



REPUBLIC OF KENYA



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Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) (Petition 65 of 2010) [2013] KEHC 6003 (KLR) (Constitutional and Human Rights) (30 August 2013) (Judgment)

Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others

Neutral citation: [2013] KEHC 6003 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 65 OF 2010
I LENAOLA, J
AUGUST 30, 2013

BETWEEN

SATROSE AYUMA 1ST PETITIONER
JOSEPH SHIKANGA 2ND PETITIONER
JOSEPH GITONGA 3RD PETITIONER
BETH WAITHIRA 4TH PETITIONER
LYDIA MUTHONI 5TH PETITIONER
LAMECK MWAMBE 6TH PETITIONER
JOSEPH OTIENO 7TH PETITIONER
WILSON GITHINJI 8TH PETITIONER
JOHN OCHIENG 9TH PETITIONER
EUNICE OPIYO 10TH PETITIONER
PRISCILLA NYOKABI 11TH PETITIONER
YASH PAL GHAI 12TH PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHALF OF MUTHURWA RESIDENTS

AND



**THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF
RETIREMENT BENEFITS SCHEME 1ST RESPONDENT**
THE KENYA RAILWAYS CORPORATION 2ND RESPONDENT
HON. ATTORNEY GENERAL 3RD RESPONDENT
AND
MILOON KOTHARI INTERESTED PARTY

Forced eviction is a violation to the right to housing

The Registered Trustees of the Kenya Railway Staff Retirement Benefit Scheme decided to terminate the tenancy of the petitioners who were residents of Muthurwa Estate and issued eviction notices with no reasons given. The court discussed the guidelines to be followed during evictions.

Reported by Kakai Toili

International Law – general rules of international law - treaties and conventions – applicability of international statutes that had not been domesticated and incorporated as law - whether it was proper for the courts to rely on international conventions that had not been domesticated – Constitution of Kenya, 2010, article 2(5) and (6).

Constitutional Law – fundamental rights and freedoms – right to housing – where the 1st respondent purported to evict the petitioners without affording them reasons for the eviction – claim that the 1st respondent was required by law to justify the decision leading to limitation of the petitioners’ right to housing – whether the actions of the respondents were justifiable - Constitution of Kenya, 2010, article 43 (1)(b); Universal Declaration of Human Rights (1948), article 25; International Covenant on Economic Social and Cultural Rights, General Comments No.s 4 and 7.

Constitutional Law - fundamental rights and freedoms – enforcement of the Bill of Rights - whether the enforcement of the Bill of Rights was limited only to private persons – whether the court could require State organs, to uphold human rights obligations – Constitution of Kenya, 2010, articles 2(1), 21(1).

Constitutional Law – fundamental rights and freedoms – right to clean and safe water in adequate quantities – where the 1st respondent (a landlord) stopped provision of water to its tenants (the petitioners) in a move to evict them – claim that the petitioners’ right to clean and safe water had been violated – whether the 1st respondent was legally bound to provide water to the petitioners as a fundamental obligation - Constitution of Kenya, 2010, articles 43(1)(d) and 56(e); Water Act, 2002, sections 53(2), 57(5)(d).

Constitutional Law – fundamental rights and freedoms - rights of the child – right to shelter, parental protection and education – where the 1st respondent decided to evict the petitioners who had children from their tenancy premises – claim that the actions of the respondents violated the children’s right to shelter protected by the Constitution – claim that the evictions were commenced in the middle of a school year causing the affected children to drop out of school – whether the respondents had violated the children’s rights – Constitution of Kenya, 2010, article 53; UN General Comment No. 7 (10).

Brief facts

The 1st respondent, (the Registered Trustees of the Kenya Railway Staff Retirement Benefit Scheme and also the petitioners’ landlord), had in 2010 decided to terminate the tenancy of the petitioners who were residents of Muthurwa Estate and issuing eviction notices with no reasons given. It had then proceeded to close the rent accounts of the petitioners and stopped provisions of social amenities such as water and sanitation, and had subsequently put up advertisements to invite buyers of the said suit premises.



The petitioners had reiterated by obtaining a court injunction to stop the 1st respondent from demolishing any of the houses, evicting them or terminating their leases or tenancies pending the hearing and determination of the petition. The petitioners challenged the actions of the respondents, claiming that they amounted to the following violations of their fundamental rights and freedoms:

- a. Their right to housing contrary to the Constitution of Kenya, 2010 and the Universal Declaration of Human Rights (1948).
- b. Their children's rights to education provided for by article 43 of the Constitution, since the children in *Muthurwa* Estate were forced to drop out of school, given that the vacate notices were issued in the middle of a school year.
- c. Children's rights to shelter and parental protection provided for under article 53 of the Constitution.
- d. Rights of persons with disabilities, since the actions of the respondents caused loss of homes occupied by persons with disabilities, who were subsequently unable to access their places of work.
- e. The rights of the older members of the society who were retirees of the 1st respondent, in violation of article 57 of the Constitution.
- f. The petitioners' right to dignity, contrary to international instruments on human rights, such as the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights; the Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights.

Issues

- i. What was the test for determining whether an entity was a private or public body?
- ii. Whether the Bill of Rights could be enforced as against a government organ or a private body.
- iii. Whether by a landlord evicting a tenant, without first providing alternative accommodation, would amount to a violation of the tenant's right to housing.
- iv. Whether a landlord could limit the right to housing of a tenant without first justifying that limitation.
- v. Whether forcible evictions constituted gross violation to the right to adequate housing.
- vi. Whether it was proper for courts to rely on international statutes that had not been domesticated.
- vii. What were the conditions to be met before and during eviction of persons from their property?
- viii. Whether the respondents violated the children's rights to shelter and education by evicting the petitioners in the middle of a school term.

Held

1. In determining whether an entity was a public body or not, the court was obliged to consider, *inter alia*, whether any share capital of the corporation was held by the Government; whether the financial assistance of the state was so much as to meet almost the entire expenditure of the corporation; whether the corporation enjoyed monopoly status conferred by the State; whether a body had deep and pervasive state control or whether the functions of the corporation were of public importance.
2. The 1st and 2nd respondents fit the description laid out since they performed functions of a public nature and enjoyed monopoly with regard to the services they provided. The 1st respondent was set up for the benefit of the Kenya Railways Corporation pensioners who constituted the petitioners, while the 2nd respondent was a railway corporation, and its management was regulated by the Government. Further, section 3(1) of the Interpretation and General Provisions Act defined a public body as any authority, board, commission, committee or other body, whether paid or unpaid, which was invested with or was performing, whether permanently or temporarily, functions of a public nature.
3. The Bill of Rights could be enforced as against a private citizen, a public or a Government entity such as the 1st and 2nd respondents. Previous decisions of the court on the subject had been completely misunderstood and misread by more persons than misguided journalists masquerading as scholars of constitutional interpretation. The Bill of Rights was not necessarily limited to State organs. Provisions of article 2(1) of the Constitution provided that, the Constitution was the Supreme Law of the



- Republic, and bound all persons and all State organs at both levels of the Government. Article 21(1) of the Constitution also provided that it was a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.
4. The obligations of the State and its organs were clear cut, to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. The very *raison d'être* (meaning: reason or purpose for being in existence) of the State was the welfare of the people and the protection of the people's rights. It was its obligation, under international and national laws, to ensure that human rights were observed, respected and fulfilled; not only by itself but also by other actors in the country. It therefore could and was obliged to regulate the conduct of non-state actors to ensure that they fulfilled their obligations as was the case with the 1st and 2nd respondents.
 5. Under article 20(3) as read with article 259 of the Constitution, the court was obligated to develop the law to the extent that it gave effect to a right or fundamental freedom. It was to adopt an interpretation that favoured the enforcement of a right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights. To interpret the Constitution in a manner even suggested that the 1st and 2nd respondents did not have an obligation to promote and protect the petitioners' rights and freedoms, did not only fly right out of the window, but would also defeat the very essence and spirit of article 20(3) of the Constitution. It was neither the intention of the drafters of the Constitution nor the people of Kenya who overwhelmingly passed the Constitution that the Bill of Rights would only bind State organs. The Bill of Rights bound all State organs and all persons, whether they were public bodies or juristic persons.
 6. Since the adoption of the Universal Declaration of Human Rights (1948), the right to adequate housing had been recognized as a fundamental human right. Article 25 of the Universal Declaration of Human Rights provided that everyone had the right to a standard of living adequate for the health and well-being of himself and of his family, which included the right to housing.
 7. The right to adequate housing had also been recognised by a number of international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of all Forms of Racial Discrimination (CERD), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. It had also been recognised by the African regional treaty, the African Charter on Human and People's Rights and Kenya was a State party to all those treaties and conventions.
 8. The Constitution, at article 43(1)(b) formally recognized the right to housing by providing that every person had the right to accessible and adequate housing to reasonable standards of sanitation. The right to housing had finally come of age in Kenya. The criteria to be adopted in developing the interpreting of the right to housing did not however, demand mathematical precision or scientific exactitude. It neither demanded talismanic formalism in recognising the specific requirements that the right demanded. It required a sober, liberal, dynamic and broad approach that would require an examination of the normative components of the right to housing generally as well as the nature of the right to adequate housing specifically.
 9. The UN Committee on Economic, Social and Cultural Rights (CESCR) adopted two General Comments which clarified the interpretation of the right to adequate housing and the nature of the State Parties' obligations. These were General Comment 4 on the right to adequate housing and General Comment 7 on forced evictions. General Comment 4 established that the right to adequate housing should not be interpreted narrowly, as a right to basic shelter or roof over one's head; but rather as the right to live somewhere in security, peace and dignity. General Comment 4 had also clarified that the right to adequate housing was internally linked to other human rights including the inherent dignity of the human person. The right to dignity had become an interpretive principle to assist the



