IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & GATEMBU JJ.A)

CIVIL APPEAL NUMBER 363 OF 2014

BETWEEN

MOI EDUCATION CENTRE CO. LTD.....APPELLANT

AND

WILLIAM MUSEMBI.....1ST RESPONDENT

FRED NYAMORA.....2ND RESPONDENT

VINCENT ONYUNO.....3RD RESPONDENT

ELIJAH MEMBA.....4TH RESPONDENT

JOSHUA KIBE.....5TH RESPONDENT

MONICA WANJIRU..... 6TH RESPONDENT

MWENI KISINGU.....7TH RESPONDENT

PAMELA ATIENO.....8TH RESPONDENT

PURITY WAIRIMU.....9TH RESPONDENT

BEATRICE WANJIRU.....10TH RESPONDENT

GERTRUDE ANGOTE.....11TH RESPONDENT

(SUING ON THEIR OWN BEHALF AND ON BEHALF OF 326 PERSONS FORMERLY RESIDING IN CITY COTTON VILLAGE AND UPENDO CITY COTTON VILLAGE AND THEIR 90 SCHOOL GOING CHILDREN)

MARGARET KANINI KELI.....12TH RESPONDENT

ROSELINE MISINGO.....13TH RESPONDENT

JOSEPH MWAURA KARANJA.....14TH RESPONDENT

(SUING ON THEIR OWN BEHALF AND ON BEHAL OF 15RESIDENTS OF UPENDO CITY COTTON VILLAGE AT SOUTH C WARD)

INSPECTOR GENERAL OF POLICE.....15TH RESPONDENT

THE ATTORNEY GENERAL ……..... 16TH RESPONDENT

THE CABINE SECRETARY FOR LANDS,

HOUSING & URBAN DEVELOPMENT.....17TH RESPONDENT

(Being an appeal from the Judgment and Decree of Mumbi Ngugi, J delivered

on 14th October, 2014

in

NAIROBI H.C. PETITION NO. 264 OF 2013 (*As consolidated*

with* H.C. PETITION NO. 274 OF 2013*)

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JUDGMENT OF THE COURT

1. This appeal, arises from the judgment and decree of the High Court of Kenya (Mumbi Ngugi, J) delivered on 14th October 2014 by which she declared that: the demolition of the 1st to 14th respondents? houses and their forced eviction from the appellant?s property without providing them and their children with alternative land or shelter is a violation of the fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing; a violation of the fundamental rights of children guaranteed by Article 53 of the Constitution; and a violation of the rights of elderly persons guaranteed by Article 57 of the constitution.

2. In addition to those declarations, the court ordered the appellant and the State to pay Kshs. 150,000.00 and Kshs. 100,000.00 respectively to each of the 1st to 14th respondents and 326 other persons as compensation.

Background

3. The 1st to 14th respondents, on their own behalf and on behalf of 326 other persons (hereafter referred to as "the evictees") presented two petitions, before the High Court. Those petitions, namely Petition Numbers 264 and 274 of 2013, were subsequently consolidated. The evictees case as pleaded, and supported by affidavits (sworn by Elijah Memba, William Musembi, Gertrude Angote and Margaret Kanini Keli) was that they entered the property known as LR No.209/11207 (the property) sometimes in 1968; that since that time, they have resided and carried on business from villages known as City Cotton and Upendo situated within the property; that in 1980 or thereabouts the appellant invaded the property and embarked on constructing a private primary school known as Moi Education Centre resulting in the displacement of about 200 families who were resettled elsewhere in a village known as Fuata Nyayo in South B, Nairobi; and that by a letter of allotment dated 22 January 1981, the Commissioner of Lands unlawfully allotted the property to the appellant.

4. The evictees averred that they peacefully coexisted with the appellant?s school on the property until

10th May 2013 when

> "*about 300 hooligans armed with crude weapons were deployed*" "*to demolish and evict*" them from the property under the superintendence and assistance of about 40 armed police officers; that between 17th May 2013 and 10th June 2013 a gang of about 300 hooligans guarded by about 40 police officers again raided the evictees? homes in the two villages and destroyed all their homes and property using a bulldozer and crude implements and evicted all the evictees from the property; that after carrying out the eviction, the appellant erected a perimeter wall enclosing the area previously occupied by the evictees; that the evictees were then constrained to erect "*temporary flimsy dwelling structures in the small empty space left between the school and the Wilson Airport where there (sic) were living in squalor to date*."

5. The evictees claimed that the demolition and eviction was carried out without notice, warning, consultation, justification or any valid court order without and according them alternative shelter; that they make a living as petty traders, vendors, labourers and as casual domestic workers in the villages and in the surrounding estates and in the industrial area; that as a result of the eviction they lost their jobs and means of livelihood; and that the education of their children who were attending public primary schools in the area was severely disrupted.

