Njeri & 8 others v Nyakiongora & 3 others; National Land Commission & another (Interested Parties) (Environment & Land Petition 47 of 2018) [2022] KEELC 2366 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2366 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 47 OF 2018

EO OBAGA, J

JUNE 28, 2022

IN THE MATTER OF THE INTERPRETATION AND APPLICATION OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23(1)&(3), 26, 27(1)&(2), 28, 29, 32, 40(1), 43, 47, 53, 54, 57, 165(3)(B) &(6) AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 26, 27(1)&(2), 28, 29, 32, 40(1), 43(1) (B) AND (F), 47, 53, 54 AND 57 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 4 OF 2015 AND

IN THE MATTER OF SECTION 152 C, 152F AND 152G OF THE LAND ACT NO.6 OF 2012

AND

IN THE MATTER OF SECTION 5 AND 6 OF THE PREVENTION, PROTECTION AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS AND AFFECTED COMMUNITIES ACT NO 56 OF 2016

AND

IN THE MATTER OF SECTION 10 OF THE PUBLIC OFFICERS ETHICS ACT NO 4 OF 2003

BETWEEN

MAGDALENE NJERI ..... 1ST PETITIONER

JANE ROSE RUGURU ..... 2ND PETITIONER

BEATRICE KAGEHA ..... 3RD PETITIONER

ROSE ODHIAMBO ..... 4TH PETITIONER

JENIPHER APONDI ..... 5TH PETITIONER

PRISCILLA WAWIRA ..... 6TH PETITIONER

MICHAEL NJIRU ..... 7TH PETITIONER

JOHN MUNGAI MURIGU ..... 8TH PETITIONER

KATIBA INSTITUTE ..... 9TH PETITIONER

AND

MOSES NYAKIONGORA ..... 1ST RESPONDENT

NATIONAL BUILDING INSPECTORATE AND MULTI-SECTORAL COMMITTEE ON UNSAFE STRUCTURES ..... 2ND RESPONDENT

MINISTRY OF TRANSPORT INFRASTRUCTURE,HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY

JUDGMENT

Background

1. Vide a Petition dated 30th of July 2018, the Petitioners herein filed Petition 264 of 2018 in the Constitutional and Human Rights Division of the High Court decrying violations of their constitutional rights by the Respondents. Filed together with the Petition was a Notice of Motion application of even date seeking among others conservatory orders against the Respondents pending the hearing and determination of the Petition.

2. On the 1st of August 2018, the matter came up before P. Nyamweya J,(as she then was) she noted that the Petition & Application raised issues touching on the use and occupation of land and the application of the *Land Act*. Accordingly, she directed that the file be transferred to this court.

3. This court vide its ruling of the 8th of August 2018 found that the Petitioners had not made a case warranting the grant of conservatory orders and dismissed the Petitioners' application.

4. On the 16th of October 2018, the Court at the Petitioners behest granted them leave to file an Amended Petition. The Amended Petition dated 15th November 2018 was filed on the 13th of December 2018. In the Amended Petition, the Petitioners sought the following reliefs;

    i. A declaration that the 1st and 2nd Respondents have no and had no authority under the law to issue the Removal Notice dated 19th July 2018 to vacate the reserves in Kaloleni, Makongeni, Mutindwa, Dandora & Kenyatta University (Kamae) and dated 26th July 2018 to vacate the Langa'ata sub county headquarters, Wilson Airport South C Link Road Reserve.

ii. A declaration that the Removal Notices dated 19th July 2018 and that of 26th July 2018 are illegal, invalid because they were issued without giving due regard to Articles 10, 28, 29, 32 40, 43, 47, 53, 54, 57, 62 & 67 of *the Constitution*.

iii. A declaration that the Removal Notices dated 19th July 2018 and 26th July 2018 are illegal and invalid because the manner in which they were conceptualized, developed and issued was illegal and in violation of constitutional and statutory requirements.

iv. A declaration that the Removal Notices dated 19th July 2018 and 26th July 2018 violate the Petitioners' rights under *the Constitution* specifically: Article 28-dignity, 29-freedom and security of the person, 32-freedom of religion, 40-property, 43-right to accessible and adequate housing and the right to education, 47-the right to fair administrative process, 53-the rights of the child, 54-the rights of persons with disabilities, 57-rights of older members of the society.

v. A declaration that any eviction notices and any actual removal of the Petitioners and all persons residing in the affected areas must be done in strict compliance with *the Constitution* and the law and specifically Section 152C, F & G of the *Land Act* No 6 of 2012 and Regulations 63, 66, 67 and 69 of the Land Regulations (Legal Notice No.280 of 2017) and, at the minimum, must be preceded by the relevant compensation and or resettlement as required by law.

vi. A declaration that the 1st Respondent by issuing Removal Notices with no powers specified under any law has violated Articles 2, 10 and 21 of *the Constitution* and Section 10 of the Public Officers Ethics Act, Section 5 of the Public Service (Values and principles Act 2015 and Section 13(b) and(c) of the *Leadership and Integrity Act* No 19 of 2012 hence is unfit to hold public office.

vii. An order quashing the pending Removal Notice dated 19th July 2018 because they were issued by a person or body which has no authority to issue such a notice and it is made in total disregard of the law on fair administrative action and evictions.

viii. A permanent injunction restraining the 1st and 2nd Respondents or their Agents/Servants or Assignees from evicting, harassing or in any other way interfering with the remaining residents or any members of Kaloleni, Makongeni, Mutindwa, Dandora, Kenyatta University (Kamae) and Langa'ata sub county headquarters, Wilson Airport South C Link Road Reserve enjoyments of occupation, use, and utilization of the properties in the affected areas.

ix. A declaration that the demolition of the Petitioners' homes and their forced illegal eviction without prior adequate notice violated the Petitioners and the affected residents' rights to Fair Administrative Action protected under Article 47 and was contrary to Sections 3 and 5 of the Fair Administration Act, 2015.

x. A declaration that the illegal and forceful evictions and demolition of the Petitioners' homes in the affected areas issued with the notices dated 19th July and 26th July 2018 was a violation of the Petitioners' and other residents rights to life, to equality and freedom from discrimination, human dignity, freedom and security of the person, freedom of religion, right to property, right to the highest attainable standard of health, right to accessible and adequate housing and to reasonable standards of sanitation, right to education, the rights of children, older persons and marginalized groups enshrined in Articles 26, 27, 28, 29, 32, 40, 43, 47, 53, 54, and 57, as read with Articles 29(5) and 21 of *the Constitution* of Kenya,2010.

xi. A declaration that the forceful and illegal evictions of the Petitioners and other affected residents from their homes on or about and between 3rd & 13th August 2018 without alternative

shelter or accommodation for the affected persons specifically the vulnerable children, women, persons with disabilities, youth, minorities and marginalized groups and older members of society protected under Articles 53, 54, 55, 56, and 57 of *the Constitution* of Kenya, 2010.

xii. A declaration that the conducting of illegal and forceful evictions on public land without the involvement of the National Land Commission was contrary to Articles 10 & 67 of *the Constitution* as read with Sections 152 A-I of the *Land Act*, 2012 and Regulations 63, 66, 67 and 69 of the Land Regulations No. 280 of 2017.

xiii. General damages at a quantum assessed by the Court, in compensation for the 1st to the 8th Petitioners' fundamental freedoms under Article 26, 28, 29, 43, 47, 54, 55, 56 and 57 of *the Constitution*.

xiv. Exemplary damages against the 1st, 2nd and 3rd Respondents for violating fundamental rights & freedoms and disregarding the guiding principles on leadership and integrity under Article 73(2) of *the Constitution* as well as the national values and principles under Article 10 of *the Constitution*.

xv. An order that the 2nd Interested Party, the Kenya National Commission on Human rights monitor the compliance of the declarations and orders issued by this Court in this cause and to promptly bring to the attention of this Court or any Court of Competent jurisdiction any non-compliance, by the Respondents or anyone else, with the declarations and orders of this Court.

xvi. Costs of this Petition.

xvii. Any other or further relief that this Honourable Court may deem fit and just to grant.