- further explication of the catalogue of rights and that all rights were best interpreted throughout the lens of the right to dignity.
10. The CESCR General Comment 4 revealed that the right to housing should be ensured to all persons irrespective of their income or access to economic resources. The CESCR outlined seven key features to be considered when assessing whether housing was adequate or not as follows;
 - a. Legal security of tenure;
 - b. availability of services, materials, facilities and infrastructure;
 - c. affordability;
 - d. habitability;
 - e. accessibility;
 - f. location; and
 - g. cultural adequacy.
 11. In order to realize the full realization of the right to adequate housing, it was proper to ensure that the persons being evicted had participated fully in the decision-making process. The affected people and communities were to be consulted and would be able to contribute substantively to the process that would affect their right to adequate housing. That would even be more crucial in instances where resettlement, compensation and restitution were being considered. At all times, the privacy and security of each affected person was to be paramount.
 12. The CESCR, in adopting General Comment 7, noted that forced evictions frequently violated other human rights such as the right to life, the right to security of the person, the right to non- interference with privacy, family and home and the right to the peaceful enjoyment of possessions. The CESCR's authoritative comments made the right to adequate housing and security fundamental preconditions to exercising and enjoying other civil, political, social, economic and cultural rights. Without housing and security, other fundamental rights could not be enjoyed. Sadly, the current economic and fiscal policies of the Government of Kenya were not designed to secure that right for the overwhelming majority of the population; given the notorious and widespread practices of forced evictions without consultation, compensation or adequate resettlement, particularly in Nairobi.
 13. The term "forced eviction" could best be understood in the context of the definition accorded to it by the CESCR. The CESCR defined the term as the permanent removal against their will, of individuals, families and or communities from the homes which they occupied, without the provisions of, and access to appropriate forms of legal or other protection. The term was later adopted by the African Commission on Human Rights, which stated that although the right to housing or shelter was not explicitly provided for under the African Charter, housing rights were protected through the combination of provisions protecting the right to property, the right to enjoy the best attainable standard of mental and physical health and the protection accorded to the family.
 14. Paragraph 9 of General Comment No.7 of the CESCR underlined the fact that state parties were obliged to use all appropriate means to protect the rights recognised in the CESCR and it also recognized that forced evictions were *prima facie* violations of the right to adequate housing. States were strictly prohibited in all cases, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the CESCR General Comment No.7 also elaborated on appropriate procedural protection and due process to be put in place to ensure that human rights were not violated in connection with forced evictions.
 15. The position that international law only applied in cases where it had been domesticated and incorporated was not good law. The Treaty Making and Ratification Act, 2012 was enacted to give effect to article 2(6) of the Constitution. However, article 2(5) of the Constitution providing for application of international law principles applied squarely to the case before court. It was therefore proper and good practice for the court to seek guidance from international law, where local laws were silent or inadequate on an issue.



16. The UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007) provided some guidance to states on measures to adopt in order to ensure that development-based evictions were not undertaken in contravention of existing international human rights standards and violation of human rights. Those guidelines provided measures to ensure that forced evictions did not generally take place and in the event that they did, then they would be undertaken with the need to protect the right to adequate housing for all those threatened with eviction, at all times. The protection accorded by those procedural requirements applied to all vulnerable persons and affected groups, irrespective of whether they held title to the home and property under domestic law.
17. UN Basic Principles and Guidelines on Development based Eviction and Displacement articulated the steps that states should undertake prior to taking any decision initiating an eviction;
 - a. that the relevant authority should demonstrate that the eviction was unavoidable and was consistent with international human rights commitments;
 - b. 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;
 - c. that alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effect of evictions;
 - d. 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;
 - e. that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations; and
 - f. that there must be resettlement measures in place before evictions can be undertaken.
18. The Guidelines on Evictions further articulated the conditions to be undertaken during evictions as follows;
 - a. that there would be mandatory presence of Governmental officials or their representatives on site during eviction;
 - b. that neutral observers would be allowed access to ensure compliance with international human rights principles;
 - c. that evictions would not be carried out in a manner that violated the dignity and human rights to life and security of those affected;
 - d. that evictions would not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams; and
 - e. that at all times, the State was to take measures to ensure that no one was subjected to indiscriminate attacks.
19. Persons responsible for the evictions were required to provide just compensation for any damage incurred during eviction, and sufficient alternative accommodation immediately upon the evictions. At the very minimum, the state was required to ensure that the evicted persons had access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities. Those important guidelines had been adopted by the African Commission on Human and Peoples Rights.
20. The notion of the right to adequate housing was therefore simply not a right to four walls and a roof. It had other elements to it including those that had been articulated under General Comment No.4 of the CESCR, all which constituted a fundamental shift in the realization of the right to adequate housing. The court had a duty and an obligation to protect that right at all times. It was important to safeguard the Petitioners right to adequate housing due to their long history on the suit premises, which for some of them span for decades. They had formed an attachment with the suit premises and it mattered not whether those homes were informal settlements, dilapidated houses or shanties, they were to be protected.



21. The 1st respondent violated the petitioners' rights to adequate housing from the manner in which it intended to carry out the eviction of the petitioners from the suit premises. The evictions were to be carried out without a proper plan at time and the petitioners in the end were to be left homeless and vulnerable. Additionally, they were not involved in the decision-making process because the notices they were issued with did not detail the justification for the eviction and if anything, those notices were not issued to the petitioners in person but were pinned on trees in the Estate. Further, the 1st respondent purported to carry out the demolitions in the wee hours of the morning and in total contravention of the CESC UN Guidelines; and the demolitions were also carried out in the middle of the school term.
22. It did not matter that the petitioners did not hold title to the suit premises. 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 occurred, they were extremely traumatic. They caused physical, psychological and emotional distress and they entailed losses of means of economic sustenance and increased impoverishment. Therefore, the eviction of the petitioners from the suit premises without a plan for their resettlement would increase levels of homelessness. The court was required to strive to uphold the rights of the petitioners, especially the right to be treated with dignity. Therefore, there was a clear violation of the petitioners' rights to adequate housing by the respondents, as forced evictions were carried out in a reckless manner and without following the UN Guidelines on forced evictions at the very minimum.
23. Article 43(1)(d) of the Constitution provided that every person had the right to clean and safe water in adequate quantities. Additionally, article 56(e) of the Constitution obliged the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups had reasonable access to water, among other social services. The mere recognition of a human right to water in the Constitution was not enough to ameliorate the plight of those without access to water. The court had a special responsibility to develop, and comprehensively so, the meaning of all the rights in the Bill of Rights, especially social-economic rights such as the right of access to clean and safe water. Therefore, it was important to elaborate on the normative content of the right to water so as to help the State realize its constitutional obligations.
24. The normative content of the right to water was set out in the CESC UN General Comment 15; that the substantive contents of the right to water included availability, accessibility and quality. The Comment also stipulated that the right to water entitled everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Supply of water in Kenya was governed by the provisions of the Water Act of 2002. Section 53(2) of that Act stipulated that water services should only be provided by a water service provider. A water service provider had been defined as a company, a non-governmental organization or other person providing water services under and in accordance with an agreement with a licensee (the Water Services Board).
25. Under section 57(5)(d) of the Water Act, all Kenyan municipalities were obliged to manage and operate water services on business and corporate lines and were to embrace the full cost of recovery in the provision of water services. The Nairobi Water and Sewage Company fell under that category and it was supposed to operate the provisions of water as a business and to make profits. The water supply system demanded for payment of a fee to access water. The petitioners could not fail to pay for that supply and be heard to complain about their denial of water, when somehow they had accepted for the years that they had been tenants and that it was their contractual obligation to pay for consumption of water. It was however time that water suppliers and the State adopted a rights - based approach with regard to the provision of water services. Further, the Water Act, 2002 did not expressly provide for the right to water and hence needed to be amended and bring it into conformity with the present realities, which included the devolution of services including the provision of water by the County Government.
26. Children were among the most vulnerable of the vulnerable members of the society alongside the elderly. They were harmless and they did not even know how to defend themselves in case of attack



- or violation, hence the State had an obligation to protect children. Article 53 of the Constitution provided for their rights as such. In the event of an imminent forced eviction, children would be among the most affected as was the case before court. They may have to live with the trauma for many years or if violated they might never be able to overcome the said trauma.
27. The United Nations Office of the High Commissioner for Human Rights had observed at paragraph 10 of General Comment No.7 that; with regard to forced evictions, children, among other vulnerable individuals and groups, suffered disproportionately from the practice of forced eviction. Evicting the Petitioners in the middle of a school term affected the petitioners' children's right to education as the same would be disrupted unnecessarily. Additionally, the CESCR UN General Comment 7 provided that forced evictions were not supposed to take place in the middle of school terms. The Petitioners' children's rights had thus been violated.
 28. **[Obiter]** "I must lament the widespread forced evictions that are occurring in the county 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."
 29. **[Obiter]** "I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in articles 9 and 10 of the Constitution."
 30. **[Obiter]** "As regards the realization of the right to adequate housing, the 3rd respondent (the Attorney General) must move with speed and establish policies and guidelines to ensure that this right is progressively realized. He should spearhead the development of a comprehensive housing programme that is within the available resources. I believe this would be crucial in enabling the State to meet and fulfill its obligations to ensure that adequate housing is accessible to all regardless of their economic status in the society. Three years after the promulgation of the Constitution, the right to adequate housing cannot be aspirational and merely speculative. It is a right which has crystallized and which the State must endeavour to realize. It is time *Wanjiku* had a decent roof over her head."

Petition partly allowed; Government directed towards an appropriate legal framework for eviction based on internationally acceptable guidelines.

Citations

East Africa;

1. *Centre for Minority Rights and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya Communication No 276 of 2003*
2. *Mitu-Bell Welfare Society v Attorney General & 2 others* Petition No 164 of 2011 – (Explained)
3. *Mwau, John Harun & 2 others v Attorney General & 2 others* Petition No 2 of 2011 – (Mentioned)
4. *Njeru v Republic* (1976-80) 1 KLR 1272 - (Mentioned)
5. *Rono v Rono & another* [2005] KLR 538– (Explained)
6. *Trusted Society of Human Rights Alliance v Attorney General & 2 others* Petition No 229 of 2012 – (Mentioned)
7. *Tinyefuza v Attorney General* [1997] UGCC 3 – (Mentioned)

Sudan;

1. *Centre for Housing Rights and Evictions (COHRE) v Sudan communication 296 of 2005* – (Explained)

Minnesota;



1. *Free Legal Assistance Group and Others v Zaire, African Commission on Human and Peoples Rights Communications No 25/89, 47/90, 56/91, 100/93 (1995) – (Explained)*

South Africa;

1. *Bon Vista Mansions v Southern Metropolitan Local Council (2002) (6) BCLR 625 – (Explained)*
2. *Dawood v Minister of Home Affairs (2000) (3) SA 936 (CC) – (Explained)*
3. *Government of the Republic of South Africa v Irene Grootboom & others (CCT 11/00) [2000] ZACC 19; 2001 (11) BCLR 1169 – (Explained)*
4. *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (CCT 03/2004) ZACC 10; 2005 (3) SA 280; 2004 (5) BCLR 445 – (Explained)*
5. *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Case CCT 24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) – (Followed)*
6. *Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) – (Explained)*
7. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council (2002) (6) BCLR 625 – (Explained)*
8. *S v Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) – (Explained)*

India;