6. Based on those pleas, the evictees sought judgment against the appellant, the Inspector General of Police and the Attorney General (the 15th and 16th respondents respectively) for: a declaration that the demolition of their houses and business structures and their forced eviction without provision of alternative land or accommodation is a violation of the fundamental rights to human dignity, security of person, right to life, accessible and adequate housing, prohibition of forced evictions, reasonable standards of sanitation, healthcare services, to clean and safe water and freedom from hunger as guaranteed under Articles 26, 28, 29, 43, 20, and 21 of the Constitution; a declaration that the demolition of houses and business structures and forced eviction without service of any notice in writing or information regarding the threatened eviction is a violation of the fundamental right to information under Article 35 of the Constitution; a declaration that the demolition of the houses without according the children and elderly persons alternative shelter is a violation of fundamental rights of children and elderly persons under Articles 53, 57 and 21 of the Constitution; a declaration that the appellant unlawfully, illegally and irregularly acquired the property; a mandatory injunction to compel the appellant to furnish the evictees with information pertaining to the ownership of the property, reasons for intended demolition of the houses and business structures, and plans by the appellant to provide an alternative land or shelter to them; and general and exemplary damages for violation of their rights and freedoms.

7. In opposition to the petition, the appellant relied on a replying affidavit sworn by the chairman of its board of management Paul K Chepngorem (Chepngorem) in which he deposed that sometime in early 1990s, the appellant applied for allotment of the property and the title was lawfully issued to it being Land Reference Number 209/11207 measuring approximately 8.7 ha that was later amalgamated with Land Reference Number 209/13695 and a valid title issued to it. He stated that the evictees? claim that they had lived on the property since 1968 was a mere allegation that was not proved; that despite the appellant being the registered owner of the property, the evictees had illegally and intentionally encroached on the property and illegally carried on business including the business of illegal brewing and selling of liquor.

8. Chepngorem deposed further, that there is a private school, Moi Educational Centre, on the property; that the appellant made several attempts to remove the evictees from the property by giving them notices to vacate which they failed to heed; that on several occasions the appellant was prosecuted by the City Council of Nairobi for allowing unauthorized structures on the property; that having made numerous complaints to law enforcement authorities against the evictees on rising cases of crime and insecurity within the school and its environs the appellant had no option but to have the evictees removed from the property to safeguard and protect the interest of the school going children; that during the eviction the appellant engaged police officers to ensure law and order was maintained; that the appellant is a stranger to proceedings in the subordinate court that resulted in an order for levying distress; that no crimes were committed in the process of eviction; that the appellant did not in any way infringe or violate the evictees

fundamental rights; as what the appellant did was to protect its fundamental right to ownership of property under Articles 40 and 64 of the Constitution.

9. Having considered the matter, the learned Judge of the High Court held in her judgment delivered on 14th October 2014 that the appellant, as well as the Inspector General of Police and the Attorney General, had violated the evictees constitutional rights and granted reliefs aforestated. Aggrieved, the appellant lodged the present appeal.

The appeal and submissions by counsel

10. Although the memorandum of appeal contains 37 grounds of appeal, the appellant?s counsel in his submissions before us compressed arguments into 7 questions, namely:

> (i) Whether the evictees? amended petition was properly drafted to show the rights infringed, the manner of infringement and the remedies sought;
>
> (ii) Whether the appellant has any obligation to provide alternative accommodation to the evictees and to ensure the realization of economic and social rights under Article 43 of the Constitution
>
> (iii) Whether the Judge appreciated and considered the appellant's rights over the property under Article 40 of the Constitution;
>
> (iv) Whether the appellant was obligated to obtain a court order prior to evicting the evictees;
>
> (v) Whether the appellant gave justifiable reasons and sufficient notice to the evictees prior to eviction;
>
> (vi) Whether there was sufficient proof of violation of the evictees? rights;
>
> (vii) Whether the Judge was correct in granting the orders that she did and in awarding compensation to the evictees.

11. During the hearing of this appeal, the parties were represented by learned counsel. Mr. James Ochieng Oduol who appeared with Ms. Leah Manyarkiy for the appellant. Mr. Mbugua Mureithi appeared for the evictees while Ms. Odhiambo appeared for the 15th, 16th and 17th respondents.

12. With regard to the question whether the amended petition was properly drafted to show the rights infringed, the manner of infringement and the remedies sought, Mr. Oduol submitted that it is a mandatory legal requirement for a person seeking redress from the court on matters involving the Constitution to set out their complaints with precision and indicate the manner in which such provisions have been infringed; that in this case, despite citing numerous provisions of the Constitution in their petition, the evictees did not give particulars of how the appellant breached those provisions. In that regard counsel relied on the High Court decision in the case of **Anarita Karimi Njeru vs.-Republic (No. 1) [1976-80] 1KLR 1272** and the decision of this Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

13. As to whether the appellant has an obligation to provide alternative accommodation to the evictees and to ensure the realization of economic and social rights under Article 43 of the Constitution and whether the Judge considered the appellant's property rights under Article 40 of the Constitution, Mr. Oduol submitted that the lower court wrongly imposed on the appellant, a private person, an obligation of the State, as regards the provision of housing and wrongly concluded that the eviction and demolition of the evictees? houses without provision of alternative land or shelter was a violation of the evictees? rights to human dignity, security of person, access to adequate housing, rights of the children and of elderly persons.

14. Counsel cited the High Court case of **Kepha Omondi Onjuro & others vs. AG & 5 others [2015]**

eKLR and a decision of the South African Constitutional Court in the case of **Government of the Republic of South Africa and others vs. Grootboom and others [2000] ZACC** (the Grootboom case) to support the argument that it is the duty of the state "to provide accessible and adequate housing;" and that it is an obligation of the State to "create the conditions for access to adequate housing for people of all economic levels of our society."

