, those with irregular titles, and those without titles but were holding temporary trading permits from the now defunct City Council of Nairobi. The *ex-parte* Applicants herein, it was averred fall under the last category above and subject to verification should form part of the persons enumerated and captured in the resettlement action plan [RAP]. For those with titles [genuine or otherwise], it was deposed, the matter was referred to the National Lands Commission [NLC] who was processing the relevant acquisitions or reviews as the case may be. But for those without titles like presumably those in these proceedings, a comprehensive consultative resettlement/relocation process commenced.

12. According to the deponent, it was not in dispute that the PAPs on the Ngara Market Section of the proposed project were on the road corridor; and what was being worked out was the manner and or mode of relocation and or resettlement. Various options including relocation to available spaces within existing city county markets or in lieu thereof ex-gratia payment or disturbance allowances were under consideration by the resettlement committee ditto the RAP.

13. It was therefore contended that the *ex-parte* Applicants were guilty of serious material non-disclosure as the information given did not inform the court of the various process and consultative *fora* held hitherto and was merely slanted to forestall and delay the vision 2030 flagship project for Nairobi metropolitan project's implementation, for ulterior and undisclosed motives and for reasons only known to the *ex-parte* Applicants.

14. The deponent exhibited a copy of the RAP brief was exhibited which in his view contained a summary of the project's brief containing information pertinent thereto such as the projects duration, its commencement, dimensions, challenges, length, funding, contractors, PAPs, mitigation measures etc. which he invited the court to consider for its full tenor and purport as the panacea to all perceivable issues are aptly articulated therein.

15. Based on legal advice it was contended that the present proceedings as articulated and drawn up were incompetent as the invoked jurisdiction of judicial review looks at administrative procedures employed and not decision, and which procedures are on-going. It was therefore asserted that the administrative review jurisdiction of judicial review cannot be invoked to determine and provide relief to alleged breaches and/or denied constitutional rights as well as proprietary rights as is being attempted through this cause. Further, the most efficacious and appropriate forum for resolution of grievance and implementation of the envisaged project are the *fora* established thereof by the RAP and not the High Court which *fora* the Applicants just ignored and rushed to court.

16. It was disclosed that that it was by reason of the foregoing and in furtherance to the resolution made in the various fora established and jointly attended by the Applicants and the respondents herein for the implementation of the resettlement action plan that the impugned notice was issued which notice was not to apply independently but in a complimentary manner, as the resettlement committee organizes the various agreed facets of the relocations/resettlements. It was contended that the newspaper and individual notices given thus far were issued as a culmination of a collaborative process involving the Respondents,

the city county government, provincial administration and PAPs, and that the notices were not in or of themselves the end of the process but a poignant stage thereof, which the RAP notes may encounter delays and challenges hence the provided grievance redress mechanism.

17. It was therefore the Respondents' case that issuing the orders sought, be they conservatory or otherwise, would adversely affect the planned schedule of implementation of the project leading the exchequer to incur contractual losses and penalties for resultant delays for idle equipment and staff. To them, by accepting the invitation to entertain the present summons and to grant the reliefs sought thereby this honourable court shall have descended into the undesirable arena of micromanaging the RAP.

Determinations

18. It was contended that the applicants herein ought to have channelled their grievances through the mechanisms put in place for doing and that these proceedings were prematurely instituted.

19. It is now trite that where a statute provides a remedy to a party, the Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

> **"In our view there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed**."

See also **Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291** and **Francis Gitau Parsimei& 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012.**

20. I agree that where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

21. I am however also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. In that case the Court held:

"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:

> **"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights"."**

22. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court

should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. It ought to be appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43.**

23. The right to access this Court should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra).** The applicant instituted these proceedings claiming breach of her rights and fundamental freedoms. The mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23(3) and 165(3) (d) of the Constitution. The Board, in my view, does not have the jurisdiction to determine alleged violations of the Constitution -See **Wananchi Group (Kenya) Ltd vs. The Communications Commission of Kenya Petition No.98 of 2012**. **Majanja J** in **Isaac Ngugi vs. Nairobi Hospital and Another Petition No. 461 of 2012** found on the same lines when he expressed himself as follows:

"For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly." (Emphasis added).

24. I associate myself with the decision of **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where he held:

"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism."