1. *Francis Coralie Mullin v Administrator, Union Territory of Delhi [1981] AIR 746; 1981 SCR (2) 516 – (Explained)*
2. *International Airport Authority RD Shetty v the International Airport Authority of Indian & Others (1979) 1 SCR 1042 – (Followed)*
3. *Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala (2006) 1 KLT 919 – (Explained)*

Nigeria;

1. *The Social Economic Rights Centre & Centre for Economic and Social Rights v Nigeria, Communication No 155/96 (2001) – (Explained)*

United States of America;

1. *Carl Di Missino and Roma M DiMissimo v City of Iear Water, No 85-3654) 805F2d 1536 – (Explained)*

Statutes:

East Africa;

1. Companies Act (cap 486) In general – (Interpreted)
2. Constitution of Kenya, 2010 articles 2(1)(5)(6); 9, 10, 19(3); 20(1)(3); 21(1); 22(2)(c); 23; 24(1)(b); 26(1); 40; 43(1)(d)(3); 53(1)(c); 56(e); 57; 65; 259; 260 – (Interpreted)
3. Housing Act (cap 117) In general – (Interpreted)
4. Interpretation and General Provisions Act (cap 2) section 3(1) – (Interpreted)
5. Kenya Railways Corporation Act (cap 397) In general – (Interpreted)
6. Registration of Titles Act (Repealed) (cap 281) section 32(2) – (Interpreted)
7. Retirement Benefits Act, 1997 (Act No 3 of 1997) In general – (Interpreted)
8. Treaty Making and Ratification Act, 2012 (Act No 45 of 2012) In general – (Interpreted)
9. Water Act (cap 372) section 53(2); 57(5)(d) – (Interpreted)

South Africa;

1. Water Services Act, 1997 (Act No 108 of 1997) section 4(3)(c) – (Interpreted)

India;

1. Constitution of India, article 12 – (Interpreted)

United States of America;

1. Florida Statutes sections 54, 83, 89.59(3)(a) – (Interpreted)



International Instruments & Covenants:

1. African Charter on Human and People's Rights (Banjul Charter), 2004
2. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979
3. International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965
4. The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 articles 11, 16
5. UN Basic Principles and Guidelines on Development based Eviction and Displacement, 2007
6. Universal Declaration of Human Rights, 1948 article 25

JUDGMENT

Introduction

1. The parcel of land subject of this Petition, LR No 209/6502 (hereinafter to be referred to as “the suit premises”/or”Muthurwa Estate” interchangeably), originally belonged to the East African Railways and Harbors Administration but is currently owned by the Kenya Railways Corporation (hereinafter “KRC”) which was established through an Act of Parliament, The Kenya Railways Act (cap 397) to succeed the East African Railways and Harbors Administration. All the assets previously vested in the East African Railways and Harbors Administration are now the property of KRC including the suit premises. The suit premises comprises residential houses and other social amenities for use by the staff of KRC.
2. The brief history of this case is as follows; sometime in 2005, there was established a retirement scheme for the staff of KRC known as the Kenya Railways Retirement Benefits Scheme and subsequently a Trust was established through a Trust Deed dated May 3, 2006 and in the Trust Deed, the Scheme's purpose was mainly, the provision of pension and other benefits for employees of KRC. The Trustees also managed some of the properties of the KRC including the suit premises.
3. Satrose Ayuma, the 1st petitioner in her affidavit sworn on October 28, 2010, explains that in 2010, the residents of Muthurwa Estate were informed that the rent account at Kenya Commercial Bank, which they previously used to pay rent into had been closed and that the bank was no longer accepting rent deposits on behalf of the Scheme. Shortly thereafter, provision of social amenities such as water and sanitation was stopped and the amenities were disconnected. The 1st respondent then published notices dated July 1, 2010 which required all the residents of Muthurwa Estate to vacate the suit premises within 90 days and subsequently an advertisement was placed in the East African “Standard” newspaper of July 15, 2010 titled “*Prime Opportunity for development in the CBD courtesy of the Kenya Railways Staff.*” The advertisement invited offers for plots, as the land was to be used for development of a micro-metropolis with shopping malls, office blocks, petrol stations and “high class apartments”. The advertisement was placed by or on behalf of the Trustees of the Kenya Railways Staff Retirement Benefits Scheme.
4. Allegedly, even before the expiry of the 90 days period, demolitions in the suit premises begun and the 1st respondent also disconnected water supply, demolished toilets and bathrooms and removed the main fence of the property all in an attempt at deliberately forcing the petitioners out of the suit premises hence this petition.
5. The petitioners therefore in their petition dated October 28, 2010, and supported by affidavits sworn by Satrose Ayuma Omusena, Priscilla Nyokabi Kanyua and Prof Yash Pal Ghai, all sworn on October 28, 2010, claim various violations of fundamental rights and freedoms including the right to accessible and adequate housing; right of access to information held by the State; right not to be treated in a cruel, inhuman or degrading manner; right of every child to be protected from inhuman treatment; right of



older members of society to live in dignity and finally rights of persons with disabilities to be treated with dignity and respect.

The Petition

6. The 1st to 10th petitioners all reside in Muthurwa Estate while the 11th petitioner, Prof Yash Pal Ghai is a distinguished Professor and Scholar of law with vast experience and expertise on Constitutional and Human Rights issues. The 12th Petitioner, Priscilla Nyokabi is an Advocate of the High Court of Kenya and at the time of filing this petition, was the Executive Director of Kituo Cha Sheria, a non-governmental organization dealing with provision of legal aid and protection and promotion of human rights in Kenya. Both the 11th and 12th Petitioners have filed the petition under the provisions of articles 22(2)(c) of the Constitution and also on behalf of Pensionees, Leases, Occupiers and Tenants of the suit premises.
7. The 1st to 10th petitioners have filed this petition on their own behalf and on behalf of other interested beneficiaries of the Kenya Railways Staff Retirement Benefit Scheme. They have also presented the petition on behalf of 359 Leaseses, Occupiers, Tenants and persons who reside on the suit premises. In their Petition, they seek the following prayers;
 - “ a) A declaration that the 1st to 10th petitioners, the persons they represent and their families are entitled to the rights set out at paragraph 12 of this petition.
 - b) A declaration that the actions and omissions of the respondents violate the fundamental rights and freedoms of the 1st to 10th petitioners, the persons they represent and their families set out in paragraph 12.
 - c) An injunction restraining the respondents, their servants, agents or others acting on their behalf or instructions from demolishing houses, terminating leases or tenancies, transferring or alienating the suit premises or in any other manner evicting the petitioners and the persons they represent from the suit premises.
 - d) An order compelling the respondents jointly and severally to reconnect sewage systems, water supply and toilet facilities to the suit premises.
 - e) An order compelling the respondents to avail all information relating to the suit premises including but not limited to the following; resolutions of all the organs of the 1st respondent that authorised the demolition, alienation of the suit premises, sale and eviction of the petitioners.
 - f) Without prejudice to the foregoing, and in the alternative, a declaration that in the event of an eviction and prior to such eviction the respondent shall ensure and provide that:
 - i. One (1) year notice in writing to the petitioners and all affected persons and the parties herein to hold public hearings on the proposed plans and alternatives and those petitioners may act in person and or through their advocates and or representatives.
 - ii. During such hearings, the petitioners be given opportunity to challenge the eviction decision and to present alternatives proposals and issues, priority rights and interests, which shall be incorporated in the final decision.



- iii. Prior to such meetings and hearings, the respondents shall furnish the petitioners in advance with all relevant information in advance and including land records and a comprehensive proposal on the resettlement plan specifically addressing the petitioners' rights in the petition herein and all rights of vulnerable persons.
- iv. The proposal in (b) above shall incorporate reasonable time for public review of, comment on, and/or objection to the proposed plan.
- v. The petitioners be accorded reasonable opportunity to obtain legal, technical or other professional advice on the petitioners' rights and interest and other options.
- vi. Compensation for breach of fundamental freedoms
- vii. Costs of the suit herein.
- viii. Any further relief or order that the court shall deem just and fit to grant.”

The Petitioners' Case

8. Satrose Ayuma, PW1, in her testimony and also in her affidavit, states that the 1st to 10th petitioners are not squatters on the suit premises and claims that they have lawfully been occupying the suit land as tenants. She is currently living in the suit premises at Block C2 door 11 and has lived there all her life having been born there 50 years ago. Her father, Silas Kembo allegedly used to work for the East African Railways and Harbours and at that time they lived in house No Block H1 door 12 and when he retired in 1978, he moved back to the village but she continued to reside in the estate with her sister who lives in Block F1 door 11. She later got married to George Omulina Shikule who was also employed by the East African Railways and Harbours and they started their marriage life in Block B6 door 5 and after her husband's death in 1996, she continued living in the estate and got a job as a casual labourer with KRC, but was retrenched in 2002. Currently, she is in the business of selling groceries in the same estate.
9. She further testified that on the morning of July 12, 2010, at 5.00am she had woken up to prepare her children for school when Joshua Ombango, a 15 year old child informed her that he found 8 bulldozers which belonged to KRC with lights on focused on the estate at Block A 8 which had around 20 houses. On making inquiries, she was informed that the drivers of the bulldozers had been sent by the KRC and the 2nd respondent herein. She rushed to Kituo Cha Sheria for help and Musinga, J (as he was then) who determined the interlocutory application herein, granted the petitioners orders of injunction restraining the respondents from demolishing any houses or evicting and/or terminating the leases or tenancies of the 1st to 10th petitioners and all other occupants of Muthurwa Estate pending the hearing and determination of this petition.
10. Satrose Ayuma also claims that before the purported eviction, they were not given any reason as to why they were being evicted and were not served with the notices personally as the notices of eviction had been pinned on trees all over the estate. That it was after making inquiries that the petitioners gathered that KRC wanted to sell the suit premises and yet they, the tenants, were not involved in any way in that decision making process. That they have been affected by that decision to evict them since it intends to leave them homeless and she further testified that since the fence of the estate has been removed,



they have been exposed to insecurities as hawkers have invaded the estate and in evidence, she produced photographs to show the state of suffering for the residents of Muthurwa Estate.

