

**AN EVALUATION OF THE CURRENT LAND LAWS IN
SOLVING THE URBAN SQUATTER LAND TENURE
PROBLEM**

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DEDICATION

I dedicate this thesis to my dear family for their love and unstinting support throughout the study.

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DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.

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ABSTRACT

Squatting is a global phenomenon fuelled by political and socio-economic factors. It is also a human rights issue. Its essence is the absence of tenure security and land use planning. In Kenya, squatting dates back to the colonial eon which marked the begging of land injustices. This is also compounded by the failure of the post-independence governments to employ innovative tools in generating appropriate intervention strategies for tenure security for urban squatters.

This study set out to evaluate the efficacy of the current land laws in dealing with urban squatting in Kenya. It sought to examine the factors that limit land governance in urban centres from finding long lasting solutions. In this regard, the study established that lack of political goodwill, coupled with adoption of non-inclusive solutions have greatly contributed to the failure in past approaches. The study relied on pre-existing data on tenure insecurity in urban informal settlements, specifically those on Mukuru and Kibera. Additionally, it incorporated interviews with personnel in key institutions dealing with urban informal settlements. The institutions include courts, government agencies and non-governmental organisations.

The study also took a comparative approach in examining the challenge of tenure insecurity in urban centres in other jurisdictions. The Philippines and South Africa were examined with the aim being to deduce the best practices in securing tenure within urban informal settlements. The experiences in these jurisdictions provide important lessons for the Kenyan context. The main lesson drawn from the Philippines experience is incorporation of participatory and inclusive approaches in developing solutions to the tenure security in the urban informal settlements. This had a great impact on the solutions as the resident of informal settlements take ownership of the measures, and the solutions are more context specific, hence a higher rate of success in implementation. South Africa takes a human rights perspective in securing tenure in informal settlements. This is primarily due to the robust constitutional dispensation adopted by the country in 1996. This is helpful to Kenya since most of the provisions in the 2010 Constitution mirror those of the Constitution of South Africa. Kenya can, therefore benefit, for example, with respect to the manner of judicial interpretation of socio-economic rights of informal settlers.

In the end the study suggests that use of the legal provisions on conversion of land and the settlement of informal settlers as communities is a most appropriate way of curbing the

tenure insecurity challenge. It also critical to have good political will and adopt participatory approaches in land governance in the urban centres.

LIST OF ABBREVIATIONS

ANC	African National Congress
BNG	Breaking New Ground
CMP	Community Mortgage Program
FAO	Food and Agriculture Organization of the United Nations
GLA	Government Lands Act
KENSUP	Kenya Slum Upgrading Programme
NGOs	Non-governmental organisations
NITD	Kabete Native Industrial Training and Development
NLC	National Land Commission
RDP	Reconstruction and Development Programme
RTA	Registration of Titles Act
SNP	Sustainable Neighborhood Programme
UN	United Nations
UN-Habitat	United Nations Human Settlements Programme

LIST OF CASES

Gabriel Dolan & 23 others v County Government of Mombasa & another [2016] eKLR.

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Indian Transfer of Property Act, 1882.
International Covenant on Economic, Social and Cultural Rights
Land Acquisition Act (Chapter 295, Laws of Kenya) (now repealed).
Land Act (Act No. 6 of 2012).
Land Registration Act.
Land Titles Act (Chapter 282, Laws of Kenya) (now repealed).
Local Government Act (Chapter 265, Laws of Kenya).
Local Government Code, 1991 (The Philippines).
National Land Commission Act (Act No. 5 of 2012).
Physical Planning Act (Act No 6 of 1996).
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (South Africa).
Registered Land Act.
Registration of Titles Act (Chapter 281, Laws of Kenya) (now repealed).
Urban Areas and Cities Act 2011.
Urban Development and Housing Act (The Philippines).
Way leaves Act (Chapter 292, Laws of Kenya) (now repealed).

CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1. Background

Land is a crucial resource to development and human survival. It is not only the source of basic needs such as shelter and as food, but also a source of livelihood to many people.¹ As such, access to land is a fundamental aspect of political change and development. Indeed, in African countries, most of the development that has taken place and Kenya in particular can be associated with land use.² Accordingly, the need to deal with the urban squatter land tenure problem in Kenya cannot be gainsaid.