25. In this case it was contended that the most efficacious and appropriate forum for resolution of grievance and implementation of the envisaged project are the fora established thereof by the RAP and

not the High Court. The applicants however contend that they ought not to be evicted before their rights to alternative accommodation are fully addressed. Article 43(1)(b) of the Constitution provides that every person has the right to accessible and adequate housing, and to reasonable standards of sanitation. It is therefore my view that where a person contends that his rights have been or are threatened with violation it behoves this Court to investigate the allegation. Accordingly, I find that this application is properly before this Court.

26. It is important therefore to deal with principles with guide forced evictions. I would like to begin my analyses by establishing what the legal position is in Kenya in regard to adequate housing and forced evictions and demolitions. It is imperative at this juncture to appreciate that there is no legal framework existent in Kenya guiding evictions and demolitions. This unpleasant position could not have been better expressed than by **Lenaola, J** in **Satrose Ayuma & 11 Others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others Petition 65 of 2010** in which the learned Judge lamented:

> **"…the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands. Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. I believe time is now ripe for the development of eviction laws and the same sentiments were also expressed by Musinga J. (as he then was) while considering the issues in this matter at an interlocutory stage, where he stated as follows;**
>
> > **"The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto".**

27. However, Article 2 (5) and (6) of the Constitution of Kenya provides:

> ***(5) The general rules of international law shall form part of the law of Kenya;***
>
> ***(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.***

28. The United Nations Basic Principles and Guidelines on the position in regard to development based evictions and settlement 2007 which by virtue of the aforesaid Constitutional provisions form part of Kenyan law set outs the threshold to be observed prior to evictions as follows:

> **PRIOR TO EVICTIONS**
>
> **Urban or rural planning and development processes should involve all those likely to be affected and should include the following elements:**
>
> **(a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives;**
>
> **(b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups;**
>
> **(c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan;**
>
> **(d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options;**

(e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.

38. States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate.

39. During planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and vulnerable and marginalized groups, and, when necessary, through the adoption of special measures or procedures.

40. Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare.

41. Any decision relating to evictions should be announced in writing in the local language to all individuals concerned, sufficiently in advance. The eviction notice should contain a detailed justification for the decision, including on: (a) absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions. All final decisions should be subject to administrative and judicial review. Affected parties must also be guaranteed timely access to legal counsel, without payment if necessary.

42. Due eviction notice should allow and enable those subject to eviction to take an inventory in order to assess the values of their properties, investments and other material goods that may be damaged. Those subject to eviction should also be given the opportunity to assess and document non-monetary losses to be compensated.

43. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. The State must make provision for the adoption of all appropriate measures, to the maximum of its available resources, especially for those who are unable to provide for themselves, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available and provided. Alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted.

44. All resettlement measures, such as construction of homes, provision of water, electricity, sanitation, schools, access roads and allocation of land and sites, must be consistent with the present guidelines and internationally recognized human rights principles, and completed before those who are to be evicted are moved from their original areas of dwelling.

29. In **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration and Internal Security Embu Petition No. 2 of 2011 [2011] eKLR, Muchelule, J** made reference to the provisions of the United Nations Office of the High Commissioner for Human Rights in **"The Right to Adequate Housing" Article 11.1;Forced Evictions**, where it is stated:

> ***"Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human***

Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

30. Lenaola, J dealt with the issue of "adequate" housing in ***Satrose Ayuma Case*** (supra) in which while relying the General Comment No. 4 to the CESCR to the effect expressed himself as follows:

"My reading of General Comment 4 also reveals that the right to housing should be ensured to all persons irrespective of their income or access to economic resources. Under this General Comment, the CESCR has outlines seven key features to be considered when assessing whether housing is adequate or not and they are as follows:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be

guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;5 Geneva, World Health Organization, 1990.

(e) <u>Accessibility.</u> Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) <u>Location</u>. Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) <u>Cultural adequacy</u>. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

31. This position was appreciated by the Supreme Court of South Africa in South African Constitutional Court in **<u>Government of the Republic of South Africa and Others vs. Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169</u>** where the Court expressed itself as follows:

"The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society."