11. It is also her position that the respondents should reconnect the water and restore sanitation and the fence and that in case any evictions are to be undertaken, the tenants should be involved in all discussion towards that end and she also claims that the residents of the estate should be given the first option to purchase the suit premises in case they were to be sold to other parties.
12. It is the petitioners' submissions that the respondents have the responsibility of proving that the socio-economic rights under article 43 of the Constitution are limited and they referred the court to the South African case of Minister of Home Affairs vs National Institute for Crime Prevention and the Re-Integration of Offenders CCT 03 of 2004, where the South African Constitutional Court held that the onus of justifying a limitation of a right rests on the party asserting that limitation.
13. With regard to the issue of whether the 1st and 2nd respondents are bound by human rights obligations since they are private bodies, the petitioners claim that the latter are not private bodies and even if they are, they are bound to respect the rights of the petitioner and that in any event, the 1st and 2nd respondents are state organs since they are not established under Companies Act but by an Act of Parliament. They add that the 1st and 2nd respondents perform a public function and the ownership and control of the suit premises shows that they are indeed such public bodies. That the 2nd respondent is also indeed a public body and to that extent a state organ because it is a body set up by the state to carry on the functions of running the railway network in Kenya, and is therefore an institution which is central to the economy of the country. They claim that it is a government corporation owned by the government and also managed by government and it is heavily regulated by the government. They relied on the Indian case of International Airport Authority's (RD Shetty v the International Airport Authority of India & Ors (1979) 1S CR 1042, which set the test for determining whether an entity is a government body or not.
14. With regard to the right to housing, the petitioners contend that the Constitution recognised the right to housing in two aspects; as a general right under article 43 and in the context of children as a specific right to shelter under article 53(1)(c). They further contend that the right to housing includes legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.
15. The petitioners also submit that prior to carrying out any evictions especially those involving a large group of people, the State and its organs and agencies should ensure that all feasible alternatives are explored in consultation with the affected persons. They claim that appropriate procedural protection and due process are all essential aspects of all human rights and are pertinent in matters involving forced evictions. It is also their position that evictions should not result in individuals being rendered homeless or made vulnerable to violation of other human rights. That in instances where those affected are unable to provide for themselves, the State should take all appropriate measures to the maximum of its available resources to ensure that adequate alternative housing or resettlement, as the case may be, is available. And further that the 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 standards especially the right to dignity, life and security of those affected must be observed; and also that women are not subjected to gender based violence and discrimination and that human rights of children are protected. And finally, on this argument, they submit that Government or the party responsible for providing just and sufficient alternative accommodation must do so immediately upon eviction and that those who are unable to provide for themselves should have access to essential food, water and sanitation, basic shelter and housing, appropriate clothing, essential medical services and education for children and children's



facilities. That the State should also ensure that members of the same extended family or community are not separated as a result of those evictions. The petitioners rely on the African Commission on Human Rights case of Ogoni People against Nigeria (no citation provided) and the South African Constitutional Court case of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg vs City of Johannesburg* (Case CCT 24/07) (2008) ZACC 1 in support of the above arguments.

16. It is against this background that the petitioners claim that the respondents, before attempting to evict them, ought to have taken into consideration the fact that they were rent paying occupiers; the difficulties they would face in trying to find alternative accommodation; the length of time the petitioners and others were residing on public land and finally that the purpose to be served with the evictions was not to benefit the residents in any other way but was meant to provide shopping malls and housing for the wealthier residents of Nairobi.
17. The petitioners thus allege that the 1st and 2nd respondents violated the petitioners' right to housing in the context of evictions by failing to give due notice; failing to engage with the petitioners and the community in the ways indicated in the *Olivia* case (*supra*) and failing to take steps to see that the petitioners and others had alternative accommodation. The petitioners also rely on the South African Constitutional Court case of the *Government of the Republic of South Africa v Irene Grootboom* (2000) (11) BCLR 1169 where it was held that the State has an obligation to protect and fulfill rights and that the South African Constitution requires a reasonable policy to ensure housing for all.
18. It is the petitioners' further case that the respondents violated their right to clean and safe water in adequate quantities by disconnecting their water supply so as to frustrate them to vacate the suit premises and submit that it was not only affecting their right to clean water but it also amounts to wrongful eviction. It is their case that, prior to the hand over of the Muthurwa Estate to the 1st respondent, the residents used to pay their water bills according to usage which would normally be between Kshs 35 to Kshs 200 a month. Afterwards, the 1st respondent used to include the water bill in the individual tenant's rent bill and that at the time of attempted eviction the outstanding water bill had reached Kshs 13 Million and they contended that this bill ought to be apportioned to all persons who consume the water including the Churches, Mosques, Shops, Restaurants, Toilets, Police Quarters and other places within Muthurwa Estate. In alleging that their right to clean water has been violated, the petitioners rely on the *South African Witwatersrand High Court case of Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) (6) BCLR 625 to support their position. The petitioners also claim that the state has an obligation to provide the basic amounts of water necessary for survival with little or no compensation at all and where there is no compensation, there ought to be in place subsidized tariffs for the vulnerable. On this limb of argument, the petitioners rely on the Indian case of *Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala* (2006) (1) KLT 919.
19. The petitioners further argue that the state, through its organs, the 1st and 2nd respondents, has discriminated against the petitioners essentially because they are poor and that they are being driven away in order to make way for the rich.
20. The petitioners' further allege that their children's right to education was violated since the notice to vacate was issued in the middle of a school year and subsequently affected accessibility to education and increased drop-outs in violation of the right to education as enshrined under article 43 of the *Constitution*.
21. It is the petitioners' further contention that there is violation of the rights of the child as provided for by article 53 of the *Constitution* by virtue of the attempted eviction and submit that the children of



- Muthurwa Estate's right to shelter was violated, parental protection undermined and there was total disregard of their best interests.
22. It is the petitioners' further argument that the rights of persons with disabilities were affected by the acts of the respondents and add that the loss of homes have affected persons with disability because they are not able to access their places of work.
 23. It is also the petitioners' case that the respondents violated the rights of the older members of the society who are the retirees of the 2nd respondent in violation of article 57 of the Constitution.
 24. In a rejoinder to the allegation by the respondents that they have the right to property, the petitioners claim that the right to property as provided under article 40 of the Constitution was limited and does not protect the respondents against the orders sought in this case, since that right protects acquisition and ownership of land, freedom from arbitrary deprivation and freedom from discrimination, and none of these is in issue in this case as the petitioners do not seek to deny the respondents their right to own property. In any event, the petitioners claim that the suit premises is public land and not private land and was meant to be used for public purposes. And that, even if the petitioners were infringing on the respondents' rights to own land, the same was justifiable since the limitation applicable was the one on the protection of the social-economic rights of the petitioners which was sufficient under article 24(1)(b) of the Constitution.

11th Petitioner's Submissions

25. Prof Yash Pal Ghai, the 11th petitioner herein, filed his written submissions separately. His submissions mainly focused on the right to dignity which he claims would be violated were the residents of Muthurwa Estate evicted as planned by the 1st respondent. He relied on international instruments on human rights such as the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights; all which recognise the right to human dignity as universal and which position is reflected in both international and regional instruments and in National Constitutions. He submits that the right to dignity has become an interpretive principle to assist the further explication of the catalogue of rights generated by the principle and all rights have come to be seen as best interpreted through the lens of the right to dignity. He has referred the court to the South African Constitutional Court case of Dawood v Minister of Home Affairs (2000) (3) SA 936(CC) where it was stated that human dignity informs constitutional adjudication and interpretation of many other rights and it is also of central significance in the limitations analysis.
26. It is Prof Ghai's further submission that human dignity is not something that belong only to individuals but at times it covers the entire Nation as it can also be wholly collective. He has relied on the South African Case of S v Makwanyane (1995) (3) SA 391 (CC) where the court recognized the concept of "ubuntu" and said that it recognizes the dignity of the individual in the context of the common good as the idea that it is in the interest of each individual to look after his neighbours and to work for the welfare of other members of the community.
27. He has further submitted that human dignity cannot be realised without the satisfaction of basic needs and that individuals cannot realize their full potential if they do not have the basic resources to enable them achieve it and to respect their dignity; as such dignity becomes the foundation for requiring states to provide social, economic and cultural support to individuals and groups. He has relied on the Indian Supreme Court case of Francis Coralie Mullin v Administrator, Union Territory fo Delhi (1981) SCR (2) 516, where it was held that the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition; clothing and shelter over the



head; facilities for reading and writing; expressing oneself in diverse forms and freely moving about and mixing and commingling with fellow human beings, is the pillar of all other rights.

28. It is his further Submission that the obligation to respect human dignity binds both state and not-state actors because the non- state actors have aggregated huge resources and dominated several sectors of economic and social life and the lives of several millions of people depend as much on their behaviour as the policies and acts of the state. And further that the obligation to provide basic necessities like health care, education, water and electricity has passed on to non-State actors and he relied on article 20(1) of the Constitution which expressly states that the Bill of Rights applies to all laws and binds all state organs and all persons and that under article 260 of the Constitution, a person is defined to include a company, association or other body of persons whether incorporated or unincorporated.
29. It is therefore Prof Ghai's submission that the residents of Muthurwa Estate should not be evicted because it is against human dignity in the context of Kenya's socio-economic background, and that the Constitution promotes human dignity and that it was not right for the respondents to claim property rights since human dignity triumphs over all other rights. He has thus suggested that all the parties should be allowed to negotiate in order to settle the issue amicably and in any case this court should provide a basic framework of law and policies to ensure that the basic needs of the residents of Muthurwa Estate are met and that this court has the obligation to enforce the provisions of the Constitution to their benefit.
30. In the end all the petitioners have urged me to find a violation of the constitutional rights and freedoms as made out in their petition and urged me to take a broader view in determining the appropriate reliefs to grant them since in such a matter the usual orders or injunctions or even compensation may not be an adequate remedy.