15. Urging that the High Court failed to consider the appellant's property rights under Article 40 of the Constitution, counsel referred to the decision of this Court in the case of **Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 others [2016] eKLR** (Mitu-Bell case) and submitted that the Judge ought to have appreciated "the tension between private property and realization of socio-economic rights"; that had the court done so, it would have upheld the appellant?s right to protect its property under Article 40 of the Constitution and would have refrained from depriving the appellant its "property rights by virtue of enforcing socio-economic rights."

16. Counsel went on to say that the Judge erred in condemning the appellant for not providing the evictees with alternative accommodation or shelter and in ordering the appellant to pay damages bearing in mind that: the appellant is the registered owner of the property with rights thereto under Article 40 of the Constitution; and that the evictees were trespassers who failed to vacate the property despite having been given sufficient notice to do so.

17. On the question whether the appellant had a duty to obtain a court order prior to carrying out the eviction, counsel submitted that there is no such requirement in Kenya; that the High Court wrongly placed reliance on international instruments and on decisions from other jurisdictions including the case of **The Social Economic Rights Centre (SERAC) vs. Nigeria Comm No. 155/96** to import and wrongly impose the requirement of a court order.

18. Counsel urged that this Court correctly stated in the Mitu-Bell case that there is no legislation in Kenya dealing with forcible eviction and resettlement of persons occupying public or private land and that the court should have justified its reliance on guidelines made by the United Nations Office of the High Commissioner for Human Rights by examining whether those guidelines formed part of the general rules of international law applicable to Kenya by dint of Article 2(5) of the Constitution.

19. As to whether the appellant gave sufficient notice prior to eviction and whether it had justifiable reasons for carrying out the evictions, Mr. Oduol submitted that the order against the appellant to pay damages to the evictees was based on an erroneous finding that the appellant failed to give notice prior to the evictions of 10th and 17th May 2013. Counsel argued that the Judge did not take into account the fact that the appellant had given notices to the evictees to vacate the property and that the evictees failed to heed those notices. He stated that important reasons were given by the appellant to justify the evictions; that the appellant had placed on record, an environmental audit assessment report that recommended removal of structures from the property; that the report identified negative effects of the sprawling slums likely to affect schoolchildren; and that the Judge also failed to take into account photographic evidence presented showing that bhang was being grown on the property.

20. Furthermore, counsel argued, the court did not properly evaluate the evidence presented before it and that had it done so, it would have arrived at a different conclusion. In that regard counsel stated that the Judge ignored that criminal charges were preferred against the appellant on the basis of which Nairobi City court ordered the appellant to restore the property to its original state.

21. As to whether there was sufficient proof of violation of the evictees? rights and whether the High Court was correct in granting the orders that it did and awarding compensation to the evictees, including those who were not in court or proved their cases, counsel submitted that the court wrongly assumed that by virtue of the eviction, the rights of elderly persons and the rights of children were violated. Maintaining that the eviction was lawful and procedurally undertaken as the appellant had put in place safeguards by involving the police to ensure law and order was maintained, counsel argued that the court had no basis for finding that the evictees? rights were violated.

22. Counsel contended that the evictees are illegal occupiers and trespassers on the appellant?s property and are not entitled to benefit from the illegality by getting compensation from the appellant. In support, counsel referred to the High Court Case of **Simon M Ethangatta vs. Eddah Wanjiru Mbiyi & another [2007]** where the court declined to award damages to the plaintiff therein on the basis that as a trespasser, he was not entitled to damages.

23. Counsel further argued, on the strength of the case of **Susan Waithera Kariuki & 4 others vs. Town Clerk Nairobi City Council & 3 others [2013] eKLR**, that the court fell into error by making a blanket order for the payment of compensation to the evictees; that there were persons who were not before the court and whose authenticity, existence, and residency in the two villages was in question, despite which the court granted relief.

24. Supporting the appeal, Ms. Odhiambo for the 15th, 16th and 17th respondents faulted the decision of the High Court urging that there was not sufficient proof of violation the evictees? rights; that the evictees did not discharge their burden of proof under Sections 107 and 109 of the Evidence Act; that in any event the petition did not set out with precision the rights alleged to have been violated and the manner in which the alleged violations occurred. In that regard Counsel relied on the case of **Prof. Julius Meme vs. Republic [2004] 1KLR** in which the case of **Anarita Karimi Njeru vs. Republic** (above) was cited with approval.

25. According to Ms. Odhiambo, the evictees have no right to compensation considering that they are illegal occupiers and trespassers on the property and are not the registered owners of the property; that the appellant?s rights to the property as the registered owner should be protected under Article 40 of the Constitution; and that the evictees should not benefit from their illegal occupation of the property.

26. Opposing the appeal, Mr. Mureithi for the evictees relied on his written submissions, which he highlighted. He submitted that the appellant?s complaint that the amended petition was not properly drafted to show the rights infringed, the manner of infringement and the remedies sought is an afterthought with no substance. He argued that in public interest litigation, such as this, the court is at liberty to entertain proceedings on the basis of informal documentation under its epistolary jurisdiction envisaged under Article 22 of the Constitution and Rule 10 of the Constitution of Kenya (protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules).

