REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 165 OF 2013

REPUBLIC……...……..……APPLICANT

AND

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING

AND URBAN DEVELOPMENT……..…….RESPONDENT

EX PARTE: **KENYATTA PETER & 3 OTHERS**

JUDGEMENT

1. By a Notice of Motion dated 22nd May, 2012 filed in this Court on 23rd May, 2012, the *ex parte* applicants herein, **Kenyatta Peter, John Keen Demesi, Ochwacho Ojango** and **Evans Emastt**, seek the following orders:

> **i. Certiorari do issue to remove into this Honourable court and quash the Respondent's directive dated 14th November, 2012 and 29th April, 2013 to evict the ex parte applicants and any other consequential orders emanating therefrom.**
>
> **ii. Prohibition against the Permanent Secretary Ministry of Housing her Officers, servants, agents or assignees from implementing or executing the order of demolishing, evicting, damaging or interference with the plaintiffs' business, homes, structures and properties located within Kibera Soweto East Zone slums or act in any other way that will prejudice their safe, quiet enjoyment of the same pending their relocation to upgraded settlement.**

2. The Motion is supported by a verifying affidavit sworn by **Kenyatta Peter** on 14th May, 2014.

3. According to the deponent, this application was brought on behalf of the applicants and on behalf of more than 600 families of Kibera Soweto East Zone "A" Slums, in Kibera Nairobi who are also affected by the directive of the Respondent to evict them.

4. According to the deponent, they had built their homes, businesses schools and other low cost community-based initiatives and enterprises that benefit members of their poor community. According to him, he was one of the administrators of Victory Hope Primary School with more than three Hundred (300) pupils, sixty of them pupils for KCSE 2013. They had also employed seventeen teachers. According to him, the applicants collectively had been living on the affected site doing their business and earning our livelihood for more than 20 years openly and uninterrupted, and that they have no other known place to call home.

5. However, sometimes on November 2012 they received a notice to vacate their premises from the Permanent Secretary Ministry of Housing through one **Mr. Charles Sikuku** and copied to the Chief Kibera Soweto East Zone "A". This was also followed on the 2nd of May 2013 when they received another letter dated 29th April 2013 but mistyped as 29th of April 2012 as a final reminder notice for them to vacate otherwise they would be evicted forcefully.

6. According to him, the applicants and other residents of Soweto Slums were awaiting relocation to new structure which are now built through the initiative of Kenya Government and the UN Habitat. However, he deposed that based on information held by the applicants, officers in the office of the Permanent Secretary Ministry of Housing and the Area Chief Soweto Laini Saba Location wanted them evicted to lease the land to private developers who would put new shops on the suit land despite the fact that the applicants and the rest of the residents were the ones supposed to be given a priority on the allocation of the said market stall allegedly to be built on the site where their homes were situate.

7. The deponent was apprehensive that the Ministry officials and the said private developers would evict them violently using "hired goons" which action would be illegal under the international laws which Kenya has domesticated as part of its laws under the current constitutional dispensation. According to him, the procedural protection and due process safeguards having not been undertaken the purported eviction was presumptuous and malicious as genuine consultations had not been carried out and adequate alternative resettlement put in place hence the reliefs sought.

8. In a further affidavit sworn by the same deponent on 15th October, 2013, it was deposed that contrary to the stand taken by the Respondent, not everybody had been enumerated and that whereas some were enumerated and given identity cards, they were not given houses as per the list. Further he denied that an alternate site was given to them or that they were advised to transfer the children to nearby schools as alleged. In his view, apart from the schools the site also houses hundreds of people and businesses who derive their means of livelihoods and that the area the schools are situated is not in the construction site as alleged. He added that the construction of the project is well on course and the schools and residential premises subject to this suit have not interfered with the same whatsoever.

9. It was deposed that it was outright lies that the courts halted the construction of the project as stated as the same was still continuing uninterrupted. He however denied that the applicants or the people they represent were part of Petition No. 498 of 2009 as the same was brought by landowners who purported to exercise ownership rights over the expansive Kibera which the applicants are not. It was his view that Petition No. 498 of 2009 and the present application are not related at all since **John Mwaura** and 82 others are not part of this suit and are unknown to them. He clarified that the former was filed by Landlords who were resisting the Slum Upgrading Project alleging rights over the land and the court held that they had no rights over the land since it was the government land.