1st Respondent's Submissions

31. The 1st respondent, The Registered Trustees of the Kenya Railway Staff Retirement Benefit Scheme is a Retirement Benefit Scheme duly set up and run under the provisions of the Retirement Benefits Act (cap 3) and for the benefit of Kenya Railways Corporation Pensioners who are currently estimated at over 12,000.
32. The 1st respondent claims that it is not a public body as defined by the Interpretation and General Provisions Act (cap 2) and that the reliefs sought by the petitioners in the nature of judicial review are not appropriate as the issues involved in these circumstances revolve around private law and not public law.
33. That it is the registered proprietor of the suit premises, and allegedly a private property wherein are erected houses for rent. Its case is set out in the affidavit of Caroline Nyororo, the Muthurwa Estate Manager and the Acting Chief Executive Officer of the 1st respondent sworn on November 3, 2010.
34. In her affidavit, she has claimed that the 1st respondent has never entered into any formal tenancy agreement with any of the tenants occupying the Muthurwa Estate houses and that it applied to the City Council of Nairobi for change of user of the suit premises in order to enhance their market value so as to offer the suit property for sale which in return would enable it raise money to pay its Pensioners. That the change of user as applied for was granted, and as a result it invited offers for purchase of the property and subsequently issued notices to all tenants of the Muthurwa Estate to vacate it and offered them an opportunity not to pay rent for two months and to carry the iron sheets and bricks for their respective houses to their new homes. That a majority of the tenants vacated and carried with them the iron sheets and bricks as advised but some tenants refused to vacate and filed this case and have remained in the suit premises without paying rent and have carried themselves out as landlords



- by allocating the vacated houses to strangers thus frustrating the 1st Respondent while enjoying the interim orders granted by Musinga, J. and she has also alleged that the 1st respondent has been sued by some of the pensioners for its failure to pay pension since it had hoped to raise the money to pay pension from the rent and from the sale of the Muthurwa Estate.
35. She has further claimed that the 1st respondent does not control the provision of social amenities and services to the petitioners' houses and as a result of failure to pay for water, the services were disconnected by the supplier; the Nairobi Water and Sewage Company since the bills were not paid as was evidenced by the outstanding bill of over Kshs 13 Million which is admitted as owing by the petitioners.
 36. In its written submissions, the 1st respondent has also contended that it is the proprietor of the suit premises and that it holds the same in trust and for the benefit of the members of the 1st respondent and claims that it has a right to own that property and can deal with the same within legal parameters including in disposing the same as provided for by article 40 of the *Constitution*. And that it is not its constitutional obligation to provide housing to the Petitioners in any event.
 37. It has also submitted that the occupation of the suit premises by the petitioners cannot be construed to be that of an informal settlement because informal settlements are areas where groups of housing units have been constructed on land that the occupants have no legal claim to or occupy illegally and are also unplanned settlements and areas where housing is not in compliance with current planning and building regulations. That in the instant case, the petitioners have not settled on the suit premises illegally, but have been in occupation of the same as a result of the informal tenancy relationship that existed between them and the 1st respondent.
 38. It is the 1st respondent's further contention that as the proprietor of the suit property, it issued reasonable notices to its tenants to vacate the suit premises as required by law and that following the notices, no forced evictions ever took place on the suit property as alleged. That since there are no informal settlements on the suit property in any event the principle of consultation and resettlement would not apply and it also contends that the submissions made in relation to international law would not be applicable in the instant case. It relies on the Court of Appeal case of *Rono v Rono & anor* CA No 66/02(UR) where the court set out the principle to be applied in determining whether international law is applicable in a case or not. It therefore prays that the Petition be dismissed with costs.

2nd Respondent's Submissions

39. The 2nd respondent, the Kenya Railways Corporation responded to the petition through the affidavit of Nduva Muli, its Managing Director, and the oral testimony of Livingstone Kamande Gitau, a surveyor who was previously employed by the KRC and was the Head of its Survey Department. It also filed written submissions dated December 17, 2012.
40. In summary, the 2nd respondent's case is that it has no role in and ought not to be involved at all in the private landlord-tenant relationship between the petitioners and the 1st respondent. This is so because the suit premises is alleged to be among many of the properties that it transferred to the 1st respondent in the year 2006 for its use and purposes of realizing its objectives as set out in the Trust Deed. That the 1st respondent is an independent and autonomous body and has not been appointed by the 2nd respondent to manage the suit premises on its behalf, and as such it has no right in law or fact to interfere in the manner in which the 1st respondent chooses to deal with its private properties. It has also claimed that the dispute between the 1st respondent and the petitioners had previously been addressed by Waweru J in HCCC No 35 of 2007, where the learned Judge held that the petitioners



had the right and the liberty to rent houses anywhere in the country and, that the petitioners had no right to insist on staying on the private property of another party.

41. It is the submission of the 2nd respondent that the obligation to provide housing and reasonable standards of sanitation was vested in the state as provided for by article 43(3) of the *Constitution* and not the 2nd respondent. That in line with this provision, the role of the government is distributed amongst the Ministry of Housing and the National Housing Corporation as governed by the provisions of the *Housing Act* (cap 117) and that the role of providing sanitation services has been vested on the Ministry of Local Government and the respective Local Authorities and not the 1st and 2nd respondents.
42. As regards the right to own property as provided for by article 40 of the *Constitution*, it is the 2nd respondents' contention that it has not violated the petitioners' rights and has invited the court to find that it has already transferred the suit premises to the 1st respondent, and in the event that the court finds that the transfer did not comply with the provisions of section 32 of the *Registration of Titles Act* (now repealed) to find that the transfer is as contemplated by section 32(2) of the repealed statute since it created a contract which is binding on the parties. That pursuant to the transfer aforesaid, the 1st respondent took up the ownership of the suit premises and thereafter acquired a tenant-landlord relationship with the petitioners and other occupants of the suit premises and it was by dint of this relationship that it increased rent and issued the notices to vacate the suit premises.
43. In conclusion, the 2nd respondent has urged me to find that it has not violated any of the petitioners fundamental rights and freedoms and urged me to dismiss the petition as against it with costs.

3rd Respondent's Submissions

44. The 3rd respondent, the Attorney General's case is contained in his grounds of opposition dated October 7, 2010 and he opposed the petition on the grounds mainly that it does not raise any constitutional issues because the issues forming the subject of the petition revolve around the issue of whether there was a tenancy agreement or not and the law has provided the forum where they ought to be determined such as the Rent Restriction Tribunal or by way of a normal civil suit. Further, that the Petitioners have not demonstrated that they have any right to the suit premises and that they deserve the enjoyment of social and economic rights in terms of article 43 of the *Constitution*. In any case, that social- economic rights can only be realised progressively and subject to the available resources and international co-operation and not in the manner submitted by the petitioners. That the petition ought therefore to be dismissed with costs.

Interested Party's Submissions

45. The interested party, Miloon Kothari, a resident of the City of New Delhi in India was enjoined in this proceedings on September 27, 2011. His case is as put forth in his affidavit sworn on November 8, 2011. In that affidavit, he has described himself as an architect and is currently the co-ordinator of the South Asian Regional Programme of Habitat International Coalition's Housing and Land Rights Network. He styles himself as an expert and a consultant in the area of housing and human rights and has previously served as the UN Special Rapporteur on Adequate Housing for the years 2000-2008.
46. He has claimed that in his capacity as the Special Rapporteur on Adequate Housing, he conducted a mission to Kenya in 2004 to assess the situation with respect to the right to adequate housing in Kenya with particular attention to the problem of lack of housing and essential services, slum upgrading, land and living conditions of vulnerable population and evictions. He has averred that he consulted with stakeholders, experts and Government officials, and visited a number of communities, and conducted research in order to prepare a report on the state of housing rights in the country and to suggest practical solutions to problems raised by listing concerns and recommendations. This report was submitted to



the UN Commission on Human Rights on December 17, 2004 and he has annexed a copy of that report (UN Doc E/CN.4/2005/48/Add.2). He has also published extensively on the areas of human rights, housing, land rights etc.

47. His submissions describe the situation in Kenya in relation to access to adequate housing and has assessed the compliance of the Government with the right to adequate housing under international law and concluded by providing his opinion on the measures that can be taken to remedy the violation of the right to adequate housing and in particular with regard to Muthurwa Estate.
48. On the issue of compliance with the right to adequate housing in Kenya generally, Mr Kothari has submitted that the Committee on Social Economic and Cultural Rights has previously observed that the right to adequate housing has been gravely violated and that the government has failed to design mechanisms for securing this right and the practice of forced evictions without consultation, compensation or adequate resettlement have become widespread in the country. That the Committee has over the years expressed concern about the number of people living in informal settlements, lack of potable water and the frequency of forced evictions.
49. It is his submission that while on the fact finding mission in Kenya, he recognised that the authorities have not focused on procedural protections which should be applied in relation to forced evictions but have been emphasizing on one aspect of the requirement which is prior notice; which he claims is an inadequate measure and in his view, and with regard to the instant case, several measures ought to have been taken into consideration before the evictions are undertaken. Firstly, that there should have been a full incorporation of the human rights perspective including a clear commitment to non-discrimination and gender equality at all levels of governance, policy making and implementation. Secondly, that there should have been a comprehensive approach that addresses the issues of forced evictions, security of tenure, legalization of informal settlements and slum upgrading and to ensure consultation with those affected at the earliest stages of planning in order to protect their right to participate in decision making.
50. It is his further submission that forced evictions constitute gross violations of a range of internationally recognised human rights, including the human right to adequate housing, food, water health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment and freedom of movement. That in the circumstances, forced evictions should only occur in exceptional circumstances and further that the protection accorded in these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to home and property or not. And that where people and communities have faced forced evictions, there should be appropriate remedies which may include fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation. He referred me to the UN basic Principles and Guidelines on Development based Evictions and Displacements to support his arguments. He clearly supports the Petition and the remedies sought in it.

Determination

51. It is common ground that the 1st respondent is the registered proprietor of the property comprising Muthurwa Estate and that the 1st to 10th petitioners reside in that estate. it is also uncontested that the 1st respondent desires to demolish the Muthurwa Estate and put up modern residential and commercial buildings thereon. As such, I believe the dispute in this matter revolves around the issue of forced eviction and whether the 1st respondent is indeed entitled to evict the petitioners from the Estate and whether that eviction or intended eviction has violated any of the petitioners' rights as alleged. And if in the affirmative, I must determine the appropriate reliefs this court can grant in the circumstances. However, before considering these issues, I must first address the preliminary issue



raised by the respondents; that the 1st respondent, being a private body, cannot owe the petitioners any guarantee of fundamental human rights and freedoms, and at the very least that it cannot violate the same.

Whether the 1st respondent owes the petitioners any guarantee of fundamental human rights and freedoms

52. The 1st respondent has claimed that it is not a public body and that the reliefs sought by the petitioner are not appropriate as the issues involved in the circumstances of this petition revolve around private law and not public law. It is not disputed in that regard that the 1st respondent, is a Retirement Benefit Scheme duly set up and run under the provisions of the *Retirement Benefits Act* and was set up for the benefit of the Kenya Railways Corporation pensioners. The 2nd respondent on its part is a statutory body established under the *Kenya Railways Corporation Act* (cap 397) to carry out the functions of running the railway transport system and network in the country. Although it is a corporation, its management is very much regulated by the government and the issue therefore is whether the 1st and 2nd respondents are public entities or not. In determining this issue, I will first be guided by the Indian Supreme Court case of International Airport Authority (*RD Shetty v The International Airport Authority of India & ors*) (1979) 1 SCR 1042, where the court set the test for determining whether an entity is a Government body or not and it is as follows;

- (1) consider whether any share capital of the corporation is held by the government and if so that would indicate that the corporation is an instrumentality or agency of government;
- (2) where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, that fact would afford some indication of the corporation being impregnated with governmental character;
- (3) it may also be relevant to consider whether the corporation enjoys monopoly status conferred by the state;
- (4) whether the body has deep and pervasive State control,
- (5) whether the functions of the corporation are of public importance and closely related to governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of government and
- (6) if a department of a government is transferred to a corporation then it becomes an instrumentality or agency of the government. The court went on to state that if after the consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would be an 'authority' and therefore, part of the definition of 'state' within the meaning of the expression used in article 12 of the Indian Constitution.