In the cities of developing countries, lack of land tenure security has been identified as a key characteristic of urban slums.³ The UN report on the challenge of slums recognizes that informal tenure often involves squatting, where households occupy a parcel of land that belongs to someone else while paying no financial compensation.⁴ As such, conceptually, in the present study, squatters are synonymous with informal settlers.

In Kenya, the urban squatter land tenure⁵ problem can be attributed to a number of reasons. First, the problem is traceable to the dispossessions that took place when the colonial powers took over much of natives' land leaving majority of them landless and forcing them to settle elsewhere.⁶ Second, with rising population, urbanisation, high unemployment rate and poverty many people rush to urban areas for search of better opportunities.⁷ These people end up living in informal settlements within urban areas where it is cheap to access housing and other basic services. Third, upon independence, a number of laws were put in place that governed how urban land could be allocated to private persons. These laws included the now repealed Government Lands Act (GLA)⁸ and the Registration of Titles Act (RTA).⁹ GLA provided for the

¹ Sessional Paper No. 3 of 2009 on National Land Policy, (Government Printer, Nairobi, 2009), 1.

² C. Juma, "In Land we Trust: Introduction" in C. Juma and J.B Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (ACTS Press, Nairobi 1996), 1.

³ *Ibid.*

⁴ United Nations Habitat, "The Challenge of Slums / Global Report on Human Settlements 2003" UN Habitat / Earth scan, London, 2003.

⁵ The term land tenure in this context means the state and process where an individual's right to property is recognized, acknowledged and protected

⁶ The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002), 66.

⁷ *Ibid* 66.

⁸ Chapter 280 of the Laws of Kenya, Repealed.

⁹ Chapter 281 of the Laws of Kenya, Repealed.

regulation, leasing and other disposal of Government lands. The president was given the power to make dispositions or grants of interests, estates, or rights over or in un-alienated government land.¹⁰ The Commissioner of Lands could also exercise certain powers on behalf of the president. It is based on this that several grants were given to individuals by the president and these grants bore some special conditions which were to be met by the grantee(s). This was in accordance with GLA which provided that any covenant or condition in a grant, lease or license is binding on a grantee, lessee or licensee.¹¹ The grantees had to meet the conditions in the grant. In most urban slums, the special conditions provided that the land and the buildings thereon were only to be used for light industrial purposes with ancillary offices and stores. A further condition was that the grantee 'shall within 24 months of registration of the grant complete the erection of the building(s)' that they had specified that they would construct. It is worth noting that most of the grantees did not meet the conditions specified in the grant. Indeed, the land allocated was left unoccupied and unattended leading to the proliferation of informal and unplanned settlements.¹²

Because the allocated land was left unoccupied and unattended, and titles to the land are held by persons not in actual occupation of the land, informal settlements sprung up that were occupied by non-owners.¹³ This creates a phenomenon of tenure insecurity that has far-reaching impacts on access to basic services such as water, food, housing, education, sanitation, etc, by squatters. As a consequence, a large proportion of the urban squatter population inhabits low-income informal settlements including slums and other squalid places most of which are unplanned and often illegal.¹⁴ Successive governments since independence have not been successful in stemming the squatter problem in Kenya with the consequent tenure insecurity.¹⁵

Informal settlers claiming ownership of land on which some of the settlements stand have thus been exposed to forced mass evictions usually involving private developers or government projects.¹⁶ Bulldozers are normally used to demolish residents' homes and evict them often with efforts at compensating or resettling them, and with little or no notice at all. Most families are as

¹⁰ Section 3 of Chapter 280 of the Laws of Kenya, Repealed.

¹¹ Section 72, Government Lands Act, Chapter 280 of the Laws of Kenya, Repealed.

¹² Akiba Mashinani Trust, *Situation Analysis Report*, 2014, 54-56.

¹³ *Ibid.*

¹⁴ Manning, M. & Hughes, P. (2007 (draft). Security of land for public purposes in PNG and Vanuatu, Pacific Land Program Case Study 6.2. AusAID, Canberra.

