

Nothing but a mass of debris: Urban evictions and the right of access to adequate housing in Kenya

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Summary

The article explores the opportunities that the new constitutional dispensation in Kenya has created for the protection against unlawful eviction of poor populations living in urban centres. It analyses the content of the right to accessible and adequate housing as provided for in article 43 of the Constitution of Kenya and articulated in various international instruments, and traces how this provision has been applied in the eviction cases that the Kenyan courts have decided. From this analysis, the article suggests that the new constitutional dispensation has opened up possibilities for rights enforcement that the courts as well as administrative organs should take advantage of. It also makes tangible suggestions on how to improve rights litigation in this regard, such as affirming the rights of access to courts and seeking further judicial oversight prior to any eviction and the promulgation of enabling legislation.

1 Introduction

On the morning of 12 November 2011, bulldozers tore into the Nairobi suburb of Syokimau and demolished all the houses said to have been

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built on land belonging to the Kenya Airport Authority.¹ A few days later, demolitions were also carried out near Wilson Airport and around Eastleigh airbase.² Like in all previous incidences, these evictions were violent, disruptive and involved a massive display of force. In their wake, property worth millions of shillings were destroyed or looted and residents, including women and children, were rendered homeless. Not surprisingly, the demolitions drew significant criticism from civil society, churches and the media. A lawyer writing in a daily newspaper termed it the 'battle of haves and have nots' and castigated the way in which those in power were using the law 'to protect the property they had stolen from government'.³ Similarly, a government minister, incensed by the barbaric nature of the evictions, labelled the acts 'unconstitutional' and called on the government to compensate the victims.⁴ In addition to the media furore, the evictions also spurred the usual stock of ponderous and ineffectual administrative and political responses, such as the formation of the Joint Parliamentary Committee to investigate the evictions, and dramatised high-level government statement promising investigations and stern action should any act of impropriety be found. Unfortunately, these responses never yielded any tangible benefit to the evictees, except to reveal, to no avail, the depth of corruption, malfeasance and pure incompetence in government departments charged with the responsibility of registering and issuing titles as well as those that regulate planning and approve new developments.⁵

1 See A Nyongesa 'More airport homes knocked down' *Daily Nation* Nairobi 13 November 2011 <http://allafrica.com/stories/201111140346.html> (accessed 15 November 2011); F Ayieko 'Questions linger over Syokimau demolitions' *Daily Nation* Nairobi 17 November 2011 <http://www.nation.co.ke/Features/DN2/Questions+linger+over+Syokimau+demolitions/-/957860/1274186/-/topwvz/-/index.html> (accessed 2 December 2011).

2 See W Oeri 'Hundreds left homeless in Nairobi demolition' *Daily Nation* Nairobi 19 November 2011 <http://www.nation.co.ke/News/Hundreds+left+homeless+in+Nairobi+demolition/-/1056/1275716/-/2efc9i/-/index.html> (accessed 2 December 2011); L Barasa 'Fury as homes near Nairobi military base pulled down' *Daily Nation* Nairobi 23 November 2011 <http://allafrica.com/stories/201111230361.html> (accessed 2 December 2011).

3 See A Abdullahi 'Demolitions: Battle of 'haves and have not'' *Daily Nation* Nairobi 20 November 2011 <http://allafrica.com/stories/201111210053.html> (accessed 2 December 2011).

4 See 'Minister condemns demolition as house team adjourns hearing' *Daily Nation* Nairobi 25 November 2011 <http://allafrica.com/stories/201111251338.html> (accessed 10 December 2011).

5 Among those who testified before the Joint Parliamentary Committee was the Commissioner of Lands who alleged that the title deeds held by Syokimau residents were 'fake'. See A Amran 'Commissioner of Lands admits Syokimau title deeds were fake' *East African Standard* Nairobi 25 November 2011 <http://www.standardmedia.co.ke/InsidePage.php?id=2000047278&cid=4&story=Commissioner%20of%20Lands%20admits%20Syokimau%20title%20deeds%20were%20fake> (accessed 10 December 2011).

There is certainly not a great deal of disagreement on the fact that forced evictions of this nature violate human rights.⁶ The consensus revolves around the universal recognition of the right to adequate housing and the possibilities that the rights regime, in general, presents for eliminating obstacles to the full realisation of fundamental dignity for all human beings. Therefore, the assumption that strengthening the enforcement of relevant rights, at the domestic level will ameliorate the suffering of evictees and improve their situation is indeed warranted, not least because it provides an entry point to analytical evocation of what could be regarded as the rights-based approach to the eviction question in Kenya. However, an approach based on this assumption must necessarily unravel a number of expectations that often determine the effectiveness of a rights-protection regime in a domestic system. The first, obviously, is the basic expectation that international standards will positively influence the adjudication of rights by domestic courts. This expectation arises from the generally-uncontested view that human rights principles will have optimum effect if adopted into domestic law and enforced through local courts;⁷ secondly, that the compartmentalisation that we have seen in judicial approaches to socio-economic rights, where courts defer to the executive in matters that they consider to fall within their competence, will not postpone rights adjudication or defeat it altogether, and that the barriers to justiciability will be overcome by the entrenchment of

2 December 2011); V Kimutai 'Lands boss says fraudster paid Sh 1.3million to legitimise Syokimau deals' *East African Standard* 1 December 2011 <http://www.standardmedia.co.ke/business/InsidePage.php?id=2000047591&cid=4&> (accessed 10 December 2011). See also D Opiyo 'Lands officials sent packing in shake-up' *Daily Nation* Nairobi 4 December 2011 <http://allafrica.com/stories/201112040025.html> (accessed 10 December 2011).

6 In para 18 of UN Committee on Economic Social and Cultural Rights General Comment 4, UN Doc E/1992/23, adopted on 12 December 1991, the Committee affirmed that 'instances of forced evictions are *prima facie* incompatible with the requirements of the [International Covenant on Economic, Social and Cultural Rights] and could only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law'.

7 See eg R Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 *Fordham International Law Journal* 296 (arguing that trends seem to be changing in favour of the application of international law in domestic courts in Africa); T Collingsworth 'The key human rights challenge: Developing enforcement mechanisms' (2002) 15 *Harvard Human Rights Journal* 183 (discussing the enforcement of international human rights law through the Alien Torts Claims Act (ATCA) in the domestic United States courts); M Ruteere 'Politicisation as a strategy for recognition and enforcement of human rights in Kenya' (2006) 7 *Human Rights Review* 6 (suggesting that socio-economic rights can only become a reality at the domestic level if politicised); JO Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 25.

these rights in the domestic constitution.⁸ Thirdly is the capacity issue – the hope that domestic systems will have the necessary capacity to deal with rights claims and render positive outcomes.

In addition to these general expectations, there is a more substantive one which calls for the subordination of the property rights regime to a constitutional rights system. This expectation draws on the proposition that evictions reflect the asymmetrical power relations between parties. The party with the legal mandate to evict is often the one who is in control of a ‘bundle of rights’, that include the right to capital, the right to possess, the right to use, the liability to execution and immunity from expropriation.⁹ The expectation that constitutional rights could tamper any rights within the bundle is revolutionary in a way, but not entirely unfathomable. In some jurisdictions, human rights have been held to constitute a new addition to the bundle, thereby conditioning the property rights holder to the observance and the respect of constitutional values.¹⁰ It may be arguable whether such an approach is conceivable in Kenya, given the slew of legislations yet to be enacted and the plethora of adjustments needed to align the existing statutes with the new constitutional dispensation. But this notwithstanding, the idea alone that property rights are not absolute and must succumb to higher goals of society should in itself lend credence to this expectation.

The claim I make in this article is that the degree of fulfilment of both the general and substantive expectations correlates with the manner in which the constitutional guarantee on the right to housing is elaborated, interpreted and ultimately infused into the domestic property governance systems. I argue that the current constitutional dispensation in Kenya offers some opportunity for the fulfilment of these expectations and, therefore, the realisation of the rights to adequate housing within the framework of protection underwritten by international human rights law. This article is not meant to be a brief on the limitations of the current framework of human rights law *per se*, rather an exploration of opportunities that the new constitutional dispensation now provide for enhancing the protection for victims of forced evictions within the rubric of the right to adequate housing.

8 See eg M Pieterse ‘Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience’ (2004) 26 *Human Rights Quarterly* 882.

9 This is what ‘ownership’ entails in property law. See AM Honoré ‘Ownership’ in AG Guest (ed) *Oxford essays in jurisprudence* (1961) 112-124; see the disputing thesis in J Penner ‘The bundle of rights picture of property’ (1995) 43 *UCLA Law Review* 711.

10 The notion of ‘constitutional property’ is well developed in South African law. See the cases of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South Africa Revenue Service* 2002 4 SA 768 (CC); *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC). See also AJ van der Walt *Constitutional property law* (2011).

Therefore, it outlines the nature and content of standards established by international regimes and assess how the new constitutional dispensation in Kenya has responded to these standards. It is against this background that the article then discusses the phenomenon of forced evictions in urban areas and isolates its implications for the effective protection and enjoyment of the right to housing. In the end, the article suggests that a rights-based approach, conceived within the framework of the constitutional right to housing, has the capacity to expand the protection regime for evictees by taking into account broader perspectives, such as the requirement for judicial oversight, and providing wider opportunities for rights litigation than had hitherto been the case. The whole discussion in this article is situated within the context of Kenya's transformational journey which begun by the enactment of the new Constitution in August 2010.¹¹

2 Debating the relevance of the discourse on the right to housing

Advocating for a rights-based approach in dealing with reckless evictions and demolition of houses in Kenya has obvious benefits. First, it provides an opportunity for testing the practical utility of rights in a needs-based environment. Already, the 'basic needs' approach,¹² which recognises the fact that society can only develop if the fundamental needs of its people are met, has absorbed key human rights standards such as those established by the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³ and the Declaration on the Right to Development.¹⁴ Yet, the idea of needs, as it resonates with impoverishment and disempowerment of the vulnerable and economically-marginalised groups, still presents the greatest challenge to a rights regime, especially where governmental action is involved. This is because claims of individual rights are inevitably juxtaposed against the obligations to ensure public good, which then gives rise to the so-called 'public interest' argument. As

11 For a discussion of the reform process that culminated in the creation of the Second Republic, see L Juma & C Okpaluba 'Judicial intervention in Kenya's constitutional review process' (2012) 11 *Washington University Global Studies Law Review* 287.