53. I adopt this reasoning and would add that based on criteria numbers 1, 3 and 4, the 1st and 2nd respondents fit the bill as agencies of the State or public bodies as they perform functions of a public nature and enjoy monopoly with regard to the services they provide. Secondly, the definition of a public body by section 3(1) of the *Interpretation and General Provisions Act*, (cap 2) points out the public nature of the 1st and 2nd respondents "Public body" has been defined therein as;

“any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature”.



54. That being the definition accorded to a public body it is obvious that the 1st and 2nd respondents are such bodies and I must now determine whether the 1st and 2nd respondents have an obligation to respect and uphold the fundamental rights and freedoms of the petitioners. In so doing, I must refer to various provisions of the *Constitution*, because it is now an accepted cardinal principle of constitutional interpretation that the entire Constitution must be read as an integrated whole, and that no one particular provision destroys the other but each sustains the other. This is what has come to be known as the rule of harmony; rule of completeness and exhaustiveness and the rule of paramountcy of a written Constitution – See *Tinyefuza vs Attorney General*, Constitutional Appeal No 1 of 1997 and *John Harun Mwau & others v Attorney General & 2 others* Petition No 2 of 2011.
55. Looking at the provisions of articles 2(1), 19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1st and 2nd respondents. I say so deliberately and with firmness because previous decisions of this court on the subject have been completely misunderstood and misread by more persons than the misguided journalist masquerading as a scholar of constitutional interpretation. The Bill of Rights is therefore not necessarily limited to a state organ as argued by the 1st and 2nd respondents and in saying so, I am alive to the provisions of article 2(1) of the *Constitution* which provides that 'this *Constitution* is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.' Article 19(3) provides that;

“the rights and fundamental freedoms in the Bill of Rights;

- (a) belong to each individual and are not granted by the state;
- (b) ...
- (c) are subject to the limitations contemplated in this Constitution”

Further, article 20(1) provides that “the Bill of Rights applies to all law and binds all state organs and all persons”. The definition of a state organ is found at article 260 which states that, a state organ is; “a commission, office, agency or other body established under this Constitution” and “person” includes “a company, association or other body of persons whether incorporated or unincorporated”. Article 21(1) of the *Constitution* also provides that;

“It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”

56. In this regard, the obligations of the state and its organs are clear cut it must “observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights” The very *raison d'être* of the State is the welfare of the people and the protection of the people's rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country. For this purpose, it can and should regulate the conduct of non-state actors to ensure that they fulfill their obligations; as is the case herein with the 1st and 2nd respondents.
57. Even if an argument could be sustained that the 1st and 2nd respondents are not established under the *Constitution*, as stated elsewhere above, they are established under statute and as I have already found them to be public bodies established to provide services of a public nature, they are bound as much as state organs are to the same Constitutional obligations. The 1st respondent which is a fully owned state body, which in turn is subject to the direction of the Minister of Transport, a state officer, is certainly a government agency.



58. I am also aware that under the provisions of article 20(3) as read with article 259 of the *Constitution*, this court is obligated to develop the law to the extent that it gives effect to a right or fundamental freedom; and it must adopt an interpretation that favours the enforcement of a right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights. Clearly, to interpret the *Constitution* in a manner to even suggest that the 1st and 2nd respondents do not have an obligation to promote and protect the petitioners' rights and freedoms does not only fly right out of the window, but would also defeat the very essence and spirit of article 20(3). It is thus clear to my mind that it would not have been the intention of the drafters of the *Constitution* and the Kenyan people who overwhelmingly passed the *Constitution* that the Bill of Rights would only bind state organs. A purposive interpretation as can be seen above would imply that the Bill of Rights binds all state organs and all persons, whether they are public bodies or juristic persons.
59. It also seems clear to me therefore that from a wide definition of the term “person” as contained in article 260, the intention of the framers of the *Constitution* was to have both a vertical and a horizontal application of the Bill of Rights. I therefore find that the petitioners are entitled to file a claim under article 22 before this court alleging a violation of the petitioners rights by any of the respondents, and the court can properly grant an appropriate relief as envisaged by article 23 of the *Constitution*. I hope this settles the issue once and for all in as far as the views of this court are concerned.
60. However, before getting to the remedies available I am called upon to balance the competing interests between the petitioners and the 1st respondent over the suit premises. It is only after this has been done that I may proceed to examine any alleged violation of constitutional rights.

Balancing the interests of the 1st respondent and the petitioners over the suit premises.

61. The 1st respondent has claimed that it has the right to property over the suit premises as provided by article 40 of the *Constitution*. I will revert to this argument shortly but at this point, I must deal with the issue raised by the petitioners that the intended developments on the suit premises are illegal as the 1st respondent has not obtained the consent of the Commissioner of Lands in changing the conditions contained in the certificate of title comprised in Grant No IR 20869, which stipulates that the land may be used for residential purposes only, and that it shall not be subdivided or transferred in any part. I have seen the Certificate of Title produced in evidence in this matter and it is indeed true that the certificate of title in respect of the suit premises contains those special conditions as stated by the petitioners.
62. The 1st respondent has however indicated that it has applied for the relevant consent from the Commissioner of Lands to enable it comply with the special conditions contained in the Grant. It has also claimed that the said consent ought not to be refused as part of the suit premises has already been sold and transferred to the City Council of Nairobi which constructed the now famous Muthurwa Hawkers market and matatu terminus. With these facts in mind, I am reluctant to get into the issue of the consent of the Commissioner of Lands for obvious reasons. This court cannot direct, supervise or control other bodies or persons, on the manner or mode in which they perform their functions. The Commissioner of Lands was an independent office, charged with the performance of peculiar duties with powers being derived from the enabling statute. At the very least, he is answerable to the authorities established under the relevant statutes. This court is definitely not one of those authorities and this court only intervene if he had acted arbitrarily, in gross violation of the Constitution or in a blatant violation of the Bill of Rights. That is not the case here because indeed he had power to change the user of land at his discretion. I will say no more.



63. Turning to the issue of the right to own the suit premises as claimed by the 1st respondent, article 40 of the Constitution provides as follows;

“Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property-

- (a) of any description; and
- (b) in any part of Kenya”

It is undisputed that the petitioners do not hold any title over the suit premises and they are but tenants of the 1st respondent. that being the case, i do not see how the petitioners may violate the 1st respondents rights to the suit premises. They were and are tenants and with or without formal tenancy agreements they have lived on the suit premises for many years, while paying rent for the houses each of them occupies. It is on this understanding that the 1st respondent chose to give them the eviction notices so as to enable them move out of its property and get alternative accommodation elsewhere. Accordingly, it is also clear to the petitioners that the 1st respondent owns the suit premises and that issue has not been contested by anyone. The issue therefore in my view and as framed above, should be whether the 1st respondent is entitled to evict the petitioners from the suit premises given their history on the suit premises as well as the relationship they have had with the 1st respondent over the years. To answer that question, I must start by determining whether the facts as pleaded above have made out a case for violation of constitutional rights.

Whether the Petitioners Constitutional rights and freedoms have been violated

64. I will start by addressing my mind to the violation of the right to housing as alleged. In so doing I will seek to establish the nature of this right and in doing so I shall advert to various international and regional instruments as well as our Constitution and thereafter, I will deal with the circumstances under which this right can be violated. Lastly, I will determine, with reference to the facts before me, whether the right has been violated as alleged.

Right to Adequate Housing

64. Since the adoption of the Universal Declaration of Human Rights (1948), (UDHR) adequate housing has been recognized as a fundamental human right. Article 25 thereof provides that;

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood circumstances beyond his control”.

64. This right has also been recognised by a number of international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights ((ICCPR), the Convention on the Elimination of all Forms of Racial Discrimination (CERD), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. It has also been recognised by our regional treaty, The African Charter on Human and People's Rights and Kenya is a State party to all these Treaties and Convention.



64. The *Constitution* at article 43 has also formally recognized the right to housing. The marginal note to this article is titled “Economic and Social Rights” and provides as follows;

- “(1) Every person has the right-
- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants”

68. Having been so anchored in our *Constitution*, it follows that the right to housing has finally come of age in Kenya. The issue however, is how that right should be interpreted given the various competing interest whenever its violation is alleged but even then, I do not think the criteria to be adopted demands mathematical precision or scientific exactitude, in developing the interpretation to be accorded to the right to housing. Neither does it demand talismanic formalism in recognising the specific requirements that the right demands. In my view, it requires a sober, liberal, dynamic and broad approach that would require an examination of the normative components of the right to housing generally as well as the nature of the right to adequate housing specifically.

69. Having said so, I believe that the starting point would be a reference to the UN Committee on Economic, Social and Cultural Rights (CESCR) which has adopted two general Comments. I am convinced that these Comments are crucial in clarifying the interpretation of the right to adequate housing and the nature of the state parties' obligations and I shall specifically focus on General Comment 4 on the right to adequate housing and General Comment 7 on forced evictions.

70. General Comment 4 has established that the right to adequate housing should not be interpreted narrowly, as a right to basic shelter or roof over one's head, but rather “as the right to live somewhere in security, peace and dignity”. This comment has also clarified that the right to adequate housing is internally linked to other human rights and I must therefore agree with Prof Yash Pal Ghai's Submission that this right is linked to the inherent dignity of the human person and indeed, the right to dignity has become an interpretive principle to assist the further explication of the catalogue of rights and that all rights have come to be seen as best interpreted throughout the lens of right to dignity – See *Dawood vs Minister for Home Affairs* (2000) (*supra*).

71. 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 outlined seven key features to be considered when assessing whether housing is adequate or not and they are as follows;



- (a) Legal security of tenure. 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.
- (b) Availability of services, materials, facilities and infrastructure; An adequate house must contain facilities for health, security, comfort and nutrition; All beneficiaries 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 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 state parties to ensure that the percentage of housing-related costs is, in general commensurate with income levels.
- 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.
- (e) Accessibility; Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Discernible governmental obligations need to be developed aiding to substantiate the right of all to a secure place to live in peace and dignity, including access to land and entitlement.
- (f) Location; adequate housing must be in a location which allows access to employment options, health care services, schools, child care centres and other social facilities.
- (g) Cultural adequacy; 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.

72. I have deliberately reproduced these features verbatim for reasons to be seen shortly but I dare add that in order to realize the full realization of the right to adequate housing, it is proper to ensure that the persons being evicted have participated fully in the decision-making process. The affected people and communities must be consulted and be able to contribute substantively to the process that would affect their right to adequate housing and this would even be more crucial in instances where resettlement, compensation and restitution are being considered. And that at all times, the privacy and security of each affected person should be paramount.