27. In any event, counsel argued, the amended petition complied with the requirements of the Mutunga Rules in that it sets out the parties, the facts relied upon, the injury complained of, the constitutional provisions violated, and the reliefs sought; that in keeping with the decision of this Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others** (above) the appellant had proper notice of the nature of the claims made against it by the evictees; that it is evident from the replying affidavit filed in answer to the amended petition that the appellant fully appreciated the nature of the claims and the question of the amended petition being imprecise does not therefore arise.

28. Mr. Mureithi submitted that the complaints by the appellant: that the Judge erred in imposing an obligation on it to provide alternative accommodation to the evictees and to ensure the realization of economic and social rights under Article 43 of the Constitution; that the Judge failed to appreciate and to consider the appellant's property rights over the property under Article 40 of the Constitution, are based on a misapprehension of the judgment of the court in that the Judge did not disturb the appellant?s property rights or make any orders adverse to the appellant?s ownership of the property. According to counsel, the Judge merely declared that the Bill of Rights under the Constitution is binding on the appellant as a non state actor as it operates both vertically and horizontally and; that the horizontal application of the Bill of Rights does not create a positive obligation on the appellant to facilitate the achievement of the rights but a negative obligation to refrain from any action that violates rights without following due process of the law.

29. Turning to the question whether the appellant should have obtained a court order prior to carrying out the eviction, counsel argued that it is a requirement of the law in Kenya for a party to obtain a court order authorizing a forced eviction whether of a resisting tenant, a licencee or a squatter. In that regard, counsel

relied on the High Court case of **Teresia Irungu vs. Jackton Ocharo & 2 others [2013] eKLR** where the court found that "since the proprietors of the suit premises did not obtain a court order for possession, the plaintiff?s eviction from the suit premises was illegal."

30. Furthermore, counsel argued, the requirement of a court order before carrying out a forced eviction is a constitutional demand under Articles 2(5), (6), 4,10(2)(a), (b), (c), 28, 40(1)(a), 43(1)(b) and 50(1) of the Constitution; that it is a dictate of the rule of law; that the Judge correctly applied **General Comment 4: The Right to Adequate Housing** and **General Comment 7: The Right to Adequate Housing (Art. 11.1) Forced Evictions** in reference to the right to accessible and adequate housing under Article 43(1) (b) of the Constitution and whose application to Kenya has been adopted under the International Covenant on Economic Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights(CESCR) to clarify the contents and meaning of the right to housing under Article 11 of the covenant. In counsel?s view the **United Nations Basic Principles and Guidelines on Development based Eviction and Displacement (2007)** relied upon by the Judge do not impinge on Kenya?s sovereignty but aim to assist the state in developing policies and legislation to prevent forced evictions at the domestic level in furtherance of the objectives of the United Nations Charter to which Kenya is a state party.

31. As to whether the appellant had justifiable reasons for, and gave sufficient notice prior to the eviction, counsel submitted that the basis of demolitions was conflicting; that while the appellant claimed to have given notice, the Inspector General of Police asserted that it superintended the eviction on the basis of a court order; that the Judge was therefore entitled to disbelieve the appellant?s allegation that it had served notices to vacate on the evictees; that as between the appellant and the evictees, there is a dispute as to who was first in time on the property, the more reason why the appellant should have sought an appropriate court order before carrying out the eviction.

32. As to whether there was sufficient proof of violation of the evictees? rights and whether the High Court was correct in granting the orders that it did and in awarding compensation to the evictees including those who were not in court to prove their cases, Mr. Mureithi submitted that the violation of the fundamental rights in the event of a forced eviction and demolition of homes is self evident; that the appellant admitted that it carried out the demolitions and evictions with the result that violations of the pleaded rights attached; that the evictees were thereby rendered homeless with the inevitable result that children of the evictees were dislocated and the plight of the elderly persons aggravated.

33. Counsel urged that in view of an admitted wrong having been committed by the appellant and the Inspector General of Police against the evictees, and in view of the fact that the record is clear that the 1st to 14th respondents were duly authorized by 362 other evictees to represent them, the learned Judge was right in granting the reliefs that she did. With that, Mr. Mureithi urged us to uphold the judgment of the High Court and to dismiss the appeal with costs.

Analysis and determination

34. We have considered the appeal and the submissions by learned counsel. We have already identified the issues for determination in this appeal in paragraph 10 above. In addressing those issues, we are mindful that this is a first appeal. We are therefore mandated to review the material that was before the High Court and to draw our own conclusions. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123.**] Nevertheless, we are entitled to interfere where the High Court?s findings are not based on the evidence on record or the wrong principles were relied on to arrive at the findings. **[**See **Jabane v. Olenja [1986] KLR 661].**

35. We begin with the question whether the amended petition adequately set out the evictees? grievances with reasonable degree of precision. It is not in contention that a party alleging violation of constitutional rights must demonstrate the rights alleged to have been violated and the manner of violation. [See **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others** (above)].

36. Under rule 10 of the Mutunga Rules, a petition should contain, among other things, the facts relied

upon, the provisions violated, the nature of injury complained of and the reliefs sought. The Judge was satisfied that the amended petition in this case met those requirements. We are of the same view. The appellant admitted that the evictees were evicted from the property and their structures demolished. There was no suggestion by the appellant in the lower court that it did not know or appreciate the case put forth by the evictees or that it was in any way handicapped from answering the evictees? complaints. There is no merit in this ground of appeal.