5. On the 17th of January 2019, the Petitioners indicated to the court that despite service of the Amended Petition on the Respondents, they were yet to receive any response from the Respondents.

6. The Court gave further directions on the 20th of May 2019 that the Petition would be canvassed by way of written submissions with parties granted an opportunity to highlight the same.

Petitioners' case

7. The Petition is supported by the supporting affidavit of Magdelene Njeri sworn on the 30th July 2018(supporting affidavit to the original petition) and a further affidavit of 15th November 2018 respectively. She avers that she swears the affidavits on her on behalf and on behalf of listed co-petitioners, a list of which is annexed to the affidavit.

8. The Petition is also supported by several further affidavits being those of Anna Syongii Muli and Jane Rose Ruguru, residents Agare, Kaloleni sub-location both dated 30th November 2018. William Musembi, a resident of City-Carton-Kismayu village in Langa'ta Constituency dated 13th November 2018 and Haron Muiruri, a photographer deposing as to the authenticity of the photographic evidence adduced dated 3rd December 2018.

9. The 1st to 8th Petitioners herein, have described themselves as residents of Kaloleni and Makongeni Villages, having instituted the Amended Petition dated 15th November 2018 (herein Petition) on their own behalf, in public interest and on behalf of the class of affected residents of Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora and Kenyatta University (Kamae), Langata Sub County Headquarters, Wilson Airport and Langata Wilson South C Link reserve.

10. The 9th Petitioner, Katiba Institute is described as a duly registered constitutional research policy and litigation institute established to further the implementation of Kenya's 2010 constitution and the development of a culture of constitutionalism in Kenya. They have instituted this suit in the Public Interest and on behalf of the residents of Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora and Kenyatta University(Kamae), Langata sub county Headquarters, Wilson Airport and Langata Wilson South C Link reserve.

11. The Petitioners claim arises from the issuance of Removal Notices dated 19th July 2018 and 26th July 2018 issued to them by the 1st and 2nd Respondents asking them to voluntarily remove structures located on the Kenya Power and Kenya Railway reserves on the affected areas and the eventual eviction and demolition of their structures by the Respondents.

12. The Petitioners contend they have at all relevant times and for a period of about 27 years been lawful residents residing and/or conducting business in the affected areas and having erected schools, churches and other social amenities.

13. The Petitioners state that the 1st and 2nd Respondents issued to them Removal Notices dated 19th of July 2018 and 26th of July 2018; that the Removal Notice of 19th July 2018 was with regard to residents of Kaloleni, Makongeni, Mutindwa, Dandora and Kenyatta University (Kamae) who had structures situate along the Kenya Power and Kenya railway reserves. They were requested to voluntarily remove the said structures before demolitions commenced as from 1st August 2018.

14. The Removal Notice of 26th July 2018 was with regard to residents situate along the Langata road reserve. They were requested to voluntarily remove their structures as demolitions would commence from 9th August 2018.

15. The Petitioners contend that the removal notices issued to them were illegal as they were not based on any lawful authority duly formed and/or given under any specific law.

16. The Petitioners further decry the manner in which the demolitions were carried out indicating that there was massive loss of property as well as destruction of social amenities such as Churches, Mosques and Schools and further that the demolitions resulted in destitution of men, women, children, the elderly and disabled.

17. The Petitioners contend that the Respondents' actions in evicting the Petitioners was tantamount to violation of their constitutional rights as espoused under Articles 26, 27 (1) & (2), 28, 29, 32, 40(1), 43(1)(b) and (f), 47, 53, 54 of *the Constitution*.

18. The Petitioners further contend that the 1st and 2nd Respondents actions in issuing the Removal Notices and evicting the Petitioners was contrary to Sections 152 B, C, G and F of the *Land Act* 2012 as well as Regulations 63, 66, 67 and 69 of the Land Regulations 2017.

19. It is the Petitioners case that the Respondents infringed on their right to fair administrative action as espoused under Article 47 of *the Constitution* and Sections 3, 4 and 5 of the Fair Administrative Actions Act.

20. The Petitioners also allege that the 1st Respondent acted ultra vires and with no lawful authority by issuing the Removal notices contrary to the principles governing public officers under Articles 10 and 73(2) of *the Constitution*, the Public Officers Ethics Act and the *Public Service (Values and Principles) Act* 2015.

Respondents' case

21. On the 18th of February 2019 the court noted that none of the Respondents had filed any response to the Petition despite service. As at the time of writing this judgement, that position remains unchanged.

Submissions

22. The Petition was canvassed by way of written submissions which were highlighted by counsel. The Petitioners submissions were dated and filed on the 15th of May 2019. The list and bundle of authorities were dated and filed on the 7th of June 2019.

23. The Petitioners through their written and oral submissions, submit that the following are the issues that arise for determination;

    i. Whether the 1st and 2nd Respondents actions of issuing the Removal Notices and illegally evicting the Petitioners was contrary to the rule of law and Sections 152B, C, G & F of the *Land Act*, 2012 as well as Regulations 63, 66, 67 and 69 of the Land Regulations,2017.

    ii. Whether the 1st, 2nd & 3rd Respondents met their obligations under Article 21 of *the Constitution*.

    iii. Whether the unlawful eviction carried out by the 1st & 2nd Respondents violated the Petitioners rights under Articles 28, 29, 32, 40, 43(1)(b) and (f), 53, 54, 57 of *the Constitution*.

    iv. Whether the 1st, 2nd and 3rd Respondents infringed the right to fair administrative action under Article 47 of *the Constitution* and Sections 3, 4, and 5 of the Fair Administrative Actions Act, 2015 by failing to conduct public participation before the issuance of the Removal Notices and issuance of a short notice period before demolitions.

    v. Whether the 1st Respondent acted ultra-vires and with no lawful authority by issuing Removal Notices contrary to principles governing public officers under Articles 10 and 73(2) of *the Constitution*, the Public officers Ethics Act,2003 and the *Public Service (Values and Principles) Act*, 2015.

    vi. What remedies are available for the Petitioners?

24. The Petitioners submit that the Respondents did not have any powers in law to issue the impugned notices and subsequently the same was a nullity. They reiterate that all actions of government authority/public officers must be founded on the rule of law. In support, they cited the cases of Muslim for Human Rights (MUHURI) & Anor v Inspector General of Police & 5 Others [2015] eKLR, Republic v Kombo & 3 Others ex-parte Waweru, Miscellaneous Civil Application No 1648 of 2005; [2008] 3 KLR (EP) 478, Reference Re Secession of Quebec, [1988] 2 SCR 217, Additional District Magistrate, Jabalpur v S.S Shukla [1976] INSC 129 and Keroche Industries Limited v Kenya Revenue Authority & 5 others Nairobi HCMA No.743 of 2006 [2007] KLR 240.

25. The Petitioners reiterate that the Removal notices by the Respondents leading to the demolition of the Petitioners structures constituted an illegal eviction contrary to Article 10 and 67 of *the Constitution*, Section 152C, F, and G of the *Land Act*, 2012 and Regulations 63, 66, 67 and 69 of the Land Regulations, 2017(Legal Notice No.280).