12 See S Liebenberg 'Needs, rights and transformation: Adjudicating social rights in South Africa' (2006) 17 *Stellenbosch Law Review* 5.

13 International Covenant on Economic, Social and Cultural Rights, GARes 2200, A/21, UN Doc A/63/6 16 December 1966.

14 GA Res 41/128 (1986). See also F Stewart 'Basic needs strategies, human rights, and the right to development' (1989) 11 *Human Rights Quarterly* 347. See also B Hamm 'A human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005 (arguing that human rights and development are interdependent); and S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 137 (discussing the United States' persistent refusal to recognise development as a human right).

is always the case, whenever evictions occur and the civil society and human rights groups call for action against those involved, the ranks of Kenyan leadership routinely brandish the 'public interest' justification.¹⁵ In Syokimau, the eviction was justified on the ground that ensuring security of the adjoining airport was in the public interest. Indeed, as the Minister of Transport was to confirm five days after the evictions, 'there was a programme of demolitions to clear people who are illegally or irregularly settled on land that they should not be residing on for security purposes'.¹⁶ It should be noted, however, that the 'public interest' notion faces a considerable challenge in human rights discourse, because it often merely provides some latitude for elite manipulation of the political agenda.¹⁷ While I do not dispute that there may be circumstances in which a public interest justification may be warranted, it must, nevertheless, meet a very stringent test. 'Public interest', if at all, must prioritise people's rights and allow for consultations among all the affected parties.¹⁸ The test therefore is the extent to which the public have been involved in the decision-making process and have accepted the government's proposal to evict them.¹⁹ None of the urban evictions seen in Kenya recently meets the test of public interest, however constructed, because the rights of evictees have never been considered. Moreover, these evictions occur against a backdrop of a culture of impunity often manifested in the persistent and routine disregard for individual rights and freedoms prescribed by both domestic and international law. Therefore, according to Ocheje, the 'public interest' rationale is 'more of a myth than a credible explanation for forced evictions'.²⁰

Be that as it may, the rights regime pierces the veil of public interest, to give voice to the voiceless and protection to the vulnerable. In a much wider perspective, the approach advocates for transparent

15 See P Ocheje 'In the public interest: Forced evictions, land rights and human development in Africa' (2007) 51 *Journal of African Law* 173.

16 See C Wafula 'Kimunya: I cannot promise end to demolitions' *Daily Nation* Nairobi 17 November 2011 <http://allafrica.com/stories/201111160160.html> (accessed 2 December 2011).

17 See generally G Schubert *The public interest: A critique of the theory of a political concept* (1960); W Leys 'The relevance and generality of "the public interest"' in C Friedrich (ed) *The public interest* (1967) 237. See also E Bodenheimer 'The use and abuse of the "public interest"' in Friedrich (above) 191.

18 At least, in South Africa the principle of 'meaningful engagement', which compels the public authority to engage with the community facing eviction and attempts to find a solution to the problems which the eviction sought could have solved, is now engrained in the law. See *Residents of Joe Slovo Community Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

19 See S K Bailey 'The public interest: Some operational dilemmas' in Friedrich (n 17 above) 96.

20 Ocheje (n 15 above) 205.

institutions, an inclusive and participatory decision-making process, and prioritising the needs of the most vulnerable.²¹ For the reason that it is participatory in nature and prioritises needs, it can play the much-needed role of moderating demands to housing based on differing levels of needs. Recognising the diversity of people's needs is important for policy formulation as well as for designing strategies for addressing issues of poverty and other concerns. Given that instigators of evictions in Kenya are big businesses, local and central government, private developers, and even holders of foreign business interests,²² the rights regime that confers entitlements to those affected by evictions will somewhat ensure that the needs of the vulnerable are not trampled by the economically powerful. Also worth noting is the fact that rights-based approaches have a social benefit in providing a useful rallying ground for organised resistance to forced evictions. For example, one of the key goals of the *Muungano wa Wanavijiji Maskini* (Federation of the Urban Poor), created in 1996 by poor communities around Nairobi and Thika, as stated in its mission, is to defend the rights of the urban poor.²³ Other organisations, such as *Kituo Cha Sheria* and *Hakijamii*, who have been active in campaigning against forced evictions, have all structured their mandate around the rights discourse.²⁴

Secondly, the demand for the right to housing necessarily implicates government policy and law. The failure of government to develop rural areas has resulted in rural-urban migration. The population swell in urban centres has in turn led to the proliferation of slums and informal settlements.²⁵ Mwangi observes that the demand for housing by the increasing population in urban areas could only be served by informal settlements.²⁶ In Nairobi alone, there are over 168 informal settlements with a total population of about 2 million people.²⁷ The lack of sophistication in the planning and development of urban environments has often necessitated the removal and clearing of

21 S Liebenberg 'Human development and human rights, South Africa country study' Human Development Report 2000, Background Paper 11 <http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf> (accessed 20 December 2011).

22 See K Otiso 'Forced eviction in Kenyan cities' (2002) 23 *Singapore Journal of Tropical Geography* 253; J Audefroy 'Eviction trends worldwide and the role of local authorities in implementing the right to housing' (1994) 6 *Environment and Urbanisation* 16.

23 Otiso (n 22 above) 262.

24 As above.

25 See R Stren 'Urban policy and performance in Kenya and Tanzania' (1975) 13 *Journal of Modern African Studies* 271. See generally M Lipton *Why poor people stay poor: A study of urban bias in world development* (1977); G Breeze *Urbanisation in newly developing nations* (1966).

26 See IK Mwangi 'The nature of rental housing in Kenya' (1997) 9 *Environment and Urbanisation* 143.

27 Ocheje (n 15 above) 190.

informal settlements. As well, since the residents of these informal settlements are considered 'illegal and uncontrolled', their plight is not taken into consideration. Yet, the informal sector, sustained by these informal settlements, makes a significant contribution to the national economy.²⁸ Needless to mention, such a contribution is lost when eviction and demolition occur. The rights regime *should* be able to change this dynamic. According to Leckie, the rights approach elevates the debate on housing rights 'to the level of *de jure* and *de facto* governmental obligation', and also 'provides a coherent means of analysing and evaluating the effectiveness of a state shelter legislation and policies'.²⁹ The question to be posited in this regard is whether there is a link between the right to housing and sustainable development, employment, stability and health – the main concerns that governments often hold up to be the basis for limiting such rights in the first place. Obviously, if a significant portion of the population has no fixed abode, then their production and participation in the national economy will be compromised.³⁰ The rights regime not only protects against the destabilisation of informal economies, but also imposes a positive obligation to remove the vulnerabilities of those who participate in the informal sector.

Thirdly, regimes which guarantee rights to housing, or any other rights for that matter, which affect property relationships, purposely place the operation of rights above considerations of ownership, possession and any other status dictated by the common law. This is because they declare those rights as due to 'everyone', no matter their status. But that is, in fact, the essence of human rights – that we qualify to enjoy certain rights just because we are human beings. Thus, whether a person has property or not, is rich or poor, they are entitled to claim these rights and the state is bound to fulfil, respect and also protect these rights. This has tremendous implications for property relationships in general and the concomitant ownership regimes established under common law. The domestic jurisdiction must not only establish a framework for property relations that ensure harmony in the acquisition, appropriation and protection of ownership rights, but must also incorporate the human rights perspectives in that framework. In a constitutional environment where the bill of rights entrenches the right to housing, instituting such a framework is obligatory. Lastly, engaging the rights approach and giving the courts the opportunity to pronounce on rights ultimately improves the status

28 See K Macharia 'Slum clearance and informal economy in Nairobi' (1992) 30 *Journal of Modern African Studies* 221.

29 S Leckie 'The UN Committee on Economic Social and Cultural Rights and the right to adequate housing: Toward an appropriate approach' (1989) 11 *Human Rights Quarterly* 522 542.

30 See eg Human Rights Watch *Double standards: Women's property rights violations in Kenya* (2003).

of a nation as a member of the international community.³¹ Thus, by establishing coherency in the law relating to access to housing and adopting international standards into domestic law we may achieve an important foreign policy objective, as well.

3 Nature and content of the right to housing under international law

Let us begin by examining the nature of the right to accessible and adequate housing with a view of isolating the elements within its content that indicate parameters of violations that have been associated with forced eviction. The right to housing is perhaps the most direct and immediate right that responds to the plight of evictees. However, this does not preclude the evocation of other rights depending on the circumstances and the nature of the eviction. Indeed, even the elaboration of the right to housing itself may be dictated by specific situations. For example, the standards required for the protection of internally-displaced persons may differ from those required to deal with urban evictions such as the ones earlier mentioned. But this caution does not rob the existing law of the stature it needs, nor does it suggest any lack of the necessary breadth to sufficiently cover instances of evictions that we have seen so far. As it is, the statement of the right in international instruments, together with guidelines established by the various UN organs, provides nations, Kenya included, with sufficient materials to develop effective regulatory frameworks for evictions within their systems. What then is the nature of the right? A preferred starting point in setting out the nature of this right is the Universal Declaration of Human Rights (Universal Declaration).³² Article 25 provides that '[e]veryone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing ...' This right is further affirmed in article 11(1) of ICESCR which reads:

The state parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

31 See T Risse & K Sikkink 'The socialisation of international human rights norms into domestic practice: Introduction' in T Risse *et al* (eds) *The power of human rights: International norms and domestic change* (1999) 1.

32 GA Res 217A (III), UN Doc No A/810 71 (1948).

Leckie has noted that this provision 'establishes the most important principle of international law on housing rights'.³³ And whereas we may not agree on what constitutes the precise content of these rights, or the manner in which they should be articulated in response to any set of circumstances, the regime established by ICESCR indicates a veritable commitment by state parties to improve access to housing and to protect persons against any actions that may inhibit or deny the enjoyment of such rights. Moreover, article 2 of ICESCR enjoins state parties to guarantee the enjoyment of these rights without discrimination of any kind, 'including ... property and other status'. State parties are also obligated to commit 'maximum available resources' so as to 'progressively' ensure the full realisation of these rights. It is also significant that ICESCR invites state parties to institute administrative and legislative measures to realise these rights.³⁴ Nonetheless, the characterisation of the obligation that state parties have, especially with regard to the progressive realisation of rights, has implications for housing rights that I shall examine in some detail later. In the meantime, I need to mention that there are other rights guaranteed by international instruments which may be ancillary to the right to housing, and which become relevant from time to time, in the context of forced eviction, for example, article 17(1) of the International Covenant on Civil and Political Rights (ICCPR),³⁵ which extends protection to privacy and homes; and article 5(e) (iii) of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),³⁶ which prohibits discrimination with regard to the protection of the right to housing. The right to housing is also safeguarded under article 17 of ICCPR, which prohibits 'unlawful interference with privacy, family, home or correspondence'.