37. The next issue is whether the High Court had regard to the appellant?s property rights under Article 40 of the Constitution. The appellant?s grievance giving rise to this issue is, to some extent, based on a misapprehension of the impugned judgment. We say this because, firstly, the evictees did not claim ownership of the property. The evictees? complaint was that they were already in possession well before the appellant became the registered proprietor and that allotment of the property and the registration of the same in the name of the appellant was irregular and illegal. They accordingly sought a declaration that the appellant acquired the property unlawfully. The learned Judge refused to entertain that complaint stating that:

> ***"I am, however, not in a position to issue orders in relation to the legality or otherwise of the*** [appellant?s] ***title. The determination of that issue is,***
>
> ***I believe, best left to the National Land Commission or a court of law seized of that particular matter which can call for the relevant evidence and examine all such documents pertaining to the allocation of the land to the*** [appellant]***…to establish the validity or otherwise of the title."***

38. In reaching the conclusion that the evictees were not lawfully evicted from the property, the Judge clearly appreciated that they (the evictees) are not the owners of the property. To that extent, therefore, the complaint that the Judge failed to have regard to the appellant?s property rights is not well founded. There is, however, a different aspect of the appellant?s complaint hinging on Article 40 of the Constitution to which we shall return later in this judgment.

39. We turn to the question whether the appellant has any obligation to provide the evictees with alternative accommodation. To begin with, we are unable to find fault with the Judge?s interpretation of Article 43 of the Constitution as entailing "*a negative obligation not to deprive citizens of … shelter*" and that "*the Bill of Rights applies both vertically-as against the state, and horizontally-against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual*." The Judge did not, however, stop there. Having concluded that the eviction was "*unlawful for having been carried out with no lawful order for its execution and with no notice given to the* [evictees]" the Judge, in declaring that the demolition of the evictees houses and their forced eviction by the appellant, the Inspector General of Police and the Attorney General "<u>without</u> <u>provision of alternative land or shelter</u>" is a violation of the respondents right to inherent human dignity, security of person, and to accessible and adequate housing" lumped the appellant together with the State as having or bearing the responsibility or obligation to provide the evictees with housing. In doing so, the Judge, with respect, went too far. Had the Judge restricted the application of the words we have underlined to the State, perhaps the appellant would have no reason to complain.

40. In our view, the Judge misdirected herself in extending the obligation for provision of alternative land or shelter to the appellant. Under Article 21(2) of the Constitution it is the duty of the State to take measures, "legislative, policy and other measures" to achieve the progressive realization of the rights guaranteed under Article 43.Those rights include the right "to accessible and adequate housing" and "to reasonable standards of sanitation." Whereas the appellant is under an obligation not to violate the evictees? rights in that regard, it is not under a "positive" obligation to provide the evictees with housing. There is therefore merit in the appellant?s complaint that the Judge erred in holding that it has an obligation to provide the evictees with alternative accommodation or shelter.

41. We turn now to consider what seems to be the central question in this appeal, that is, whether the appellant required a court order to carry out the eviction and whether the appellant had justifiable cause for carrying out the evictions. Those questions are linked to the question, to which we have to an extent

already alluded, whether the Judge appreciated the appellant?s property rights under Article 40 of the Constitution and whether there was sufficient proof before the court of violation of the evictees? rights.

42. In addressing those questions, we bear in mind, and proceed on the basis: that there is no contention that the appellant is the registered proprietor of the property; and that the appellant accepts that it did in fact evict the evictees from the property with the superintendence of police and in the process demolished their houses and business structures.

43. As already indicated, the evictees asserted that they occupied the property in 1968; and that between 17th May 2013 and 10th June 2013, in the wee hours of the morning, a gang of over 300 goons descended on the property, forcefully evicted them from their houses and embarked on demolishing their houses and business structures.

44. In an affidavit sworn on 7th August 2013, Mr. Dennis Omuko, the officer Commanding Police Station at Langata Divisional Police Headquarters deposed that auctioneers known as "Kindest Auctioneers" (a seemingly incongruous or oxymoronic name for an auctioneering firm!) delivered to the Provincial Police Officer?s office, a court order dated 24th April 2013 "*directing the police to supervise the eviction exercise for purposes of maintaining law and order*"; that "*on 10th May 2013, having followed all the procedures, the police gave security and the eviction was carried out peacefully*."; that on 17th May 2013, the auctioneer went to the property to fence it "*when those who had been evicted reacted by throwing stones at them*" and that "*the police were called to maintain law and order which they did within the law*."