26. The Petitioners contend that the intention of the legislature in drafting the Land Laws Amendment bill was to streamline the process of evictions from public land having noted the unscrupulous ways the government had been handling evictions particularly in informal settlements and to ensure that

evictions were carried out in humane manner and with due regard to the bill of rights as well as international standards and principles.

27. It is the Petitioners argument that the reasons given for the Removal Notices was not genuine and was a ploy by the government to evict the Petitioners.

28. The Petitioners state that the procedure for eviction of persons from public land is well set out in Sections 152B, C, F & G of the *Land Act*, 2012 buttressed by Regulations 63, 66, 67 and 69 of the Land Regulations, 2017.

29. The Petitioners submit that there must be clear, laid down procedures governing the manner in which the government categorizes structures as unsafe and conclude that they warrant destruction to avoid instances of arbitrary evictions like the present case. In support of this contention, they cited the South African case of Nthabiseng Pheko and 777 Others V Ekurbuleni Metropolitan Municipality (Socio-Economic Rights Institute as Amicus Curiae) [2011] ZACC 34 where the Court found that the Municipality acted contrary to *the Constitution* when they invoked the Disaster Management Act to evict residents of Bapsfontein and demolish their homes without an order of the court.

30. On the question as to whether the Respondents met their obligations under Article 21 of *the Constitution*, the Petitioners contend that they did not. The Petitioners state that the Respondents have both positive and negative obligations with respect to the rights. Towards this contention, they relied on the case of Kepha Omondi Onjuro & others V Attorney General & 5 others [2015] eKLR.

31. It is argued by the Petitioners that the 1st, 2nd and 3rd Respondents failed to respect the Petitioners rights to adequate housing; that the 3rd Respondent failed to protect the Petitioners by preventing 3rd parties such as the 1st and 2nd Respondents from interfering with their rights.

32. The Petitioners compare the instant circumstances with the case of Kepha Omondi (supra) where the Kenya Railways Corporation was tasked with relocating dwellers who lived along the railway reserves. They state that in contrast, there was adequate notice and due consultation and participation before the evictions.

33. On the issue of violation of their right to fair administrative action, it is the Petitioners case that the short notice period in the impugned notices were a violation of the Petitioners rights to fair administrative action as set out under Article 47 of *the Constitution* and the Fair Administration Act, 2015 as well as international conventions to which Kenya is a state party. In particular the International Covenant on Economic, Social and Cultural Rights where Un General Comment No 7 on forced evictions stipulates that a person is entitled to adequate and reasonable notice before they are evicted.

34. The Petitioners submit that most of the residents of the affected areas had lived and conducted business there for long periods of time and had no alternative places to go; they contend it was therefore unfair to expect them to upheave their lives within the short timelines given by the notices.

35. The Petitioners state that the High Court has on the issue of evictions severally found that inadequate notices given before evictions were unreasonable. Towards this end, they cited the cases of Ibrahim Osman v Minister of State for Provincial Administration and Internal Security and 3 others [2011] eKLR where a 21 day notice issued against residents who had resided in the area from 1940's was deemed unreasonable. They further cited the cases of June Seventeenth Enterprises Ltd, suing on its own behalf and on behalf of 223 other persons being former inhabitants of Kenya Airports Authority Masaai Village, Embakasi within Nairobi v Kenya Airports Authority & 5 others [2014] eKLR; Veronicah Njeri Waweru and 4 others v City Council of Nairobi & 2 others; and Susan Waithera

Kariuki and 4 others v Town Clerk Nairobi City County Council & 3 others in all of which the Court found that the notices issued prior to evictions were too short or not issued at all.

36. It is argued by the Petitioners that the *Land Act* provides for a 3 month notice period before evictions can be carried out.

37. On the issue of violations of Constitutional rights, the Petitioners contend that the evictions carried out by the Respondents caused them mental anguish hence violating their rights to dignity as protected under Article 28 of *the Constitution*. They cited the case of Moi Educational Centre Co Ltd -vs- William Musembi & 16 others [2017] eKLR where the Court of Appeal stated that human dignity must be upheld during evictions.

38. The Petitioners further contend that the destruction of their places of worship being churches and mosques was a violation of their right to practice a religion of ones choice as protected under Article 32 of *the Constitution*; that the evictions resulted in the destruction of their household items and structures and this violated their right to property as protected under Article 40 of *the Constitution*; that the evictions further violated their rights to adequate housing under Article 43(1)(b) of *the Constitution* and right to education under Article 43(1)(f) of *the Constitution* as schools within the affected areas were demolished and the children were adversely affected during the evictions and were unable to attend school.

39. The Petitioners submit that the evictions equally adversely affected the elderly, persons with disabilities and children. They referred to the affidavits of Jane Rose Ruguru and Magdalene Njeri both elderly widows who deponed as to their suffering and that of their children as a result of the evictions as well as to the Affidavit of Magdalene Njeri who deponed that her son who was suffering from a mental disability and went missing as a result of the evictions.

40. The Petitioners reiterate that the 1st Respondent, a public officer, acted contrary to the national values as espoused in Article 10 and 73(2) of *the Constitution* as well as the Public Officers Ethics Act, 2003 and the Public Service Values and Principles Act, 2015 by purporting to issue the impugned notices when he has no authority under the law to do so. They cited the case of Samuel Thinguri Warwathe v Mary N. Mungai, Commissioner for Co-operative & 2 others Petition No.7 of 2017 [2017] eKLR to support the contention that a public officer must uphold *the constitution* and the law.

41. The Petitioners urged the court to rely on the case of Kenya Country Bus Owners Association & others v Cabinet Secretary for cabinet and infrastructure & others, Judicial Review Case No.2 of 2014, where the court determined that where a public officer carried out an action not caring whether or not it was wrong or for malicious and other extraneous purposes, he could be held personally responsible.

42. In discussing the appropriate remedies, the Petitioners urge the court to be guided by the cases of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate Petition No 4 of 2012 [2013] eKLR where the Supreme Court stated that the Articles 22 and 23 give the courts special and wide responsibilities for the enforcement of bill of rights and the Supreme court case of Communications Commission of Kenya & 5 others V Royal Media Services Limited & 5 others Petitions No. 14, 14A, 14B and 14C of 2014 [2014] eKLR where the court stated that the reliefs under Article 23 are not exhaustive and the court has discretion to give further reliefs.

2nd Interested Party's Submissions

43. The 2nd Interested Party filed their submissions dated the 11th of October 2019 and filed on the same date. They filed their List and bundle of authorities dated 11th October 2019 on 18th of October 2019.

44. In their written and oral submissions, the 2nd Interested Party submitted on three main issues;

i. Legality or otherwise of the impugned notices;

ii. Legality or otherwise of the eviction of the Petitioners; and

iii. Human rights violations occasioned by the illegal actions of the 1st & 2nd Respondents.

45. On the issue of the legality or otherwise of the impugned notices, the 2nd Interested Party submits that the same have no legal backing and as such are illegal, null and void. They contend that Section 152B of the *Land Act* 2012 makes mandatory provisions setting out the procedures to be followed in carrying out evictions on public land.

46. The 2nd Interested Party states that pursuant to Section 152C of the *Land Act* 2012(as amended in 2016), the National Land Commission is responsible for communicating a decision relating to eviction of persons on public land and the same is to be in writing and where appropriate to be given at least three months before the eviction.

47. The 2nd Interested Party reiterates that the mandate to communicate a decision regarding eviction to unlawful occupiers of public land is vested with the National Land Commission vide the Land Regulations of 2017. They cite the case of Super Nova Properties Limited Vs The National Land Commission [2019] eKLR wherein they contend the Court found fault with a notice issued by the National Land Commission to the Applicant to vacate the suit property as the same had not been published in the Kenya Gazette nor announced on the radio as required by Section 152 C of the *Land Act*.