Although the right to adequate housing is not expressly provided for in the African Charter on Human and Peoples' Rights (African Charter),³⁷ the combined effect of article 4 (the right to life), article 14 (the right to property), article 16 (the right to health), article 18(1) (the right to a

33 S Leckie 'The right to housing' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 111.

34 There is a measure of achievement in this regard, among a range of states. Eg, in South Africa one might point to the Social Assistance Act 13 of 2004 and Social Security Agency Act 9 of 2004 and, in India, to the National Rural Employment Guarantee Act (2005) as legislative interventions that support socio-economic rights. See F Coomans 'Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 7.

35 GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966).

36 GA Res 34/180, 34 UN GAOR Supp (No 49) 193, UN Doc A/34/46 (1979).

37 OAU Doc CAB/LEG/67/3 re 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 29 (adopted 27 June 1981).

family life) and article 24 (the right of peoples to a 'general satisfactory environment favourable to their development'), would seem to affirm such right. This view was ventilated by the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*.³⁸ The complaint was based on the actions of Nigeria National Petroleum Development Company and Shell Petroleum Development Corporation in the Niger Delta region. It alleged that the military government had allowed these two organisations to extract oil in a manner that adversely affected the environment and that the government had abetted these actions by using the military to suppress, kill and destroy houses and property of the Ogoni people. The African Commission interpreted the African Charter to find an implied right to housing. It observed that when housing is destroyed, property, health and family life are adversely affected.³⁹ It also found that the government was in violation of the right to shelter by instigating forced evictions and destroying houses and villages. Importantly, however, the Commission found that the right to adequate housing encompassed the protection against forced evictions.⁴⁰ This decision also illustrates how, in the elaboration of the right to housing, the notion of the interdependence and mutually supportive nature of rights becomes important.

3.1 Contents of the right to housing

Giving content to the right to housing is crucial in this discourse for two reasons. First is the obvious necessity of delineating the essential elements of the right so as to give concrete definition of what the right is or should mean in the context of eviction. It is a truism that in Kenya, and perhaps in many other developing countries, a house should be perceived as more than just a dwelling place, but a space in which the conglomerate of family structures and livelihood are nurtured, used and even shared.⁴¹ Thus, without a house, a person's dignity may be impaired apart from being deprived of a basic need. The Global Strategy

38 (2001) AHRLR 60 (ACHPR 2001) (SERAC). This decision has been reviewed by many commentators. See eg D Shelton 'Decision regarding Communication 155/96 (*Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria*)' (2002) 96 *American Journal of International Law* 937; G Bekker '*The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*' (2003) 47 *Journal of African Law* 107; D Olowu *An integrated rights-based approach to human development in Africa* (2009) 62; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010).

39 SERAC (n 38 above) para 60.

40 SERAC (n 38 above) para 63.

41 In South Africa, the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35 stated that adequate housing meant 'more than bricks and mortar'. See G Miller 'Impact of section 26 of the Constitution on the eviction of squatters in South African law' unpublished dissertation, University of Stellenbosch, 2011 75.

to year 2000 (GSS), adopted by the United Nations (UN) Commission on Human Settlement, invited the community of states to view shelter in much broader terms than just a roof over one's head. In the GSS report, the meaning of shelter was broadened to include 'adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic structure and adequate location with regard to work and basic facilities – all at a reasonable cost'.⁴² It is this same understanding of shelter that the community of nations affirmed at the second UN Conference on Human Settlement held in Istanbul in 1996.⁴³ At the Conference, member states committed themselves to⁴⁴

[p]roviding legal security of tenure and equal access to land to all people, including women and those living in poverty ... Ensuring transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure ... Increasing the supply of affordable housing, including through encouraging and promoting affordable home ownership and increasing the supply of affordable rental, communal, co-operative and other housing through partnerships among public, private and community initiatives, creating and promoting market-based incentives ...

Thus, housing rights have implications for other rights as well. As Stone notes, the right is built on 'recognition that the political and civil rights ... have little practical meaning or utility for those among us whose material existence is precarious'.⁴⁵ In providing context to the right and elaborating on its features, the Committee on Economic, Social and Cultural Rights (ESCR Committee), which has the responsibility of monitoring the implementation of rights under ICSECR, has listed seven essential components of the right to housing.⁴⁶ These are legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. Of most relevance to us is legal security of tenure. It is common knowledge that access and enjoyment of rights to housing would not be possible unless a person is guaranteed security of tenure. Among the factors that induce insecure tenure are poverty, ineffective or non-existent normative regimes, corruption and poor governance. The insecurity is mostly felt among the slum populations in urban areas.⁴⁷ A common feature of the phenomenon would be

42 The Global Shelter Strategy to the Year 2000, Report of the Executive Director, UN Comm on Human Settlement, UN Doc H/C11/3 para 9 7 (1988).

43 See United Nations Report of the United Nations Conference on Human Settlement (Habitat II) (1996), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/025/00/PDF/G9602500.pdf?OpenElement>.

44 n 43 above, para 40(b).

45 M Stone *Shelter poverty: New ideas on housing affordability* (1993) 314.

46 General Comment 4 para 8.

47 See A Durand-Lasserve 'Informal settlements and the Millennium Development Goals: Global policy declaration on property ownership and security of tenure' (2006) 2 *Global Urban Development* 1 <http://www.globalurbandevelopment.org/GUDMag06Vol2Iss1/Durand-Lasserve%20PDF.pdf> (accessed 15 December 2011).

insecure housing structures and dense occupation, both of which attract eviction by urban authorities and unscrupulous land grabbers.

Ordinarily, we associate legal security of tenure with property rights and therefore struggle to find how persons with no right in the property in which they are living should be accorded such security. But legal security of tenure for purposes of the right to housing should be understood to exist in two forms: legal security of tenure and *de facto* security of tenure.⁴⁸ Legal security of tenure embodies the benefits in the bundle of rights that would, presumably, shield an owner of property from forced eviction. *De facto* security of tenure, on the other hand, may entail factors such as 'illegal occupation of a dwelling or land and acquisition of security of tenure in practice as a result of prohibition against eviction, provision of basic services, support from local politicians, customary rituals'.⁴⁹ According to the ESCR Committee, security of tenure could take many forms, including 'rental (public and private), accommodation, co-operative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property'.⁵⁰ The idea seems to be that all persons should have some form of security that guarantees them legal protection against forced eviction. This means that the right to housing places a positive obligation on states to ensure that informal settlements are secure places of residence and that persons living there are protected. For a country like Kenya, this envisages the development of housing programmes that may involve a lot more than just implementing property regimes inherited from colonial days. Back in 2005, the government admitted in its strategy for upgrading slums in Nairobi that a lack of security of tenure was the greatest threat to persons living in these informal settlements.⁵¹ It then undertook to 'regularise land for purposes of integrating the settlements into the formal physical and economic framework for urban centres'.⁵² This plan was never implemented, and the recent evictions in Syokimau and Eastleigh are a testimony to the failure of government in this regard.

The other side to this argument is that even in situations where forced evictions are mandated by some other law, legal security of tenure places an obligation on the authorities concerned to ensure that rights are not violated. Thus, it creates a layer of protection, the components

48 See generally UN Habitat *Enabling shelter strategies: Review of experience for two decades of implementation* (2006) <http://www2.unhabitat.org/programmes/housingpolicy/documents/HS-785.pdf> (accessed 15 December 2011).

49 UN Habitat (n 48 above) 161.

50 Para 8(a) General Comment 4.

51 See Amnesty International, Kenya *The unseen majority: Nairobi's two million slum dwellers* (2009) http://www.amnesty.ca/dignity/resources/Slums_Kenya_AFR32005009.pdf (accessed 20 December 2011).

52 As above.

of which may dictate the procedures to be employed in the eviction process and the fulfilment of conditions that have implications on the rights regime as a whole. I will elaborate on this view when discussing the manner in which the constitutional framework could be elaborated to extend protection to victims of forced evictions.

3.2 Right to housing in Kenya's new constitutional dispensation

Article 43 of the Constitution guarantees a right to 'accessible and adequate housing' for 'everyone'. Further to the declaration of the right, the Constitution places the usual responsibility on the state to 'observe, respect, protect, promote and fulfil' these rights, and to take 'legislative and policy' measures to achieve the 'progressive realisation' of rights.⁵³ In doing this, however, the state must take into consideration the special needs of 'vulnerable groups within society' and ensure that its international obligations are met.⁵⁴ Among these vulnerable groups are women, the elderly, persons with disabilities, children, young persons, minority or marginalised communities, and certain ethnic religious or cultural communities.⁵⁵ This is not unusual. At the continental level the need to protect the rights to housing of the vulnerable is affirmed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),⁵⁶ which provides:⁵⁷

Women shall have the right of access to housing and to acceptable living conditions in a healthy environment. To ensure this right, states parties shall grant to women, whatever their marital status, access to adequate housing.

Ultimately, what matters in the domestic arena is the justiciability of the rights guaranteed under article 43. Justiciability refers to the ability of courts to adjudicate and enforce rights.⁵⁸ The idea is that a court should be able to provide a remedy if it finds that there has been a violation.⁵⁹ Traditionally, socio-economic rights have been perceived as falling within the domain of second generation rights and, therefore,

⁵³ Arts 21(1) and (2) Constitution of Kenya, 2010.

⁵⁴ Art 21(3) Constitution of Kenya, 2010.

⁵⁵ As above.

⁵⁶ African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, CAB/LEG/66.6/Rev 1 (2003). For discussions on key aspects of the Protocol, see M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

⁵⁷ Art 16 African Women's Protocol (n 56 above).

⁵⁸ See SBO Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79.

⁵⁹ See F Viljoen 'National legislation as a source of justiciable socio-economic rights' (2005) 6 *ESR Review* 6.

they should not be automatically enforced by the courts in the same manner as civil and political rights.⁶⁰ Central to the justification of this perception is the argument that socio-economic rights impose positive obligations on the state and therefore affect the allocation and management of resources, a function that falls within the exclusive competence of the executive arm of government.⁶¹ Therefore, when courts pronounce on such rights, they may undemocratically violate the doctrine of separation of powers.⁶² To counter this argument, which is obviously inimical to the human rights project, the international community rejected this classification of rights in 1993 at Vienna. In a statement, which is worth reciting here, it said:⁶³

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote all human rights and fundamental freedoms.