45. With that affidavit Mr. Omuko exhibited an order of the Chief Magistrates Court in Misc. Application No. 303 of 2013 naming the appellant herein as the Landlord, Kindest Auctioneers as the applicant, and Milcah Wanjiru and Elijah Maemba, as the tenants by which the court ordered:

> "*1. THAT an order be and is hereby issued authorizing the OCS Langata Police Station to assist the Auctioneer KANGERI WANJOHI T/A KINDEST AUCTIONEERS and his agents <u>to execute instructions to</u> <u>levy distress to the premises occupied by the Tenants MILCAH WANJ1RU and ELIJAH MEMBA</u> at L.R. No. 209/13695 along Mai Mahiu Road, Nairobi West and remove the proclaimed movable assets for the purpose of auctioneering (sic) them to recover the rent arrears amounting to Kshs: 960,000/= plus other incidental costs of the distraint.*
>
> *2. THAT the Officer in Charge, Langata Police Station to supervise the exercise for the purpose of maintaining Law and Order*." [Emphasis]

46. Patently, that order did not, as Mr. Omuko deposed in his affidavit, direct the police *"to supervise the eviction exercise."* The order authorized the police to assist the auctioneer to execute instructions to levy distress for rent against the two persons named. It is evident, therefore, that the eviction of the evictees and demolition of their structures was carried out, under the pretext of levying distress for rent against the two alleged tenants of the appellant.

47. Chepngorem, the chairman of the board of the appellant in his replying affidavit before the High Court dismissed the evictees? assertion that they had lived on the property since 1968 as *"mere allegations that cannot be substantiated or proved."* He went on to depose that *"in the unlikely event they have been on the land from then, one wonders why they never applied to be allotted the said land."*

He exhibited to his affidavit an environment impact assessment report conducted by the appellant in 2009 in which the environmental impact of the existence of *"a sprawling slum"* within the property was analyzed. He asserted that the appellant "*had no option but to have the [evictees] removed from the premises to safeguard and protect the interest of the school going children"* and that the appellant engaged the police to ensure "law and order was maintained during the eviction process" and that "*throughout the eviction process,"* no crimes were committed; and further that the evictees "*knowing that the suit property did not belong to them, had all the opportunity to peacefully vacate from the said*

land, an opportunity they did not make use of."

48. In effect, the evictees asserted, and the appellant did not counter this assertion, that they were in possession of the property well before the appellant became registered as the proprietor; that the police relied on a court order that was disowned by the appellant, ostensibly authorizing the levying of distress on two occupants of the property, to oversee, by providing the appellant with about 100 police officers, the eviction of the evictees from the property and the demolition of their structures. Given the material, the learned Judge correctly found as a fact and held "that the eviction of the [evictees] was not sanctioned by the law and authorized through a court order."

49. Based on the foregoing, the learned Judge was justified in observing that, "*the request by the auctioneer for 4 police inspectors and 100 police officers to effect the court order for distress for rent against the alleged tenants should have put* [the Inspector General of Police] *on notice: such a large contingent of officers cannot possibly have been required to levy distress on one man and one woman. In the circumstances therefore, the acts of the respondents were unlawful and unjustified*." We are in total agreement with the statement by the Judge that:

> ***"it is undisputed that the eviction did take place as alleged, and that the*** [evictees] ***were as a result removed from the place they knew as home. The*** [evictees] ***allege that the eviction took place at 4.00. a.m, and that it was carried out violently by gangs of youth who demolished their homes and carried away their personal belongings. While the*** [appellant and 15th and 16th respondents] ***deny that there was violence or commission of criminal acts, or that the*** [evictees?] ***goods were carried away, they have not disputed the averment that the eviction took place, or that it took place in the early hours of the morning; or that at the end of it, all the*** [evictees?] ***structures which had been erected on the subject land had been demolished and a wall erected around the premises."***

50. In the foregoing circumstances, we are satisfied that the Judge was right in concluding as she did that the eviction of the evictees was unlawful for having been carried out under the pretext of levying distress and with no lawful order for its execution and for the same reason the conclusion reached by the Judge that the evictees? rights were violated cannot be faulted.

51. As pointed out by counsel, this Court grappled with related issues in the **Mitu-Bell case**. In that case, Mitu-Bell Welfare Society petitioned the High Court on behalf of its members and residents of a slum dwelling known as Mitumba village that was located within a parcel of land registered in the name of Kenya Airports Authority (KPA) where, as squatters, they had erected residential and business structures. KPA published a notice in the local newspaper giving the squatters notice to vacate the property within 7 days. Despite a conservatory court order having been issued, eviction of the squatters and demolition of their structures took place rendering them homeless. The court held that the demolitions by KPA was illegal, irregular, unprocedural and contrary to Articles 26, 27(2)(4) & 6, 28,29,39,40,43,47, and 56 of the Constitution. On appeal, this Court, whilst reaffirming its "commitment to the realization, justiciability and enforcement of socio-economic rights" set aside the judgment of the High Court being of the view, among other considerations, that there was no violation of the squatters "constitutional right to property under Article 40 of the Constitution."

52. In reaching its determination in that case, this Court noted that the High Court had, in reaching its decision, relied on the **Grootboom case** (supra). The Court noted that the decision in the Grootboom case was based on Section 26 of the South African Constitution, which, unlike Article 43 of the Kenyan Constitution, has an express provision that:

> ***"No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."***

The Court also cited Section 8 of the South African Prevention of illegal Eviction from and unlawful occupation of Land Act that provides that ***"No person may evict an unlawful occupier except on the***

authority of an order of a competent court."