32. It has been summarized by the **UN Habitat Fact Sheet No. 21/ Rev. 1** that: In general, international human rights law requires Governments to explore all feasible alternatives before carrying out any eviction, so as to avoid, or at least minimize, the need to use force. When evictions are carried out as a last resort, those affected must be afforded effective procedural guarantees, which may have a deterrent effect on planned evictions. These include:

a. **An opportunity for genuine consultation;**
b. **Adequate and reasonable notice;**
c. **Availability of information on the proposed eviction in reasonable time;**
d. **Presence of Government officials or their representatives during an eviction;**
e. **Proper identification of persons carrying out the eviction;**
f. **Prohibition on carrying out evictions in bad weather or at night;**
g. **Availability of legal remedies;**
h. **Availability of legal aid to those in need to be able to seek judicial redress.**

33. It is my position that the Petitioners and Interested Parties are driving an agenda that their right to adequate housing is being violated and they are being discriminated against yet they are *bona fide* beneficiaries of the project.

34. The UN Habitat Fact Sheet No. 21/ Rev. 1 opines that:

> **"One of the most common misconceptions associated with the right to adequate housing is that it requires the State to build housing for the entire population, and that people without housing can automatically demand a house from the Government. While most Governments are involved to some degree in housing construction, the right to adequate housing clearly does not oblige the Government to construct a nation's entire housing stock…It is sometimes believed that the protection against forced evictions prohibits development or modernization projects that entail displacement. There are inevitable needs for the redevelopment of certain areas in growing cities and for public agencies to acquire land for public use and infrastructure. The right to adequate housing does not prevent such development from taking place, but imposes conditions and procedural limits on it. It is the way in which such projects are conceived, developed and implemented that is important…"**

35. This position was supported by the decision in ***Grootboom Case*** (supra) where the Court held:

> **"In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights. The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live. Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources."**

36. The UN Habitat Fact Sheet No. 21/ Rev. 1 further states that:

> **"It is sometimes believed that the right to adequate housing equates to a right to property or property rights. Some also argue that the right to adequate housing threatens the right to property. The right to own property is enshrined in the Universal Declaration of Human Rights and other human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (d)(v)) and the Convention on the Elimination of All Forms of Discrimination against Women (art. 16(h)), although absent from the two Covenants. The right to adequate housing is broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that everyone has a safe and secure place to live in peace and dignity, including non-owners of property. Security of tenure, the cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements. As such, it is not limited to the conferral of formal legal titles. Given the broader protection afforded by the right to adequate housing, a sole focus on property rights might in fact lead to violations of the right to adequate housing, for instance, by forcibly evicting slum-dwellers residing on private property. On the other hand, protection of the right to property might be crucial to ensure that certain groups are able to enjoy their right to adequate housing. The recognition of spouses' equal rights to household property, for instance, is often an important factor in ensuring that women have equal and non-discriminatory access to adequate housing."**

37. The UN Habitat Fact Sheet No. 21/ Rev. 1 reveals that:

> **"Discrimination means any distinction, exclusion or restriction made on the basis of the specific characteristics of an individual such as race, religion, age or sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. It is linked to the marginalization of specific population groups and is generally at the root of structural inequalities within societies. In housing, discrimination can take the form of discriminatory laws, policies or measures; zoning regulations; exclusionary policy development; exclusion from housing benefits; denial of security of tenure; lack of access to credit; limited participation in decision-making; or lack of protection against discriminatory practices carried out by private actors."**

38. The decision in **Government of the Republic of South Africa and Others vs. Grootboom and Others** (supra), in my view is particularly important in eviction cases. In that case the court recognised that:

> **"The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order…The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage."**

39. In my view, it is the duty of the State to bridge the gap between the "haves" and "have nots" in the society in order to avoid situations where people who live in intolerable conditions are not tempted to

invade the lands of others so as to enable them eke a living. The government is under a duty not only to protect property but also to take proactive steps to ensure that social and economic rights of the people are given meaning and not to merely to adopt a position of non-interference. As was held in ***Grootboom Case*** (supra):

> **"Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met."**

40. Right from the Preamble to our Constitution there is the recognition that in enacting the Constitution, the people of Kenya were alive to the recognition that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, *social justice* and the rule of law. Article 10 of the Constitution binds all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; make or implement any public policy decision, to national values and principles of governance which include *participation of the people*, *human dignity*, equity, *social justice*, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability and sustainable development.