In Africa, we have come a long way since then, thanks mainly to the South African Constitutional Court.⁶⁴ Although doubts still linger and justiciability is still contested in some jurisdictions, trends indicate that courts within Africa are gradually accommodating international standards in adjudicating claims of rights violations.⁶⁵ Nonetheless, the notion of indivisibility and interdependence of rights have a particular relevance to forced evictions. This is because in every instance, a multiple of rights are implicated: the right to life, dignity, education, health, adequate food and even the right to privacy and the protection of family life. Moreover, the right to housing is often a precondition for

60 See A Eide & A Rosas 'Economic, social and cultural rights: Universal challenge' in Eide *et al* (n 33 above) 15; P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) 7.

61 See eg V Sripathi 'Towards fifty years of constitutional and fundamental rights in India: Looking back to see ahead 1950-2000' (1998) 14 *American University International Law Review* 413.

62 Sripathi (n 61 above) 451; J Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible' (1989) 37 *American Journal of Comparative Law* 495; E Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' (2006) 38 *Columbia Human Rights Law Review* 321.

63 See Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June, UN DOC A/CONF. 157/24 (Part I) 1993.

64 See M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383; M Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2003) 6 *Chapman Law Review* 137.

65 See generally T Maluwa 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey' (1998) 23 *South African Yearbook of International Law* 45.

the enjoyment of all other rights.⁶⁶ Thus, the compartmentalisation of rights only serves the purpose of assisting states to pick and choose the rights that they want to protect or promote.

The issue of justiciability also hinges on another important imperative: the availability of resources as a justification for the permissible infringement of rights. Obviously, the provision of housing for all needy Kenyans may be challenging and does demand proper planning and a lot of resources. Given these challenges, when should a state be compelled to guarantee and respect all other rights associated with it? Like other socio-economic rights, the obligations should be fulfilled 'progressively'. This means that the fact alone that the state does not have resources is not an excuse for limiting rights. There must be an objective criterion for determining whether rights cannot be fulfilled in a particular case. But the development of such a criterion has been controversial. The ESCR Committee in General Comment 3 suggested that states should aim to fulfil the 'minimum core obligations' of any right⁶⁷ and that

[i]n order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposition to in an effort to satisfy, as matter of priority, those minimum obligations.

For lack of space, I will not go into the debate on whether trimming rights to their absolute core is the best way to ensure justiciability.⁶⁸ Perhaps what may be worth mentioning is that the South African courts have rejected the minimum core approach and have instead developed the test of reasonableness – that courts should establish 'whether the means chosen by the state are reasonably capable of facilitating the realisation of the socio-economic rights in question'.⁶⁹ According to Liebenberg, this approach allows the state some margin

66 See UN Habitat The Right to Housing, Fact Sheet 21 (2009) http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (accessed 30 September 2012).

67 Para 10 General Comment 3 (5th sess 1990) The Nature of States Parties Obligations (art 2(1) of the Covenant) UN Doc E/1991/23.

68 For these debates, see K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113. See also D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484; D Bilchitz 'Towards a reasonable approach to minimum core: Laying foundations to future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of minimum core' (2006) 22 *American University International Law Review* 163.

69 Liebenberg (n 38 above) 151. The test is established in the cases of *Grootboom* (n 41 above) and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC). See also A Sachs 'Judicial enforcement of socio-economic rights: The *Grootboom* case' (2003) 56 *Current Legal Problems* 579.

of discretion – some sort of presumption of diligence on the part of the state – that relies on the objective belief that states will want to do the best for their citizens.⁷⁰

Given these imperatives, what promise exists for the enforcement of article 43 of the Kenyan Constitution? Interestingly, the Constitution anticipates limitations on the implementation of article 43 based on a paucity of resources. Section 20(5) of the Constitution provides some guidelines to the court in cases where the state has claimed a lack of resources to be the reason for not implementing rights. Basically, the Constitution takes the view that, whereas the state enjoys some ‘margin of discretion’ in line with the requirement of progressive realisation of socio-economic rights decreed by ICESCR, that discretion is not unfettered. Thus, it establishes three broad principles that will guide the court in making a determination as to whether the state has met its obligations or not: that it is the responsibility of the state to show that it lacks resources; that in allocating resources, the state ensures the widest possible enjoyment and takes into account vulnerable sections of the community; and that the court should not interfere with decisions of the state or its organs ‘solely on the basis that it would have reached a different conclusion’.⁷¹ It seems to me that what this article has done is to override the ‘minimum core obligations’ approach and to adopt in its place the ‘reasonableness’ approach preferred by the South African courts. The courts in Kenya cannot therefore construct the core of any right and impose it on the state without considering the ‘reasonableness’ of the state’s action. The import of section 20(5)(c) is to provide the state with a ‘margin of discretion’ that the minimum core approach eliminates.

4 Forced evictions

The phenomenon of forced evictions is almost synonymous with landlessness and poverty. This link has a historical presence that dates back to colonial days. Thus, what happened in Syokimau and Eastleigh in November last year were not isolated incidences. They represent a pattern in government’s approach to land reform and urban management that has been in place for years. Although Kenya is in its fiftieth year of independence and its politics and even demographics have changed, a lot less has changed in terms of its agrarian policy and physical planning in urban spaces.⁷² Likewise, legal frameworks

70 Liebenberg (n 38 above) 151.

71 Arts 20(5)(a), (b) and (c) Constitution of Kenya, 2010.

72 See eg L Onyango & R Hume ‘Land law, governance and rapid urban growth: A case study of Kisumu, Kenya’ in R Hume (ed) *Local case studies in African land law* (2011) 39–40 (arguing that the colonial legacy and regulatory systems in Kenya have shaped the current urban forms).

that govern property relations have also remained the same despite a few cosmetic changes, such as changes in dispute settlement and the creation of racial parity in land ownership. Given these imperatives, the law and policy that have abetted forced evictions must be understood in the context of their historical formations and, of course, the stubborn reality of the failure of decolonisation.⁷³ It is therefore fitting to begin the discussion in this section by highlighting some of these formations, but mainly focusing on the evolution of 'squatterdom', a phenomenon that represents the true impact of the segregation policy, and the programme of land divestiture that rendered a majority of Africans in areas designated for white settlement landless.

4.1 Historical origins of 'squatterdom'

It all began with the land alienation programmes instituted by the British colonial administration at the close the eighteenth century that were aimed at removing indigenous African populations from the 'white highlands' – areas thought to be most suited for European settlement – to create room for white settler communities.⁷⁴ Through this programme, Africans were violently and inhumanely evicted from their ancestral lands and forced into high-density squatter settlements known as reserves.⁷⁵ Land in the reserves remained the property of the government and therefore permission was required from the commissioner to erect a dwelling house, cultivate certain kinds of crops or even keep animals.⁷⁶ Moreover, the maximum portion that a family could get was only five acres (2,023 hectares). Unfortunately, the population in the reserves began to swell, as landless Africans jostled to find accommodation in these confined spaces while consolidating their claim to land. This constituted a security threat to the European settler community and the colonial enterprise as a whole. Thus, the Resident Native Labourers Ordinance of 1937 was passed, which effectively transferred power over squatters from the commissioner to settler-controlled district councils.⁷⁷ These councils were given the

73 See G Wasserman 'Continuity and counter-insurgency: The role of land reform in decolonising Kenya 1962-1970' (1973) 7 *Canadian Journal of African Studies* 133.

74 The 1897 East African Order in Council that applied the Indian Transfer of Property Act of 1881 and Indian Land Acquisition Act of 1894 to Kenya allowed the Commissioner of the Protectorate to grant permission for European occupation of land. See MPK Sorrensen *Origins of European settlement in Kenya* (1965). See also W Morgan 'The White Highlands of Kenya' (1963) 129 *Geographical Journal* 140; N Carey Jones 'The decolonisation of the White Highlands of Kenya' (1965) 131 *Geographical Journal* 186.

75 See D Ellis 'The Nandi protest of 1923 in the context of African resistance to colonial rule in Kenya' (1976) 17 *Journal of African History* 555.

76 See S Wanjala *Essays on land law* (2000) 9.

77 See D Anderson & D Throup 'Africans and agricultural production in colonial Kenya: The myth of the war as a watershed' (1985) 26 *Journal of African History* 327-333.

authority to regulate squatter cultivation and to organise and carry out the eviction of the so-called 'excess population' from time to time.⁷⁸ It is noteworthy that eviction in these instances was legitimised by law – the Crown Lands Ordinance of 1902 (as amended in 1915), the same law that had facilitated the divestiture of ownership of land from Africans and vested it in the European settlers. The ordinance characterised African land rights as based on occupancy – a usufruct arrangement that would allow for land to be declared 'waste or unoccupied' when such occupation ceased.⁷⁹

The divestiture was complete when the Kenya Annexation Order-in-Council and the Kenya Colony Order-in-Council of 1921 were promulgated and Kenya formally declared a British colony. All Africans then became tenants-at-will of the Crown.⁸⁰ The effect of the divestiture is summarised in this passage from a colonial court's judgment:⁸¹

The effect of the Crown Lands Ordinance 1915 and the Kenya (Annexation) Order in Council 1920, by which no native private rights were reserved and the Kenya colony order in Council 1921 ... is clearly *inter alia* to vest land reserved for the use of the native tribes in the Crown. If that be so, then all natives' rights in such reserved land, whatever they were, disappeared and natives in occupation of such Crown lands became tenants-at-will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier. Such land would include fallow. Section 54 of the Ordinance puts a specific embargo on any alienation by such a tenant.

It meant that the security which Africans had in land was completely extinguished and that they were subject to eviction or displacement whenever the colonial government thought it appropriate to do so. Worth mentioning here is that the displacement and erosion of security in land resulted in great poverty, the effect of which is still being felt today. Indeed, many scholars attribute the rise of the Mau Mau liberation war to the existence of a large pool of deprived youth who could neither find land to cultivate nor employment in European establishments.⁸² Poverty and depravation within rural communities also resulted in the youth migrating to urban areas to look for work.