53. In the **Mitu-Bell case**, this Court also faulted the High Court for not considering "the tension between socio-economic rights and the right to private property in the Kenyan context". The Court reviewed several decisions of the High Court in which attempts had been made to reconcile the right to property under Article 40 and the right to human dignity Article 28 and the right to adequate housing under Article 43 of the Constitution.[1] The preponderant view expressed by the High Court in those decisions, correctly in our view, is that notwithstanding that squatters may not have title over the property they occupy they are entitled to be treated with dignity. Lenaola, J (as he then was) articulated the argument by positing that *"it does not matter that the petitioners do not hold title to the suit premises and even if they had been occupying shanties, the 1st respondent was duty bound to respect their right to adequate housing as well as their right to dignity."* After reviewing those decisions, this Court concluded as follows:

> ***"136. We have surveyed the emerging judicial decisions in Kenya in an attempt to discern the emerging principles to address the seeming tension between private property and realization of socio-economic rights. The Constitution in the Bill of Rights recognizes and protects the right to private property. Whereas socio-economic rights are***

[1] See Susan Waithera Kariuki & 4 others vs. Town Clerk Nairobi City Council & 2 others, Petition No. 66 of 2011; Satrose Ayuma & 11 others vs. The Registered Trustees of Kenya Railways Staff Retirement Pension Scheme & 2 others, Nairobi HC Petition No. 65 of 2010; Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Security, Constitutional Petition No. 2 of 2011; Veronica Njeri Waweru & 4 others vs. The City Council of Nairobi & others, Nairobi Petition No. 58 of 2011 ***recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another. In Latin, socio-economic rights cannot confer rights*** *in alieno solo.* ***Under the law as it stands today, enforcement and realization of socio-economic rights does not override the provisions of the Limitation of Actions Act (Cap 22 of the Laws of Kenya). Prescriptive rights to land cannot be acquired in the name of enforcement of socio-economic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineer, take away and re-distribute property rights. Subject to Article 25 of the Constitution, all provisions in the Bill of Right are to be treated as equal with no one provision overriding another."*** [Emphasis]

54. Although there are marked factual differences between the **Mitu Bell case** and the present case, [2] we are in agreement with Mr. Mureithi for the evictees that the absence of a legal framework did not mean that the law of the jungle was to apply[3] and that the appellant was at liberty „to use any means necessary? to rid itself of the squatters.

55. Under Article 10 of the Constitution, the rule of law is a national value and principle of governance and every person has an [2] For instance, in the present case the police conceded having been involved in the evictions and demolitions based on a court order permitting the levying of distress for rent. There was also a claim for ownership by the squatters in Mitu Bell Case which is not the case here.

[3] That case was decided in July 2016 prior to the enactment of The Land Laws (Amendment) Act, 2016 that commenced operation on 21st September 2016 providing for, among other things, procedures on evictions from land. See in particular Section 98 of that Act. obligation to respect, uphold and defend the Constitution.[4] As Migai Akech noted in his book, **Administrative Law**, Strathmore University Press, 2016, the essence of the rule of law is that people ought to be governed by law. There is also the decision of this Court in the case of **Gusii Mwalimu Investment Co. Ltd & 2 others vs. Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 of 1995** applied by the High Court in **Teresia Irungu vs. Jackton Ocharo & 2 others [2013] eKLR**, where this Court held that:

"It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession."

In this case, an order of the court was therefore a prerequisite for undertaking the evictions, and we so find.

56. Ultimately, each case must stand and be decided on its own facts. In the circumstances of the present case, where the evictees or some of them appear to have been on the property well before the allotment of the property to the appellant, it would have been necessary, to seek a court order prior to carrying out the eviction. Thankfully 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 or public land[5].

57. As regards the question whether the appellant served notice of eviction on the evictees, the appellant swore that it did. In his replying affidavit to which we have already made reference under paragraph 47 above Chepngorem deposed that the appellant gave the evictees "various notices to vacate the premises but to no avail." He exhibited eviction notices dated 21st May 2009 and 14th March 2013 that bore certificates attesting that the notices were [4] Article 3, of the Constitution. [5] The Mitu-Bell case was decided in July 2016 prior to the enactment of the Land Laws (Amendment) Act, 2016. duly served on all the occupants of the property. The evictees denied having been given any form of notice prior to the evictions. It is not clear how the Judge arrived at the conclusion that no notice was served or why she rejected the appellant?s assertion regarding service of notices while accepting that of the evictees. There is no reason to doubt that the notices that the appellant exhibited before the court were not served as indicated or as proclaimed in those notices. The appellant is therefore justified in its complaint that the Judge failed to have regard or proper regard to that evidence.

58. What remains is to determine whether the High Court was correct in granting the orders that it did and in awarding compensation to the evictees. Having found that the appellant and the state had violated the evictees? constitutional rights, the court granted three declarations, namely:

"(i) That the demolition of the petitioners' houses and their forced eviction by the 1st, 2nd and 3rd respondents without provision of alternative land or shelter is a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing;

(ii) That the demolition of the petitioners' houses without according their children alternative shelter or accommodation is a violation of the fundamental rights of children guaranteed by Article 53 of the Constitution;

(iii) That the said eviction and demolition of the petitioners' house was a violation of the rights of elderly persons guaranteed by Article 57 of the Constitution."