73. The South African Constitutional Court in the oft-quoted case of the *Government of the Republic of South Africa and others v Irene Grootboom and Others* (*supra*) had the opportunity to expound on the meaning of adequate housing and stated as follows;

“The right delineated in section 26(1) is a right to 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and 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 [and] there must be land, there must be services, there must be a dwelling. Access to land for the purposes 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.”

74. It is instructive that article 43 of our *Constitution* uses the words “accessible and adequate housing” similar to section 26(1) of the *South African Constitution* which uses the words “access to adequate housing” and so I adopt the above words in that context and as if they were my own. In addition to General Comment 4, the CESCR has also adopted General Comment 7 and noted that forced evictions frequently violate other human rights such as the right to life, the right to security of the person, the right to non- interference with privacy, family and home and the right to the peaceful enjoyment of possessions. Clearly, the CESCR authoritative comments have made the right to adequate housing and housing security fundamental preconditions to exercising and enjoying other civil, political, social, economic and cultural rights. Without housing, security and other fundamental rights cannot be enjoyed. Sadly, the current economic and fiscal policies of the Government of Kenya are not designed to secure this right for the overwhelming majority of the population. How else would one explain the notorious and widespread practices of forced evictions without consultation, compensation or adequate resettlement particularly in Nairobi? I digressed.
75. PW1, Satrose Ayuma, in her affidavit and in oral evidence stated that the intended evictions will have dire consequences on the petitioners as it would render them homeless and expose them and their property to insecurity and threats on their persons, interfere with their children’s access to education, distance the petitioners from their families and business opportunities and more gravely generate internally displaced persons and homeless people. The question at this point therefore is, whether forced evictions would violate the petitioners’ constitutional rights as alleged.

Forced Evictions

76. The term “forced eviction” can best be understood in the context of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines the term as;

“the permanent removal against their will of individuals, families and or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection.”

This term was later adopted by the African Commission on Human Rights which stated that although the right to housing or shelter is not explicitly provided for under the African Charter, housing rights are protected through the combination of provisions protecting the right to property, the right to enjoy the best attainable standard of mental and physical health and the protection accorded to the family.

77. In 1993, the UN Commission on Human Rights issued a resolution categorising forced evictions as a gross violation of human rights, and in particular the right to adequate housing. The Commission further observed that forced evictions invariably affect the poorest and most vulnerable sectors of the society. Perhaps it was on the basis of this recognition that the UN Committee on Economic, Social and Cultural Rights adopted General Comment No 7 on forced evictions as a follow up to General Comment No 4 on the right to adequate housing.
78. Paragraph 9 of General Comment No 7 underlines the fact that state parties are obliged to use all appropriate means to protect the rights recognised in *ICSECR* and it recognises that forced evictions are prima facie violations of the right to adequate housing, and that states should be strictly prohibited in all cases, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of General Comment No 7 also elaborates on appropriate procedural



protection and due process to be put in place to ensure that human rights are not violated in connection with forced evictions.

79. Kenya, so far as I know, does not have a law governing evictions whether forced or otherwise. Consequently, I must look to international law and the jurisprudence emerging from other countries to discern the ideal situation with regard to the subject. Having said so, I must also say something about the submission made by the 1st respondent that this court cannot refer to International law in the context of this case. I find that submission misguided. I am aware of the Court of Appeal decision in Rono vs Rono CA No 66 of 2002 (UR) and I do not think that the position that international law applies only in cases where it has been domesticated and incorporated is good law. I know that the Treaty Making and Ratification Act, 2012 was enacted to give effect to article 2(6) of the Constitution but article 2(5) on application of international law principles applies squarely to this case. I therefore deem it proper and good practice to seek guidance from international law where our laws are silent or inadequate on an issue such as the one before me.
80. In that regard, 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 taken 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.
81. 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.
82. 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.
83. 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.



84. 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 facilities.
85. 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 from 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”

I am wholly guided and with that in mind I must now return to the issue whether the petitioners' right to adequate housing was violated.

86. They have alleged a violation of inter-alia their right to adequate housing by the respondents. As it can be seen from the facts, some of the petitioners have lived on the suit premises since they were born. They have at all times been tenants or occupiers at the 2nd respondent's premises and later the 1st respondent after the suit premises was vested on the latter. The petitioners have generally been paying rent for their respective houses until July 2010 and in fact during the pendency of these proceedings, the issue of unpaid rent took a lot of the court's time. In that month, in any event, the 1st respondent gave them both verbal and written notices, (which were pinned on the trees in the Estate), requiring them to vacate the suit premises within 90 days from the July 1, 2010. These notices were allegedly issued after the 1st respondent obtained the change of user of the suit premises and also in line with the requirement of the *Retirement Benefits Act* that a Pension Scheme should reduce or convert its fixed assets into liquid assets so as to enhance the market value and offer the property for sale to raise money to pay the monthly pension to its members. Caroline Nyororo in her affidavit alleged that the decision to sell the Estate was reached, after it became clear that the rent obtained from the Estate was not economical to meet the monthly requirements of the 1st respondent. Consequently, the 1st respondent proceeded to subdivide the suit premises and approached real estate agents to sell the properties and up to the time of filing the suit, several offers had been received. It is now contended that the actions of the 1st respondent were calculated to deny the petitioners their rights to adequate housing as well as render them homeless notwithstanding the explanation given above.



87. 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.”

It is also clear to my mind that taking all facts together, the right of the petitioners to adequate housing were violated and it matters not that the 1st respondent issued notices to all the tenants in the estate and offered them an opportunity not to pay rent for two months and also carry iron sheets and bricks for their use. Where were the petitioners supposed to get alternative accommodation in two months given the difficulties associated with getting accommodation in Nairobi? In the end, I think what matters is whether the initial eviction was carried out in accordance with the set UN guidelines and I think not. I have deliberately linked adequate housing and evictions because this judgment will focus on the latter.

88. It is also clear that way before the notices were served on the petitioners, the 1st respondent had commenced demolition of the sanitary facilities, roofs, doors and fence of the houses and this in my view is constructive eviction since it was done perhaps with an intention of forcing the petitioners to abandon the houses which in itself is unlawful. Of constructive eviction, the US Court of Appeals Eleventh Circuit stated in *Carl Di Missino and Roma M DiMissimo vs City of Iear Water*, No 85-3654) 805F 2d 1536 that;

“Depriving a tenant of water services amounts to constructive eviction, which under section 83, 54 of the Florida Statutes, a tenant would be entitled to half in a suit to enjoin the landlord from taking possession by means other than the eviction proceedings required by section 89.59(3)(a).”

I am in agreement and I am clear in my mind that the 1st respondents' actions of demolishing the sanitary facilities, roofs, doors and fence were part of the eviction strategy. If forced evictions must not take place, surely, demolition of crucial facilities such as sanitation and security apparatus must also not take place.

89. So far as it can be seen, the 1st respondent violated the petitioners' rights to adequate housing from the manner in which it intended to carry out the eviction of the petitioners from the suit premises. I say so because the evictions were to be carried out without a proper plan and time and the petitioners in the end were to be left homeless and vulnerable. In addition, they were not involved in the decision-making process because the notices they were issued with did not detail the justification for the eviction and if anything, those notices were not issued to the petitioners in person but were pinned on trees in the Estate. Further, the 1st respondent purported to carry out the demolitions in the wee hours of the morning and in total contravention of the UN Guidelines; and the demolitions were also carried out in the middle of the school term.



90. It does not matter that the petitioners 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.
91. 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 v 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 ...”

I wholly agree with the learned judge.

93. In the light of the foregoing, I find a clear violation of the petitioners' rights to adequate housing by the respondents; as the forced evictions were carried out in a reckless manner and without following the UN Guidelines on forced evictions at the very minimum.

Right to Water

94. A look at the facts and the submissions of the parties in this case would reveal that there is no clarity on the issue as to who is/was responsible for collecting of payments for supply of water in the Estate. Initially when the 2nd respondent was responsible for the estate, the tenants used to have their water bills deducted from the salaries. It is unclear who the actual supplier was. Things changed with the



hand over of the Estate to the 1st respondent who required the residents and tenants to pay their water bills together with their rent for each month. Currently, according to the 1st respondent, there is an outstanding water bill of over Kshs 13 Million owed to the Nairobi Water and Sewage Company but it is again unclear how the bill accumulated to that colossal sum but I will revert to the issue shortly but it is against this backdrop that the petitioners have alleged a violation of their right to water.

95. So far as I can see, the right to water is not expressly mentioned in international human rights instruments. The only explicit reference to the right to water is contained in [CEDAW](#), the [Convention on the Rights of the Child](#) and the [International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disabilities](#) (Disability Convention). The UN Committee on Economic, Social and Cultural Rights in Comment 15 set its criteria for deriving the right to water from other related rights and stated;

“Article 11, paragraph 1, of the Convention specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living, including adequate food, clothing and housing ... The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival”

96. The right to water has also not been specifically provided for under the [African Charter on Human and Peoples' Rights](#), but the African Commission on Human and Peoples' Rights has ruled in various cases that failure by the state to provide basic services such as safe drinking water was a violation of article 16 of the [African Charter](#) which provides that every individual has the right to enjoy the best attainable state of physical and mental health – See for example [Free Legal Assistance Group and Others v Zaire](#) Communications 25/89. In its recent decision in the case of [Centre for Housing Rights and Evictions \(COHRE\) v Sudan](#) Communication 296 of 2005 the Commission found the Republic of Sudan to have violated a number of rights provided in the [African Charter](#) including the right to water. The Commission in that case ruled that the poisoning of water sources such as wells was a violation of the right to water implicit in article 16 of the [Charter](#) as it exposed the victims to serious health risks. The Commission has also found in the Kenyan case of [Centre for Minority Rights and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya](#) Communication No 276 of 2003 that the Endorois people's access to clean drinking water was severely undermined as a result of loss of their ancestral land around Lake Bogoria which had ample fresh water sources.
97. Fortunately for Kenyans, article 43(1)(d) of the [Constitution](#) provides that “every person has the right to clean and safe water in adequate quantities”. Additionally, article 56(e) obliges the state to put in place affirmative action programmes designed to ensure that minorities and marginalised groups have reasonable access to water, among other social services.
98. The mere recognition of a human right to water in the [Constitution](#) is in my view not enough to ameliorate the plight of those without access to water. This court has a special responsibility to develop, and comprehensively so, the meaning of all the rights in the Bill of Rights, especially social-economic rights such as the right of access to clean and safe water. It is important therefore to elaborate on the normative content of the right to water so as to help the State realise its constitutional obligations.
99. The normative content of the right to water is set out in UN General Comment 15; that the substantive contents of the right to water include availability, accessibility and quality. The Comment stipulates that; “the right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” and these elements have also been accepted by he



Indian High Court in *Vishala Koch Kudivella Samarbhana Samithi vs State of Kerala* 92006 (10) KLT 919; where the court stated that;

“We have no hesitation to hold that failure of the state to provide safe drinking water to citizens in adequate quantities would amount to a violation of the fundamental right to life enshrined in article 21 of the *Constitution* of India and would be a violation of human rights. Therefore, every government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency.”