78 As above. See also B Berman *Control and crisis in colonial Kenya: The dialectic of domination* (1990) 305.

79 Secs 30 & 31 of the Ordinance. See also S Wanjala 'Land and resource tenure, policies and laws: a perspective from East Africa' paper read at the Pan-African Programme on Land and Resource Rights inaugural workshop, Cairo, Egypt, 25-26 March 2002.

80 See generally HWO Okoth Ogendo *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (1995).

81 *Isaka Wainaina v Murito* (1922) 9 KLR 102 (the plaintiffs had claimed ownership of a parcel of land on the basis that they had purchased it from the Ndorobo tribe before the European settlement).

82 The details about the revolt and the politics behind it can be found in F Furedi *The Mau Mau in perspective* (1989); T Kanogo *Squatters and the roots of Mau Mau 1905-63* (1987); W Maloba *Mau Mau and Kenya: An analysis of a peasant revolt* (1998).

Land ownership regimes existing in 'white highlands' were extended to urban areas and, therefore, in special areas reserved for African population, such as Pumwani in Nairobi, all properties belonged to the Crown.

4.2 Formalisation and entrenchment of 'ownership'

However, the formalisation of ownership of land, as modelled on British colonial law, came by way of the Swynnerton Plan of 1955, which laid the basis for the registration of individual titles and the creation of private property rights. The plan, although presented as a panacea to fragmentation and the less productive African tenural system, was mainly aimed at curtailing the ubiquitous rise of native opposition to European encroachment, racial policies and law regulating the access and use of land.⁸³ Nonetheless, the plan yielded a much more concerted programme of tenure reform which involved the adjudication of clan and individual rights, consolidation of fragmented holdings and the registration of individual freeholds.⁸⁴ The ultimate aim was to confer private and absolute rights of ownership to title holders for the reason that this might encourage the efficient and more productive use of land among Africans. The independent government adopted this land reform strategy and sought to implement the colonial programme more widely across the country. Legislation such as the Registration of Titles Act (Cap 281), Land Adjudication Act (Cap 284) and Registered Land Act (Cap 300), consolidated the movement towards individualisation of ownership. For example, section 23 of the Registration of Titles Act provides that '[c]ertificates of titles issued by the registrar to a purchaser of land ... shall be taken by all courts as conclusive evidence that the person named in it as the proprietor of land is the absolute and indivisible owner'. But despite such efforts, land reform based on acclamation of private ownership rights was haphazardly implemented, resulting mostly in landlessness among the poorer sections of society (as they were forced to sell their land to the rich) and unequal distribution.⁸⁵ Moreover, the reform strategy merely entrenched the historical injustices that existed at independence and, in some cases, even magnified them. For example, in a recent report compiled by the Ndungu Commission, the skewed structure of land

83 See P Karanja 'Women's land ownership rights in Kenya' (1991) *Third World Legal Studies* 109 121; J Haberson 'Land reform and politics in Kenya' 1954-70' (1971) 9 *Journal of Modern African Studies* 231 233.

84 A Haugerud 'Land tenure and agrarian change in Kenya' (1989) 59 *Africa* 61 63.

85 See generally HWO Okoth-Ogendo 'African land tenure reform' in SN Hinga & J Heyer (eds) *Agricultural development in Kenya: An economic assessment* (1976).

ownership resulting from this reform process was documented.⁸⁶ So, whereas political and legislative changes after independence may have removed racial segregation in many aspects of life, the African elite who stepped into the shoes of their colonial masters merely perpetuated the inherently unequal systems of acquisition and distribution of land.

Placing the current experiences of violent evictions and the demolition of property in this historical perspective enables us to appreciate why the rights regime is indeed crucial in redressing the underlying problems that make evictions the preferred method of giving effect to land management policies in Kenya. Also, it assists us to construct a proper meaning of rights themselves in a context where the operation of common law rules of property ownership may give rise to debilitating consequences for the poor. The rights regime provides a platform upon which historical injustices that are entrenched in laws governing land ownership inherited from the colonial days can be confronted and redressed. This has an important economic and political benefit. Through the years, Kenyans have witnessed many conflicts arising from grievances relating to land and these have undermined national cohesion and efforts to consolidate political gains after independence.⁸⁷ However, before I examine how the rights regime confronts the reality of forced evictions, it may be useful to draw some link between the trajectories of forced evictions that we see in urban areas with the overall scheme of property relations that history has bequeathed to us.

4.3 Urban evictions

Forced evictions and demolitions of property in urban areas show how ownership rights are being constructed in spaces poisoned by vile politics, poor management of resources and corruption. That is why, in Nairobi, and perhaps most urban centres in Kenya, forced evictions of middle and low-income earners have been used to create space for the wealthy to expand their investments.⁸⁸ In most cases, the prospective owners were allocated the land by government to reward political patronage.⁸⁹ Ochola gives the example of the Kingston village, where land inhabited by about 2 000 residents was allocated

86 See Government of Kenya Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (GoK, Nairobi, 2004) (Ndungu Report). See also R Southall 'The Ndungu Report: Land and graft in Kenya' (2005) 103 *Review of African Political Economy* 142.

87 See eg L Juma 'Ethnic politics and the constitutional reform process in Kenya' (2002) 9 *Tulsa Journal of Comparative and International Law* 471.

88 See D Satterthwaite 'Evictions: Enough violence, we want justice' (1994) 6 *Environment and Urbanisation* 3.

89 See J Klopp 'Pilfering the public: The problems of land grabbing in contemporary Kenya' (2000) 47 *Africa Today* 7.

by government to a private individual who subsequently sold the property at a pittance to a developer.⁹⁰ The developer secured a court order and evicted the residents, since they were causing him 'great financial difficulty'. Forced evictions may also occur to create space for 'economic development'. But evictions have served other purposes too. During the Moi regime, eviction and reckless demolitions of dwelling houses were part of the official government policies of containment and urban management.⁹¹ The violent Muoroto eviction of 1990 is perhaps the most remembered because of the bloody battles that were fought between the police and the residents and the loss of lives that occurred as a result.⁹² In the same year, 30 000 residents of Kibagare village in Kangemi were forcefully evicted and their houses demolished. In 1996, 20 000 residents of Mukuru kwa Njenga were threatened with eviction but the threat was never carried out.⁹³ The Moi government also used forced evictions as a political tool. His government is reputed to have incited ethnic violence in the Rift Valley to drive out the non-Kalenjin communities so as to consolidate support for the ruling party in the province.⁹⁴ In the Kibaki era, the same system has continued but with a mixed promise of streamlining city planning, invoking appropriate norms for sustainable resource use and environmental protection and, of course, security. For example, in January 2004, palatial homes in the Kitisuru area and sections of Kibera slums were demolished to create room for a public road. Also in the books are the famous Mau evictions of June 2005 which were largely attributed to the need to preserve the natural environment.⁹⁵ Nonetheless, there have also been widespread cases of urban evictions that serve the interests of the elite.⁹⁶ And, as one commentator has

90 L Ochola 'Eviction and homelessness: The impact on African children' (1996) 6 *Development in Practice* 340.

91 See J Klopp 'Remembering the destruction of Muoroto: Slum demolitions, land and democratisation in Kenya' (2008) 67 *African Studies* 295.

92 As above.

93 See H Charton-Bigot & D Rodriguez Rorres *Nairobi today: The paradox of a fragmented city* (2010) 48.

94 See O Oculi 'The role of economic aspirations in elections in Kenya' (2011) 35 *Africa Development* 13 19. See also Juma (n 87 above).

95 See K Oman 'Mau forest evictions leave Ogiek homeless' *Cultural Survival* 3 October 2005 <http://www.culturalsurvival.org/news/karin-oman/mau-forest-evictions-leave-ogiek-homeless> (accessed 15 December 2011); A Barume 'Indigenous battling for land rights: The case of Ogiek in Kenya' in J Castellino *et al* (eds) *International law and indigenous people* (2005) 365.

96 See C Bodewess & N Kwinga 'The Kenyan perspectives on housing rights' in S Leckie (ed) *National perspectives on housing rights* (2003) 221 223. Kenya is not alone in this regard. See United Nations Human Settlement Programme (UN-Habitat) report, *Forced evictions – Towards solutions* (2005).

lamented, the Syokimau and Eastleigh evictions of November last year were just a tip of the iceberg.⁹⁷

Against this backdrop of an increasingly tumultuous urban environment, a sense of concern for marginalised groups – vulnerable communities in informal settlements who eke out survival from the very bottom of the economic chain – has emerged. Buoyed by the new constitutional dispensation and ongoing reform in the judiciary, the voices of those who want to see forced eviction become a thing of the past have become louder. But the overarching question still remains: Against the web of normative and institutional structures that respect private ownership, what possibilities exist for squatters (or persons without title but living on the property) to assert their rights of access to housing? What safeguards are there to ensure that persons without title will not be evicted arbitrarily or their property demolished in such an inhumane fashion as we have seen in Syokimau and other places in the recent past? Invariably, victims of forced evictions in urban areas are often the poor who cannot afford to buy land, who are neglected and whose views on the property they occupy do not count, and who are the most insecure as their areas are considered to be the dens of criminals. And, as already mentioned, their removal is often justified as being good for society and a necessary precondition for development.

5 Protection against forced evictions

The ESCR Committee defines forced evictions as⁹⁸

[t]he permanent or temporary removal against their will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

The responsibility of state parties that flow from this definition, as elaborated by international bodies, is twofold: to prohibit forced evictions and to put in place measures aimed at protecting evictees. The two elements of prohibition and protection need some elucidation here. The first, which is the responsibility to prohibit forced evictions, is characterised by the term ‘legal security of tenure’. The ESCR Committee in General Comment 4 decreed that ‘[n]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction,

⁹⁷ See R Wangui ‘Who is to blame for inhumane evictions?’ *Daily Nation* Nairobi, 8 December 2011 <http://allafrica.com/stories/2011120800085.html> (accessed 20 December 2011).