48. The 2nd Interested party contends that by issuing the Notices, the 1st and 2nd Respondents have usurped the constitutional and statutory mandate of the National Land Commission granted to it by virtue of Article 67(2)(a) of *the Constitution*, Section 5(1)(a) of the *National Land Commission Act*, Section 152C, F and G of the *Land Act* 2012 (amended 2016) and Regulations 63, 66 and 67 of the Land Regulations, 2017.

49. On the issue of the legality or otherwise of the eviction, the 2nd Interested party submits that Section 152G of the *Land Act* 2012 (amended 2016) provides for mandatory procedures during evictions. They contend that, the evictions carried out were contrary to the mandatory provisions on the basis that; there was no authorization by the National Land commission, there was no prior identification of persons conducting the evictions and the said evictions were conducted at the wee hours of the morning and thus denied the Petitioners an opportunity to salvage and carry with them their personal belongings. They relied on the case of Moi Education Centre Co Ltd v William Musembi & 16 Others [2017] eKLR where the Court of Appeal stated

> "there is now in place and in force a statutory legal framework through the Land Laws (Amendment Act), 2016 providing for the manner and procedure that should be followed in evicting persons in unlawful occupation of private, community and or public land"

50. The 2nd Interested Party further argued, on the strength of the case of Port Elizabeth Municipality v Various Occupiers (2005] (1) SA 217(CC) that the court ought to take into consideration the duration the Petitioners have been in occupation of the lands they were evicted from and take judicial notice of the attachments they have formed over time.

51. On the issue of the alleged violation of human rights, the 2nd Interested Party submits that the Respondents actions violated the Petitioners' rights to accessible and adequate housing as provided for under Article 43(1)(b) of *the Constitution* and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

52. The 2nd Interested Party also submits that the destruction of schools which were situate in the affected areas violated the children's right to education as espoused under Article 53(1)(b) of *the Constitution*.

53. The 2nd Interested Party states that the evictions and destruction of property left the Petitioners homeless and without any means of livelihood violating their rights to be treated in a dignified manner in accordance with Article 28 of *the Constitution*. They referred to the case of Moi Education Centre (supra) where the court found that demolition of the Petitioners' houses and their forced eviction without a court order was a violation of their rights to inherent human dignity and security of the person.

54. It is the 2nd Interested Party's argument that the Respondents' actions in issuing the notices and the eventual evictions were done in contravention of Article 47 of *the Constitution* as read together with the Fair Administration Act, 2015; that the Petitioners were not granted an opportunity to be heard before the issuance of the impugned notices. In support, they cited the Supa Nova Case (supra).

55. It is the 2nd Interested Party's further contention that the Respondents as state organs and/or public officers are bound to uphold the national values and principles as contained in Article 10 of *the Constitution*. They cite the case of Stanley Munga Githunguri, CR, Application No.271 of 1985 where Chief Justice C.B Madan (as he then was) emphasized the importance of the rule of law.

56. In conclusion, the 2nd Interested Party urges this court as a custodian of human rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom in accordance with Article 20(3)(b) of *the Constitution* and to be guided by Article 259(1) of *the Constitution*. In support, they relied on the case of Apollo Mboya V Attorney General & 2 others (2018) eKLR.

57. The 2nd Interested Party submits that the state failed in its duty of respecting the Petitioners' rights and ensuring that they are not in any way subjected to illegal evictions. They cited the Committee on Economic Social and Cultural Rights, General Comment No.7.

Analysis & determination

58. The court has considered the Petition, Amended Petition together with the supporting affidavit, further affidavits and annexures thereto, submissions and all other material placed before it.

59. The key factual aspects of this dispute are undisputed being that the Petitioners had lived on the affected areas for a long period and erected structures on the affected areas; that notices were issued seeking the removal of those structures and there was eventual demolition of the structures.

60. The court opines that the following are the issues that arise for determination;

    i. Whether the Petitioners have locus to institute this suit.

    ii. Whether the Respondents had authority to issue the impugned eviction notices.

    iii. Whether the 1st, 2nd & 3rd Respondents' violated the Petitioners right to fair administrative action as espoused under Article 47 of *the Constitution* and Sections 3, 4 and 5 of the Fair Administrative Actions Act.

    iv. Whether the Petitioners' rights under Articles 28, 29, 32, 40, 43(1)(b) and (f), 53, 54, 57 of *the Constitution* were violated and;

    v. What are the Appropriate reliefs if any?

I. Whether the Petitioners have locus to institute this suit

61. The Petitioners herein have indicated that they have instituted this suit on their own behalf, in the Public interest and on behalf of a class of residents of several areas mentioned herein.

62. Article 22 of *the Constitution* allows any person to file a petition alleging that his/her rights or those of another, or indeed those of a group, have been violated or are threatened with violation. It provides as follows:

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by––

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

63. Article 258 of *the Constitution* provides;

1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

64. In instituting a suit Article 22(b), the Petitioners ought to have been guided by Order 1 rule 8 of the Civil Procedure Rules. It provides as follows;

" One person may sue or defend on behalf of all in same interest.

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such cases give a notice of the suit to all such persons either by personal service, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

65. Order 1 rule 8 is quite clear that for a representative suit there has to be notice to all those affected by either personal service or by way of a public advertisement, as the Court may direct. This requirement is mandatory.

66. In Ngugi Mbugua v Chairman National Land Commission & 8 others; Chairperson Kenya National & another (Interested Parties) [2020] eKLR the Court stated:

Further Order 1 Rule 8 of Civil Procedure Rules has couched the issue of service to the said persons who have interest over the same to be personally served in mandatory terms. The Petitioner/ Applicant has not provided to this Court the number of people that have been targeted or has he provided any evidence that the said persons had either personally been served or served by public advertisement. In the absence of compliance with the law, the Court finds and holds that it cannot hold this to be a Representative suit.

67. Mulla on Code of Civil Procedure on the same issue provides as follows:

...the courts, where called upon to deal with an application under Order 1 rule 8, should bear in mind that the provisions contained therein are mandatory and not merely directory, and are essential preconditions for trial of the case as a representative suit. They must see that if they direct that the notice should be by public advertisement, the notice must disclose the nature of the suit as well as the reliefs claimed therein, in order to enable the persons interested to get themselves impleaded as parties to the suit, either to support the case or to defend against it. Further, the notice must mention the names of the persons who have been permitted to represent them, so that the persons interested may have an opportunity of knowing who has been selected to represent them".

68. Also, in the Ugandan Case of Ibrahim Buwembo, Emmanuel Ssrungoji Zubairi Muwanika for and on behalf of 800 others v Utoda Ltd HCCS NO. 664 OF 2003 on the provisions of the Civil Procedure Code of Uganda similar to those in Order 1 Rule 8 of the Civil Procedure Code, 2010 for Kenya, the learned judge had the following to say:

> " It would appear to me that the wording of O1 r8 (1) with regard to notice either by personal service or by public advertisement as the court may in each case direct is mandatory. Furthermore, the requirement to give a proper notice cannot be regarded a mere technicality or direction that can be dispensed with".

69. This Court in Jonathan Charles Titi v Principal Magistrate Kapsabet & 2 others [2019] eKLR, a constitutional petition, stated:

> " From a perusal of the pleadings no such notice has been filed by the applicant to prove that he acts in a representative capacity. He therefore has no locus to file the present application and by extension, the petition."

70. There is no evidence of any such notice and indeed this large class of people purported to be represented remain largely unknown. There is also no evidence that the represented class of people did appoint the Petitioners to represent them. It is obvious that the suit filed by the Petitioners did not meet the strict requirements of a representative suit under Order I Rule 8 of the Civil Procedure Rules as sought to be argued by the Petitioners. It is therefore not a representative suit.