100. I agree and with all those principles in mind, sadly, I do not think the petitioners have made out a case for violation by the respondents of their right to water in the context of the *Constitution* I say so for reasons to be seen below.
101. Supply of water in Kenya is governed by the provisions of the *Water Act* of 2002. Section 53(2) of that *Act* stipulates that water services shall only be provided by a water service provider. A water service provider has been defined as “a company, non-governmental organization or other person providing water services under and in accordance with an agreement with a licensee (the water services board).” Under section 57(5)(d), all Kenyan Municipalities are obliged to manage and operate water services on business and corporate lines and must embrace the full cost of recovery in the provision of water services. The Nairobi Water and Sewage company falls under this category and it is supposed to operate the provisions of water as a business and it ought to make profits, such that the failure of the petitioners and other persons to pay for the water they have consumed to the tune of Kshs 13 Million necessarily called for disconnection. I will say something about the water bill later in this Judgment but the water supply system as I understand it, demands for payment of a fee to access water. The petitioners cannot fail to pay for that supply and now be heard to complain about their denial of water when somehow they accepted for the years that they have been tenants that it is their contractual obligation to pay for consumption of water. This is the system in place and much as I am sympathetic to the petitioners' situation generally this court's hands are tied. And I say so because it is not clear to whom the petitioners pay for the water; is it the 1st respondent together with the rent? Is it through deduction in their salary? Is it to Nairobi Water Sewage Company directly? I do not know whom to believe since this issue was heavily contested and none of the parties led evidence to prove or disprove their opponents position. Furthermore the Nairobi Water and Sewage Company, which allegedly disconnected the water supply is not a party to these proceedings and in the circumstances, I am unable to find any violation of the right to water as alleged by the petitioners.
102. Further, the South African case of *Bon Vista Mansions v Southern Metropolitan Local Council* (2002) (6) BCLR 625; relied on by the petitioners must be distinguished with the instant case. That case was concerned with the interpretation of what the meaning of sufficient water was. The right to water has been recognized under the South African *Water and Services Act* and the South African Government is obliged to provide some basic amount of water to the most vulnerable in the society but that is not quite the case in our realm. In the circumstance, I am unable to issue any orders as regards the allegation of violation of right to water.
103. Suffice it to say in any event that it is time the water suppliers and the State adopts a rights based approach with regard to the provision of water services and I suggest that we should borrow a leaf from the South African water laws regime. Section 4(3)(c) of South Africa's *Water Services Act* states that procedures for the discontinuation of water services must not result in a person being denied access to basic water services for non-payment, where that person proves that he or she is unable to pay



for such basic services. Section 4(3) of the *Water Services Act* further provides that procedures for the limitation or discontinuation of water must be fair and equitable and should provide for reasonable notice of intention to terminate water services and most significantly, for an opportunity to make representations. This, in my view, is what a progressive and realistic realization of social economic rights including the right to water should be.

104. I must add that it is time that the Kenyan Water Act is amended as it was enacted 8 years before the promulgation of the *Constitution, 2010* and it does not expressly provide for the right to water and there is a clear need to have it amended and brought into conformity with the present realities which include the new constitutional dispensation and the devolution of services including the provision of water by County Governments. That is all there is to say on this matter.

Violation of the Rights of Children's

105. Children are among the most vulnerable of the vulnerable members of the society alongside the elderly. They are harmless and they do not even know how to defend themselves in case of attack or violation. The state has an obligation to protect children and articles 53 provides for the rights as such. This article provides that:

- “(1) If at anytime during the period of a child’s stay at a rehabilitation school the Director is satisfied that such child should not remain subject to the applicable committal order, he may refer the matter to the Children’s Court for revocation of the committal order.
- (2) A children’s court may at any time, on its own motion or on the application of any person, revoke an order committing a child to a rehabilitation school, but before doing so it shall call for all the relevant records of the court which made the order, and all relevant records of any court which may previously have considered an application under this section.
- (3) Notwithstanding anything in this Act, an order committing a child to a rehabilitation school shall not remain in force beyond the date on which the child attains the age of eighteen years, nor shall any such order remain in force for longer than three years at a time except by order of the court.
- (4) On an application for an order under subsection (2) or subsection (3) the manager of the rehabilitation school where the child is, shall cause the child to be brought before the court, unless the court otherwise orders.”

106. In the above context, in the event of an imminent forced eviction, children would be among the most affected. They may have to live with the trauma for many years or if violated they may never be able to overcome the said trauma. The United Nations Office of the High Commissioner for Human Rights has observed at paragraph 10 of General Comment No 7 that; with regard to forced eviction;

“women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction.”

The petitioners aver that the eviction in this case took place in the middle of a school term. That would obviously affect the petitioners' children's' right to education as the same would be disrupted unnecessarily. In fact under General Comment 7 above, forced evictions are not supposed to take place



in the middle of school terms. I am satisfied that the petitioners have also made out a case of violation of this right in the circumstances of their case.

Right to information, Protection from discrimination and rights of persons with disability and older members of the society

107. Turning to the violation of other rights as alleged by the petitioners, that is; right to information, protection from discriminations, the right of persons with disability and rights of older members of the society, I do not think that the petitioners have demonstrated the violations of these rights. There is no material before me that would lead to such a categorical finding. This being a constitutional petition, it is now a well settled principle that the petitioners ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation – See *Anarita Karimi Njeru v Republic* (1976- 80) 1 KLR 1272 and *Trusted Society of Human Rights Alliance vs Attorney General and Others* Petition No 229 of 2012. This is important not just to allow the Respondents to know the case that they have to answer, but also to enable the court make a clear determination on the alleged violations. I shall say no more.

Appropriate Remedies

108. The petitioner having made out a case for violation of their right to adequate housing and sanitation as well as right to human dignity and violation of the right to protection of the law for children, I must design the appropriate remedies to address those violations. I recall that the Petitioners urged me to take a broader view in determining the appropriate reliefs applicable in the case and I agree.

109. Before I do that, I must lament the widespread forced evictions that are occurring in the county 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”.

The need to have those guidelines was also aptly captured by Yacoob J in the *Grootboom* case (*supra*) where he stated that;

“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 in 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 result to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of Land suitable for housing development is a key fact in the fight against the country's housing shortage”

110. It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to



observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions may be carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in articles 9 and 10 of the Constitution.

111. As regards the realization of the right to adequate housing, the 3rd respondent must move with speed and establish policies and guidelines to ensure that this right is progressively realised. He should spearhead the development of a comprehensive housing programme that is within the available resources. I believe this would be crucial in enabling the state to meet and fulfill its obligations to ensure that adequate housing is accessible to all regardless of their economic status in the society. Three years after the promulgation of the Constitution, the right to adequate housing cannot be aspirational and merely speculative. It is a right which has crystallized and which the State must endeavour to realise. It is time “Wanjiku” had a decent roof over her head and so I agree with the sentiments of Mumbi Ngugi, J in Mitubell Welfare Society v Attorney General and 2 others Petition No 164 of 2011, where she stated thus;

“The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be ‘progressive realization’ of social economic rights, implying that the State must begin to take steps, and I might add be, seen to take steps, towards realization of these rights”

I agree wholly and will say nothing more.

112. In light of all the information available to me, especially on the nature of the housing crisis in this county, this case has clearly assumed an enormity of purposes beyond itself. In designing whatever remedies I shall grant the petitioners I must take into account the fact that whereas I have found violations of rights articulated above, the following other issues are pertinent;

- i) Muthurwa Estate and income derived therefrom is the lifeline of hundreds of KRC pensioners some of whom still have families residing in the estate. To grant all the orders sought in the petition would therefore be counter-productive and may not achieve the ends of justice.
- ii) The 1st to 10th petitioners are tenants and Satrose Ayuma in her evidence had no strong objection to the change of user of the suit premises but desired a more humane programme of eviction.

This judgment was therefore deliberately focused on forced evictions specifically.

I should close by stating that I did not see any evidence of wrongdoing on the part of the 2nd respondent and it is obvious why. Its protestations in that regard must be upheld.

In the event, and noting all that I have stated above, the orders that attract my mind are the following;

- a) It is hereby declared that the 1st respondent violated the petitioners’ rights to accessible and adequate housing contrary to article 43 of the Constitution but limited to the manner in which the forced evictions from Muthurwa Estate was conducted on or about July 12, 2010.
- b) The 3rd respondent is directed to consider amendments to the Water Services Act of 2002 to bring it in line with the expectations of article 43(1)(d) of the Constitution 2010.



- c) The 3rd respondent shall within 90 days of this judgment file an affidavit in this court detailing out existing or planned State Policies and Legal Framework on Forced Evictions and Demolitions in Kenya generally and whether they are in line with acceptable International standards.
- d) The 3rd respondent shall within 90 days of this judgment file an affidavit in this court detailing out the measures the government has put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the expectation of article 43(1)(b) of the *Constitution*.
- e) Within 21 days of this judgment, a meeting shall be convened by the Managing Trustee of the 1st respondent together with the petitioners, where a programme of eviction of the petitioners shall be designed taking into account all the factors clearly outlined at paragraph 83 of this judgment;
 - i) that at the time of eviction, neutral observers should be allowed access to the suit premises to ensure compliance with international human rights principles.
 - ii) that there must be a mandatory presence of Governmental officials or representatives including Nairobi County 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.

The agreed programme shall be filed in this court, in any event within 60 days of this judgment.

- f) As to costs, clearly the issues raised in the petition and the orders made above would show that there shall be no orders as to costs.
- g) All other prayers in the petition are not granted and are consequently dismissed.
- i) Each party at liberty to apply.

113. I must sincerely thank all parties and their advocates for patience, decorum, depth and wealth of research and submission which have all gone a long way in enriching this judgment.

114. Orders accordingly.

SIGNED AT NAIROBI THIS 26TH DAY OF AUGUST, 2013

ISAAC LENAOLA

JUDGE

DATED, SIGNED AND DELIVERED ON BEHALF OF LENAOLA, J. ON THIS 30TH DAY OF AUGUST, 2013

MUMBI NGUGI

JUDGE