⁹⁸ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions and the right to adequate housing (16th session, 1997) UN Doc E/1998/22, annex IV 113 (1997) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003).

harassment or other threats'.⁹⁹ The obligation of state parties in this regard is stated to be that of conferring legal security of tenure to those lacking such protection. In the same year that the ESCR Committee issued its comment, the Commission on Human Rights resolved that the practice of forced eviction constituted 'a gross violation of human rights and in particular the right to adequate housing'.¹⁰⁰ It urged governments to take measures that would ensure the elimination of the practice and to confer legal security of tenure on those threatened with forced eviction. There was bound to be some resistance to these regimes, given that national norms were at variance with the standards they sought to establish. Indeed, the expectation that national laws would conform to international standards was tested when the General Comment as well as the Resolution placed emphasis on the elimination of eviction rather than regulating it. That is why a further elaboration of this responsibility became necessary towards the end of that decade, in General Comment 7.¹⁰¹ Later the Commission also adjusted its position to accommodate the regulatory approach.¹⁰²

Before I examine exactly how this General Comment changed the landscape, let me say something about the other element of state parties' responsibility that deals with protection. The Resolution mentioned above demanded that state parties set up proper mechanisms for the protection of evictees that are based on 'effective participation, consultation and negotiations with affected persons or groups'.¹⁰³ Further, the Resolution called upon governments to provide restitution, compensation or alternative accommodation or land to victims.¹⁰⁴ Here the Resolution envisaged that national systems would establish and respect the rule of law and adopt a rights-based approach in dealing with the plight of evictees. But all these became clearer in General Comment 7. Here, the prohibitionist approach was replaced by a regulatory approach. The General Comment established five major criteria for regulation of forced evictions: substantive justification, consultation or alternatives, due process, the right to alternative accommodation and non-discrimination. This approach has found favour with both domestic and international treaty

99 Para 8(a) General Comment 4.

100 See para 1 Commission on Human Rights Resolution 1993/77, http://www.unhabitat.org/downloads/docs/1341_66115_force%20evic%20chr1.htm (accessed 2 December 2011).

101 General Comment 7.

102 In the Preamble to Resolution 2004/28, the Commission *recommended* that 'all governments ensure that any eviction *that is otherwise deemed lawful* is carried out in a manner that does not violate any of the human rights of those evicted' (my emphasis).

103 n 102 above, para 3.

104 As above. See also para 43, UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, A/HRC/4/18, http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf (accessed 24 September 2012).

monitoring bodies and has been widely regarded as the benchmark for determining the responsibility of states in this regard.¹⁰⁵ Its spirit has also guided the formulation of national law on evictions.¹⁰⁶

6 Judicial approach to forced evictions in Kenya

In view of the international standards discussed above, it may be useful to examine how Kenyan courts have interpreted their government's responsibility. Worth noting is the fact that the new Constitution only came into force in August 2010. This has not allowed enough time within which to assess the judicial approach to the rights indicated above or to the law on forced evictions. Moreover, given the publicity and the gravity of loss suffered from the recent Syokimau and the Eastleigh evictions, there is bound to be some jurisprudence emanating from the courts which will further elaborate these rights, since as of writing a few complaints have already been filed and are awaiting trial. Nonetheless, what we could probably do is predict what might become of the law given the few glimpses we have seen thus far.

6.1 *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council*¹⁰⁷

The applicants in this case were squatters living in an informal settlement and on a road reserve in the Kitisuru area of Nairobi. In October 2010, officers from the Nairobi City Council delivered eviction notices to them, requiring them to vacate their homes within 24 hours. The next day, at night, the agents of the City Council together with administration police demolished all their houses. They had nowhere to go so they put up temporary structures and in the meantime went to court to seek a conservatory order. Their application was based on claims that the Nairobi City Council had violated their rights under articles 43 and 47(2) of the Constitution, by forcefully evicting them from their homes without giving ample notice and not providing them with an alternative site for settlement. The Council disputed this claim, alleging that the area in which the applicants were living was a road reserve and that they had not obtained the permission to settle there; secondly, that it had no mandate or capacity to allocate land to the homeless or to settle them. And since the Council had been

105 See eg African Commission in *SERAC* (n 38 above); European Committee on Social Rights in *ERRC v Greece* (Complaint 15); Constitutional Court of South Africa in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and more recently in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 2 SA 104 (CC).

106 A few examples here include the South African prohibition of forced eviction from homes provided for in art 26(3) of the Constitution of the Republic of South Africa, 1996, and South Korea's Relocation Assistance Statute Act 9595 of 2009.

107 High Court of Kenya, Nairobi, Petition 66 of 2010 (2011) KLR 1, http://kenyalaw.org/Downloads_FreeCases/80847.pdf (accessed 20 December 2011).

charged with the responsibility of planning developments within the city, it was merely performing its duties and that could not amount to a violation of rights.

The court acknowledged that the Constitution guaranteed the rights to housing in article 43, but observed that it did not define what 'adequate' housing means. Therefore, the court resorted to international law as mandated by articles 2(5) and (6).¹⁰⁸ The court then found that article 11 of ICESCR and all other elaborations of the right by international bodies, which guarantee the rights of access to adequate housing, also apply to forced evictions. The right is reinforced by 'national values and principles embedded in the Constitution, such as dignity, equity, social justice and protection for the marginalised'. Therefore, the rights to housing and the protection against forced eviction must override the duty of physical planning that the city might have in respect of the property in question. The court then went on to deal with the more problematic aspect of balancing property rights as against constitutional rights and fundamental freedoms. Here the court relied on leading decisions from the South African Constitutional Court, such as *Grootboom*¹⁰⁹ and *Modderklip Boedery v President of Republic of South Africa*,¹¹⁰ to pronounce that forced evictions in circumstances where the petitioners were rendered homeless because no alternative land or accommodation was provided by the City violated their right to housing. The court relied on the fact that the petitioners had been living on that land for close to four decades and that the state had a positive obligation under article 43(b) to ensure, 'within its available resources', that reasonable housing was available to its citizens. The latter depended on the demonstration that the government had put in place a policy that 'responds reasonably to the needs of the most desperate'. On the issue of 'reasonableness' of the government's policy, the court adopted the criteria set in *Grootboom*, which included the expectation that the policy would be comprehensive, coherent and effective, have sufficient regard for the social, economic and historical contexts of widespread deprivation, have sufficient regard for resources, make short, medium and long-term provision for housing needs and also give special attention to the needs of the poorest and most vulnerable.

108 Art 2(6) now provides that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.

109 2001 1 SA 46 (CC).

110 2003 6 BCLR 638 (T). In the discussion, the judge refers to the Supreme Court of Appeal judgment. This is an error which needs to be corrected. The Supreme Court of Appeal judgment is reported in 2004 6 SA 40 (SCA), and the correct title of the case is *President of the Republic of South Africa & Another v Modderklip Boedery (Pty) Ltd*. Note that this matter went all the way to the South African Constitutional Court and the judgment is reported in 2005 5 SA 3 (CC). Also, the Constitutional Court decision was on the right of access to justice.

6.2 *Ibrahim Osman v The Minister of State for Provincial Administration and Others*¹¹¹

Judgment in this case was delivered by the High Court sitting in Embu on 16 November 2011, just three days after the Syokimau evictions in Nairobi. The case arose out of the eviction of residents from the Bulurika, Bulamedimna, Sagarui, Naima, Bulanagali and Gesto (commonly known as Medina) areas in Garissatown, carried out by the provincial administration to create space for the construction of a public road. The land in question is unalienated public land in respect of which no titles have been issued. However, the residents had lived there since the 1940s. The eviction was carried out between 24 and 31 December 2010. The residents petitioned to court for an injunction restraining the respondents from further removing them from the land and for an award of aggravated, punitive and exemplary damages on the basis that their rights had been violated. They claimed that the forcible violent and brutal eviction through the demolition of homes was in violation *inter alia* of their rights to property under articles 40(1), (3) and (4) of the Constitution and their rights to accessible and adequate housing under article 43(1) as read together with articles 20(5) and 21(1), (2) and (3) of the Constitution.

Unfortunately, the government did not contest these allegations despite having been served with court papers. Whether it is because of its usual indolence or because it considered the merits of the claim and saw that no useful means would be served by raising a defence to the claims, is not at all clear. Perhaps the Attorney-General's office is waiting to take the matter on appeal. All these remain to be seen. What was left was for the judge to consider the merits of the claim based on the affidavit of the petitioner and the arguments of their lawyers. Thus, he analysed the standards for protection of the rights in question under international law by first acknowledging that Kenya had acceded to ICESCR in May 1972 and was therefore bound by its provisions. It then found that the petitioners were entitled to 'the fundamental rights of accessible and adequate housing and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education' guaranteed under article 43 and made the following ruling:

I consider that this forced eviction was in violation of the fundamental right of the petitioners to accessible and adequate housing as enshrined in article 43(1)(b) of the Constitution of Kenya 2010. More important, the eviction rendered the petitioners vulnerable to other human rights violations. They were rendered unable to provide for themselves. The eviction grossly undermined their right to be treated with dignity and respect. The petitioners were thrown into a crisis situation that threatened their very existence.

111 High Court of Kenya, Embu, Constitutional Petition 2 of 2011 (unreported).

The court then proceeded to order that the respondents return the petitioners to the land in question and bear the cost of reconstructing their homes. In addition, the court awarded a global sum of Ksh 200 000 to each petitioner as special damages.

6.3 Future prospects

The two cases discussed above shed some light on the conversations that the new constitutional dispensation has engendered. What is pertinent is that there seems to be space to expand the protection available to persons or communities that are likely to be forcefully evicted in the manner that has become the norm in Kenya. Three indicators may be worth mentioning here. The first is the obvious prominence of international legal principles in Kenya's rights litigation. Worth noting in this regard is that in both cases, the courts have applied principles of international law as part of Kenya's domestic law. This is a huge improvement from the previous position where the courts were impervious to the direct application of international law.¹¹² This change has been brought about by article 2(6) of the Constitution.¹¹³ However, this article refers to 'treaties and conventions', which then leaves the question as to how the court should treat soft law instruments such as pronouncements of UN treaty bodies or other elements which we associate with international law.¹¹⁴ Perhaps one could argue that article 2(5) of the Constitution, which stipulates that the 'general rules of international law' shall be part of Kenya's law, is good enough authority for applying resolutions of UN treaty bodies and other pronouncements. However, this position could be controversial because there is neither an indication as to what constitutes 'general rules' nor a definition of the substantive prerequisites for the application of these rules. One way of looking at it is to limit these rules to customary international law – rules that have passed the *opinion juris* and *usus* tests and are recognised as law by civilised nations. Moreover, this approach would in effect recognise the common law nature of rules of customary international law, considering that the court would have to determine their application depending on the circumstance of the case.¹¹⁵ Apparently, the court in *Susan Waithera*

112 See eg *Pattni & Another v Republic* (2001) KLR 262 where the courts, although willing to 'take account of the emerging consensus of values' embodied in the international human rights instruments, maintained that such laws were only of persuasive value.