59. As we have already stated, the Judge ought to have taken into account the provisions of Article 21(2) of the Constitution when granting those reliefs. Article 21(2) as already indicated provides that "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". The concept of progressive realization expressed in Article 21(2) of the Constitution is premised on the recognition that economic resources are required in order to fulfill all socio economic rights and it is not possible in the context of our country to immediately fulfill these rights. At the same time, an obligation is imposed on the State to take appropriate measures towards the full realization of those rights.

60. In its Advisory Opinion (***Advisory Opinion No. 2 of 2012)*** in **The Matter of The Principle Of Gender Representation In The National Assembly & The Senate [2012] eKLR**, the Supreme Court of Kenya when addressing itself to the concept of progressive realization stated that it simply refers to the

gradual or phased-out attainment of a goal and that "*there is no mandatory obligation resting upon the State to take particular measures, at a particular time*" for the realization.

61. In declaring, in effect, that the appellant and the State had violated the evictees? rights to accessible and adequate housing, it is not apparent that the court had regard to Article 21(2) of the Constitution. These are germane considerations that the learned Judge ought to have taken into account but does not appear to have done so with the result that the Judge misdirected herself.

62. We have stated that in addition to the declarations aforesaid, the court ordered the appellant to pay to each of the evictees an amount of Kshs. 150,000.00 as compensation while the State was ordered to compensate each evictee with an amount Kshs. 100,000.00. The appellant complains that these orders are erroneous.

63. It is undoubtedly, within the mandate of the High Court, under Article 23(3) of the Constitution, to grant relief in the form of an "order for compensation." As an appellate court, the circumstances in which we can interfere with an award of damages by the lower court are limited. In **Butt v. Khan [1981] KLR 349** this Court held that an appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates. Law, J.A at page 356 put it this way:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

64. Recently, in the case of **Gitobu Imanyara & 2 others vs. AG [2016] eKLR**, this Court stressed the position that:

> ***"It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

65. In the same case, the Court had occasion to consider what appropriate remedies are available for damages arising out of violation of constitutional and fundamental rights of an individual by a State under public law. After reviewing numerous decisions from different jurisdictions, the Court concluded, and it necessary to quote at length, that:

> ***"It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court.***
>
> ***However, the court's discretion for award of damages in constitutional violation cases though (sic) is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."***

66. Against those principles, it is not at all clear from the judgment of the lower court what informed the awards or how the Judge arrived at the amounts that she awarded.

67. In addition to their complaints that their constitutional rights were violated having regard to the manner of their eviction, the evictees complained that as a result they lost their houses as well as business structures and businesses. In our view, such loss is to a large extent quantifiable and can be assessed on settled ordinary principles taking account all the relevant facts and circumstances of the particular case.

68. Whereas the High Court, whilst granting relief, was exercising its constitutional jurisdiction to uphold or vindicate a constitutional right that it found had been contravened, in awarding compensation for the specific damage that the evictees claimed they had suffered, the court should have inquired into the nature of such loss. If necessary, the evictees should have been granted an opportunity to prove the damage and for the appellant and the State to test the evictees claims.

69. The Privy Council observed in the case of **Siewchand Ramanoop vs. The AG of T&T, PC Appeal No 13 of 2004** that in most cases involving violation of constitutional rights, the remedy of a declaration by the court may not in itself be sufficient and there are cases where "more will be required than words." Lord Nicholls stated in that case that:

> ***"…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."***

70. Where, as here, the court determines that an order for compensation is deserved and the material available is not such as would enable the court to determine the crucial question as to what is a reasonable amount to be awarded in the circumstances of any particular case, it would be desirable, if not necessary, to undertake an inquiry with a view to assessing the quantum of loss.

71. In the present case, the evictees were obliged to place material before the court on the basis of which an assessment of damages would be undertaken. Lord Kerr in the case of **Romauld James vs. AGT [2010] UKPC** adopted the following the words, which are applicable here:

> ***"In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."***

72. There was clearly no evidence before the Judge to assist the court in assessing the amount of appropriate compensation. We hold that, in the circumstances of this case, it was incumbent upon the evictees to place material before the court on the basis of which the court would undertake an enquiry to ascertain the extent of loss so as to arrive at a reasonable amount.

73. In conclusion therefore and based on the foregoing, we hold that: The evictees amended petition provided sufficient particulars in accordance with the requirements of the Mutunga Rules and the law; The appellant is under no obligation to provide alternative accommodation or shelter to the evictees; In the circumstances of this case, and considering that the evictees failed to heed notice served on them to

vacate the property, the appellant should have sought a court order in order to carry out the evictions; The manner in which the evictees were evicted and their houses and business structures demolished was in violation of their right to human dignity; there was no material before the court on the basis of which the orders for compensation were made.

74. To our mind the only relief that should have commended itself to the trial Court was a declaration that the forced eviction and demolition of their houses without a Court order is a violation of their right to human dignity and security of the person. The rest of the prayers would fall by the wayside.

75. The upshot of the foregoing is that the appeal partially succeeds. The judgment and decree issued by the High Court on 14th October 2016 in Constitutional Petition No. 264 of 2013 as consolidated with Constitutional Petition No. 274 of 2013 is hereby set aside and substituted with a declaration in favour of the evictees that the demolition of their houses and their forced eviction without a court order is a violation of their right to inherent human dignity and security of the person.

76. Each party shall bear its own costs of the proceedings in the High Court as well as the costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of December, 2017. P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR