# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

*(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Wanjala, & Njoki, SCJJ)*

**PETITION NO. 3 OF 2018**

**–BETWEEN–**

**MITU-BELL WELFARE SOCIETY ..... PETITIONER**

**–AND–**

**THE KENYA AIRPORTS AUTHORITY..... 1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

**THE COMMISSIONER OF LANDS.....3RD RESPONDENT**

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA..... *AMICUS CURIAE***

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*(Being an appeal from the entire Judgment and Orders of the Court of Appeal sitting at Nairobi **(Githinji, Karanja & Otieno-Odek, JJ.A)** delivered on the 1st day of July, 2016 in Nairobi Civil Appeal No. 218 of 2016)*

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# JUDGMENT OF THE COURT

## A. INTRODUCTION

**[1]** This is a Petition of Appeal dated 5th February 2018, and filed on even date, pursuant to its certification by the Court of Appeal *(Okwengu, Makhandia & Murgor, JJ.A)* in Civil Application Sup No. 3 of 2016 as one involving a matter of general public

importance under Articles 163(4)(b) and 163 (5) of the Constitution. The Appellants are challenging the entire Judgment and Orders of the Court of Appeal; *(Githinji, Karanja & Otieno-Odek, JJ.A)* in Civil Appeal No. 218 of 2014 delivered on the 1st day of July, 2016.

## B. BACKGROUND

### *(i) At the High Court*

**[2]** The Petition before the High Court was filed on 21st September, 2011 by *Mitu-Bell Welfare Society,* a society registered under the provisions of the Societies Act Cap 108, which according to its Chairman, one Benjamin Kaunda Gishemba, comprised residents of Mitumba Village, with 3065 households or approximately 15, 325 men, women and children. The petition was filed on behalf of its members and other residents of Mitumba village, (For ease of reference, the members of the society and other residents of Mitumba village are hereinafter referred to as '*the appellants'*).

**[3]** On the basis of the pleadings, at the time of filing the Petition before the trial Court, the appellants were all residents of Mitumba Village situated on Plot Number 209/12908, near Wilson Airport, Nairobi; while their children attended school at Mitumba Primary School, situated on Plot Number 209/12921, also located near the Wilson Airport.

**[4]** The appellants' Petition was prompted by a Notice published in the newspapers on 15th September 2011, by the 2nd respondent giving them seven (7) days within which to vacate the suit land. Together with the Petition, the appellants filed a Chamber Summons application seeking among others, conservatory Orders against the 1st respondent. On 22nd September, 2011 *Gacheche J* granted an Order restraining the respondents from demolishing the village pending the hearing *inter partes* and determination of the application for conservatory orders. However, notwithstanding the

Conservatory Order, the respondents proceeded to demolish the appellants' houses in the Village on 19th November, 2011.

**[5]** The Petition was amended by leave of the Court on 1st December, 2011 following the demolition and eviction. The Amended Petition sought the following;

*(i) a declaration that the demolition was illegal, irregular, unprocedural and contrary to Art. 26, 27(2) (4) & (6) Art. 28 Art 29, Art 39. 40 Art. 43, Art.47, Art 56, of the Constitution;*

*(ii) a declaration that any forceful eviction and or demolition without a relocation option is illegal, oppressive and violates the rights of the appellants;*

*(iii) an order restraining any purported demolition and or forceful eviction by the 2nd Respondent against the appellants;*

*(iv) a declaration that the resident of Mitumba Village were legally entitled to plot number 209/12921 under file number 226958 for Mitumba primary school and plot Number 209/12908 under file number 176952 for the village respectively and in the alternative they were entitled to compensation and reallocation of another land or alternative shelter with access to education facilities, clean water, health care and food at the state's expense;*

*(v) a declaration that the appellants were entitled to the full protection from discrimination and the same right had been violated hence they were entitled to full compensation for loss suffered during and after the illegal demolition or their structures;*

*(vi) a declaration that the appellants and other members of the public were entitled to the full enjoyment of the right to economic and social rights that were about to be violated and or already violated; and*

(vii) *Costs of the Petition.*

**[6]** The respondents opposed the Petition and maintained that there had been no violation of the appellants' fundamental rights. They advanced four main arguments in support of this position; that the land in question did not belong to the appellants but to the 1st respondent; that the 1st respondent was under an obligation in performing its statutory duty under the Civil Aviation Act, to ensure air safety by removing any informal settlement which was on a flight path; that the demolition was not carried out by the 1st respondent but by the state in order to remove the threat posed by the village given the ongoing war in Somalia; and that the appellants were claiming social economic rights which were progressive and could not be granted at once.

**[7]** The High Court framed the following issues for determination:

*(i) What rights, if any, do the Petitioners have over the subject property?*

*(ii) If the answer to (i) above is in the negative, was their eviction and the demolition of their houses a violation of their Rights under the Constitution?*

*(iii) If the answer to (ii) above is in the positive, what relief should the Court grant to the petitioners?*

*(iv) Rights over the Subject Property.*

**[8]** In a Judgment dated 11th September 2013, the High Court (*Mumbi Ngugi J.*) allowed the Petition. She declared that following the demolition of Mitumba village, more so as the demolition was carried out while an Order of the Court restraining the demolition was in force, the 1st and 2nd Respondents had violated the appellants' Constitutional rights.

**[9]** The High Court's detailed findings are summarized as follows; on the issue of the *appellants' rights, if any, over the subject property*, the Court found that that the appellants had no legitimate claim to the land, and could not therefore maintain a claim for violation of their right over the property (land) under Article 40.

**[10]** On the issue as to *whether the eviction was in violation of the appellants' Constitutional rights*, the Court at the outset addressed the issue of reasonableness of

the Notice to vacate. In finding the Notice unreasonable, the Court noted that the same was dated 15th September 2011 requiring the appellants and others to vacate the suit land within seven days. The Court also noted that though headed as a 'Reminder Notice', there was nothing before it to indicate that the 1st respondent had issued any other Notice to the appellants. The Notice was therefore adjudged to be unreasonable, unconscionable, and unconstitutional. Further, the Court opined that Kenya was yet to develop legislation and guidelines, for eviction of persons occupying land they are not legally entitled to occupy.

**[11]** It was the Court's further view that despite the lack of legislation and guidelines for eviction, as a member of the international community and a signatory to various United Nations treaties and Conventions, Kenya is bound by such international guidelines that are intended to safeguard the rights of persons liable to eviction. To this end, the Court invoked Article 2(5) and (6) of the Constitution and held that the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as issued by ***The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7*** *"The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7."* (General Comments).

**[12]** On whether the demolition had resulted in a *violation of the appellants' rights* under the Constitution, the Court found that the appellants had made out a clear case of violation of their Constitutional rights by the 1st and 2nd respondents. On the *violation of the right to property*, the Court held that the Constitutional right to property under Article 40 as read together with Article 260 of the Constitution, extends to, and must include protection of, goods and personal property. In the opinion of the Court, even though the appellants had not given particulars of their goods that had been destroyed during the eviction, it must inevitably follow that such goods as the appellants had in their dwellings, and the materials the houses were made of, were destroyed during the demolition.

**[13]** On *violation of the right to housing and other social economic rights,* the Court found that these rights are protected under Article 43 and 21 of the Constitution. It proceeded to hold that when the State or a state agency such as the 2nd respondent demolishes the homes of poor citizens such as the appellants following a Seven-day Notice, and without providing an alternative accommodation, it violates not only the rights of the appellants under Articles 21 and 43 of the Constitution, but also the national values and principles of governance set out in Article 10 of the Constitution.

**[14]** The Court observed that, Article 43 of the Constitution imposes on the state a positive obligation to ensure access by its citizens to social economic rights, whose realization is progressive and dependent upon, the availability of resources. By the same token, while placing reliance upon the South African case of ***Irene Grootboom and Others v. The Government of the Republic of South Africa and Others*** (2001) (1) SA 46, the Court held that under Article 21(1) the Constitution, the state and private individuals have a negative obligation to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms. Further, the Court found that the state had an obligation to protect the appellants' existing homes, rudimentary as they were, while doing what it could, to the extent of its available resources, to ensure their progressive access to adequate housing.

**[15]** On the issue of *violation of civil and political Rights* under Articles 26, 27, 28, 29 and 47 of the Constitution, it was the Court's view that the enjoyment of these rights, was not possible without the social economic rights which the Constitution guarantees under Article 43. That a failure by the State to ensure that citizens have access to the rights guaranteed by Article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in the Constitution.

**[16]** On the issue of *Constitutional Requirement for Consultation and Participation*, the Court recognized that there may be instances when eviction of people may be necessary, but reiterated that even in such instances, there is a need to follow due process: that those to be affected should be given reasonable notice, and that there

should be consultation and participation of those to be affected by the removal process. It added that the Principle of consultation and participation of the people is entrenched in the Constitution as well as the United Nations Office of the High Commissioner for Human Rights Guidelines. It concluded that the State had in this regard, abdicated its Constitutional responsibilities and obligations under International Law.

**[17]** On the *violation of the right to Non-discrimination and Equal Protection of the Law*, the Court found that the selective demolition of the appellants' temporary shacks for allegedly being on the airport's flight path or posing a security threat, while sparing multi- storied buildings which surrounded it, wreaked of discrimination. Such action in the Court's view, amounted to a violation of the right to non-discrimination and equal protection of the law guaranteed under Article 27(1), (2) and (4) of the Constitution.

**[18]** On *violation of the Rights of Children*, the Court observed that the State has an obligation to protect children in accordance with Article 10, on the National Values and Principles, Articles 53 and 54 on protection of children and persons with disabilities respectively, and Article 56 on protection of the marginalised. It added that the evidence before it indicated that there was within Mitumba Village, a primary school-albeit an 'informal' primary school, which the children of the village attended. The Court added that with no averment by any of the respondents that they took any action to provide for the needs of vulnerable groups particularly children, in the period leading up to and during the demolition, it was uncontested that the actions of the respondents resulted in a violation of the rights of the appellants' children.

**[19]** In considering the *appropriate relief*, the Court opined that under Article 23 of the Constitution, it has power to grant various reliefs, including declarations of rights, injunctions, conservatory orders, and compensation. It further noted that the appellants were a community deprived of their shelter and rendered homeless; that the State has a Constitutional obligation to take appropriate legislative and police measures to ensure access to the rights set out in Article 43; that these rights are progressive in nature; that the State, when confronted with a matter such as this, is expected to go beyond the

standard objection that the appellants had not demonstrated a right to the land, or how their rights had been violated; and that obligation requires that the state assists the Court by showing if, and how, it was addressing or intended to address the rights of citizens in the attainment of the social economic rights, and what policies, if any, it had put in place to ensure that the rights are realized progressively.

**[20]** Before making any further Orders with regard to the appropriate relief for the appellants in the matter, the Court directed as follows;

*(i) That the respondents do provide, by way of affidavit, within 60 days of Judgment, the current state policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.*

*(ii) That the respondents do furnish copies of such policies and programmes to the appellants, other relevant state agencies, Pamoja Trust (and such other civil society organisation as the appellants and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the appellants' grievances), to analyse and comment on the policies and programmes provided by the respondents.*

*(iii) That the respondents do engage with the appellants, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the appellants' grievances following their eviction from Mitumba Village.*

*(iv) That the parties report back on the progress made towards a resolution of the appellants' grievances within 90 days from the date of Judgment.*

**[21]** Thereafter, the State filed an affidavit appending the Government's Guidelines on Settlement and Evictions. Consequently, the learned Judge gave parties 45 days to engage in discussions with a view to finding an amicable solution.

### *(ii) At the Court of Appeal*

**[22]** Aggrieved and dissatisfied with the entire Judgment and directions of the High Court, the 1st Respondent (the appellant before the Court of appeal) filed, *Civil Appeal No. 218 of 2014*, citing 18 grounds which are summarized hereunder as follows: That the learned Judge erred in law and in fact in;

*(i) Finding that the 1st respondent had not filed any response to either the petition or the amended petition hence failed to consider the 1st respondent's response thereof.*

*(ii) Delegating judicial functions and powers to Pamoja Trust, other unnamed state agencies and civil society organizations and by directing that the parties should engage with those third parties in identifying appropriate remedies.*

*(iii) Making findings and issuing orders not sought or contemplated by law.*

*(iv) Failing to appreciate that the 1st respondent had issued earlier notices to the residents to vacate the suit property and holding that the notice issued was short.*

*(v) Holding that the 1st respondent had a Constitutional and legal obligation to make policies and programmes on provision of shelter and access to housing for marginalized groups and further failing to consider that the appellant had a specific statutory mandate that does not include settlement of landless Kenyans.*

*(vi) Issuing contradictory orders incapable of compliance.*

*(vii) Issuing composite orders applying to the respondents jointly whereas their actions and obligations differ.*

*(viii) Failing to appreciate that the appellants had not demonstrated an entitlement to the reliefs sought and shifting the burden to the respondents, contrary to the law.*

*(ix) Failing to appreciate the progressive nature of social economic rights under the Constitution.*

*(x) Entertaining the petition filed by Mitu-bell welfare society which was not a legal entity hence lacking the requisite locus to represent the residents of Mitumba Village.*

*(xi) Finding that the eviction in question was carried out by the 1st respondent.*

*(xii) Making findings which were not supported by the evidence before the Court."*

**[23]** In a Judgment delivered on 1st July 2016, the Court of Appeal (*Githinji, Karanja & Otieno-Odek, JJ.A*) identified eleven(11) issues for determination. These issues are discussed further: On the issue *of locus standi of the appellants to institute the petition before the trial Court,* the Court found that the appellants through *Mitu-bell Welfare Society*, had *locus* before the trial Court. It reasoned that in light of the Certificate of Registration, the provisions of Article 22 (2) (d), Articles 22 & 258 of the Constitution and this Court's decision on the issue of *locus* in ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*** [2014] eKLR, every person has the right to institute proceedings claiming that the Constitution has been contravened; that a person in that regard, includes one acting in public interest and further, that pursuant to Article 260 it also includes a company, an association, or other body of persons whether incorporated or unincorporated.

**[24]** On the issue *whether the trial Court failed to consider the 1st respondent's answer to the petition and or amended petition,* the Court held that it was manifest from the Judgment that all the issues and grounds in opposition to the petition that were raised and urged by the 1st respondent were considered by the trial Court.

**[25]** On the *liability of the 2nd and 3rd respondents*, the Court upheld the High Court's finding of the 2nd respondent's liability on grounds that under the provisions of Article 156 (4) (a) and (b) of the Constitution, the 2nd respondent (Attorney General) is the legal advisor to the Government, and is empowered (other than in criminal proceedings) to

represent the Government in Court or in any other legal proceedings to which the National Government is a party.

**[26]** The Appellate Court however set aside any liability against the 3rd respondent, and concluded that the trial Court, erred in law in making a composite order and issuing directives against the latter. It reasoned that after an evaluation of the evidence on record, and the Judgment of the learned Judge, the trial Court made findings as regards non-culpability and non-liability of the 3rd respondent; that the 3rd respondent as Commissioner of Lands was under no legal obligation to allocate or alienate land that was already alienated and registered to a third party; that there was no violation of the appellants' Constitutional right to property (land) under Article 40 of the Constitution and that the 3rd respondent neither demolished nor evicted the appellants from the suit property. It thereby set aside in entirety the trial Court's Judgment and decree and any and all consequential orders and directions applicable and enforceable against the 3rd respondent.

**[27]** On *whether the trial Court abdicated or delegated its judicial function*, the Appellate Court considered the provisions of Articles 9, 10 and 23 (3) of the Constitution as read with the jurisdictional mandate and functions of the Court as provided for in Article 159 (1). It also relied on the holding in ***R v. Governor of Brixton Prison, ex parte Enahoro*** (1963) 2 QB, Supreme Court decision in ***Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others,*** Petition No. 12 of 2014 at paragraphs 150-151 and Court of Appeal decision in ***Telkom Kenya Ltd. v. John Ochwada*** (2014) eKLR to find that the trial Court abdicated its judicial function and bestowed the same to persons and entities *(to wit, segment committees, Pamoja Trust, the Social Economics and Geo-Spatial Engineers, Muugano wa Wanavijiji as well as Commissioners from the Kenya National Commission on Human Rights Commission)* not vested with the Constitutional mandate of resolving disputes between parties.

**[28]** The Appellate Court in addressing the issue of reservation of powers to make further Orders, faulted the trial Court, for delivering a Judgment and then reserving

outstanding matters to be dealt with by the same Court. It further found that, save for the limited exceptions provided for in law, delivery of Judgment marks the end of litigation and the end of jurisdictional competence of the Court, hence upon delivery of Judgment, a Court becomes *functus officio*; that the concept of partial Judgment or interim Judgment was unknown to Kenyan law; that a Court of law in delivering its Judgment must determine the rights and liabilities of parties; and that if a Court is inclined to grant or make interim orders, it is within its powers to do so, however, a Court cannot deliver Judgment and invite further pleadings on contested matters for its consideration and determination.

**[29]** It added that by allowing parties to file affidavits and reports after Judgment, the trial Court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings. That such a procedure was not provided for in the Civil Procedure Act and Rules and perpetuated and introduced secondary and side litigation; and that it was impermissible to allow parties to file pleadings after Judgment.

**[30]** On the issue as to *whether the trial Court properly evaluated the evidence on record,* the Appellate Court was of the opinion that the trial Court failed to evaluate critical aspects of the pleadings before it. The Court held that there had been no finding of fact, regarding the following; whether Mitumba village and the structures thereon were on the flight path to Wilson Airport; no factual determination as to what constituted the flight path to Wilson Airport; no determination whether there was unregulated garbage disposal at the Mitumba village that could attract birds along Wilson Airport's flight path thereby posing security risk to the aerodrome; no evaluation of the public interest in maintaining the safety and security of the aerodromes in Kenya; no evaluation of the evidence to determine if the adjacent high rise buildings were on the flight path; and no consideration of the Legal Notice No. 59 of 8th May 1998 which prohibited constructions of structures near airports or aerodromes.

**[31]** To justify the need to evaluate the expounded aspects, the Appellate Court pronounced that there are instances when eviction of people may be necessary hence considerations of national security was paramount. It was of an additional view that the security and safety of the flight paths was a limitation on enjoyment of the rights and freedoms in the Bill of Rights as permitted under Article 24 of the Constitution. It thereon cited comparative (Indian) judicial authorities to demonstrate that public interest, public policy and national interest or security may justify eviction and demolition of structures. These decisions included ***Chameli Singh v. State of Utar Pradesh*** (1996) 2 SCC 549; ***Ahemdabad Municipal Corporation v. Nawab Khan Gulab Khan*** (1997) 11 S.C.C. 123; ***Narmada Bachao Andolan v. Union of India,*** A.I.R. 2000 S.C. 3751; ***Dharampal Singh v. GNCT of Dehli*** WP (C) 1978/2011,

**[32]** The Appellate Court agreed with the trial Court, that there was no legislation in Kenya meant to regulate forcible eviction and resettlement of persons occupying public or private land. The Court held that until such a statute was enacted by the legislature, Courts must interpret and apply the law as is.

**[33]** On the *statutory mandate of the 1st Respondent* in relation to the trial Court's directive that the 1st to 3rd respondents do provide State policies and programs on provision of shelter and access to housing, the learned Judges of appeal found that the trial Court had erred in issuing orders and directions, applicable to the 1st Respondent while ignoring its express statutory mandate. In arriving at this finding, the learned judges were guided by the decision in ***Hawkes v. Eastern Railways Company*** (1885) 5HL 331, stating that a statutory corporation, created by an Act of Parliament is limited to the functions and mandate granted by its enabling statute.

**[34]** On *the issue as to whether the trial Court issued orders not sought or prayed for in the amended petition,* the Judges made a finding that the trial Court erred in law in issuing orders and directions on un-pleaded issues. It faulted the trial Judge's directions requiring third parties to comment on the policies and guidelines, which it found was

not a prayer sought in the amended Petition. The Court also faulted the learned Judge's directions to the effect that the parties engage Pamoja Trust and other civil societies for purposes of identifying appropriate remedies. The Court noted that Pamoja Trust and the civil societies alluded to by the trial Court were not parties to the suit neither were they joined as friends to the Court. It was however cognizant of the provisions of Rule 6 of the Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013, where cases involving matters of general public interest may occasion a Court inviting certain persons with expertise on a particular issue to participate as *Amicus curiae*.

**[35]** In considering the issue of *post-Judgment implementation and the political question doctrine*, the Court was alive to the provisions of Article 159 (2) (c) of the Constitution, which enjoins Courts to promote alternative dispute resolutions mechanism, but emphasized that these alternative dispute resolution mechanisms must be adopted and effectuated prior to issuance of a Judgment by a Court. It also emphasized that the Courts had no role to play in policy formulation, which it added, was an executive and legislative function. In arriving at this finding, it was guided by the authority in ***Marbury v. Madison – 5 US. 137***; ***Peter Njoroge Mwangi & 2 Others v. The Attorney General & Another***, Nairobi Petition No. 73 of 2010; ***Speaker of the Senate & Another v. Hon. Attorney General & 3 Others*** (2013) eKLR; ***Ndora Stephen v. Minister for Education & 2 Others,*** Nairobi High Court Petition No. 464 of 2012.

**[36]** Consequently, the Court opined that a Court of law should not act in vain and issue orders and directions that it cannot implement. That further, in making orders and directions in relation to Article 43 (1) of the Constitution, the provisions of Article 20(5)(c) of the Constitution, which stipulates that the Court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion, must be borne in mind. It concluded that post-Judgment supervision is not a function of the Court as

implementation and execution of Judgments is governed by specific rules and that resort to those rules must be made.

**[37]** The Appellate Court also considered *the comparative jurisprudence on post-Judgement* supervision. It considered South African Constitutional Court decisions in ***Fose v. Minister of Safety and Security*** 1997 (3) SA 786 (CC) paragraphs 19 and 69; ***Treatment Action Campaign v. Minister for Health*** 2002 (4) BCLR 356 (T); ***Pretoria City Council v. Walker*** 1998 (2) SA 363 (CC); ***Madderklip Baerdery (Edms) Bpk v. President van die*** RSA 2003 (6) BCLR 638 (T) where structural interdicts were upheld as an appropriate relief and Courts allowed to retain supervisory jurisdiction in Constitutional cases. In ***Sibiya v. Director of Public Prosecutions*** (Johannesburg High Court), (Constitutional Court) Case CCT 45/04; ***Minister of Health v. Treatment Action Campaign*** (No. 2) 2002 (5) SA 721 (CC); and ***Pretoria City Council v. Walker*** 1998 (2) SA 36, the general principle that 'a *mandamus* and the exercise of supervisory jurisdiction' may be necessary to ensure an effective remedy for a breach of any Constitutional right, including a socio-economic right was strongly embraced by the Courts.

**[38]** The Court also considered the Supreme Court of Canada decision in ***Doucet-Boudreau .v Nova Scotia (Minister of Education)*** [2003]3 SCR 3, the American decision of ***Swann v. Charlotte-Mecklenberg Board of Education*** 402 US 1 (1971) at 16 and Supreme Court of India decision in ***Sheela Barse v. Union of India*** (1988) AIR 2211 (SC) at 221, where the Courts in Canada, USA and India have required submission of specific reports on compliance to the Court or to a Court-appointed assistant after delivery of Judgments. And ***Vineet Narain v. Union of India,*** AIR 1996 SC 3386 and ***Bandhua Mukti Morcha v. Union of India***, AIR 1984 SC 802 where the concept of continuing *mandamus* enables a trial Court to monitor implementation of its Orders.

**[39]** Noting the comparative jurisprudence and trends in issuing supervisory Orders, the Appellate Court however faulted the trial Court's directives. It noted that the Kenya

Constitution does not have provisions similar to Articles 32 and 226 of the Indian Constitution providing for the principle of continuing *mandamus*, or Section 24(1) of the Canadian Charter of Rights and Freedoms and Sections 38 and 172(I) (b) of the Constitution of the Republic of South Africa Act 108 of 1996, whereby both contemplate wide remedial powers for Courts ; that there was no prayer by the appellants for an Order of *mandamus* or continuing *mandamus*; that Article 23 (3) of the Kenya Constitution that permits the High Court to grant an appropriate relief should not be construed to be provision that permits the High Court to borrow legislations from other countries and through judicial interpretation embed them into the laws of Kenya; that under the political question doctrine, a Court has no jurisdiction to make orders relating to policy formulation or give guidelines on who should participate in the formulation of government policy; that as regards the specific facts of this case, the orders and directions given by the trial Court are policy related and did not take into account the issue of flight path to Wilson Airport and threat to the security of aerodromes; that if properly crafted to avoid vagueness; a supervisory order can be made pursuant to the provisions of Article 23 (3) of the 2010 Kenya Constitution.

**[40]** On the issue of reliance on the *Universal Declaration of Human Rights,* the Court of appeal without faulting the High Court for citing the UN Guidelines, noted that it was imperative to bear in mind the hierarchy of laws in Kenya view. It opined that before a Court can invoke Article 2 (5) of the Constitution, it must be satisfied that the rule of international law being invoked is a general rule of international law and not simply a rule of international law; that it must be borne in mind that the United Nations and any other international or multilateral organization is neither a supplementary nor complementary legislature for Kenya; that neither the UN nor any international organization legislates for Kenya; and that it is impermissible to use Article 2 (5) of the Constitution as a basis to justify any or all rules and principles of international law as part of the laws of Kenya.

**[41]** On the right to *private property and socio-economic rights* the Appellate Court held that the trial Court had correctly decided on the issue of adverse possession and determined that the appellants did not have any legitimate claim to the suit property. However, the Court noted that the High Court had failed to consider the tension between socio-economic rights and the right to private property in the Kenyan context. It faulted the trial Court for adopting a mechanistic approach to precedent in relying on the Indian case of ***Olga Telis & Others v. Bombay Municipal Corporation*** (1985) Supp. SCR 51 and the South African Constitutional Court case of ***Irene Grootboom & others v. The Government of the Republic of South Africa & Others*** (2001) (1) SA 46. It noted that these cases involved interpretation of Constitutional provisions of the respective countries and that similar provisions are not found in the Kenyan Constitution.

**[42]** In addressing the tension between the realization of socio-economic rights and the right to private property, the Appellate Court surveyed the emerging jurisprudence as illuminated in various judicial decisions in Kenya; to wit, ***Susan Waithera Kariuki & 4 Others v. Town Clerk Nairobi City Council & 2 Others*** Petition No. 66 of 2011; ***Satrose Ayuma & 11 Others v. The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 Others***, Nairobi HC Petition No. 65 of 2010, ***Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*** Constitutional Petition No. 2 of 2011; and ***Veronica Njeri Waweru & 4 Others v. The City Council of Nairobi & Others***, Nairobi Petition No. 58 of 2011.

**[43]** The Court opined that the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another and that the realization of socio-economic rights does not override the provisions of the Limitation of Actions Act (Cap 22 of the Laws of Kenya). It noted further that in the interpretation of the Constitutional Articles on socio-economic right, more so in the absence of a legal framework, it is not the role or function of the Courts to re-engineer and redistribute

private property rights. Such a role, according to the Appellate Court, lay squarely in in the province of the Executive and Legislature.

**[44]** On the issue as to *whether the eviction in question was carried out by the 1st respondent*, the learned Judges of Appeal concurred with the trial Court in concluding that the uncontroverted presence of security agents meant that the State was responsible for the eviction and demolition. With regard to the 1st respondent, the Court found that the trial Court erred in holding the latter responsible. The Court took the position that the appellants had the burden to prove that the 1st respondent, evicted and demolished their houses and structures. According to the Court, the absence of a link between the security agents and the 1st respondent, cast doubt as to the latter's responsibility.

**[45]** After conducting the analysis, the Court made the following summarized conclusions and determinations:

*(i) That the trial Court made correct findings as regards the 3rd respondent but erred in law in making final orders that were applicable and enforceable against the 3rd respondent;*

*(ii) that the trial Court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the Constitutional mandate to identify and determine appropriate relief and resolution to the appellants' grievances;*

*(iii) that subject to limited exceptions, delivery of Judgment renders a trial Court functus officio;*

*(iv) that the trial Court erred in law in reserving for itself outstanding issues to be considered after Judgment;*

*(v) that the Court further erred in allowing affidavits and or pleadings to be filed after delivery of Judgment;*

*(vi) that whereas a Court has jurisdictional competence to issue interim orders, the trial Court failed to appreciate that the concept of partial or interim Judgment is not part of the Kenyan legal system;*

*(vii) that whereas a trial Court has the jurisdictional competence to make interim orders, the trial Court erred in delivering a Judgment that was not a final Judgment determining the rights and liability of parties;*

*(viii) that under the political question doctrine and noting the provisions of Article 20(2) and 20 (5) (c) of the Constitution, a trial Court should rarely interfere with a decision by a state organ concerning the allocation of available resources for progressive realization of socio-economic rights solely on the basis that it would have reached a different conclusion;*

*(ix) that the trial Court erred in law in issuing orders and directions on unpleaded issues;*

*(x) that the trial Court erred in law and fact when it failed to properly evaluate the pleadings and evidence on record;*

*(xi) and that the trial Court erred in law in issuing orders and directions compelling the 1st respondent to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements while ignoring the appellants express statutory mandate.*

**[46]** Aggrieved by the Judgment, the Appellants on 11th August, 2016 sought the certification of the intended appeal as one raising questions of general public importance under Article 163(4)(b) of the Constitution. In a Ruling delivered on 2nd February 2018, the Court of Appeal certified the appeal.

### *(iii) At the Supreme Court*

**[47]** The appellants moved this Court, citing the following eight (8) broad grounds of Appeal. That the learned Judges erred in law and in fact;

*(i) In the interpretation and application of the Respondents' obligation to observe, respect, protect, promote and the appellants' right to housing, right to dignity, rights of children, right to life as well as equality and freedom from discrimination;*

*(ii) In unjustifiably interfering with the High Court's discretionary grant of structural interdict as the most appropriate relief under Article 23;*

*(iii) In failing to properly interpret and apply international law on the right to housing/prohibition of illegal and forceful evictions under Article 43;*

*(iv) In disregarding the Court's obligation under Article 20(3)(a) and (b) to develop the law to the extent that it did not give protection from forced evictions and adopt the interpretation that most favors the right to housing;*

*(v) In invoking the foreign 'political question doctrine' to exclude the High Court's jurisdiction under Article 10, 19(1), 20(1) and (5), 21(2) and 165 to review state policy on socio- economic rights;*

*(vi) In failing to conduct the sequential Article 24 analysis necessary to justify public interest or national security as a limitation of the Petitioners' right to adequate housing through forced eviction and demolitions;*

*(vii) In failing to interpret the concept of progressive realization of the right to housing under Articles 21 and 43; and*

*(viii) In reversing a High Court Judgment from an admitted forceful eviction in its entirety and failing to grant any appropriate relief;*

**[48]** The appellants seek the following reliefs;

*(i) This appeal be allowed.*

*(ii) A declaration that the respondents violated the appellants' Constitutional rights under Articles 26, 27(2),(4) & (6), 28, 29, 39, 40, 43, 47 & 56 as determined by the High Court.*

*(iii) A declaration that the appellants are entitled to compensation and or alternative land for loss of their property including land and other property destroyed by the 1st Respondent (and its agents) when it carried out an illegal eviction contrary to the Orders of the Court.*

*(iv) An Order quashing the Judgment, Orders and Decree of the Court of Appeal and affirming the Judgment, Orders and Decree of the High Court.*

*(v) An Order remitting this matter to the High Court (Human Rights and Constitutional Division) with the Directions that that Court monitor the compliance by the Respondents with the Orders and directions issued by the High Court on 11th April, 2013.*

*(vi) An Order awarding costs to the appellants.*

*(vii) Any other Order the Court deems fit.*

**[49]** On 7th March, 2019, *The Initiative for Strategic Litigation in Africa (ISLA)* filed a Motion dated 5th March, 2019, seeking leave to be admitted in these proceedings as *Amicus Curiae* so as to make submissions *on the meaning of the right to remedy in the context of human rights' violations; demonstrate how remedies in human rights have*

*evolved and present comparative jurisprudence on the subject.* By a Ruling of this Court dated 29th November 2019, ISLA was admitted as *Amicus Curiae.*

## C. PARTIES RESPECTIVE SUBMISSIONS

### *(a) Appellants' Case*

**[50]** The appellants' written submissions are dated 28th February,2019, and filed on 1st March, 2019. The List of Authorities dated 15th May, 2020 was filed on even date. In their written and oral submissions, the Applicants have outlined five issues for determination namely:

*(i) Whether the 1st and 2nd respondents violated the appellants' rights under Articles 26, 27, 28, 29, 40, 43, 47 and 56 of the Constitution;*

*(ii) whether the 1st and 2nd respondents failed to meet their obligations towards the appellants under Article 21 of the Constitution;*

*(iii) whether the Court of Appeal erred in its analysis of the application of international law under Article 2(5) and 2 (6) of the Constitution in relation to the United Nations Comments and Guidelines;*

*(iv) whether the Court of Appeal erred in law in applying the 'political question' doctrine; and*

*(v) whether the Court of Appeal erred in law in its interpretation of appropriate remedies under Article 23(3) of the Constitution.*

**[51]** On the first issue *as whether the 1st and 2nd respondents violated the appellants' rights under Articles 26, 27, 28, 29, 40, 43, 47 and 56 of the Constitution,* the appellants submit that the Appellate Court erred in law in failing to analyse whether the state actions of forcefully evicting them was in violation of rights and fundamental freedoms under the Constitution. It is the appellants' case that the High Court was correct in

finding that all rights are interdependent and the violation of the social economic rights affected other rights in the Bill of Rights.

**[52]** They submit that their right to *fair administrative action* under Article 47 of the Constitution was violated. It is the appellants further case that the Appellate Court failed to analyse whether the seven (7) days eviction notice was adequate and reasonable. They submit that the 1st respondent did not tender any evidence of previous Notices, hence the Notice was unreasonable and in violation of Article 47 of the Constitution. They rely on the decisions in ***Ibrahim Sangor Osman v. Minister for Provincial Administration and Internal Security & 3 Others*** [2011] eKLR; ***Susan Waithera Kariuki & 4 Others v. City Council of Nairobi & 2 Others*** Petition No. 58 of 2011, [2012] eKLR and ***June Seventeenth Enterprises Ltd v. Kenya Airport Authority & 5 Others*** [2014] eKLR.

**[53]** They urge further that under Article 2(6) of the Constitution, Kenya being a state party to the International Covenant on Economic, Social and Cultural rights, (ICESCR), the state obligations under the *ICESCR, United Nations Committee, General Comment 7 on forced evictions are binding*. That the respondents violated paragraph 15(b) of General Comment 7, which stipulates that a person is entitled to adequate and reasonable Notice before they are evicted.

**[54]** In addition, they urge that Parliament has since legislated on what constitutes Reasonable Notice of Eviction. They cite Section 152B and 152C of the Land Act requiring at least three (3) months notice before eviction. They urge that while the foregoing provisions were enacted in 2016, the right to adequate notice was constitutionally available to them at the time of eviction as the legislation did not confer a right, but only provided a statutory clarification as to what constitutes an adequate eviction notice.

**[55]** They fault the Appellate Court's reliance on the decisions ***of Veronica Njeri Waweru & 4 Others v. The City Council of Nairobi & Others*** *[supra]* and ***Kepha Omondi Onjuro & Others v. the AG & 5 Others*** Petition 239 of 2014,

[2015] eKLR. They distinguish these decisions and urge that the Judges failed to consider that sufficient notice had been issued to the project affected persons in the two matters.

**[56]** It is also the appellants' submission that their *right to dignity* was violated by the 1st respondents and other State agents. Towards this end, they cite the provisions of Article 10(2)(b) and Article 19(2) of the Constitution which recognize the right to human dignity, Article 20(4) which binds Courts when interpreting the Bill of Rights to promote human dignity and Article 28 of the Constitution.

**[57]** The appellants rely on this Court's decision in ***Francis Karioko Muruatetu Another v. Republic*** Petition No 15 & 16 of 2015, [2017] eKLR; The Preamble of the United Nations Declaration on Human Rights and High Court decision of ***JWI v. Standard Group Limited & Another*** Petition Nos 466 and 416 of 20122, [2013] eKLR*;* ***Satrose Ayuma Case*** and Court of Appeal decision of ***Moi Educational Centre Company Ltd v. William Musembi & 16 Others*** Civil Appeal No. 363 of 2014,[2017]eKLR in arguing that their right to dignity was violated.

**[58]** The appellants submit that the Appellate Court erred in its interpretation of the right to property by limiting the said right to land. They urge that the term "property" is accorded a broad meaning under Article 260 of the Constitution. They add that the demolition of their houses and destruction of household goods was a violation of their right to property under Article 40 of the Constitution.

**[59]** The appellants submit that the forced eviction and demolition rendered them homeless and destroyed schools thus violating their children's rights under Article 53(2) of the Constitution. They also submit that by virtue of their low income and social status, they are a marginalized group, hence entitled to protection under Articles 21(3) and 56 of the Constitution. They urge further that General Comment 7 at paragraph 10 recognizes that minorities and other vulnerable groups suffer disproportionately from the practice of forced evictions hence the need for protection.

**[60]** It is the appellants' submission that the respondents' action of selectively demolishing their houses while sparing highrise apartments which were also on the flight path was discriminatory and a violation of their rights under Article 27 (4) and Article 10 of the Constitution.

**[61]** It is the appellants' case that Article 21 (1) of the Constitution imposes both positive and negative obligations upon the State with regard to protection of rights and freedoms in the Bill of Rights. They urge that in this case, the negative obligation is to *respect*, which requires the state to refrain from interfering directly or indirectly with the right to housing while the positive obligation includes; to *protect,* which requires the State to prevent third parties from interfering with the right to housing. This entails the adoption of legislative measures to deter potential violations and to provide for appropriate remedies in the event that such violations occur. Then there is the duty to *promote,* which requires the State to put in place, measures aimed at the promotion of tolerance, awareness raising, and the building of infrastructure to enhance enjoyment of rights; and finally, the duty to *fulfil,* which requires the state to adopt appropriate legislative, administrative, judicial, promotional and other measures to realize the right.

**[62]** To buttress this submission, the appellants rely on the South African case of ***Glenister v. President of the Republic of South Africa*** [2011] ZACC 6;2011 (3) SA 347(CC); 2011(7) BCLR 651 in which, while interpreting the provisions of Section 7(2) of the South African Constitution, which is similar to Article 21 (1) of our Constitution, (*Ncogbo CJ*) upheld the negative and positive state obligation to give effect to fundamental rights contained in the Bill of Rights.

**[63]** In addition, the appellants submit that it is incumbent upon the National Government to make policies and take other measures to ensure the protection of human rights under Article 21 (2) of the Constitution. They submit further that, in accordance with the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, the

State has an obligation to put in place, measures to ensure the realization of social, economic and cultural rights.

**[64]** It is therefore the appellants' submission that the Court of Appeal specifically failed to find that the Attorney General being the Government representative, and the one who had initiated the forceful eviction, had not protected, promoted or fulfilled the rights to housing and dignity as enshrined in the Constitution.

**[65]** It is the appellants' main argument that the 1st respondent had a negative obligation to refrain from interfering directly or indirectly with the right to adequate housing by avoiding or refraining from instigating the forced evictions and demolitions. The appellants also submit that although the 1st respondent is a creature of Statute, it remains a State Agency and a public body. As such, it cannot escape the duties imposed upon the State with regard to the right to housing. They rely on Section 3(1) of the Interpretation and General Provisions Act Cap 2, and Section 4 of the Public Service (Values and Principles) Act No 1A of 2015 in furtherance of their argument.

**[66]** Relying on CESCR General Comment No. 4, on the Right to Adequate Housing, they urge further that the Court of Appeal failed to address itself to the normative content of the State's obligation attached to the said right in view of an admitted forceful eviction and erred further by not interrogating the State's obligations to the appellants in the circumstances. It is submitted that a critical analysis of the positive obligation imposed upon the State with regard to the right to housing, would have enabled the Court to appreciate the fact that the appellants were entitled to certain remedies.

**[67]** On the *progressive realization of Article 43 rights*, the appellants submit that the term "progressive" does not afford the State *a Carte-Blanche* to postpone or suspend its obligations. On the contrary, it requires the State to take immediate steps to the maximum of its available resources to realize those rights. They therefore urge that, the State cannot sanction an eviction in the absence of a concomitant duty to ensure alternative housing for the evictees.

**[68]** They further submit that the State must not only begin to take steps towards the realization of the rights under Article 43 of the Constitution, it must be seen to be taking such through clear policies and demonstrable measures. In support of this argument, the appellants cite ***Okwanda v. Minister of Health and Medical Services***, Petition No 94 of 2012 (paragraphs 15-16); ***MMM v. Permanent Secretary, Ministry of Education & 2 Others [2013] eKLR;*** and ***The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*** (*Limburg Principles*).

**[69]** The appellants submit that the Appellate Court completely disregarded *Article 20(5)* of the Constitution in applying Article 43 rights., In this regard, they urge that it was the responsibility of the State to not only demonstrate that resources were not available, but also to demonstrate priority in allocating, to the widest possible enjoyment of the right to housing, having regard to prevailing circumstances including the vulnerability of the appellants. They submit that the State had an obligation to protect the appellants' existing homes, rudimentary as they were, while doing whatever it could to the extent of its resources, to ensure their progressive access to adequate housing.

**[70]** On the third issue as to *whether the Court of Appeal erred in law in its analysis of the applicability of international law,* it is the appellants' submission that Article 2(5) incorporates general rules of international law while Article 2(6) incorporates international treaties ratified by Kenya into Kenyan laws. They urge that the Court of Appeal misinterpreted the application of international law by the High Court, more so its reliance on UN General Comment No. 7.

**[71]** They add that General Comment No. 7 derives its authority from Article 21 of the ICESCR and although not binding, is an authoritative interpretation of the State's treaty obligations. That the Comment was rendered by the treaty body and is intended to assist States Parties in interpreting and complying with their obligations under the treaty. They therefore urge that the UN General Comments and Guidelines are part and parcel of the ICESCR and are an authoritative interpretative guide on the meaning and the

content of the treaty. That since Kenya is a State Party to the ICESCR, the trial Court was justified in relying on the UN General Comments.

**[72]** To further justify reliance on General comments No. 7, the appellants submit that our Courts have time and again relied on UN general comments as persuasive value in interpreting different provisions of the Constitution as was in the cases of; ***Attorney General & Others v. Kituo cha Sheria & 7 Others,*** Civil Appeal No 108 of 2014 [2017] eKLR, where the Court of Appeal relied on International Covenant on Civil and Political Rights, UN Human Rights Committee, General Comment No. 27; ***PAO & 2 others v. the Attorney General*** [2012] eKLR, the High Court applied General Comment Nos. 14 and 17 in determining the right to health; ***Satrose Ayuma Case (Supra)*** and ***Susan Waithera Case (Supra).***

**[73]** Citing this Court's decisions in ***The Matter of the Principle of Gender Representation in the National Assembly and Senate*****,** Advisory Opinion No. 2 of 2012, [2012] eKLR ; ***In the Matter of the Kenya Commission on Human Rights*****,** Advisory Opinion No 1 of 2012, [2012] eKLR; **and *Communication Commission of Kenya & 5 Others,*** Petition No. 14 of 2014, [2014] eKLR; the appellants urge that in interpreting Article 2 (5), the Constitution must be read holistically and in a manner that provides the most robust and expansive protection of fundamental rights and freedoms. The appellants submit that the Court of Appeal was required to adopt a more expansive interpretation of the scope of Article 2(5) to include sources of law other than customary international law. It is their view that the Judges should have considered the UN General Comment No. 7 to arrive at an interpretation that most favours the enforcement of rights. They submit that the Appellate Court ignored widely adopted international human rights law standards in its interpretation.

**[74]** On the fourth issue as to *whether the Court of Appeal erred in law in the interpretation and application of the political doctrine question*, more so its characterization of the High Court Orders as delving into policy formulation; the appellants submit that the High Court's directives were an attempt to obtain additional

information in order to grant the appropriate relief. It is the appellants' contention that in relying on ***Marbury v. Madison*** 5 US. 137 and applying the political question doctrine, the Court of Appeal ignored several provisions of the Constitution and Supreme Court jurisprudence that establish greater powers for Kenyan Courts in upholding, interpreting an applying the Constitution.

**[75]** To this end, the appellants submit that in adopting the narrow reasoning, the Appellate Court had rendered the High Court powerless in its endeavor to determine if, national values and principles articulated in Article 10(1)(b) of the Constitution were considered by the Executive in public policy formulation and implementation as provided for in Article 19(1) of the Constitution. It is their argument that the reliance on the "political question doctrine" by the Court of Appeal had flown in the face of Article 20(1) the Constitution, which clearly envisages that Courts and tribunals have power to review policy decisions, concerning social-economic rights.

**[76]** They further urge that the application of the "political question doctrine" disregards this Court's holding in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others***, Petition No 14, 14A, 14B and 14C, 2014 [2014] eKLR, ***(Communications Commission of Kenya Case),*** where the Court cautions against unthinking deference to common law canons of interpretation, and foreign cases; and the decision in ***Judges & Magistrates' Vetting Board v. Center for Human Rights Democracy*** [2014] eKLR, which held that the principles enshrined in Articles 23(3)(d) and 165(3)(d) of the Constitution require Kenyan Courts to go beyond the USA Supreme Court in the ***Marbury v. Madison Decision***. It is their further contention that the "political question doctrine" and the concept of separation of powers cannot oust the jurisdiction of Courts to interpret the Constitution to determine whether anything done is in contravention thereof.

**[77]** On the fifth issue as to *whether the Court of Appeal erred in its interpretation of appropriate remedies* under Article 23(3) of the Constitution, the appellants submit that

Article 23(3) provides the High Court with the discretion to issue remedies including structural interdicts, injunctions, continuing mandamus, supervisory orders or any other appropriate relief. They urge further that as was held by this Court in the ***Communications Commission of Kenya Case***, the word including in Article 23(3) means that the reliefs listed in the provision are not exhaustive and therefore the Court can issue others as it deems appropriate. In addition, the appellants submit that in a number of decisions, the High Court has interpreted the term 'appropriate remedy' to mean "effective remedy to a constitutional violation". They cite the following decisions in support of their assertion; ***Law Society of Kenya v. The Attorney General & Another*** Constitutional Petition No. 307 of 2018, [2019] eKLR; ***Republic v. Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & Another Ex-Parte Council of County Governors & Another,*** Misc. App 291 & 314 of 2016 [2017] eKLR; and ***Republic v. Council of Legal Education & Another Ex-Parte Mount Kenya University,*** Misc. App 16 of 2016.

**[78]** The appellants are categorical that a structural/supervising interdict is a remedy available in Kenya under Article 23 (3) of the Constitution in a similar manner as was fashioned in the South African case of ***Fose v. Minster of Safety & Security*** [1997] ZACC 6;1997(7) BCLR 851;1997 (3) SA 786, and applied in the High Court decision of ***Republic v. Council of Legal Education & Another Ex-Parte Mount Kenya University*** *(supra)* paragraphs 144-145. The same approach, urge the appellants, was followed in ***Daniel Ngetich & 2 Others v. The Attorney General & 3 Others*** Petition No. 329 of 2014; [2016] eKLR (***Daniel Ngetich Case)*** where the High Court issued structural interdicts as a remedy to protect the right to highest attainable standards of health, regarding inmates with infectious tuberculosis.

**[79]** The appellants fault the Court of Appeal for disregarding the principle of *stare decisis* by not following binding precedents set by this Court on the use of structural interdicts or other appropriate reliefs in ***Communications Commission of Kenya***

***[Supra],*** and ***Francis Karioko Muruatetu Another v. Republic [Supra],*** wherein the Supreme Court granted unspecified reliefs under Article 23.

**[80]** In conclusion, the appellants make the case that, where a Court makes a structural remedial Order, it cannot be said to have become *functus officio,* as it would not have completed its judicial task. They also submit that the Appellate Court erred in failing to apply Article 159 of the Constitution, which requires Courts to promote the use of alternative forms of dispute resolution. It is the appellant's view that it was perfectly in order for the High Court to issue an Order allowing Pamoja Trust and other relevant stakeholders to participate in finding solutions to forced evictions and violations of the right to adequate housing.

### *(b) 1st Respondent's Case*

**[81]** In response to the appeal, the 1st respondent filed Grounds of Opposition dated 20th February, 2019, written submissions dated 8th March, 2019, and a List of Authorities dated 19th May, 2019.

**[82]** It relies on twelve (12) grounds of opposition, summarized as follows, that:

(i) *The appellants admit the subject matter is registered in favour of the 1st respondent, that the 1st respondent did not grant its consent for the appellants to occupy the suit land hence the 1st respondent cannot be said to have violated the appellants' rights to property under Article 40;*

(ii) *the realization and enforcement of social economic rights should not be taken as conferring proprietary rights;*

(iii) *that the appellants were granted adequate notices;*

(iv) *that the Court Order issued on 22nd September 2011, was never known or served upon the 1st respondent;*

(v) *by consent, the Court of Appeal set aside a Ruling by the High Court that the 1st respondent managing director was in contempt hence the demolitions were not carried out in contravention of any Court Order;*

(vi) *the 1st respondent has no power to alienate or grant land to the appellants hence the High Court Orders directed to the 1st respondent to find a solution to relocate the appellants was untenable;*

(vii) *that the appellants illegally occupied and developed the land on a flight path hence the right of the appellants' could be limited under Article 24 of the Constitution;*

(viii) *it was prejudicial for the High Court to issue partial or interim Judgment; that the trial Court abdicated its judicial function to third parties;*

(ix) *there is no evidence the 1st respondent was responsible or carried out the demolition;*

(x) *the realization of social economic rights is progressive and must be balanced on available resources;*

(xi) *the appellants have introduced new facts not pleaded before the trial Court; and finally,*

(xii) *the High Court granted Orders that had not been prayed for by the appellants.*

**[83]** Subsequently in written and oral submissions, the 1st respondent addresses the Court on five issues. On *whether the learned judges were justified in interfering with the trial Court's discretionary grant of structural interdicts under Article 23* of the Constitution, the 1st respondent, submits that structural interdicts or supervisory Orders are not traditional remedies under common law jurisdiction, that the same are relatively novel concepts developed by innovative judicial officers especially applied in respect to the Constitution of South Africa and Canada.

**[84]** The 1st respondent urges the need for caution in resorting to structural interdicts by considering the context in which such remedies emerged in South Africa. It is the 1st respondents submission that this jurisprudence gained traction in the post-apartheid political and social setup, as illustrated the South African Constitutional Court reasoning in; ***Grootboom v. Oostenberg Municipality*** 2000(3) BUR 277(C) where the Court upheld the High Court grant of structural interdicts as a remedy in the protection of the right to shelter; ***Minister of Health v. Treatment Action Campaign*** 2002 (5) SA 721 (CC) where the Court found that the High Court had jurisdiction to issue structural interdicts against the government but cautioned that the orders should only be made where necessary and the orders should not be construed as preventing the government from adopting its own policy if it was appropriate or if better methods were available; ***Fose v. Minster of Safety and Security*** 1997 (3) SA 786 (CC) where it was held that the Court in interpreting and enforcing the bill of rights has jurisdiction to be innovative and to issue an appropriate relief including structural interdict. However, the Constitutional Court stated that such a remedy must be effective. In ***Moderkplip Boerdery (Pty) Ltd v. Modder East Squatters*** 2003(6) BCLR 638 (T), the Constitutional Court set aside the High Court orders stating the case was not suitable for structural interdicts. I

**[85]** The 1st respondent further argues that the use of structural interdicts is even more restricted, in jurisdictions such as Canada whose Constitutional architecture is similar to South Africa's. For example, it makes reference to the decisions in ***Doucet-Boudreu v. Nova Scotia (Minster of Education)*** [2003] 3 SCR 3 by the High Court, Court of Appeal, and Supreme Court. The trial judge had issued a structural interdict having found that the government had violated the right to provision of minority language facilities. However, on appeal, the Court of Appeal held that the trial judge could not retain jurisdiction by way of structural interdicts, having become *functus officio*. On a further appeal, the Supreme Court of Canada upheld the High Court's jurisdiction to issue structural interdicts, but only in appropriate cases.

**[86]** The 1st respondent submits that structural interdicts are only suitable, where the executive branch of government is shown to be intransigent or incompetent; where there is evidence that declaratory orders may not be of assistance on account of past conduct of the government; where all attempts and efforts at persuasion and assistance to the state have been made and failed; and where the order is not ambiguous, but clear and specific as to what is required of both parties. In this regard, argues the 1st respondent, a Constitutional relief must be effective and appropriate as demonstrated by a reasonable prospect of it being successfully implemented and practically complied with as was held in the South African case of ***Johannesburg Metropolitan Municipality v. Blue Moollight Properties 39 (Pty) Ltd*** 2012 2 BCLR 150 (CC)**.** It is therefore the 1st respondent's case that the High Court order in the instant matter was not only vague, it also failed to articulate the normative parameters and guidelines for participating parties and the specific persons to which the desired resolution of the dispute applies. It submits that it has neither the Constitutional mandate, nor the resources to allocate alternative land to the appellants.

**[87]** On the issue as to *whether the 1st and 2nd respondents failed to meet their obligations towards the appellants under Article 21 of the Constitution,* the 1st respondent submits that it was not responsible for any forceful eviction from or demolitions of the appellants' premises. In this regard, argues the 1st respondent, the Court of Appeal was in order to vindicate it regarding the demolitions.

**[88]** The 1st respondent submits that it is not a State Organ within the meaning of Article 260 of the Constitution, which defines a state organ as "a commission, office, agency or other body established under the Constitution". As such, it does not have any obligation to provide housing to the appellants. In arguing thus, the 1st respondent distinguishes Article 260 of our Constitution from Article 239 of the South African Constitution. The latter, unlike ours, defines a state organ as including all public bodies with an attendant obligation to provide healthcare, adequate food, clean and safe water, housing, and any other social-economic rights.

**[89]** On *whether the Court of Appeal erred in law in its analysis of the applicability of international law,* the 1st respondent concurs with the Appellate Court's holding and submits that while applying the general rules of international law, the Courts ought to have regard to the hierarchy of laws in Kenya and the supremacy of the Constitution as set out in Article 2(4) of the Constitution.

**[90]** The 1st respondent urges the Court to uphold the supremacy of the Constitution in the application of general rules of international law. It submits that the jurisdictions of America, Canada, Nigeria, South Africa and India more often than not, tend to gravitate towards upholding the supremacy of their domestic Constitutions. It cites the American case of ***Reid v. Covert*** 354, US 1(1997); the Canadian case of ***R v. Hape*** [2007]2 SCR 292; the Nigerian case of ***Ibidapo v. Lufthansa Airlines*** 4 NWLR (Pt498) 124 and the India case of ***National Legal Services Authority vs Union of India & Others*** (AIR 201 SC 1863) in support of this submission. The 1st respondent submits that in a monist system such as Kenya's, the Courts have a responsibility to resolve the tension between international human rights treaty obligations and the Constitution in favour of the latter.

**[91]** On *whether the Court of appeal failed to interpret the progressive realization of the right to housing under Article 21 and 23,* the 1st respondent submits that this Court had the opportunity to consider the concept of progressive realization of rights in the ***Matter of the Principle of Gender Representation in the National Assembly and the Senate*** Advisory Opinions Application 2 of 2012, [2012] eKLR and determined that progressive realization simply refers to the gradual or phased-out attainment of a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The Court went further to observe that the expression "progressive realization", as apprehended in the context of the human rights jurisprudence, signifies that there is no mandatory obligation resting upon the State to take particular measures, at a particular time, for the realization of the gender-equity principle, save where a time-frame is prescribed.

That any obligation assigned in mandatory terms, but involving protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realization of a goal. In view of this finding, the 1st respondent submits that it was erroneous for the Trial Court to have determined that there was a violation of the appellants' economic and social rights under Article 43 of the Constitution.

**[92]** On the issue as to *whether the Appellate Court erred in its interpretation of Articles 24 of the Constitution on limitations of rights*, the 1st respondent concurs with the Appellate Court to the effect that public interest, public policy, and national security, may be taken into account to limit individual rights under the Bill of Rights. It relies on the South African case of ***S v. Manamela & Another (Director General of Justice Intervening)*** CCT 25/99 to urge that key factors have to be considered in an overall assessment as to whether or not a limitation is reasonable and justifiable in an open and democratic society. The 1st respondent therefore submits that, each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom.

### *(c) 2nd and 3rd Respondents' Case*

**[93]** The 2nd and 3rd respondents' written submissions and List of Authorities are both dated 15th May, 2020 and filed on even date. They submit on four issues. On the issue as to *whether the Court of Appeal erred in failing to find that the respondents violated the appellants' rights under Articles 26, 27, 28, 29, 40, 43, 47 and 56 of the Constitution,* the respondents submit that the 3rd respondent acted in accordance with Article 40 as read with Article 65 of the Constitution and Article 17 of the United Nations Declaration of Human Rights in protecting the 1st respondent's right to property.

**[94]** They submit further that, the Constitution guarantees rights and freedoms to be enjoyed by all citizens, and that each individual must ensure their enjoyment of rights, does not infringe upon the rights of others. To this end, they submit that it is ironical for

the appellants, to claim a right to housing on one hand, and yet trample upon the 1st respondent's right to the use and enjoyment of the suit land on the other hand. It is their argument that to allow the appellants claim, would encourage people to trespass on private or public land with the intention of acquiring "housing rights" over the same.

**[95]** On *whether the Court of Appeal failed to properly interpret and apply the concept of progressive realization of the right to housing under Article 21 of the Constitution,* they rely on this Court's opinion in ***The Matter of the Principle of Gender Representation in the National Assembly and Senate [supra]*** to submit that in the context of human rights jurisprudence, there is no mandatory obligation resting upon the state to take particular measures at a particular time.

**[96]** They submit further that pursuant to Articles 21 and 25 of the Constitution, social economic rights are not absolute but are limited and subject to the rights and freedoms of others. They rely on the Court of Appeal decision in ***Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited v. Governor Central Bank of Kenya & 2 Others*** Misc. Civil Applic 1759 of 2004, [2006] eKLR to buttress this point.

**[97]** The 2nd and 3rd respondents submit that whereas social economic rights are recognizable and justiciable, the enforcement and implementation of the same cannot confer property rights in land. They rely on the persuasive authority as decided in ***Moi Education Centre Company Limited v. William Musembi & 16 Others*** [2017] eKLR and urge that prescriptive rights in land cannot be acquired in the name of enforcement of social economic rights.

**[98]** In addition, they urge that the rights claimed by the appellants, are subject to the provisions of Article 40 of the Constitution, as read with Sections 24 and 26 of the Land Registration Act, and cannot therefore accrue from an illegal occupation. They submit that there has been no documentary evidence adduced by the appellants, to prove their direct or contingent entitlement to the suit land. They cite the High Court decision of ***John Mukora v. Minister of Lands & 6 Others***, Petition No 82 of 2010, [2013]

eKLR, to urge that the right to property under Article 40 can only be enjoyed by registered proprietors of the land in question.

**[99]** On *the issue as to whether a self-help group can hold property in its own capacity*, the 2nd and 3rd respondents submit that since *Mitu-bell Welfare Society* was an un-incorporated entity, it had no legal capacity to own land. They rely on the decision in ***Kipsiwo Community Self Help Group v. the Attorney General*** Environment and Land Petition No 9 of 2013, [2013] eKLR to support their argument.

**[100]** On *whether the Appellate Court erred in its interpretation of Article 24 of the Constitution on limitations of rights*, the 2nd and 3rd respondents submit that the Appellate Court was right in upholding public interest and national security as a reasonable ground to limit the appellants' right to housing.

**[101]** On *whether the learned Judges of Appeal were justified in interfering with the High Court's discretionary grant of structural interdicts under Article 23,* the 2nd and 3rd respondents submit that in the interpretation and application of the Bill of Rights under the Constitution, a Court has the jurisdiction to be innovative and to issue appropriate reliefs including supervisory orders. They however contend that in the issuance of the supervisory orders, case law has demonstrated that certain principles must be met. They submit further that the South African Constitutional Court decision in ***Fose v. Minister of Safety and Security,*** 1997 (3) SA 786 (CC) establishes the principle that such remedies must be effective. To this end, the respondents insist that the supervisory order issued by the High Court was neither effective nor appropriate as it could not have benefitted the appellants in any way.

### *(d) Amicus Curiae Brief*

**[102]** The *Amicus* addresses four issues, namely:

*(i) the meaning of the right to a remedy in the context of human rights violations;*

*(ii) the evolution of remedies in human rights litigation under international law and regional human rights systems;*

*(iii) comparative jurisprudence on issuance of structural interdict as effective and sufficient remedies; and*

*(iv) applicable Kenyan jurisprudence on the execution of the Courts' Constitutional mandate to provide appropriate relief under Article 23(3) of the Constitution.*

**[103]** As an introduction to their submissions, they urge that Superior Courts have an inherent jurisdiction to issue remedies in rights-based cases and in the discharge of this power, Courts must ensure that their orders are just and equitable. In issuing such orders, Courts must always be alive to the doctrine of separation of powers. They urge further, that states have an obligation to ensure that human rights violations do not go unpunished and that the victims can seek effective remedies from Courts of law.

**[104]** On *the meaning of the right to remedy*, the *Amicus* submits that traditionally, the right to remedy arises from the State's obligation for all wrongs committed in its territory. In such a situation, the consequential remedy was addressed to the victim's state as opposed to the individual. However, with the growth and development of international human rights law, the remedies are now addressed to individuals for violations of their rights.

**[105]** As to the evolution of the right to remedy under international law, the *Amicus* embraces the principle enunciated in the ***Charzow Factory Case*** (1928) PCIJ (ser. A) No. 17 page 47, by the Permanent Court of International Justice, wherein, it was stated that, repatriation must remove the consequences of the illegal act, and revert to the situation that would have existed if the act was not committed. It is the opinion of the *Amicus* that the foregoing case signals that *restitution* and *compensation*, are effective remedies that Courts of law should resort to in cases of human rights violations. Under the *international sphere*, the *Amicus* submits that Article 2(3) of the ICCPR

provides for an effective remedy for violation of the rights and freedoms provided for in the Convention.

**[106]** Turning to the *African context,* the *Amicus* notes that the African Charter on Human and Peoples' Rights, does not have a provision mandating its supervisory bodies, with an express authority to grant remedies for violation of human rights. The *Amicus* however submits that, Article 27 of the Charter's Protocol, creating the African Court On Human and Peoples' Rights, mandates it to grant appropriate remedies for violations of human and peoples' rights.

**[107]** In addition, the *Amicus* submits that the African Commission on Human and Peoples' Rights (African Commission) held in ***Sir Dawda Jawara v. The Gambia*** (2000) AHRLR 107 that states are obligated to provide remedies that must be effective, available and sufficient. The Commission has granted remedies crafted with great deference to states concerned, such as ordering the state to take measures to align them to the African Charter.

**[108]** The *Amicus* submits that in line with Rule 112 of its Rules, the Commission has in a number of decisions, directed States to report to it on the measures undertaken to implement its recommendations. For example, notes *the Amicus*, in ***The African Commission on Human and Peoples' Rights Commissions v. Republic of Kenya*** Application No. 006 of 2012, the African Court ordered Kenya to take all appropriate measures within a reasonable timeframe, to remedy the violations and report to the Court on the measures taken within six months. The *Amicus* submits that, the African Court has recognized structural interdicts as appropriate remedies for the enforcement, full realization and implementation of Court orders and recommendations.

**[109]** Turning to the *Inter American Human Rights system*, the *Amicus* submits that the Inter American Court on Human Rights has also embraced what can be considered as structural edicts as forms of remedy to redress human rights violations. It adds that the Inter American Court has consistently ordered parties to report back on measures

the States Parties have taken to comply with the decisions handed down on human rights violation claims.

**[110]** The *Amicus* submits that the *European Human Rights System* guarantees the right of victims to an effective remedy under Articles 13 and 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). Under this System, submits the *Amicus,* a remedy must be effective in practice and in law as decided by the European Court on Human Rights in the ***MSS v. Belgium and Greece***, Application No 30696 of 2009, and Judgment of 21 Jan, 2011. The *Amicus* urges that in addition to restitution and compensation, structural interdicts are increasingly resorted to by Courts in human rights cases. Towards this end, the *Amicus* cites the decisions by the South African Constitutional Court in ***Government of the Republic of South Africa & Others v. Grootboom & Others 2 Case*** *[Supra];* ***Minister of Home Affairs v. National Institute for Crime Prevention and Re-integration of Offenders*** (NICRO) 2004 (5) BCLR 455 (CC); ***Sibiya and Others v. The Director of Public Prosecutions; Johannesburg High Court & Others*** 2005 (8) BCLR 812 (CC); and most recent decision in ***All-Pay Consolidated Investment Holdings v. Chief Executive Officer of the South African Social Security Agency & Others*** [2014] ZACC 12.

**[111]** The *Amicus* also cites ***Decision T-760*** from Colombia where, in 22 accumulated cases, the Court ordered remedies for 22 individual cases and compelled the government authorities, to modify regulations that cause structural problems in the system. The *Amicus* submits that this Judgment has been fully implemented and is significant in granting Orders that are geared towards public policy reforms.

**[112]** As for the Kenyan situation, the *Amicus* submits that Article 23 (3) of the Constitution allows for resort to structural interdicts as appropriate forms of relief. In the opinion of the *Amicus,* an appropriate relief, is a remedy that is sufficient, effective, and able to address the violation in question. The *Amic* submits that the actual content, shape, and form of these remedies are better left to the Courts' discretion. In support of

this argument, the *Amicus* cites the decisions by the High Court in ***Republic v. Council of Legal Education*** Misc. Application No 16 of 2016 [2016] eKLR, and ***Daniel Ng'etich [supra]*** wherein the Court issued structural interdicts against the Ministry of Health. The *Amicus* also cites this Court's decision in the ***Communications Commission of Kenya Case*** *[Supra]* to urge that Article 23(3) of the Constitution does not limit the Court to the reliefs listed.

**[113]** the *Amicus* submits that emerging jurisprudence from international and regional human rights bodies demonstrates the expanding resort to structural interdicts as appropriate and effective reliefs in human rights cases. The *Amicus* further submits that Article 23(3) of the Constitution gives the Courts wide powers to fashion appropriate remedies on a case by case basis. Towards this end, argues *the Amicus,* a court of law does not become *functus officio* after it delivers a Judgment in the form of a structural interdict.

## D. ANALYSIS

**[114]** Although this Appeal was certified as one involving a matter or matters of general public importance by the Court of Appeal, the Appellate Court did not identify the issues or points of law, that the Supreme Court ought to pronounce itself upon. In view of this situation, we have no option but to revisit our holding in ***Hermanus Phillipus Steyn v. Giovanni Gnnecchi-Ruscone;*** Sup. Ct Appl. No. 4 of 2012 [2013] *(Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)* wherein, we stated, (para 60):

> ***"For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest."***

Further on, we stated:

> **"*... a matter meriting certification as one of general public importance,* *if it is one of law,* *requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below.*"**

**[115]** Applying these principles to the appeal before us, we hereby identify the following issues/questions of law as meriting our attention under Article 163 (4) (b) of the Constitution. These are:

1. What is the place of ***Structural Interdicts*** (if any) as forms of relief in human rights litigation under the Constitution?
2. What is the effect of Article 2 (5) and 2 (6) of the Constitution regarding the applicability of international law in general and international human rights in particular?
3. To what extent are Guidelines by UN bodies relevant in the interpretation and application of Socio-Economic Rights by Kenyan Courts under the Constitution?
4. Under what circumstances may a Right to Housing accrue (if at all) in accordance with the provisions of Article 43 (1) (b) of the Constitution?

As must be apparent from the ***ratio*** in **Hermanus** (Supra), all the other issues do not pass the threshold envisaged under Article 163 (4) (b) of the Constitution. Other issues, such as, what constitutes the right to property, would have been more appropriately addressed under Article 163 (4) (a) of the Constitution.

### *(i) Structural Interdicts*

**[116]** The point of divergence between the High Court and Court of Appeal, regarding the place of structural interdicts as forms of relief in case of alleged human rights violation by the State, is quite stark. On the one hand, the trial Judge had no or little hesitation in granting interim Orders requiring the respondents to furnish the Court, with information regarding policies and programmes on provision of shelter and access to housing. However, on its part, the Court of Appeal was of the view that the High Court could not reserve for itself, any outstanding issues, since it had become *Functus-Officio* after delivery of Judgment.

The High Court had ordered thus:

> ***"(a) That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.***
>
> ***(b) That the respondents do furnish copies of such policies and programmes to the petitioners, other relevant State Agencies, Pamoja Trust (and such other civil society organizations as the petitioners and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioners' grievances, to analyse and comment on the policies and programmes provided by the respondents."***

But in setting aside these Orders of the High Court, the Court of Appeal stated:

> ***"(a) The trial Court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the***

***Constitutional mandate to identify and determine appropriate relief and resolution to the petitioners' grievances.***

***(b) Subject to limited exceptions, delivery of Judgment renders a trial Court*** *functus-officio.* ***The trial Court erred in law in reserving for itself outstanding issues to be considered after Judgment. The Court further erred in allowing affidavits and or pleadings to filed after delivery of Judgment.***

***(c) Whereas a Court has jurisdictional competence to issue interim orders, the trial Court failed to appreciate that the concept of partial or interim Judgment is not part of the Kenyan legal system. ...the trial Court erred in delivering a Judgment that was not a final Judgment that determined the rights and liability of the parties.***

**[117]** It is clear from the foregoing, that the two superior Courts hold diametrically opposed views regarding *structural interdicts or interim Orders*. In considering this issue, we regard Article 23(1) and 23 (3) of the Constitution to be the launching pad of any analysis into the place and scope of interim orders in our human rights enforcement architecture. Article 23 (1) of the Constitution provides that:

> "*The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications* ***redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights"*** (Emphasis added).

Article 23 (3) of the Constitution provides that:

> "*In any proceedings brought under Article 22, a Court* ***may grant appropriate relief, including:***
>
> ***(a) a declaration of rights***

***(b) an injunction***

***(c) a conservatory order***

***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***

***(e) an order for compensation***

***(f) an order of judicial review***

**[118]** The Supreme Court had occasion to consider the scope of Article 23 (3) of the Constitution, as read with Article 165 (3) (d) of the Constitution in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others;*** Petition No. 14, 14A, 14B and 14C of 2014 (Consolidated); The Court stated:

> *"... a close examination of these provisions (Article 23 (3) and 165 (3) (d) of the Constitution) shows that* ***the Constitution requires the Court to go even further than the U.S Supreme Court did in the Marbury*** , and that ***Article 23 (3) grants the High Court powers to grant appropriate relief "*** *including"* ***meaning that this is not an exhaustive list."***

The Court went further to observe as follows: [Para 412]

> *"It is emerging already, in this Court's path of jurisprudential development, that we have endeavoured to enhance and, as far as possible, stabilize the objective normative yardsticks that assure certainty and predictability in the application of the Constitution and the law to the merits of particular cases."*

The Court then issued the following Orders *Inter-alia:*

***(d) The 1st Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD lisence by the 1st, 2nd, and 3rd respondents,***

***and of any other local private sector actors in the broadcast industry, whether singularly or jointly.***

***(e) The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD lisence issued to the 5th appellant herein, is duly aligned to Constitutional and statutory imperatives.***

***(f) The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set timelines for the digital migration, pending the International Analogue Switch-Off Date of 17th June, 2015.***

***(g) Upon the course of action directed in the foregoing Orders (d & e) being concluded, the 1st appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention on the basis of priority, before a full Bench.***

**[119]** There can be no doubt, that in issuing the foregoing Orders, this Court was well aware of their interim nature, and that in doing so, it was giving effect, to Articles 23 (3) and 165 (3) (d) of the Constitution pursuant to Section 3 of the Supreme Court Act. However, the Court of Appeal merely stated, without more, that it was cognizant of our Orders in the ***Communication Commission Case*** *[*Supra*]*. The Appellate Court also took note of two High Court decisions, to wit, ***Satrose Ayuma & 11 Others v. The Registered Trustees of the Kenya Railways Staff Retirment Pension Scheme & 2 Others*** Nairobi HC Petition No. 65 of 2010; (*Lenaola, J,* as he then was); and ***Kepha Omondi Onjuro & Others v. Attorney General & 5 Others;*** Nairobi HCC Petition No. 239 of 2014; *(Odunga J)* wherein orders similar to the ones issued by the trial Court, in the instant case had been granted.

In ***Muruatetu*** (Supra), this Court made the following orders, *inter alia;*

***"(b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment***

***(c) The Attorney General, the Director of Public Prosecutions and other relevant agencies, shall prepare a detailed professional review in the context of this judgment and Order made with a view to setting up a framework to deal with sentence-re-hearing of cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same"*** (see para 112).

**[120]** By not clearly distinguishing our decisions in the ***Communication Commission and Muruatetu Cases,*** and by finally faulting the High Court's approach in the three cases, we can only conclude that, the Court of Appeal, simply disregarded our signal, concerning interim reliefs that a Court may issue to redress the violation of a fundamental right. Instead, the Appellate Court was categorical that a Court of law becomes *functus-officio* once it has delivered Judgment. The Court placed critical emphasis on Order 21 of the Civil Procedure Act, which can be regarded as the embodiment of the *functus- officio* doctrine. (see paras 68-72 of the Court's Judgment). The Court appeared to have shut the door, to the use of interim reliefs or structural interdicts, in human rights and other Constitutional litigation when it declared that:

> "*…the concept of partial Judgment or interim Judgment after hearing of the parties is unknown to the Kenyan law."*

**[121]** We are however, in agreement with the submissions of the appellant and *Amicus Curiae*, to the effect that Article 23 (3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this Court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the *functus-officio doctrine* retains its validity, even vitality, in the majority of cases,

both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis. To subject Article 23 of the Constitution to the limitations of Rule 21 of the Civil Procedure Act, would stifle the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a Court of law issues an order, whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.

**[122]** Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the Courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order. Most importantly, the Court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.

### *(ii) Applicability of International Law under Articles 2(5) and 2(6) of the Constitution*

**[123]** Article 2 (5) of the Constitution provides that—

> "The general rules of international law shall form part of the law of Kenya"

While Article 2 (6) of the Constitution provides that—

> "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

**[124]** These provisions have given rise to different and often conflicting judicial interpretations regarding their import and meaning. One school of thought holds the

view that by this declarations, Article 2 (6) of the Constitution has transformed Kenya from a *dualist* to *a monist* nation as far as its approach towards international treaties, conventions, and protocols, is concerned. Thus, whereas in the past Kenya had to "incorporate" an international treaty to which it was a State Party into its domestic law, before the former could take effect, Article 2 (6) now makes such a treaty directly applicable in the Country's legal system without more. On the basis of this presumption, a number of Courts have declared certain treaties and conventions as "*binding"* upon all our institutions of governance. Apparently, this conclusion derives from the Courts' interpretation of the expression, "*shall form part of the law of Kenya"* to mean ***shall be directly applicable in Kenya.***

**[125]** The other school of thought in our Courts, has adopted a more restrictive view of Article 2 (5) and (6) of the Constitution regarding the applicability of international law in our legal system. This school takes the position that, international law is subordinate to the Constitution, and as such, can only apply subject to the supreme law of the land. Obviously, the proponents of this view do not support the argument that Kenya is now a *monist state,* by dint of Article 2(5) and (6) of the Constitution. Before delving further into the anatomy of this Article, for purposes of conceptual clarity, let us re-emphasize the fact that Article 2(5) refers to *the general rules of international law* while Article 2(6) refers to the *treaties or conventions ratified by* Kenya.

**[126]** Article 2 (5) and (6) is better understood by revisiting the relationship between international law and municipal law, and the circumstances under which, one takes precedence over the other. On the international plane, international law is binding on all states, and every state is obliged to give effect to it. While the international obligation is upon the state, and not upon any particular branch, institution, or any individual member of its government, the state is responsible for the violation of international law by any of its organs. It is an established principle that a State cannot plead its own domestic law as an excuse for non-compliance with international law. Article 13 of the

*Declaration of Rights and Duties of States* adopted by the International Law Commission in 1949 provides:

> "***Every State has the duty to carry out in good faith, its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its Constitution, or its laws as an excuse for failure to perform this duty."***

This principle later found its way into Article 27 of the **Vienna Convention on the Law of Treaties** (specifically regarding treaties).

**[127]** On the domestic scene, since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic Courts apply and give effect to international obligations. However, states do from time to time, undertake to carry out their obligations by particular means, such as taking legislative and other measures to give full effect to their treaty obligations under international law. For example, the International Covenant on Civil and Political Rights requires states to enact laws to protect and ensure respect for rights thereunder; the Genocide Convention commits states to make genocide a crime; the U.N Convention against Corruption requires states to undertake a range of legislative and other measures in its domestic sphere so as to effectively combat corruption. Otherwise, States usually differ as to whether their Courts are required or permitted, by *their domestic law,* to give effect to the state's international obligations.

**[128]** So what meaning is to be attributed to the expression *"shall form part of the law of Kenya"* as provided in Article 2 (5) and (6)? This phrase was eloquently elaborated in ***the Paquete Habana Case;*** *Supreme Court of the United States, 1900 20 S. Ct. 290.* Considering the place and applicability of customary international law in the United States. Mr. Justice Gray stated:

> "***International law*** *is part of our law,* ***and must be ascertained and administered by the Courts of justice of appropriate jurisdiction as***

***often as questions of right*** *depending upon it are duly presented for their determination.* ***For this purpose,*** *where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these,* ***to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat…"*** [Emphasis added].

**[129]** Long before the American revolution, English Courts had been applying customary international law, with Lord Mansfield declaring that "*the law of nations* ***was part of the law of England"*** in ***Triquet & Others v. Bath,*** *97* Eng. Rep.936. 1764. In 1938, the Privy Council declared; ***"The Courts acknowledge the existence of*** *a body of rules which nations accept amongst themselves. On any judicial issue, they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law,* ***so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals"*** (see ***Chung Chi Cheung v. The King,*** [1939] A.C, 160) [Emphasis added].

**[130]** Where it has been used, as in the judicial pronouncements above, the expression *"part of our law"* means that domestic Courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement. The phrase *rules of international law*, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refers to customary international law.

**[131]** It is already clear that in our context, Article 2 (5) and (6) of the Constitution embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking. The Article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the Article can be considered to be stating the obvious,

in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party. Yet, reference to international law by a domestic Constitution is evidence of its progressive nature.

**[132]** On the other hand, Article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement. Where for example, a Court of law is faced with a dispute, the elements of which, require the application of a rule of international law, due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the Court must apply the latter, because, *it forms part of the law of Kenya*. In other words, Article 2(5) and (6) of the Constitution, recognizes international law (both customary and treaty law) as *a source of law* in Kenya. By the same token, a Court of law is at liberty, to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision (see for example, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate;*** S.C Advisory Opinion No. 2 of 2012, [2012] eKLR).

**[133]** Having dealt with this issue, we must conclude by stating that Article 2(5) and (6) of the Constitution has nothing or little of significance to do with the *monist-dualist* categorization. Most importantly, the expression "*shall form part of the law of Kenya"* as used in the Article does not transform Kenya from a dualist to a monist state as understood in international discourse. As already demonstrated, the phrase was in fact first embraced by the pioneer dualist states, i.e. the United Kingdom and the United States. At any rate, given the developments in contemporary treaty making, the argument about whether a state is *monist* or *dualist,* is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols

are *Non-Self Executing,* which means that, they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action.

### *(iii) The Role of U.N Guidelines in the Interpretation and Clarification of the Bill of Rights*

**[134]** The trial Judge in the instant case, relied on the *U.N Guidelines on Evictions; General Comment No.7,* issued by the U.N Office of the High Commissioner for Human Rights; to determine the conditions under which forced evictions may be undertaken in Kenya. In ***Kepha Omondi Onjuro*** (Supra) and ***Satrose Ayuma*** (Supra); the High Court had similarly adopted the said Guidelines as part of the law of Kenya pursuant to Article 2(5) of the Constitution.

**[135]** But, in taking issue with the High Court for relying on the U.N Guidelines, the Court of Appeal opined (at para 115):

> "***In the High Court decisions referred to above, reliance upon the U.N Guidelines is premised on Article 2 (5) and (6) of the Constitution. The Articles stipulate that the general rules of international law and any Treaty or Convention ratified by Kenya is part of the laws of Kenya.*** *Whereas we do not fault the High Court for citing the U.N Guidelines, it is imperative to bear in mind the hierarchy of laws in Kenya. The Supreme law in Kenya is the Constitution and if any general rule of international law or Treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails."* (Emphasis added).

**[136]** While we agree with the Court of Appeal's statement on the hierarchy of laws as quoted above, we are at pains to understand why the Appellate Court, faulted the High Court's reference to the Guidelines, on grounds of *inconsistency with the Constitution*. Indeed, it is unclear to us, how the principle of *hierarchy of laws* came into play. What particular stipulation in the Guidelines can be said to have fallen afoul of the

Constitution so as to be declared inconsistent? Or put another way, how are the U.N Guidelines, General Comment No. 7 inconsistent with the Constitution?