41. To paraphrase **Olum& Another vs. Attorney General (2) [1995-1998] 1 EA 258**, although the national values and principles of governance enshrined in Article 10 of the Constitution are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

42. To achieve the Constitutional aspiration Article 19(1) of the Constitution which falls within Chapter 6 (the Bill of Rights) gives prominence to the foregoing by providing that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies and that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote *social justice* and the realisation of the potential of all human beings.

43. With respect to socio-economic rights, the State is enjoined to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. Accordingly, in implementing housing policy decision the State must ensure that the rights of the marginalised and vulnerable groups are protected.

44. Social and Economic Rights are provided for in Article 43 of the Constitution and these include the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. The Constitution further provides that a person is not to be denied emergency medical treatment and enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants. This includes the elderly. It is therefore the State's duty to provide accessible and adequate housing as well as reasonable standards of sanitation. For the State to forcefully evict persons from a land they have occupied for

decades without offering them alternative accommodation which accommodation itself must be reasonably habitable taking int0 account their circumstances would be to neglect its Constitutional mandate.

45. This Court appreciates that the State is enjoined to carry out its development agenda for the prosperity of the nation. In so doing it may be necessary to put into place mechanisms some of which will necessarily disrupt people's way of life. Such disruption however must be systematic and must be undertaken with as minimal pain as possible. In so doing the State must adhere to the provisions of Article 28 of the Constitution which provides that every person has inherent dignity and the right to have that dignity respected and protected.

46. The Respondents have contended that the applicants occupy a road reserve. In my view, where the State allows people to occupy land be it government or private for a considerable period of time so that the people consider the said land to be their homes, it would be inhuman for the State to suddenly evict them forcefully therefrom without affording them an opportunity to seek alternative mode of accommodation. It must always be remembered that under Article 21, it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and is therefore mandated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 21(2) of the Constitution.

47. In so deciding this Court ought not to be understood to be encouraging the culture of land invasion. Far from it. People who take it upon themselves to invade other people's private lands ought not to benefit from such invasions. However genuine landless people have a right and a legitimate expectation that the State will provide them with adequate housing and shelter. As was held in **Grootboom Case** (supra):

> **"This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case."**

48. As was held by **Lenaola, J** in **Satrose Ayuma Case:**

> **"...the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)* have provided some guidance to States on measures to adopt in order to ensure that development-based evictions, like the present one, are not undertaken in contravention of existing international human rights standards and violation of human rights. These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the right to adequate housing for all those threatened with eviction, at all times. The Guidelines *inter-alia* place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorised by law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction; that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with international human rights commitments; that any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision; that alternatives and where no alternatives exist, all measures taken and**

foreseen to minimize the adverse effect of evictions; that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that maybe damaged during evictions and most importantly that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations. Finally, that there must be resettlement measures in place before evictions can be undertaken. The Guidelines go further to lay down the conditions to be undertaken during evictions as follows; that there must be mandatory presence of Governmental officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks. The UN Guidelines in addition provide what ought to happen after the eviction; 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 facilitates."

49. The learned Judge further held:

"These important guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48thOrdinary Session it adopted the *Principles and guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*. Accordingly, the African position on the right to housing can be understood from the African Commission on Human and Peoples' Rights case of *The Social Economic Rights Centre & Centre for Economic and Social Rights vs Nigeria, Com. No.155/96 (2001)*. In the judgment, the Commission stated that;

"Individuals should not be evicted form their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a Court should consider before authorising forced evictions or demolitions is the impact on vulnerable and disadvantaged groups. A Court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities"

50. According to the learned Judge:

"From what I stated elsewhere above, it is very important for the Respondents to understand that the notion of the right to adequate housing is simply not a right to four walls and a roof but it has other elements to it including those that have been articulated under General Comment No.4 as reproduced in this judgment all which constitute a fundamental shift in the realization of the right to adequate housing. This court has a duty and an obligation to protect that right at all times. Indeed it is now clear that it is important to safeguard the Petitioners right to adequate housing due to their long history on the suit premises, which for some of them spans for decades. They have formed an attachment with the suit premises and it matters not, in my view, whether those homes are informal settlements, dilapidated houses or shanties. They must be protected and therefore I agree with the sentiments of Sachs J. in *Port Elizabeth Municipality vs Various Occupiers (2005) (1)*

SA 217 (CC) **where he stated that;**

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

51. As was held in the said case that:

"It does not matter that the Applicants do not hold title to the suit premises and even if they had been occupying shanties, the 1st Respondent was duty bound to respect their right to adequate housing as well as their right to dignity. Wherever and whenever evictions occur, they are extremely traumatic. They cause physical, psychological and emotional distress and they entail losses of means of economic sustenance and increase impoverishment. 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. In so holding I find support in the South African Constitutional Court case of *Occupiers of 51 Olivia Road, Berea Township, And 197 Main Street. Johannesburg vs City of Johannesburg (2008)ZACC 1*where Yacoob J. stated as follows;**

"It became evident during the argument that the City had made no effort at all to engage with the occupiers at any time before proceedings for their eviction were brought. Yet the city must have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance. In these circumstances, those involved in the management of the municipality ought at the very least to have engaged meaningfully with the occupiers both individually and collectively. Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is not a closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine;(a) what the consequences of the eviction might be, (b) whether the city would help in alleviating those dire consequence, (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period, (d) whether the city had any obligations to the occupiers in the prevailing circumstances and (e) when and how the city could or would fulfil these obligations. Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process ..."

52. Similar position was taken in **Susan Waithera Kariuki & 4 others vs. Town Clerk Nairobi City Council & 3 others [2013] eKLR** where the learned Judge held that:

"Even though it is important that the first Respondent plans the City of Nairobi properly, and that may entail having to evict some people in informal settlements on road reserves for purposes of road expansion and/or beautification, the Constitutional rights of those people must be respected and given due consideration."

53. Similarly, **Muchelule, J** in **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Security** (supra) expressed himself as follows:

"Notwithstanding the type of tenure, all persons should possess a degree of security which guarantees legal protection against forced eviction, harassment or other threats. State parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons or groups."

54. Having considered the parties' respective cases in this application, it is clear that the powers of the Respondents to undertake the developments they intend to carry out have not and cannot be challenged. Before this Court is a copy of the Resettlement Action Plan. According to clause 1 thereof the said plan was to be completed before the road construction commenced. The applicants while not contesting that the Respondents have the power to evict them from the suit land, contend that the said plan has not been adhered to. The Respondents on the other hand contend that the Project Affected Persons on the Ngara Market Section of the proposed project were on the road corridor; and what was being worked out was the manner and or mode of their relocation and or resettlement. Various options including relocation to available spaces within existing city county markets or in lieu thereof ex-gratia payment or disturbance allowances were under consideration by the resettlement committee ditto the Resettlement Action Plan. With respect to the contentious notices, it was contended that the same do not apply independently but in a complimentary manner, as the resettlement committee organizes the various agreed facets of the relocations/resettlements. It was contended that the newspaper and individual notices given thus far were issued as a culmination of a collaborative process involving the Respondents, the city county government, provincial administration and Project Affected Persons, and that the notices were not in or of themselves the end of the process but a poignant stage thereof, which the Resettlement Action Plan notes may encounter delays and challenges hence the provided grievance redress mechanism.

55. There is however a letter dated 17th September, 2012 exhibited by the Respondent from which it would seem that the process of verification of the number of Project Affected Persons who might not have been captured in the Resettlement Plan report needed to be conducted. I however do not agree with the applicant's contention that they were not involved in the whole process of resettlement since they did not respond to the allegations made by the Respondents in the replying affidavit.

56. Therefore whereas this Court is unable to grant the orders sought by the applicants in the manner they are sought herein, it is however necessary that the Respondents not only comply with the said Plan but also comply with the minimum guidelines which guide forceful evictions.

57. Accordingly whereas I decline the prayers sought herein I make the following orders:

58. The Respondents in undertaking the evictions in question will have to take into account the following factors:

i) that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.

ii) that there must be a mandatory presence of Governmental officials and security officers.

iii) that there must be compliance with the right to human dignity, life and security of the evictees.

iv) That the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.

v) that no one is subjected to indiscriminate attacks.

59. The project will be undertaken in strict compliance with the Resettlement Action Plan and in the presence of representative/s from the Kenya National Commission on Human Rights.

60. Each party will bear the costs of these proceedings.

61. Liberty to apply granted.

62. Orders accordingly.

Dated at Nairobi this 30th day July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for the Respondents

Mr Kahuthu for Mr Ngaruiya for the Applicants

Cc Patricia