113 See Ambani (n 7 above); T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of South Africa* 293.

114 For some in-depth discussion of what constitutes international law, see H Thirlway 'The sources of international law' in M Evans (ed) *International law* (2007) 115.

115 See eg D Klein 'Theory of the application of customary international law of human rights by domestic courts' (1998) 13 *Yale Journal of International Law* 334.

did not give this matter any serious thought and therefore treated the pronouncements of a UN treaty body as though they were treaties or conventions. And because it did not care to explain why it was doing so, no explicit meaning can be attributed to article 2(5) at this stage. All the court did was to cite a document allegedly produced by the UN High Commissioner for Human Rights dealing with forced evictions and apply it as part of domestic law.¹¹⁶ This notwithstanding, the prominence of international law seems set to increase rather than decrease, and all indicators seem to suggest that principles of international law will continue to influence domestic litigation in Kenya.¹¹⁷ Indeed, this development seems to be concomitant with trends on the continent.¹¹⁸ Perhaps the impetus is coming from the intensification of reform movements within countries such as Kenya, the re-emergence of regional and sub-regional frameworks for the administration of justice and the mobility and cross-pollination of rights practice across nations. Nonetheless, the general momentum that is swinging rights litigation towards accommodating international standards is a welcome development.

The second factor relates to the first and concerns the use of foreign jurisprudence, especially South African cases. The courts have shown a tendency to readily apply South African cases, mainly those interpreting constitutional guarantees, when dealing with eviction matters. While in certain respects the provisions of the law in question may be similar, in others they are not. For example, section 26 of the South African Constitution and article 43 of the Kenyan Constitution both guarantee the right of access to adequate housing. However, the South African Constitution has more elaborate provisions regarding eviction from homes, which the Kenyan version does not have.¹¹⁹ Moreover, there are several legislations that clarify obligations under section 26 of the South African Constitution which the courts take into account as well, such as the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. When Kenyan courts adopt South African decisions, we are fast-forwarded to the present. While this may be a good thing, generally, our legislature should be reminded of the need to give effect to these rights by creating guidelines that answer

116 Here again, one cannot help but lament a lack of proper referencing that makes the judgment hard to read and the court's reasoning difficult to follow.

117 An additional constitutional measure that supports this proposition is found in art 132, which enjoins the President to ensure that 'the international obligations of the Republic are fulfilled through actions of the relevant cabinet secretaries'.

118 See Maluwa (n 65 above).

119 Eg, sec 26(3) of the South African Constitution provides that '[n]o one may be evicted from their home, or have their home demolished, without an order of the court made after considering all relevant circumstances'. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

to our specific conditions. This need was identified by Justice Musinga in *Susan Waithera* and articulated as follows:¹²⁰

Kenya should develop appropriate legal guidelines on forced evictions and displacement of people from informal settlements so that if people have to be evicted from such settlements, the act is done without violating people's constitutional rights and without causing extreme suffering and indignity to them.

Apart from the courts, there have been calls from civil society and the media reminding our parliamentarians that the implementation of the new Constitution requires that appropriate statutes putting into effect guidelines and procedures for rights realisation be enacted. A suggestion has been put forth by a consortium of non-governmental organisations (NGOs) and civil society groups that the government should enact an eviction and resettlement law and discussions with the Ministry of Lands are currently ongoing.¹²¹

7 Towards an expanded rights protection regime

The prospects discussed above indicate that there is an opportunity to solidify the elements of protection of the right to housing and thereby create a more humane and rights-friendly regime for evictions. This opportunity has been created by the Constitution. Given that the trend favours the regulation rather than prohibition of forced evictions, a rights-based approach to the improvement of the framework for evictions must necessarily build on that jurisprudence. I suggest, therefore, that a liberal interpretation of rights that expand their reach in line with experiences from other parts of the world is desirable. Even without amending the Constitution so as to create specific thresholds for the realisation of the right to housing and regulation of forced evictions, an approach that recognises the primacy of the rights of access to the court and the concomitant notions of judicial oversight, provisions of alternative accommodation or land for evictees, and the establishment of an elaborate scheme for restitution or compensation may still be possible within the current framework. What may be needed is an activist judiciary and a legal fraternity willing to take up eviction cases and challenge the government's position. Apart from judicial oversight, the other consideration that may be implicated is that of the right to counsel for indigent evictees. If we accept that further judicial oversight is mandatory and that parties must seek courts' approval for eviction to occur, then all parties should necessarily have equal capacity to litigate

¹²⁰ *Susan Waithera* (n 107 above) 9.

¹²¹ See H Ayodo 'Slum dwellers now demand decent housing' *East African Standard* 28 October 2011 <http://www.standardmedia.co.ke/InsidePage.php?id=%202000045793&cid=159&story=Slum%20dwellers%20now%20demand%20decent%20housing> (accessed 2 December 2011).

the matter. As we have seen, cases with tremendous impact coming from India, South Africa and even Kenya have been litigated through the help of international NGOs or other civil society bodies. One can then imagine the great number of other cases where parties, because of resource constraints, are unable to litigate their claims. Considering, too, that most evictees are poor and vulnerable, the right to counsel in eviction cases raise particular concerns that must be addressed.¹²² Despite the compelling need, this article will not delve into this concern because it raises a whole lot of issues that demand ample space. What I would like to focus on, for now, is the right of access to court and the notion of further judicial oversight.

7.1 Right of access to court

The debate on the recent evictions in Syokimau and Eastleigh has been dominated by issues of ownership – whether the titles obtained by the residents were valid – rather than the legality of the procedures employed by the government to evict the residents.¹²³ This is understandable given the history of Kenya's land reform programmes which have emphasised registration and documentation of ownership. As I have indicated already, the right to housing is made up of many elements that work together, therefore it must be construed in broad terms for it to be effective. Moreover, the right attaches to everyone irrespective of their ownership status. The expectation therefore would be that, before eviction is undertaken, a reasonable and justifiable limitation of the right or any of its elements should be established. And this can only be achieved through a judicial enquiry. It could be argued that the Constitution had anticipated such enquiry and that is why it established the right of access to justice in article 48. This provision enjoins the state to 'ensure access to justice for all persons'. The implication is that any administrative action that denies

122 In the United States, serious concerns have been raised about the possibility of indigent persons faced with prospects of eviction being denied equal access to justice. See M Rabiee 'Activists push for right to counsel in US civil cases' *Voice of America* 2 December 2011 <http://www.voanews.com/english/news/usa/Activists-Push-for-Right-to-Counsel-in-US-Civil-Cases-134933063.html> (accessed 15 December 2011). See also R Kleinman 'Housing Gideon: The right to counsel in eviction cases' (2004) 31 *Fordham Urban Law Journal* 1507; A Scherer 'Why people who face losing their homes in legal proceedings must have right to counsel' (2004) 3 *Cardozo Public Law Policy and Ethics Journal* 699. In Europe, however, the right to counsel in civil cases has been recognised largely due to the interpretation that the European Court of Human Rights has given to the fair hearing provisions (art 6) in the European Convention on Human Rights (4 November 1950). See J Frowein 'Recent developments concerning the European Convention on Human Rights' in J Sundberg (ed) *Laws, rights and the European Convention on Human Rights* (1986) 11 24.

123 See S Kangara 'Syokimau: Real estate professionals, lawyers and surveys highly culpable' *Daily Nation* 8 December 2011, <http://allafrica.com/stories/201112080078.html> (accessed 20 December 2011).

persons affected by it the opportunity to ventilate their rights in court violates the Constitution. Moreover, as observed by one commentator, '[t]he very legitimacy of the court system is dependent upon access to justice that all courts are supposed to afford to ordinary folks'.¹²⁴ And this would go for any Act of parliament that provides for summary procedures or unilateral action by one entity against the other that bypasses the courts or other tribunals mandated to exercise judicial powers. This provision will have a huge impact on the way government performs its functions, especially if the courts in Kenya adopt a liberal interpretation similar to that which the Constitutional Court of South Africa has given to a similar provision in their Constitution.¹²⁵ In South Africa, the Court interpreted this provision to abrogate legislation that allows the bank to recover a debt from a defaulting customer through attachment and sale without seeking a court order (*Chief Lesapo v North West Agricultural Bank*;¹²⁶) and declared the attachment and sale of a debtor's immovable property to recover a debt unconstitutional because the processes did not afford the debtor an opportunity for 'further judicial oversight', especially because the property involved were the applicants' homes (*Jafta v Schoeman*; *Van Rooyen v Stolz*¹²⁷ and *Gundwana v Stoke Development CC*¹²⁸). It will be interesting to see how Kenyan judges deal with this provision in the future. Already, the issue of access to justice as provided for in this article was argued before Justice Muchelule in *Ibrahim Osman*, but there no pronouncement was made in this regard. Nonetheless, the judge seemed to place much emphasis on absence of sufficient engagement with the petitioners before eviction was carried out, indicating that pre-conditional factors are important enough to attract the court's attention.

The right of access to court is also envisaged in dealings in public property. Article 40, which embodies safeguards against the public expropriation of property, has the following provision:¹²⁹

The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

....

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –

124 P Hoffman 'To judge the judgments' *Mail & Guardian* 2 December 2011 32.

125 Sec 34 of the South African Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. See also L Juma 'Mortgage bonds and the right of access to housing in South Africa: *Gundwana v Stoke Development* 2011 (3) SA 608' (2012) 37 *Journal of Juridical Science* (forthcoming).

126 2000 1 SA 409 (CC).

127 2005 2 SA 140 (CC).

128 2011 3 SA 608 (CC).

129 Art 40(3) (my emphasis).

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 (ii) allows any person who has interest in, or right over, that property
a right of access to a court of law.

Here, the right of access to court is mentioned in relation to specific statutes that may decree judicial oversight before the state exercises its rights of eminent domain. However, it is a clear indication that the drafters were well aware that judicial oversight is an important component of the right to property. Moreover, an argument could be made that the right of access to court also exists by virtue of the fact that the latitude for enforcement of rights contained in the Bill of Rights should be expanded rather than constricted. The Preamble to the Constitution states the commitment to nurturing and protecting the well-being of Kenyans to be an overriding value. Such a commitment is amplified in article 43. The role of the court in protecting and enforcing the rights thereunder is articulated in expansive rather than restrictive language. Thus, a court faced with claims of socio-economic rights provided for in article 43 have obligations to 'develop the law' and to 'adopt the interpretation that most favours the enforcement of a right'.¹³⁰ The court also has an obligation to interpret the Bill of Rights in a manner that promotes 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom'.¹³¹ In the same vein, a right may only be limited 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.¹³² This apart, one would suppose that the disclaimer in article 40(6), which abrogates rights on account of the property in question being 'found to have been unlawfully acquired', begs the question as to how such a status may be determined, if not through the courts.