10. According to legal advice received from the applicants' legal advisers, it was deposed that even if the government is the owner of the land as per the judgment of the court Petition No. 498 of 2009 what the applicants claimed was a fair administrative action well entrenched in the constitution and that guidelines relating to eviction which have received judicial approval must be strictly followed regardless whether the evictor had title or not. To the applicants, what they oppose is the unprocedurally and capricious administrative action taken by the Respondents which leave them at the mercy of the elements of weather with no alternatives just like wild animals hence humanitarian crisis of the worst proportions is in the offing.

11. In the applicants' view as opposed to the landlords in Petition No. 498 of 2009 they did not claim any ownership rights to the land but what they were asking was transparency in the process and alternative accommodation before resettlement. However, the notices subject of the judicial review did not offer an alternative site as demanded by the law and procedure in eviction hence the prayer for an alternative site and the project completed before the applicants are removed as demanded by the law.

12. In the deponent's view, it was ridiculous, presumptuous and illogical for the Respondent to evict them and the rest of the group while the development in which they were supposedly to benefit is not complete.

In his view, Milimani Magistrate's Court No. 2490 of 2013 was filed based on misadvise by their previous counsel since they were laymen and his mistakes should not be visited to innocent litigants. Thereafter, upon meeting their new advocate **Mr. Okemwa**, he promptly perused the file and found that the matter was dismissed on 17th May 2013 as it was incompetent since the lower court could not deal with the issue of judicial review, prompting filing in proper court.

13. In the deponent's view, there was no prejudice suffered by the Respondent at all as contended by the Respondent and that it was in fact the Respondent who had derailed this matter since its inception. To him, Zone A construction is on course and has never been interfered with. According to him, the applicants' case is totally different because their structures are not falling on the construction area of Zone A.

14. According to him, the slum Settlement Committee (SEC) which purports to represent them are the ones who have halted the project as they have collaborated with the corrupt officials of the Respondent to sell house to people not intended and that it was the Respondent who was shielding individuals with selfish interest, some who sit on the "Development Board" while they are not the applicants' representatives.

15. He denied that they were claiming any adverse possession and contended it was not true that the issues had been dealt with. He therefore prayed that the court orders for an alternative site for their schools and that they move to their houses before eviction.

Respondent's Case

16. In response to the application, the Respondent filed a replying affidavit sworn by **Pauline Mbote**, the Senior Assistant Director of Slum Upgrading Department under the Ministry of Lands Housing, and Urban Development on 24th September, 2013.

17. According to the deponent, in the year 2003, the Government of Kenya came up with the plan of systematically upgrading the slums in urban areas to be implemented through the Kenya Slum Upgrading Program which was a collaborative effort between the Government and the UN-HABITAT, setting aside a huge sum of Kshs 2.9 Billion out of public money as costs of the project with the objective of improvement of houses and living conditions of residents and inhabitants of various slums and informal villages in urban areas in line with the constitutional requirements of the state.

18. Pursuant to the Upgrading Program in Kibera the tenants and other occupants were enumerated and given unique identity cards including the Applicants herein for purposes of allocation of houses upon construction and all the concerned parties including the Applicants were given due notices and subsequent notices to vacate the area earmarked for construction and more importantly advised to transfer the affected school going children to nearby government's schools and mission schools who were to observe the pupils on charitable basis.

19. However, instead of vacating the area, the Applicants have engaged in using the courts to delay and derail the construction work to their own detriment and that of the public money going to waste by way of materials and machineries on the site. It was contended that the Applicants as individuals classified as members of Zone A Soweto East Kibera together with other residents did file Petition No. 498 of 2009 **John Mwaura** and 82 Others challenging the Upgrading Program of which the court declined.

20. It was deposed that subsequently and inspite of the aforesaid holding the Applicants on 8th May 2013 filed a civil suit 2490 of 2013 in Magistrate's Court under certificate of urgency seeking injunction against the construction citing the same grounds which suit is pending before court.

21. It was therefore contended that it is clear that the Applicants are not concerned with due notice to vacate as alleged but determined to derail the implementation of the upgrading project to their own selfish ends and to the detriment of the real slum dwellers. To the Respondent, the application is an abuse of the court process and is full of non-disclosure of true facts and hence must be dismissed with costs.

22. According to the deponent, the Applicants are trespassers on un-alienated Government land cannot claim adverse possession and in any case the issues have been dealt within the aforesaid petition. It was asserted that the project in the area under dispute is already behind schedule by far and has already affected the completion date and may lead to contractual claims from the contractors to the detriment and loss of public monies.

Applicants' Submissions

23. It was submitted on behalf of the applicants that they are owners of temporary and semi-permanent structures residential, rental and low cost community base initiatives and enterprises that benefit members of the poor communities at Kibera Soweto Estate Zone "A" slums and brought the application on behalf of more than 600 families affected by the eviction notices issued by the Respondent. It was contended that the said notices were not only short but also presumptuous, draconian, illegal and *ultra vires* and therefore void *ab initio*. To the applicants the same have denied the applicants their legitimate expectation to a fair administrative action as their concerns have not been taken into account. To them there were no consultations and no alternative resettlement put in place and should they be evicted they stand to suffer irreparable damage and loss.

24. It was submitted that proper guidelines on eviction and resettlement adopted as a policy paper by the Respondent and in extension the Government of Kenya as well as by the UN Convention on evictions have not been followed yet Kenya is bound by the same.

25. It was submitted that this Court ought to grant the orders sought since judicial review is a mechanism in which the courts ensure that public bodies and persons in public offices act fairly and reasonably and therefore when they act irrationally and unfairly the matter becomes the subject of a judicial review and in support of this submission, the applicants relied on **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 66 of 1996** as well as Article 47 of the Constitution.

26. It was appreciated that in granting the orders of judicial review what the Honourable Courts look to is the breach or non-observance of the due process and administrative safeguards in place but not necessarily the human rights angle of the same though they are sometimes intertwined. It was submitted based on **Symon Gatutu Kimamo vs. East African Portland Cement Co. Ltd eKLR** that while forced evictions may be permitted in some instances, procedural safeguards have to be in place to ensure that the rights of intended evictees are respected. In the applicants' view, appropriate procedural protection and due process are essential aspects of all human rights and is especially pertinent in relation to matters of forceful evictions involving large numbers. Basing their submissions of the UN General Comment No 7 on the Right to Adequate Housing Art 11.1 of the Covenant on Economic, Cultural and Social Rights, it was submitted that the procedural protections applicable to forced evictions include an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to scheduled date of eviction; information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be availed in reasonable time to all those affected; especially where groups of people are involved, government officials or their representatives to be present during an eviction; all persons carrying out the eviction to be properly identified; evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; provisions for legal remedies; and provision where possible, of legal aid to persons who are in need of it to seek redress from the courts. Further reliance was placed on **Musa Mohammed Dugane & 25 Others vs. Attorney General & Another [2011] KLR** and **Susa Waithere Kariuki vs. Town Clerk Nairobi City Council [2011] KLR**.

27. It was submitted that the Respondent while issuing the notices of eviction against the Applicants clearly contravened the aforesaid guidelines hence its decision ought to be quashed. It was contended that it was unfair to give the applicants just 7 days to vacate and also untenable for them to vacate the said premises while an alternative settlement is still under construction. Further reliance was placed on **Kieran Holdings Limited vs. AG and 2 Others [2012] KLR**.

28. To the applicants, whatever noble intentions the Respondents may have a legitimate expectation of the people to a fair administration must be given due consideration, yet this has not been demonstrated at all hence the orders and directives issued to the applicants are not only void, unlawful and *ultra vires* but also unconstitutional and ought to be quashed. In addition the Respondent should be prohibited from evicting the applicants until all procedural and due process steps have been complied with. The applicants also cited in support of their submissions **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Security [2011] eKLR**.

Respondent's Submissions

29. On behalf of the Respondent, it was submitted that the applicants had not brought themselves within the ambit of judicial review which is meant to examine, determine and ensure that public bodies or officers act within their jurisdictional, and comply withthe principles of natural justice in discharging their administrative duties. It was submitted that the applicants had not pleaded any of the facts which can bring the actions of the Respondents under the ambit of lack of or excess of jurisdiction, undue process or against the principle of natural justice hence have not made out any case for judicial review.

30. It was submitted that since the land in question is unalienable government land, no proprietary interests have been create in favour of the applicants.