¹⁵ *Ibid.*

¹⁶ Republic of Kenya, Evictions and Resettlement Guidelines- Towards Fair and Justifiable Management of Evictions and Resettlements, Ministry of Lands, 2009, 2-3.

a consequence left homeless, without access to basic services and without livelihoods when their small businesses are destroyed.¹⁷

Consequently, at the turn of the new millennium, the government of Kenya initiated a documentation of the injustices in the land sector.¹⁸ To this end, the government established a New Institutional Framework for Land Administration and a Constitutional Position of Land and as well as Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework in an effort to start correcting the malaise in the Ministry of Lands.¹⁹ The Njonjo Commission observed that “the policies of the colonial government helped to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms.”²⁰

After a protracted land policy formulation process stretching between February 2004 and December 2009, Kenya obtained a comprehensive National Land Policy²¹ that was meant to direct the country towards a sustainable, efficient and equitable framework for landholding and use.²² The Policy noted that the squatter problem is a challenge for urban land planning and development that is caused by absence of security of tenure.²³ The Policy recommended a number of measures to safeguard the rights of land owners and informal settlers. These include: inventorying people who live in informal settlements and genuine squatters; instituting suitable instruments for the removal of squatters and resettlement from inappropriate land ; ensuring that land informal settlement is developed in sustainable and an ordered manner; facilitating squatter settlement registration for those found on community and public land for purposes of development or upgrading; developing, in discussions with affected communities, a resettlement and slum upgrading programme under identified tenure systems that are flexible; instituting appropriate measures to avoid further informal settlements developments on open spaces and private land; prohibiting transfer and/or sale of land allocated to informal settlers and squatters;

¹⁷ *Ibid.*

¹⁸ The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Sessional Paper No. 3 of 2009 on National Land Policy, (Government Printer, Nairobi, 2009).

²² *Ibid.*

²³ *Ibid* 50.

and instituting a suitable legal framework for removal grounded on internationally acceptable guidelines.²⁴

Key features of the National Land Policy have been grounded in the Constitution of Kenya, 2010. The constitutional and policy frameworks for the first time in history, offered Kenya, in response to contemporary land issues, a unique occasion to undertake comprehensive land reforms. .

Under the 2010 Constitution, the right to property is protected.²⁵ This protection however, does not cover ‘any unlawfully acquired property’.²⁶ It also provides for compulsory acquisition of land for public purposes and in the public interest predicated on payment of prompt and full compensation and access to justice for the affected owner of property.²⁷ There is also conversion of freeholds held by foreigners to leaseholds and the Conversion of 999 year leases to 99 year leases.²⁸ It further sets out the principles governing land policy and provides that “Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable”.²⁹ It also goes ahead to state that “All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals”³⁰ and the categories of public, private and community land are outlined in the Constitution.³¹ It also mandates Parliament to revise, consolidate, and rationalize existing land laws³² in order to ‘protect, conserve and provide access to all public land’ and to regulate the manner in which land may be converted from one category to another.³³

It is noteworthy that these provisions may be used to deal with the squatter problem in urban areas if it is established that the land was illegally and irregularly acquired. Moreover, the State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.³⁴ Thus,

²⁴ *Ibid* Paragraph 211.

²⁵ Article 40(1), Constitution of Kenya, 2010.

²⁶ Article 40(6), Constitution of Kenya, 2010.

²⁷ Article 40(3), Constitution of Kenya, 2010.

²⁸ Article 66(1), Constitution of Kenya, 2010.

²⁹ Article 60(1), Constitution of Kenya, 2010.

³⁰ Article 61(1), Constitution of Kenya, 2010.

³¹ Articles 62, 63 and 64, Constitution of Kenya, 2010.

³² Article 68(a), Constitution of Kenya, 2010.

³³ Article 68(c), Constitution of Kenya, 2010.

³⁴ Article 66(1), Constitution of Kenya, 2010.

it is arguable, that pursuant to the constitutional provisions under schedule 6, section 6(7), the formal titles issued under the repealed GLA and RTA are subject both to Article 40 and 66 of the Constitution. Most importantly, the Constitution guarantees economic and social cultural rights such as the right to housing, water and sanitation,³⁵ whose enjoyment cannot be realised without secure land tenure.

Pursuant to the Constitutional provisions, several laws have been enacted whose provisions are relevant in dealing with informal settlements in urban areas. These laws include the Land Act,³⁶ Land Registration Act,³⁷ National Land Commission Act³⁸ and Community Land Act.³⁹

The Land Act 2012⁴⁰ requires the National Government to implement settlement programmes to provide access to land for shelter and livelihood.⁴¹ Settlement programmes are to be administered by the national government in consultation with the National Land Commission (NLC) and the respective county governments.⁴² Settlement programmes are to be for the purpose of, but not be limited to provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement.⁴³ Under the Act a ‘public purpose’ is define to include the settlement of squatters, poor and internally displaced persons.⁴⁴ A “squatter” is defined as a person who occupies land that legally belongs to another person without that person’s consent.⁴⁵ It establishes a land settlement fund to be administered by a board of trustees known as the Land Settlement Fund Board of Trustees.⁴⁶ The Board of Trustees are, *inter alia*, responsible for providing access to land settle squatters; purchase of private land to enable settlement;

³⁵ Article 43, Constitution of Kenya, 2010.

³⁶ Act No. 6 of 2012. It provides the substantive of land law and repeals the Indian Transfer of Property Act 1882, the Government Lands Act, the Registered Land Act, the Way Leaves Act Cap. 292 and the Land Acquisition Act Cap 295.

³⁷ It provides for the registration of interests in land and repeals the Land Titles Act Cap. 282 and Registration of Titles Act Cap. 281.

³⁸ Act No. 5 of 2012.

³⁹ Act No. 27 of 2016.

⁴⁰ Section 134 and 135, *Land Act*, No. 6 of 2012.

⁴¹ Section 134(1), *Land Act*, No. 6 of 2012.

⁴² Section 134(3), *Land Act*, No. 6 of 2012.

⁴³ Section 134(2), *Land Act*, No. 6 of 2012.

⁴⁴ Section 2, *Land Act*, No. 6 of 2012.

⁴⁵ Section 2, *Land Act*, No. 6 of 2012.

⁴⁶ Section 135(1), *Land Act*, No. 6 of 2012.

coordinate the provision of shelter and a livelihood to persons in need of settlement programmes, and perform any other function that may enhance the development and promotion of settlement programmes.⁴⁷

The National Land Commission Act,⁴⁸ establishes NLC which is mandated to, *inter alia*, recommend a registration programme for titles in Kenya, a National Land Policy, undertake inquiries into and make recommendations for appropriate redress into historical land injustices, and to, with the consent of or on behalf of National and County Governments alienate public land. Section 5 further tasks the NLC to ensure the registration of land in Kenya within 10 years from the Act's commencement. The NLC is further tasked to establish the legality and propriety of all grants and recommend, within a five year period, either on request of National and County Governments or on its own motion.

Section 5 of the Community Land Act provides for the protection of community land rights. In subsection (4), it goes further to state that subject to Article 40 (3) of the Land Act and the 2010 Constitution, that except in accordance with the law, no right over or interest in community land may be forcibly attained by the State upon speedy compensation to the person(s), by negotiated settlement or in full and for a public purpose. In this case, as per the Land Act, public purpose includes the settlement of internally displaced persons or squatters in section 2. And this Act thus administers the settlement of squatters on community land.⁴⁹

The enactment of the new Constitution and the adoption of the National Land Policy, were expected to resolve the urban squatters land tenure security problem among other issues associated with land in Kenya. Additionally, the foregoing legal provisions, if adequately enforced would go a long way in administering lands in the country, not only in the urban setting, but also in the rural setting through proper identification of private, public and communal lands, and the procedural notifications in the event of squatting in private lands, provision of alternative settlements, especially for public lands, and/or formalization of ownership in case of communal lands.

⁴⁷ Section 135(1C), *Land Act*, No. 6 of 2012.

⁴⁸ Act No. 5 of 2012.

⁴⁹ Cap. 27 of 2016.

1.2. Statement of the Problem

With the push for land reforms in the country including the enactment of the 2010 Constitution and enabling laws thereunder, it was hoped that there would be a solution to urban squatter problem. However, these frameworks have not increased access to land to squatters nor have they ensured tenure security, with informal settlement population at 54.7% in Kenya's urban areas.⁵⁰ The United Nations Development Programme (UNDP)⁵¹ further projects that Nairobi City will have a population of 4.9 million at the year 2020 and 6.1 million at 2025, implying that as many people as the current population of 4 million inhabitants and 134 informal settlements, will reside in informal settlements at the year 2025.

Cases of mass forced evictions by government agencies or private developers claiming ownership of land on which some of the settlements stand have been on the rise. This is because most informal settlers inhabit lands classified as unfit for human habitation or land to which they have no title with the attendant violations on their economic and social-cultural rights. For instance, according to the Nairobi City County government,⁵² in the informal settlements, only about 24% of the population have access to a latrine or a flush toilet, 68% use public toilets and that 6% resort to open defecation or defecation in plastic bags commonly dubbed “flying toilets”. The foregoing implies that intervention strategies by government and related actors to secure urban land tenure security have not been effective, which begs the question, are the current land laws adequate in solving the urban squatter land tenure problem? Against this backdrop, this study assesses the adequacy of these frameworks, conditions that increase tenure insecurity and makes recommendations on how to secure tenure security in informal settlements in Kenya.

1.3. Research Questions

1. What are the causes of tenure insecurity within informal settlements in Kenya?
2. Are the existing laws adequate in addressing tenure insecurity problems within informal settlements in Kenya?
3. What intervention strategies can ensure tenure security for informal settlers in urban areas in Kenya?

⁵⁰ GORA. (2015). Multiple Slum Index - GORA for the People Agenda Global Observatory linking Research to Action. Retrieved September 11th 2018, from <http://www.gora4people.org/multiple-slum-index.html>

⁵¹ UNDP. (2015). City of Nairobi Environment Outlook. Nairobi.

⁵² Nairobi City County (2014). The Project on Integrated Urban Development Master Plan for the City of Nairobi in the Republic of Kenya. Final Draft Report

4. What best practices drawn from other jurisdictions can be used to effectively address the urban squatter land tenure problems in Kenya?

1.4. Objectives of the Study

1. To examine the causes of tenure insecurity within informal settlements in Kenya.
2. To assess the adequacy of existing laws in addressing tenure insecurity within informal settlements in Kenya.
3. To highlight intervention strategies that can ensure tenure security for informal settlers in urban areas in Kenya.
4. To identify and recommend some best practices drawn on how to address the urban squatter land tenure problems in Kenya.

1.5. Hypotheses

1. The existing land laws have not made significant attempts at addressing the urban squatter land tenure problems in Kenya.
2. The National Land Commission and other select institutions are limited in their powers to address the urban squatter land tenure problems in Kenya

1.6. Justification of the Study

In spite of there being a consensus concerning the resolution of the innumerable land issues including the squatter land problem in Kenya, little attention has been given by the government on the issue. Apart from studies undertaken by scholars pertaining to the squatter phenomenon, not much has been done in addressing the problem. The present study findings are of significance as they aim at providing a solution to the problem based on experiences and best practices from other jurisdictions and how they can be applicable and relevant in the Kenyan context. The study contributes to the existing knowledge gap and sensitizes the policy makers, urban planners and the developers towards leveraging the constitutional and land reform dispensation in resolving the urban squatter problem. It also contributes to the limited literature on the efficacy of the new land laws in addressing urban squatter settlement and is resourceful to future researchers as a reference material.

1.7. Literature Review

The land problem in Kenya has evoked a lot of comments by academics in their literature.

1.7.1. Understanding Urban Squatter Settlements/Informal Settlements

Urban squatter/informal settlements are mostly context-specific. The United Nations Human Settlements Programme (UN-HABITAT) describes informal settlements as residential areas where a group of housing units have been constructed on land to which the occupants have no legal claim, or which they occupy illegally.⁵³ They are mostly unplanned settlements and housing is not in compliance with current planning and building regulations (or unauthorized housing).⁵⁴ They have also been defined as settlements that lack permanent housing; sufficient living space both inside and outside the house; easy access to safe water, adequate sanitation, social amenities and infrastructural facilities; and security of land tenure.⁵⁵

There are other terms that are often used to describe informal settlements including: unplanned settlements, squatter settlements, marginal settlements, unconventional dwellings, non-permanent structures, inadequate housing, slums, housing in compliance etc.⁵⁶ Unconventional dwellings is used to define the number of housing units occupied by households, but considered inappropriate to human habitation. Housing in compliance is used as a Human Settlements Indicator by the UN Habitat Programme and is defined as the percentage of the total housing stock in urban areas which is in compliance with current regulations (authorized housing). Housing may also be categorized by its type or permanence (e.g. permanent, semi-permanent, non-permanent), although definitions of these categories vary widely from country to country.⁵⁷ Challenges abound in determining the boundaries of informal settlements because oftentimes they merge with formal settlements, industrial and rural areas. There is also no sufficient data on the population within settlements and the existing population data is mere approximation.⁵⁸

Squatters especially in urban areas face a myriad of problems. Urban inequality especially in informal settlements creates tensions such as increased poverty, lack of essential

⁵³ UNHABITAT, *“The challenge of slums: Global Report on Human Settlements 2003,”* (Earthscan, 2003), p.310.

⁵⁴ *Ibid.*

⁵⁵ UN HABITAT, *“Handbook on Best Practices: Security of Tenure and Access to Land-- Implementation of the Habitat Agenda,”* (UN-Habitat, Nairobi, 2003); See also D. Palmer, S. Fricska, B. Wehrmann, *“Towards Improved Land Governance,”* (FAO, Land Tenure Working Paper 11, 2009), 42.

⁵⁶ Available at <http://www.who.int/ceh/indicators/informalsettlements.pdf>, accessed on 24/08/2013.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

services, urban violence and tenure insecurity.⁵⁹ Empirical evidence suggests that slum dwellers pay more on average for cooking, water, sanitation/drainage services and electricity than their wealthier counterparts, who are likely to be connected to service networks.⁶⁰

1.7.2. Land Tenure in Kenya

Land tenure has been defined variously. To some, land tenure defines the the terms and conditions under which rights to land and land-based resources are acquired, retained, used, disposed of, or transmitted.⁶¹ Formally, the rules of tenure define the nature and content of property rights and determines how society allows individuals or groups to hold land rights and the conditions under which those rights are to be held and enjoyed.⁶²

Forms of land tenure differ from community to community and are therefore culture specific and dynamic.⁶³ According to Okoth-Ogendo, the land tenure operative in a given context is concerned with the tripartite question as to who owns what interest in what land.⁶⁴ Thus, property rights in land, address a three-dimensional relationship relating to people, time and space.

Land has been described as a bundle of entitlements and different people can have different claims over it.⁶⁵ Some of these rights may be legal (stronger or weaker according to the law) and some informal (stronger or weaker depending on enforcement, length of possession, political support etc.).⁶⁶ such property rights in land include: the right to occupy, enjoy and use; restrict others from entry; sell, buy or inherit; develop or improve; cultivate or use for production; rent, sublet, or sublet and fix the rent (e.g. free of rent control); realize a pecuniary

⁵⁹ Summary Human Development Report 2013- The Rise of the South: Human Progress in a Diverse World, (UNDP, 2013).

⁶⁰ UN-HABITAT, 'Country Programme Document,' 2013–2015.

⁶¹ GOK, (2009). Sessional Paper No. 3 of 2009 on National Land Policy, Nairobi: Government Printer, para 52.

⁶² Ogolla, B.D. and Mugabe, J, "Land Tenure Systems and Natural Resource Management "In Juma, C. and J.B. Ojwang *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books, Nairobi and London, 1996.

⁶³ Bentsi-Enchill, K (1965) "Do African Systems of Land Tenure Require a Special Terminology" Vol. 9(2) *Journal of African Law*, 114-139.