71. However, the Petition has also been instituted by the Petitioners on their own behalf as well as in public interest.

72. It is not in dispute that the Petitioners were residents of the affected area. This fact has not been disputed by the Respondents. It is therefore a fact that the actions of the Respondents directly affected the Petitioners and they have the right to challenge the said actions as having affected their constitutional rights.

73. The Tenth Edition of Black's Laws Dictionary at page 1425 defines "public interest" as:

> " ...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation". In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."

74. It is not in doubt that evictions and demolitions affects and in the instant case did affect a wide range of public citizens. The petition is therefore rightly instituted in the public interest.

75. In Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 it was appreciated that:

> " Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of *the constitution* or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural

trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of *the Constitution* of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever *the Constitution* of Kenya is threatened with violation. If an authority which is expected to move to protect *the Constitution* drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of *the Constitution* of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly, in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of *the Constitution*, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...In the interest of the realisation of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering *the Constitution* legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court's mandate to uphold *the Constitution* as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

76. The petition will therefore be determined on the basis of having been instituted by the Petitioners on their own behalf and in the interest of the public in accordance with Article 23 of *the Constitution*.

II. Whether the Respondents had authority to issue the impugned eviction notices/Whether 1st Respondents actions were contrary to principles governing public officers under Article 10 and 73(2) of *the Constitution*, the Public Officers Ethics Act,2003 and the Public Service(Values and Principles)Act 2015.

77. It is the Petitioners and 2nd interested parties case that the 1st and 2nd Respondents had no lawful authority to issue the Removal Notices. The Petitioners opine that the mandate to evict persons illegally occupying public land lies with the National Land Commission by virtue of Land (Amendment) Act 2016 specifically Sections 152B, C, F & G as well as the Land Regulations of 2017.

78. The Petitioners cited the cases of Muslims for Human Rights (MUHURI) & Anor v Inspector General of Police & 5 others [2015] eKLR, Republic V Kombo & 3 others Exparte Waweru Miscelleneous Civil Application No 1648 of 2005:(2008)3 KLR (EP) 478, Reference Re Secession of Quebec [1998] 2 SCR 217 and Keroche Industries Limited Vs Kenya Revenue Authority & 5 others Nairobi HCMA No 743 of 2006 [2007] KLR all of which allude to the principle that any and all actions by public bodies must be founded on law.

79. In support, the 2nd Interested Party cited the case of Supa Nova Properties Limited Vs the National Land Commission [2019] eKLR where the Court held that the National Land Commission contravened Section 152C of the Land (Amendment) Act 2016 by failing to follow the laid down procedures with regards to eviction.

80. Section 14 of the *National Land Commission Act*, sets out the functions of the Commission being inter-alia; powers to review grants or dispositions relating to public land, in order to establish their propriety or legality.

81. In line with its powers under the aforestated section, the Commission's power regarding eviction from public land is stated under section 152 of the *Land Act* as amended by section 98 of the Land Laws (Amendment) Act 2016, and Section 155 of the *Land Act*. The amendment introduced by section 98 of the Land Laws (Amendment) Act, 2016 are as follows:

152A. A person shall not unlawfully occupy private, community or public land.

152B. An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

82. The Land Regulations of 2017, equally speak to the manner of evictions from public land. Regulation 63 states;

63(1) Upon establishing that a particular parcel of public land is unlawfully occupied, the commission shall issue a notice to the unlawful occupiers of public land to vacate the land in Form LA 57 set out in the 3rd Schedule.

(2) The Notice under Paragraph (1) shall be published in the gazette in one newspaper with nationwide circulation.

83. Regulations 66 and 69(1) sets out the procedures and necessary requirements before evictions on public land can be carried out.

84. The court opines that whereas the Petitioners may indeed be correct about the role of the National Land Commission in carrying out evictions on public land, the circumstances of this case are different.

85. The impugned removal notices issued to the Petitioners read as follows;

> "In order to avoid human risks like injuries, loss of life and damage to property associated with Railway operations and high voltage electricity lines, public notice is hereby issued for the removal of all structures located along the Kenya power and Kenya Railway reserves in Kaloleni, Makongeni, Mbotela, Mutindwa, Dandora and Kenyatta University from the 1st of August 2018.

The notice is hereby issued to all such persons living and/or operating along the said reserve to voluntarily move out of the land before the above date.

Upon the expiry of this notice, any structures or properties found on the specified corridor will be demolished or removed from the land at the trespassers risk."

86. The notice of 26th July 2018 reads as follows;

> " Notice is hereby given of the intended removal of all illegal structures along Langa'ata Sub-county Headquarters, Wilson Airport and Langata Wilson South C Link Road Reserve as from 9th August, 2018.
>
> The owners are therefore advised to remove them before the above date.
>
> Upon the Expiry of this Notice, any structures or property found on the specified area will be demolished or removed from the road reserve at the trespassers risk and Costs."

87. The impugned notices were issued by 1st Respondent, the secretary of the 2nd Respondent a state department under 3rd Respondent Ministry.

88. The 2nd Respondent, the National Building Inspectorate was established by Presidential directive vide Executive Order No 1 of 2018. Its mandate is to undertake a comprehensive audit of all existing buildings with a view of profiling those that have not met the standards of construction.

89. The 2nd Respondent audits buildings for conformity with land registration, planning, zoning, building standards and structural soundness. Its duties also include profiling unsafe and dangerous buildings and structures and to demolish such structures.

90. The Department also demolishes and removes unlawful encroachments on road reserves, riparian land, way-leaves set aside for power lines, railways, pipelines and sewer lines.

91. The 3rd Respondent Ministry, through the State Department of Housing provides a framework for housing provision, management and maintenance nationally and through the state department of Public works sets standards and regulates the building industry.

92. As aforestated, the 2nd Respondent was established vide an Executive Order. Executives Order are issued pursuant powers donated to the President pursuant to the provisions of Article 132 (3) (b) and Article 135 of *the Constitution*.

93. It is apparent from the foregoing that it was well within the 1st Respondent's mandate as Secretary of the 2nd Respondent to issue the impugned notices.

94. The Court notes that the 2nd and 3rd Respondents mandate overlaps with the mandate of the County Governments, Ministry of Lands and National Land Commission. There is need for a clear statutory framework and comprehensive guidelines to avoid the legal questions such as on this issue before the court.

95. The Petitioners opine that the 1st Respondent acted contrary to the Principles governing public officers under Articles 10 & 73 of *the Constitution* as well as the Public Officers Ethics Act, 2003 and the Public Service Values and Principles Act 2015.

96. The basis of the Petitioners contention under this head is that the 1st Respondent arrogated himself powers that he did not have and further that he failed to uphold the national values and principles as espoused under Article 10 of *the Constitution*. They relied on the case of Samuel Thinguri Warwathe v Mary N. Mungai, Commissioner for Co-operative 2 others Petition No 7 of 2017 [2017] eKLR as well as the case of Kenya Country Bus Owners Association & others V Cabinet Secretary for Transport and Infrastructure and others, Judicial review case No 2 of 2014.

97. Article 10 (2) of *the Constitution* provides that:

The national values and principles of governance include-

a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

b. Human dignity, equity, social justice, non-discrimination and protection of the marginalized;

c. Good governance, integrity, transparency and accountability; and

d. Sustainable development.

98. Article 73 of *the Constitution* on the other hand prescribes for the responsibilities of leadership in the following terms:-

1. Authority assigned to a State officer-

a. Is a public trust to be exercised in a manner that-

i. Is consistent with the purpose and objects of this Constitution;

ii. Demonstrates respect for the people;

iii. Brings honour to the nation and dignity to the office; and

iv. Promotes public confidence in the integrity of the office; and

b. Vests in the State officer the responsibility to serve the people, rather than the power to rule them.

99. The sections of the Public Officers Ethics Act and the Public Service (Values and principles Act), 2015 speak as to standards of duty expected of public officers.

100. The case of Samuel Thinguri (supra) as relied on by the Petitioners is of no relevance in this case. The dispute therein was with regard whether the definition of a public officer under S.2(e) of the Public Officers Ethics Act 2003 was inconsistent with the definition of Public officer provided for in *the Constitution*. The Court found that it was. The citation quoted by the Petitioners in the case of Kenya Country Bus Owners Association was with regard to negligent or malicious actions by a Public officer.

101. As aforestated, the 1st Respondent as the Secretary of the 2nd Respondent was well within his rights in issuing the Removal notices. He cannot on that point be said to have acted ultravires. Further, there is nothing to indicate that the 1st Respondent was guided by any extraneous purpose in issuing out these notices.

102. The court therefore finds no merit in this argument.

III. Whether the 1st, 2nd & 3rd Respondents violated the Petitioners' right to Fair administrative action under Article 47 of *the Constitution* and Sections 3, 4 and 5 of the Fair Administrative Actions Act.

103. The Court notes that regrettably despite the serious and heavy allegations of fact against them, the Respondents only appeared before this Court during the interlocutory stage after which they did not deem it important to further participate in these proceedings.

104. The Court of Appeal in Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR stated as follows:

> "A pertinent legal issue therefore arises as to what is the effect of the respondent's failure to file a replying affidavit?... The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims? ...We come to the conclusion that the appellants' affidavits not having been challenged by the respondent, the facts averred were essentially admitted...The respondent having made a conscious and deliberate decision not to respond to or challenge the appellants' affidavit evidence, the learned Judge could not become the respondents' advocates by questioning evidence that had not been challenged. In effect that would amount to applying a higher standard of proof than that of a balance of probability."

105. In the case of Kariuki Gathitu v Attorney General [2013] eKLR, the Court stated thus;

> "It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of fact. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts, then the court can only but take it that those facts are uncontested".

106. The facts as deponed to by the Petitioners are therefore uncontroverted.

107. In Car Importers Association of Kenya v County Government of Mombasa [2021] eKLR it was held:

> "It is the Petitioner's case and rightfully so in this Court's view, that the Grounds of Opposition that were filed by the Respondent are deemed to address issues of law; the said grounds of opposition are general averments and cannot amount to a proper or valid denial of allegations made on oath". See Peter O. Nyakundi & 68 others vs. Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR where Odero J, addressing a claim where the Attorney General as the Respondent failed to file a Replying Affidavit stated:
>
> "As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition, which were filed, are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see Mereka & Co. Advocates Vs Unesco Co. Ltd 2015 Eklr, Prof Olaka Onyango & 10 Others vsHon. Attorney General Constitution Petition No. 8 Of 2014 And Eliud Nyauma Omwoyo & 2 Others –vs Kenyatta University).The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the

absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."

108. The Court in the Car Importers Case(supra)went further to say;

> " Similarly, in Phillip Tirop Kitur v Attorney General [2018] eKLR, the Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the Petitioner's evidence stood unchallenged...As previously mentioned, the Respondent did not file a Replying Affidavit to controvert the issues of facts raised in the Petition. Consequently, this Court finds and holds that there has been a violation of the Petitioner's Rights guaranteed under Article 47 of *the Constitution* and that the Respondent has not adhered to the provisions of Articles 10 of *the Constitution*."

109. However, despite the fact that the Petitioners' averments of facts has not been controverted, as the Petitioners have instituted this suit claiming contravention of their constitutional rights it is trite that they had to set out clearly the violation in respect of which they seek redress. This was the holding in Anarita Karimi Njeru Versus Republic (1976 – 80) 1 KLR 1272 Trevelyan and Hancox, JJ stated that:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

110. The Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR addressed the issue of the burden of proof on a Petitioner in a Constitutional petition. The Court stated as follows:

> " Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

111. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR in re-affirming the principle as set out in the Anarita Karimi case(supra) had this to say;

> " We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

112. There is also the issue of discharging the burden of proof under Sections 107(1), (2) and 109 of the *Evidence Act*. The provisions state as follows: -

107. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

113. The Court will be guided by the above principles in the determination of the alleged violations of the Petitioners rights.

Violation of the right to fair administrative action

114. It is the Petitioners case that the short notice period in the impugned notices coupled with the lack of consultation in line with Article 10 of *the Constitution* was a violation of the Petitioners rights to Fair Administrative Action as set out under Article 47 of *the Constitution* and the Fair Administration Act, 2015 as well as international conventions to which Kenya is a state party. In particular the Petitioners cited the International Covenant on Economic, Social and Cultural Rights where UN General Comment No 7 on forced evictions stipulates that a person is entitled to adequate and reasonable notice before they are evicted.

115. Article 47 of *the Constitution* of provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

116. Additionally, Section 4(1), (2) & (3) of the *Fair Administrative Action Act*, 2015 provides as follows;

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) 4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

(a) a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

117. In discussing the import of Article 47 of *the Constitution*, the Court of Appeal in the case of Benson Wekesa Milimo v National Land Commission & 2 others [2021] eKLR stated thus;

> " In addition, Article 47 of *the Constitution* provides a right to fair administrative action. This right includes, amongst others, the right to administrative action that is lawful, reasonable and procedurally fair, and the right to have prior adequate notice of the nature and reason for the proposed administrative action, and an opportunity to be heard".

118. The prominence of fair administrative action as a constitutional right was equally appreciated in the South African case of President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, at paragraphs135 -136 where it was held as follows:

> " Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of

power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

119. Similarly, in the Australian case of Kioa v West [1985] HCA 81; (1985] 159 CLR 550, Mason J. remarked that the law in relation to administrative decisions

> " ... has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention....".

120. The UN Habitat Fact Sheet No. 21/ Rev. 1 states;

> " In general, international human rights law requires Governments to explore all feasible alternatives before carrying out any eviction, so as to avoid, or at least minimize, the need to use force. When evictions are carried out as a last resort, those affected must be afforded effective procedural guarantees, which may have a deterrent effect on planned evictions. These include:

a) An opportunity for genuine consultation;

b) Adequate and reasonable notice;

c) Availability of information on the proposed eviction in reasonable time;

d) Presence of Government officials or their representatives during an eviction;

e) Proper identification of persons carrying out the eviction;

f) Prohibition on carrying out evictions in bad weather or at night;

g) Availability of legal remedies;

h) Availability of legal aid to those in need to be able to seek judicial redress.

121. Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given reasons for the adverse administrative action, adequate notice and a hearing before the adverse action is taken.

122. The Petitioners have cited a myriad of cases dealing with what constitutes reasonable notice. The Court in the cited case of Ibrahim Sangor Osman (supra) found that the 21 day notice issued to the Petitioners was insufficient especially as the same was not written down. The Respondents merely went and announced that they wanted the land for a road and 21 days later to begin the evictions. The court found that 21 days' notice for people who had lived on this land since the 1940s and had put up permanent and other dwellings thereon was both insufficient and unreasonable. The court equally found that they had not been given adequate information on the need to develop the road in the area. In the case of Veronica Waweru (supra) the court while finding that none of the Petitioners constitutional rights had been violated found that the 14 days notice was insufficient for business men and women who had been residing on the premises for a long time. In the case of Susan Waithera (supra) the Court

while equally finding no merit in the alleged violations of the Petitioners rights indicated that 3 months' notice would be sufficient notice.

123. The Petitioners have through various affidavits deponed to having lived in the affected areas for long periods of time, a fact which is uncontroverted.

124. In the present case, the impugned notices of 19th July 2018 gave the Petitioners until 1st August 2018 to have removed their structures whereas the notices of 26th July 2018 gave the Petitioners up until 9th August, 2018 to have removed their structures. This gave the Petitioners 12 and 14 days respectively to move out of the public land and demolish the structures.

125. It is inconceivable that two weeks would be sufficient time to enable them upheave their lives. Even though they were in occupation of a public road or their structures deemed unsafe, they deserved to have been given adequate notice to vacate the said premises as held in the authorities referred to above.

126. In addition, the Petitioners had a right to be heard before the adverse action was taken. The Court in the case of Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others [2013]eKLR held that:

> " Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.'

127. It is apparent that the Petitioners were not engaged in any genuine consultations before the issuance of removal notices and eventual forceful eviction and demolitions were carried out.

128. The Court therefore finds that the 1st, 2nd & 3rd Respondents violated the petitioners' right to fair administrative action by failing to engage them in consultations prior to the issuance of the removal notice and in the issuing them with 14 days' notice which was inadequate in the circumstances of the case.

b. Violations of Articles 26 and 27 of *the Constitution*-Right to life and Freedom from discrimination

129. Whereas it has been alleged that the illegal and forceful demolitions was a violation of the Petitioners rights under Articles 26 and 27 of *the Constitution*, the petition has provided little or no particulars as to the allegations and the manner of the alleged infringements. There is no clarity in the Petitioners' allegation of how these rights were violated. There is therefore no basis upon which the Court can make such a finding.

c. Violations under Article 28 and 29 of *the Constitution*-Right to Dignity and Freedom from Cruel and Inhumane treatment

130. The Petitioners argue that the notices and eventual evictions by the Respondents violated their rights to dignity and freedom from cruel and inhumane treatment as protected by Articles 28 and 29 of *the Constitution*.

131. The Petitioners contend that the demolitions left them homeless; that they slept outside together with their children for several nights under harsh weather conditions. One of the Petitioners deponed that during this period she fell ill and was unable to access medical help

132. The Petitioners referred to the case of Moi Educational Centre Co (supra) wherein the Court found that the forced evictions of the Petitioners violated their right to dignity.

133. Article 28 contains the constitutional guarantee to the right to human dignity. It provides that

> " Every person has inherent dignity and the right to have that dignity respected and protected"

134. The African Charter on Human and Peoples' Right (Banjul Charter) on its part states;

> " Every individual shall have the right to respect of the dignity inherent in human beings".

135. Black's Law Dictionary, Tenth Edition, defines dignity as:

> " The quality, state, or condition of being noble; the quality, state or condition of being dignified."

136. In the case J W I v Standard Group Limited & Another [2013] eKLR Hon. Lenaola, J. (as he then was) took the view that:

> " 27...the right to human dignity has been recognised as the basis of fundamental rights and the Universal Declaration of Human Rights in its Preamble states that;
>
> "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."
>
> "In the context of the issue under consideration, human dignity need not be pleaded as a right for it to be enforced because it is inherent and together with the right to life, they form the basis for all other rights to be enjoyed by a human being qua human being. I need not say more..."

137. The Court in the often cited case of Satrose Ayuma (supra) stated thus;

> " It does not matter that the Applicants do not hold title to the suit premises and even if they had been occupying shanties, the 1st Respondent was duty bound to respect their right to adequate housing as well as their right to dignity. Wherever and whenever evictions occur, they are extremely traumatic. They cause physical, psychological and emotional distress and they entail losses of means of economic sustenance and increase impoverishment. In this case, I must therefore agree with the Petitioners that their eviction from the suit premises without a plan for their resettlement would increase levels of homelessness and this Court must strive to uphold the rights of the Petitioners and especially the right to be treated with dignity. In so holding I find support in the South African Constitutional Court case of Occupiers of 51 Olivia Road, Berea Township, And 197 Main Street. Johannesburg 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 ..."

138. On the claim that their rights to freedom from cruel, inhuman and degrading treatment were infringed, Article 29 of *the Constitution* guarantees everyone the right to freedom and security of the person which includes the right not to be treated in a cruel and inhumane manner. *The Constitution* does not define "torture" or "inhuman" or degrading punishment"

139. Black's Law Dictionary (9th Edition) defines torture as:

> " the infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure,' and cruel and unusual punishment as 'punishment that is torturous degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community.' Inhuman treatment is defined as 'physical or mental cruelty that is so severe that it endangers life or health'.

140. Article 1 of the United Nation on Convention against Torture, and other Cruel, Inhuman and Degrading treatment or punishment, adopted by the UN General Assembly in 1984 defines torture as follows:

> "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person, has committed or is suspected to having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

141. Cruel and inhuman and degrading treatment has been defined by the European Court of Human Rights has defined torture and inhuman treatment in the Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R in the following terms;

> " The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience."

142. The forceful eviction of the Petitioners without adequate notice and which exposed them to the harsh weather conditions can be said to be cruel and inhuman treatment. This is because it caused the Petitioners both mental and physical suffering which was unjustifiable.

143. The Petitioners' averments under oath, which were not controverted by the Respondents, point to an unfortunate set of circumstances. The annexed photographs in the affidavit of Haron Muiruri show destruction of structures and what are clearly identifiable as household items including beds. The Court takes notice of the fact that the month of August is particularly cold and harsh and opines that the circumstances that the Petitioners were subjected to denied them of their right to dignity and subjected them to cruel and inhuman treatment contrary to Article 28 and 29 of *the Constitution*.

Violation under Article 32 of *the Constitution*-Freedom of Religion.

144. The Petitioners allege that that the evictions resulted in the destruction of their churches and mosques and consequently they had no places to worship. It is their contention that this was a violation of their right to practice a religion of their choice.

145. Article 32 (1) of *the Constitution* guarantees every person the right to freedom of conscience, religion, thought, belief and opinion. Sub Article (2) provides that;

> " Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship."

146. Sub Article (3) further provides that;

> " a person may not be denied access to any institution, employment or facility or enjoyment of any right because of the person's belief or religion. While Sub Article (4) states that a person should not be compelled to act or engage in any act that is contrary to the person's belief or religion.

147. The Petitioners allegation of violation of their rights under Article 32 is on the basis of the destruction of their churches and/or mosques. There has been no evidence presented before this Court to attest to the destruction of any churches or mosques. In addition, the Petitioners have not shown that they were denied access to any institution, employment or facility or enjoyment of any right because of their belief or religion.

148. The Court does not find merit in this claim

d. Violation under Article 40 of *the Constitution*-Right to property

149. The Petitioners allege that the demolitions resulted in the destruction of their household items and structures and this violated their right to property as protected under Article 40 of *the Constitution* which provides as follows;

> 40.
>
> (1) 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.

150. Article 260 of *the Constitution* defines property as follows;

> " property" includes any vested or contingent right to, or interest in or arising from—
>
> (a) land, or permanent fixtures on, or improvements to, land;
>
> (b) goods or personal property;
>
> (c) intellectual property; or
>
> (d) money, choses in action or negotiable instruments;

151. The constitutional right to property thus extends to, and must therefore include protection of permanent fixtures on and improvements to land, such as the houses and structures erected on the affected areas, goods and personal property.

152. The Petitioners claim that in the eviction from the premises, their houses and household goods were destroyed.

153. The court finds that this has been ably demonstrated through the photographs annexed to the affidavit of Haron Muiruri.

e. Violation under Article 43(1)(b) & 43(1)(f)of *the Constitution*-Right to Adequate Housing & Right to Education.

154. It is the Petitioners case that the evictions violated their social and economic rights as guaranteed under Article 43 of *the Constitution* specifically the rights to adequate housing and the rights to Education.

155. Article 43 provides as follows;

> 43. (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.

156. Apart from constitutional provisions governing economic and social rights, Article 2(6) provides that treaties and conventions ratified by Kenya shall form part of the law of Kenya. Some of the relevant instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social Rights (ICESR) amongst others.

157. Article 25.1 of the Universal Declaration of Human Rights (UDHR) provides that;

> " Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services."

158. In applying Article 43 of *the Constitution*, the context of Article 20 (5) is crucial, it states:

> "(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles––
>
> (a) it is the responsibility of the State to show that the resources are not available;
>
> (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
>
> (c) c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."

159. There is also the positive obligations of Article 21 of *the Constitution* as follows:

> "(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
>
> (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.
>
> (3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
>
> (4) The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms."

160. The issue for consideration is whether the petitioner has established that the State has failed in its obligation to, "observe, respect, promote and fulfill the rights and fundamental freedoms in the Bill of rights".

161. Article 43(1) (f) of *the Constitution* enshrines the right to education as part of the economic and social rights.

162. In the ICESR Committee General Comment 13 (21st Session, 1999 "The Right to Education Article 13" it was stated as follows;

> "Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and

sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical; a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and regards of human existence".

163. The Petitioners allege that their children's right to education was violated. They depone that since the notice to vacate was issued in the middle of a school year it subsequently affected accessibility to education and further that a number of schools that were situate within the affected areas were demolished.

164. As aforestated these allegations have not been controverted. The court therefore finds these claims merited.

165. With regard to the claim of violation of their right to housing under Article 43(1)b have been violated, the Petitioners contend that having lived in the affected areas for long periods, the demolitions rendered them homeless. From the photographs annexed to the affidavit of Haron Muiruri, there is clear evidence of household items to support a conclusion that the Petitioners lived in the structures.

166. The Supreme Court in the case of Mitubel (supra) conclusively dealt with the right to adequate housing. In answering the question when does the right to accessible and adequate housing accrue, they stated thus;

> " The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by *the Constitution* under the Bill of rights."

167. The Court further stated;

> " The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under Article 60 (1) (a) of *the Constitution*."

168. On the strength of the evidence presented and relying on the above cited Mitubel case, the Court finds that the Petitioners right to housing was violated.

f. Violation under Article 53, 54 and 57 of *the Constitution*-rights of Children, the elderly and persons with disabilities.

169. Children, the elderly and persons with disabilities are the most vulnerable of the members of the society. The Petitioners contend that this group of people was adversely affected by the evictions. It was deponed by Jane Rose Ruguru & Magdalene Njeri who are both widows that when the evictions took place, they together with their children slept outside in the cold.

170. In addition to the fact that these depositions were not controverted, the court acknowledges that being a community, there were inevitably persons with disabilities.

171. It is therefore the finding of this court that by their actions which deprived the Petitioners of their housing and rendered them homeless, the Respondents did violate the Petitioners' rights guaranteed under Articles 53, 54 and 57 of *the Constitution*.

172. With no averment by any of the Respondents that they took any action to provide for the needs of vulnerable groups particularly children, in the period leading up to and during the demolition, it was

uncontested that the actions of the Respondents resulted in a violation of the rights of the Petitioners' children.

IV. What are Appropriate reliefs?

173. The Petitioners contend that they are entitled to reliefs under Article 23(3) of *the Constitution* in particular declarations that their rights have been violated and general and exemplary damages for the violation. The Petitioners further invite the court to grant them "any other or further relief".

174. They cited the Supreme Court cases of Jasbir Signgh Rai and 3 others v Tarlochan Signh Rai Estate Petition No 4 of 2012 [2013] eKLR and Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others Petition No.14, 14A, 14B & 14C of 2014 [2014] eKLR the Supreme Court stated that the appropriate reliefs are not limited to those envisaged under Article 23(3) of *the Constitution*.

175. Article 23 (3) of *the Constitution* provides that:

> "In any proceedings brought under Article 22, a Court may grant appropriate relief, including:
>
> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
>
> (e) an order for compensation; and
>
> (f) an order of judicial review.

176. "Appropriate remedy" was defined by the constitutional court of South Africa in the case of Fose v Minister of Safety and Security 1997(3) SA786 (CC) (7) BCLR 851 CC where the court stated that;

> "Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...In our context an appropriate remedy must mean an effective remedy".

177. In Minister of Health & others v Treatment Action Campaign & others [2002] ZACC 15; 2002(5) SA 721 BCLR (CC), the same court observed that where a breach of any right has taken place, a court is under a duty to ensure that effective relief is granted, the nature of the right infringed and the nature of the infringement providing guidance as to the appropriate relief in the particular case.

178. The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 to include, a remedy that will:

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

4) be fair to the party against whom the order is made.

179. In Peters v. Marksman & Another [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported), where the Court held that:

> "It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable...Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

180. Closer home, the Court of Appeal in the case of Moses Onchiri v Kenya Ports Authority & 4 others [2017] eKLR had this to say;

> "The sixth and final point is that a monetary award for constitutional violations is not confined to an award of compensatory damages in the traditional sense. The court is more concerned to uphold, or vindicate, the constitutional right which has been contravened. This point was explained by the Court in Hon. Gitobu Imanyara & 2 Others v The Attorney General, Civil Appeal NO. 98 OF 2014 as follows;
>
> The relevant principles applicable to award of damages for constitutional violations under *the Constitution* was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.
>
> Per Lord Nicholls at Paragraphs 18 & 19:
>
> "...A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law."
>
> "An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional

right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."

181. The Court concluded thus;

> "Apparent from the foregoing is that the nature of the damages awarded may be compensatory but should always be vindicatory, if circumstances demand."

182. It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

183. However, considering the nature of the violations of their constitutional rights, the psychological and physical suffering visited on each one of them, and considering the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I find that the petitioners are entitled to compensation.

Disposition

184. In light of the above analysis and determination, I find the following reliefs to be appropriate;

i. A declaration that the demolition of the 1st to 8th Petitioners' structures in Kaloleni and Makongeni without consultation and without reasonable adequate notice violated their right to fair administrative Action as guaranteed by Article 47 of *the Constitution*.

ii. A declaration that the demolition of the 1st to 8th Petitioners' structures which included homes with children, elderly persons and persons with disabilities among the Petitioners without according them alternative shelter and/or accommodation rendering them homeless was a violation of their fundamental rights to dignity and freedom from inhumane and degrading treatment, rights to property , rights to education, rights to adequate housing, rights of children, elderly and persons with disabilities guaranteed by Articles 21(3), 28, 29, 40, 43(1)(b), 43(1)(f), 53, 54 & 57 of *the Constitution* of Kenya 2010.

iii. A declaration be and is hereby issued that each of the 1st to 8th Petitioners is entitled to damages for violation of their Fundamental Rights and freedoms enshrined in *the constitution*.

iv. That judgement be and is hereby entered in favour of the 1st to 8th petitioners against the Respondents by way of general damages in the sum of Kshs 1,000,000/= (one million Kenya shillings) each

v. As Petitioners are not seeking any costs, there shall be no orders as to costs.

vi. All other prayers in the Petition not granted are consequently dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 28TH}} DAY OF JUNE, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Orero for Mr. Lampaa for Petitioners.**

Mr. Abdikadir Osman for 1st Interested Party.

Court Assistant Albert

E. O. OBAGA

JUDGE

28TH JUNE, 2022