**[137]** The Court of Appeal also faulted the High Court's application of the U.N Guidelines on grounds that what Article 2 (5) of the Constitution envisages by the words "*general rules of international law"* are *peremptory norms of international law* or *JUS COGENS* and not all rules of international law. The Court stated (para 116):

> "***Further, it must be noted that Article (2) (5) of the Constitution makes general rules of international law to be part of the laws of Kenya.*** *It is the general rules that form part of the laws of Kenya and not all the rules of international law. In this context, rules of international law are not part of the laws of Kenya unless they are part of the general rules of international law.* ***The general rules of international law are those rules that are peremptory principles and are norms of international law; they are the customary rules of international law or*** *jus cogens* ***in international law, they are those rules from which no derogation is permitted; they are globally accepted standards of behavior; they are rules and principles that are applicable to a large number of states on the basis of either customary international law of multi-lateral treaties; the general rules of international law are not based on the consent of the State but are obligatory upon state and non-state actors on the basis of customary international law and peremptory norms."***

**[138]** With due respect to the Appellate Court, we do not find any indication in the wording of Article 2 (5) of the Constitution that the words *"general rules of international law"* refer only to the *peremptory norms of international law* or *jus cogens*. The two main basic sources of international law are International Treaties (either bilateral, multi-lateral or universal) and international custom. International law governs relations between independent states *qua states* and other subjects of international law. The rules

of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate their relations or achieve common aims. These two sources have exercised an influential role in the formation of international law. Article 38 of the Statute of the International Court of Justice provides that the Court is to apply *inter alia;*

> ***(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*** and
>
> ***(b) International custom, as evidence of a general practice accepted as law.***

The Statute is regarded as the most authoritative statement on the sources of international law.

**[139]** *Jus Cogens* is a technical term given to those norms of general international law which are of a peremptory force, and from which, as a consequence, no derogation is permitted. How an international rule gains the status of a peremptory norm is still debatable. The Vienna Convention on the Law of Treaties defines a peremptory norm of general international law as one which is "accepted and recognized by the International Community of States as a whole…" A peremptory norm may be derived from a custom or a treaty. There is still considerable uncertainty as to the scope and extent of *jus cogens*. Only a few examples have been identified as falling in to the category of *jus cogens,* such as the Prohibition on the Use of Force in the United Nations Charter (see ***The Nicaragua Case,*** ICJ. Rep, 1986), the Prohibition on Genocide, the Prohibition on Piracy and Slave trading, and the Right to Self-Determination.

**[140]** Therefore, *jus cogens* accounts for a very tiny *corpus* of the general rules of international law as we know them. International custom remains the basic source of general rules of international law (ordinarily referred to as *Customary International Law).* Is it conceivable then, that the framers of the Constitution, in their use of the

words *"general rules of international law"* could have been referring to the limited and still evolving concept of *jus cogens* as opposed to the whole *corpus* of customary international law? We think not. Even if we were to entertain such a possibility, the same is definitely not apparent on the face of Article 2 (5) of the Constitution. In light of the foregoing, we hold that the words *general rules of international law* in Article 2 (5) of the Constitution refer to customary international norms, including *jus cogens*.

**[141]** Having so declared, we must still determine whether the U.N Guidelines, Comment No. 7 can be regarded as *general rules of international law* within the context of Article 2(5) of the Constitution. There exists considerable literature regarding the effect of U.N Resolutions, Declarations, Comments, and Guidelines and their norm-generating quality in international law. The consensus emerging from such discourse is that, generally speaking, such resolutions, declarations, and comments do not ordinarily amount to norms of international law. At best they constitute what is called in international jurisprudence, *Soft Law*. However, it is also accepted that certain U.N General Assembly Declarations and Resolutions can ripen into a norm or norms of customary international law, depending on their nature and history leading to their adoption. A striking example is the Universal Declaration of Human Rights which was long considered as part of customary international law before the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

**[142]** The U.N Guidelines, General Comment No. 7 do not in our view qualify as general rules of international law, which have a binding effect on members of the international community. However, the Guidelines are intended to breathe life into the Right to Dignity and the Right to Housing under the ICCPR and the ICESCR respectively. They therefore constitute *soft law* in the language of international jurisprudence. In the instant case, while the trial Judge cannot be faulted for having referred to the Guidelines per se, being soft law, as opposed to general rules of international law, the learned Judge ought not to have elevated them to the status of Article 2 (5) of the Constitution.

However, given the fact that the learned Judge, was interpreting and giving life to the Bill of Rights, specifically the Rights to Dignity, Property, and Housing under the Constitution, she could have been in order to refer to the Guidelines as an aid in fashioning appropriate reliefs during the eviction of the appellants. Rather than offending the Constitution, the Guidelines actually do fill the existing lacuna as to how the Government ought to carry out evictions.

**[143]** Of even more significance is the fact that the U.N Guidelines in question were issued pursuant to Article 21 of the International Covenant on Civil Economic Social and Cultural Rights (ICESCR). Strictly speaking therefore, they can only be considered under Article 2 (6) of the Constitution, which refers to international treaties and conventions ratified by Kenya. These Guidelines cannot be regarded as being part of the treaty under which they were issued. They are tools or aids directed to states parties to help the latter in implementing the treaty or better fulfilment of their obligations there-under. Each state party is free to make use of the Guidelines, to the extent that is practicable under its legal system. The guidelines are not "binding" upon the states parties, nor are they *part of the law of Kenya* in the language and meaning of Article 2 (6) of the Constitution, unless they have ripened into a norm of customary international law, as evidenced by widespread usage. Again, we must emphasize that there is nothing wrong in a court of law making reference to the Guidelines as an interpretative tool aimed at breathing life into Article 43 of the Constitution.

### *(iv) The Reality of the Right to Housing under Article 43 (1) of the Constitution*

**[144]** This appeal revolves around the right to housing as guaranteed under Article 43 (1) of the Constitution. The appellants herein, were uprooted from their habitation by the Government, on grounds that their settlements lay on the flight path to Wilson Airport, thus posing danger to the security of the public and air travelers. By this action, the appellants were deprived of their right to shelter (read "housing") for however

informal, however decrepit, these settlements had been home to their existence, their aspirations, and their very humanity. The appellants case is that the State, through its duty-bearing organs, had an obligation to respect and protect their right to housing under Article 21 (1) of the Constitution.

**[145]** The respondents, on the other hand, argue that the appellants, had no recognizable title to the land from which they had been justifiably evicted, on security grounds. It is their case that a right to housing, cannot accrue from an illegal occupation of land by the claimants. At any rate, argue the respondents, such right, if any, is subject to the limitations stipulated in Article 24 (1) of the Constitution.

Article 43 (1) (b) of the Constitution provides that:

> ***"Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation."***

Article 21 (1) of the Constitution provides that:

> ***"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights."***

Article 21 (2) of the Constitution provides that:

> ***"The State shall take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43"***

**[146]** The crucial question we must consider is; when does the right to accessible and adequate housing accrue? In the language of Article 21, the right to housing, being an economic and social right, can only be realized progressively. In determining the import of the expression *"progressive realization"* ***in the Matter of the Principle of Gender Representation in the National Assembly and Senate;*** (Supra), the Supreme Court opined:

"***We believe, that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal-a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action."*** (see para-53)

**[147]** The issue of what constitutes the progressive realization of a socio-economic right has therefore been long settled. The right to accessible and adequate housing, just like any other right under Article 43, requires the State to take legislative, policy and other measures to achieve it. Under Article 20, the Constitution empowers the Courts and tribunals to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right. Regarding the rights under Article 43 of the Constitution, Article 20 (5) provides that:

"***In applying any right under Article 43, if the State Claims that it does not have the resources to implement the right, a Court, tribunal or other authority shall be guided by the following principles—***

***(a) It is the responsibility of the State to show that the resources are not available***

***(b) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals and***

***(c) The Court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available***

***resources, solely, on the basis that it would have reached a different conclusion***

**[148]** Article 20 (5) clearly empowers a Court or tribunal, presiding over a dispute, in which the petitioners are claiming that the State, has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability. How would a Court exercise its powers under this Article? By issuing interim Orders to that effect. The Orders have to be directed at the state organ responsible for the requisite measures. Such Orders by their very nature, must be interim, before the Court issues final Orders. This appears to be what the trial Judge intended by issuing the interim Orders, a matter to which we shall return.

**[149]** From the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with each successive government erecting the defence of "lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.

**[150]** This scenario has inevitably led to the emergence of the so called "informal settlements", an expression that describes a habitation by the "landless". In their struggle to survive, many Kenyans do occupy empty spaces and erect shelters thereupon, from within which, they eke their daily living. Some of these settlements sprout upon private land, while others grow on public land. It is these "settlers" together with their

families who face the permanent threat of eviction either by the private owners or State agencies. The private owners will raise 'the sword of title', while the State agencies will raise 'the shield of public interest'. So where does this leave the right to housing guaranteed by Article 43 of the Constitution?

**[151]** While we are in agreement with the submission to the effect that, an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants, we don't think the same can be said of an "illegal occupation" of public land. To the contrary, we are of the considered opinion, that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all? The retired Constitution did not create a specific category of land known as "public land". Instead, the constitution recognized what is referred to as "un-alienated government land". The radical title to this land was vested in the president, who through the Commissioner of lands, could alienate it, almost at will. The consequences of this legal regime have been adequately recorded for posterity elsewhere. The 2010 Constitution has radically transformed land tenure in this country by declaring that ***all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals.*** It also now creates a specific category of land known as ***public land.*** Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in ***public land.***

**[152]** The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under Article 60 (1) (a) of the Constitution. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the Court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that, the eviction may be entirely justifiable in the public

interest. But, under Article 23 (3) of the Constitution, the Court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (U.N Guidelines), the provision of alternative land for settlement, etc.

**[153]** The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The Courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth".

**[154]** We now turn to the nature of the orders granted by the trial Judge, and with which the Appellate Court took issue. It is to be recalled that the appellants herein, had already been evicted from their settlements, in an operation they contend was not only illegal, but which violated their right to housing and dignity. This Court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under Article 163 (4) (b) of the Constitution.

**[155]** Applying the principles we have enunciated in our analysis to this appeal, all we can consider is, whether the orders of the Trial Court were inappropriate as held by the Court of Appeal. Given the fact that the appellants had already been evicted, what reliefs, ought they have sought from the Court? Having alleged a violation of their rights to dignity and housing, it is our considered opinion that the most effective relief open to the appellants was a claim for compensation. Had the appellants been still in occupation, all the other possible reliefs we have signaled in paragraph 150 would also have been available to them. Counsel for the appellants has urged us to craft an appropriate remedy for compensation. Such a cause ought to have been urged at the Trial Court, with the aggrieved party having an opportunity to appeal any award to the Court of Appeal.

**[156]** We do not think that the orders requiring the respondents to furnish the Trial Court, with the current state policies, and programmes on provision of shelter and access to housing, would have been of any remedial benefit to the appellants. We are also in agreement with the Court of Appeal that, such orders, ought not to have involved non-state actors, who were not parties to the suit. It would be different if the order had been directed to the relevant state agencies, even if they were not parties to the suit. We may however not delve into the factual findings of the Trial Court and Court of Appeal.

Having said this, it is not lost to us that the eviction that triggered these proceedings was carried out in contravention of a court order. Neither are we oblivious of the fact that, during the eviction, the appellants' houses and property, including schools, were destroyed. This Court, cannot close its eyes to these uncontroverted findings on record. Actions by state organs, carried out in flagrant disregard of court orders, do undermine our constitutional order, more so, if they result in the violation of citizens' rights. If a trial Court is so moved, there is no reason why it cannot grant relief to the aggrieved.

## E. ORDERS

***(i) The Appeal dated 5th February, 2018 is hereby partially allowed.***

***(ii) These proceedings are hereby remitted to the Trial Court, with instructions that appropriate reliefs be crafted and granted in accordance with this Judgment and the pleadings at the High Court.***

***(iii) We make no Orders as to costs.***

**It is so Ordered.**

**DATED** and **DELIVERED** at **NAIROBI** this **11th Day** of January, **2021.**

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|---|---|
| **……** | **……** |
| **D. K. MARAGA** | **P. M. MWILU** |
| **CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT** | **DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT** |
| **……** | **……** |
| **M. K. IBRAHIM** | **S. C. WANJALA** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |

**……**

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**