31. It was submitted that the applicants are well to do business community, administrators of schools and most likely are concerned with maintaining the status quo for their own commercial gains which ought not to be allowed to stand.

Determinations

32. This being a judicial review application, it is important at this stage to revisit the principles guiding judicial review jurisdiction. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

33. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

34. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may

be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

35. Judicial review is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."**

36. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration, for example, does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

37. However, it is therefore clear that the right to fair administrative action is nolonger just a judicial review issue but a Constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and 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.

38. Therefore the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

> **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines**

of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

39. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

40. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

41. In my view it is nolonger possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both.

42. In this case, the applicants' case is that they were never consulted before the impugned decision was made and that no provisions have been made for their resettlement despite the fact that they have been residing at the place where they have been notified to vacate for more than 20 years.

43. This case brings to mind the decision of the South African Constitutional Court in 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. In that case the court recognised:
"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."

44. 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 to not merely to adopt a position of non-interference.

45. 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 bind 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.

46. 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 was fairly possible to do so without violating the meaning of the words used.

47. 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.

48. 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.

49. 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 out account their circumstances would be to neglect its Constitutional mandate.

50. 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.

51. In this case the applicants while not seriously challenging their eviction, contend that guidelines relating to eviction which have received judicial approval must be strictly followed regardless of whether the Government has title or not. To the applicants, what they oppose is the unprocedurally and capricious administrative action taken by the Respondents which leave them at the mercy of the elements of weather with no alternatives just like wild animals hence humanitarian crisis of the worst proportions is in the offing. On the other hand the Respondent contend that the tenants and other occupants were enumerated and given unique identity cards including the Applicants herein for purposes of allocation of houses upon construction and all the concerned parties including the Applicants were given due notices and subsequent notices to vacate the area earmarked for construction and more importantly advised to transfer the affected school going children to nearby government's schools and mission schools who were to observe the pupils on charitable basis.

52. In this case the applicants' case is that they have been in occupation of the land they occupy for over twenty years and that their lives revolve around the said area. 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 of the Constitution. Apart from that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

53. 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."**

54. As was held by **Lenaola, J** in **Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition No. 65 of 2010:**

> **"...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 may be 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."

55. The learned Judge further held:

"These important guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48th Ordinary 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"

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 he 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."

54. Having considered the parties' respective cases in this application, just like **Lenaola, J** in the above case, the Respondent has not satisfied me that the intended action complies with the UN guidelines on evictions. I am similarly of the view that the rights of the applicants to adequate housing are threatened with violation and that the intended action threatens to violate the applicants' rights to adequate housing. To simply notify people to vacate the area earmarked for construction and to transfer the affected school going children to nearby schools is not anything nearer to the guidelines set out by the UN.

55. As was held in **Satrose Ayuma's Case** (supra):

"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 fulfill 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 ..."

56. Similarly, **Muchelule, J** in **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Security [2011] eKLR** 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."**

57. I can do no better but to associate myself with **Lenaola, J's** views lamenting:

> **"…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 sated 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".**

58. Having found that the intended eviction of the applicant fall foul of the international guidelines in respect of evictions I find merit in the Motion herein.

Order

59. Consequently, I grant the following orders:

> **1. Certiorari removing into this Honourable court the Respondent's directive dated 14th November, 2012 and 29th April, 2013 to evict the ex parte applicants and any other consequential orders emanating therefrom and the same are hereby quashed.**
>
> **2. Prohibition against the Permanent Secretary Ministry of Housing his Officers, servants, agents or assignees from implementing or executing the order of demolishing, evicting, damaging or interference with the applicants' business, homes, structures and properties located within Kibera Soweto East Zone slums or act in any other way that will prejudice their safe, quiet enjoyment of the same pending further orders of this Court.**
>
> **3. Pursuant to Article 23 of the Constitution which does not limit the remedies this Court is empowered to grant in such cases, I direct that within 30 days of this Judgment, a meeting shall be convened by the Respondent with the Applicants, where a programme of eviction of the Applicants shall be designed taking 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.

4. The Report of the progress shall be filed in this Court within 60 days from the date of this Judgement.

5. Liberty to apply granted.

6. As this was substantially a representative Cause, there will be no order as to costs.

Dated at Nairobi this day 27th of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okemwa for the Applicants

Cc Richard