In my view, the argument in support of the right of access to courts, which is most compelling, is based on the content of the right to housing itself. As already mentioned, housing rights should be considered not just in terms of the positive obligation of states to fulfil the right, but also in terms of the state's policing role and its intervention in the private sphere to ensure that rights are not violated. The obligation to ensure that evictions conform to the law and respect the rights of the evictees is one that a state cannot avoid. If the eviction is to be carried out by the government or any of its agencies, then the obligation should extend to the requirement that it seeks judicial oversight of its actions and affords the citizens an opportunity to contest the move. In this case, the mere giving of notice will not suffice. The state must do more in terms of facilitating an active and transparent engagement

¹³⁰ Art 20(3).

¹³¹ Art 20(4).

¹³² Art 24(1).

with residents. If this process does not result in voluntary movement out of the property, a court order must necessarily be sought before eviction is instituted.

7.2 Factors to be considered

I have argued elsewhere that the purpose of further judicial oversight is to provide the party at risk of losing their home an additional layer of protection beyond that offered by the common law or the exiting land laws governing property relations.¹³³ This layer of protection derives its legitimacy from the Constitution and can be articulated within a framework of the right to housing. This makes it possible to advance the argument that an eviction process that has not been validated through a court order violates the rights to housing. If this argument is preferred, then the next question would be what factors a court exercising its judicial oversight role should consider before it allows or prohibits eviction. The Constitution does not provide any guidelines in this regard. What one has to do is piece together various elements within the Bill of Rights and construct some benchmarks or thresholds against which the conduct of parties could be weighed or evaluated. In South Africa, the Constitution refers to these benchmarks and thresholds simply as ‘all relevant circumstances’ and leaves it to the court to make the determination.¹³⁴ In my view, the factors to be taken into account must be those that go to the heart of the rights in question, and they must be of a nature that, if not met, the benefits to be derived from the right will be completely meaningless or the right will be rendered futile. This notwithstanding, each case will present its own peculiar factors and so the courts must be wary of creating a template for the assessment of the circumstances to be considered. Given the manner in which evictions in Kenya have been carried out and the underlying interests that often come to light after the fact, several general factors could be identified. The factors which I discuss here include the need to investigate whether there were other options; the provision of alternative land or accommodation; and the relationship between the parties and in relation to the property.

7.2.1 Other options

Obviously the place to begin is the consideration of whether the evicting authority could have achieved its purpose other than through eviction. In almost all eviction cases, the government, the evicting person or entity, does not avail itself of the considerations of other alternatives. Once the cabinet or a municipal council has made the decision, all minds are often directed towards planning the assault.

¹³³ See Juma (n 126 above).

¹³⁴ See sec 26(3) Constitution of the Republic of South Africa, 1996.

A court in this instance will need to be persuaded that the evicting authority had considered other options. Another way of looking at this is by investigating the level of participation of all parties involved, including those to be evicted, in finding alternatives. Ignoring the opinion of those who are settled on the land may contribute to acrimony between the public authority and community sought to be removed. Indeed, various instruments now consider this factor to be a necessary prerequisite to eviction. The UN Committee's review of Kenya's implementation of the right to housing report of 1993 noted that there were widespread 'practices of forced eviction *without consultation, compensation or adequate resettlement*' especially around Nairobi.¹³⁵ This important imperative necessitates joint consultations with the residents and making them aware of the proposed plans beforehand and inviting their input into the discussions.

7.2.2 Provision of alternative land

A rare debate in Kenya's parliament occurred in June 1999 when a member of parliament asked the Minister of State in the President's office if he was aware that residents of the slum areas of Jangwani, Korogocho and Mathare, among others in Nairobi, were being threatened with eviction and whether the government could provide an alternative site to resettle the evictees.¹³⁶ The Minister in his response vehemently stated that those residents were occupying the lands belonging to Nairobi City Council illegally and that the government had no plans to resettle them. However, when pressed, he admitted that the government would look into the matter. Twelve years later, the court in *Ibrahim Osman* found that the absence of any indication that the petitioners would be moved to some alternative settlement, or not providing such alternative settlement, exposed them to violations of other rights. According to the court, 'the petitioners were merely thrown out, as it were, without care about where they were going. The eviction threw them into an open, hostile and shelterless environment where there was no single basic necessity of life.' Similarly, in *Susan Waithera*, the court found that the City of Nairobi had 'a constitutional obligation to provide them [applicants] with alternative housing'.¹³⁷

The obligation to provide alternative accommodation may become acute depending on the length of time which the squatters have been living on the land. In *John Samoei Kirwa and 9 Others v Kenya Railways Corporation*,¹³⁸ a much earlier decision, the judge was emphatic:¹³⁹

135 See para 16 Conclusions and Recommendations of the Committee on Economic Social and Cultural Rights, Kenya, UN Doc E/C.12/1993/6 (1993) (my emphasis).

136 See Question 257 *Kenya National Assembly Official Hansard* 30 June 1999.

137 *Waithera* (n 107 above).

138 High Court of Kenya, Bungoma, HCCC 65 of 2004 (unreported).

139 As above.

I am of the view that [if] squatters ... [have] settled and have been in existence for a long time, say for twenty years or more, and ... have improved and developed the land on which they stand [and that land] is required for a public purpose ... alternative site or accommodation should be considered ...'

The length of stay also affects any compensation that might be necessary to resettle the evictees in their new home. In some cases, it might be necessary to provide them with shelter, schools for their children and even medical care immediately so that their lives are not completely disrupted.

What is suggested here is not far-fetched, even for a developing economy such as Kenya. In fact, trends worldwide indicate that many municipalities are willing to offer alternative sites for the settlement of evictees.¹⁴⁰ Although statistics also show that such offers are often rejected because the new areas are too far from their places of employment, and there is a lack of or minimal infrastructure, the idea is seemingly gaining support.¹⁴¹ A relocation project in Phnom Penh, for example, was found to have increased transportation expenses, diminished the capacity of women to engage in meaningful economic ventures, and increased the costs of putting up shelters.¹⁴² Recently, the South African Constitutional Court affirmed that a local authority has the obligation to provide an alternative site for occupation by victims of eviction carried out by a private property owner.¹⁴³ It is apparent, therefore, that local authorities must now begin to take the obligations to provide shelter seriously. Also, they must now be proactive in regulating how settlements occur rather than wait until communities are settled and then evict them.

7.2.3 Relationship between the parties

The relationship between the parties is an important factor to consider because it enables the court to determine whether the claim for rights is not being made to disguise a failure to honour commitments already made. Obviously, if the occupation was contingent on some legal arrangements such as a lease, then the claim for access to justice or judicial oversight can only be made within the law regulating

140 Audefroy (n 19 above) 18. See also J Kim 'The displaced resident's right to relocation assistance: Towards an equitable urban redevelopment in South Korea' (2010) 19 *Pacific Rim Law and Policy Journal* 587 for a discussion of how legislative intervention together with a renewed urban development approach have improved access to housing in South Korea's major cities.

141 D Clark 'The World Bank and human rights: The need for greater accountability' (2002) 15 *Harvard Human Rights Journal* 205 (suggesting that resettlement programmes cannot adequately compensate for the losses that evictees suffer).

142 Clark (n 141 above) 20.

143 See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* (n 105 above).

such arrangement.¹⁴⁴ In cases where the occupation is threatened by public need and the government is compelled to exercise its power of eminent domain, then the obligations are clearly spelt out in article 40 of the Constitution, and the court's supervisory role will be subject to ensuring that the rights thereby assigned are not violated.

This apart, the relationship that exists in cases of evictions that we now see in urban areas exposes both the asymmetry of power between the parties and circumstances of vulnerability that the rights regime should redress. As we have seen from the judgments discussed here, the courts are more likely to stop evictions in situations where those adversely affected are the weaker party and the methods used to evict are clearly underhand or burdensome. Even before the new Constitution came into effect, mass evictions of squatters by property owners or government had to satisfy a very high threshold, especially where the squatters would be rendered destitute and homeless. For example, when granting an order restraining the Kenya Railways Corporation against evicting squatters who were living on railway reserve, the court in *John Samoei*¹⁴⁵ stated as follows:¹⁴⁶

The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.

Secondly, procedure has clearly been a matter of concern. In all the cases that we have discussed thus far, the courts have been less appreciative of the kinds of notices given to the evictees. But notice alone is not sufficient. It was found in *Susan Waithera* that the notices that were served on the petitioners neither gave sufficient time nor contained reasons why the action was being taken. Article 47 of the Constitution now provides that '[i]f 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'. The judge in *Susan Waithera* was categorical that the right to fair administrative action, embodied in article 47 of the Constitution, may be violated if ample time is not given and reasons for evictions are not discussed with those likely to be affected by the eviction.

144 There are restrictive measures that are imposed by legislation such as the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301), which regulates tenancies in business premises, and the Rent Restriction Act (Cap 296), which deals with rental policies, controls practices in residential housing and sets out the legal rights and obligations of both landlord and tenant. See Mwangi (n 26 above) 141 148.

145 *Samoei* (n 144 above).

146 As above.

8 Conclusion

The discussions in this article have shown that the new constitutional dispensation in Kenya has created some opportunities for safeguarding and protecting the rights of victims of forced eviction because its framework for the protection of rights answer to the expectations that I posed at the beginning, to be the key to the realisation of the right to adequate housing. However, these opportunities must be seized by the courts and administrative organs if the right to housing and other ancillary rights are to be concretised into tangible benefits for evictees. Thus far, the jurisprudence has indicated positive movements towards rights enforcement, and the courts are more readily applying international standards given that inhibitions hitherto imposed by the dualist orientation of the last constitutional order have now been removed.¹⁴⁷ While it may still be too early to determine what effect the new dispensation will have on forced evictions, the spirit of a new era abounds and the government had better be prepared to deal with its consequences.

147 See, generally, Ambani (n 7 above).