⁶⁴ Okoth-Ogendo, H.W.O (1991), *Tenants of the Crown: Evolution of Agrarian Laws and Institutions*, Acts Press, Nairobi.

⁶⁵ UN-HABITAT, "Urban Land for All," (UN-HABITAT, 2004), 5.

⁶⁶ *Ibid.*

benefit from increased property values or rental income; access services; access formal credit, etc.⁶⁷

According to FAO, land tenure is the legal or customary relationship among people with respect to land and associated natural resources such as water, trees, minerals or wildlife.⁶⁸ It entails a web of intersecting, overlapping and overriding interests to the same parcel of land, and which may be complementary where more than one person shares the same interest in a parcel of land.⁶⁹ It is noteworthy that in the context of squatter settlements, such overlay and intersection of interests is very common because the land is owned by private owners or government. For instance, it is common for the land and the structures to be owned by entirely different people altogether.

Before the 2010 Constitution, land tenure in Kenya was classed into three broad categories: government, trust and private land tenure.⁷⁰ However, the 2010 Constitution and the National Land Policy provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals⁷¹ and proceed to classify land as public, community or private.⁷² Public land tenure includes land vested in and held by the county government in trust for the people resident in a county and administered on their behalf by the National Land Commission.⁷³ It also includes land vested in and held by the National Land Commission in trust for the people of Kenya and administered on their behalf by the National Land Commission.⁷⁴ Community land is to vest and be held by communities identified on the basis of ethnicity, culture or similar community of interest.⁷⁵ Private land, is classified as land held privately by any person as freehold or leasehold of up to 99 years.⁷⁶ Only citizens of Kenya may hold freehold titles.⁷⁷ Property rights granted under private land tenure are granted and protected by the state.

⁶⁷ *Ibid.*

⁶⁸ FAO, “*Land tenure and rural development*,” (FAO, 2002).

⁶⁹ *Ibid.*

⁷⁰ Sessional Paper No. 3 of 2009 on National Land Policy, (Government Printer, Nairobi, 2009), paragraph 56.

⁷¹ Article 61(1), Constitution of Kenya, 2010.

⁷² Article 61(2), Constitution of Kenya, 2010.

⁷³ See Article 62(2), Constitution of Kenya, 2010.

⁷⁴ See Article 62(3), Constitution of Kenya, 2010.

⁷⁵ Article 63(2) delineates four broad categories of land that may be classified as community land.

⁷⁶ Article 65(1), Constitution of Kenya, 2010.

⁷⁷ Article 65(2), Constitution of Kenya, 2010.

1.7.3. Land Access and Land Tenure in Squatter/Informal settlements

In the context of squatter or informal land settlements it is difficult to categorize the existing tenure regimes into any of the three classifications of land tenure provided for under the 2010 Constitution.⁷⁸ This is because informal settlements can be found on all of these constitutional classifications of land tenure. What are the prevailing tenurial arrangements within informal settlements in Kenya?

Although access to land is fundamental for human shelter, food production and other economic activity, including by businesses and natural resource users of all kinds,⁷⁹ this is not the case within informal and squatter settlements. Access to land in squatter settlements within urban areas is highly limited and direct invasion, inheritance and purchase are the most common methods of accessing land.⁸⁰ Moreover, most people within informal/squatter settlements are faced with the problem of access to land because of rising population densities within urban areas.⁸¹

In addition, the problem is made more complex by the fact that most urban settlements are situated on either private or public land⁸² and residents have to pay rent to landlords or structure owners who in turn do not own the land on which the houses and structures stand.⁸³ There are also many houses or structures built on land reserved for roads, electricity lines and railway tracks, or on dumping grounds and river banks.⁸⁴ Such residents do not have tenure security in such cases making the inhabitants to live in fear of perpetual threats of evictions as land allocations are made without due consideration to the rights of actual occupants. Lack of secure tenure exposes informal settlers to the risk of forceful evictions which are often carried out *en masse* with catastrophic consequences for individuals and families.⁸⁵ It is, however, being argued that improving tenure security alone for the existing urban populations will not be enough

⁷⁸ Akiba Mashinani Trust, *Situation Analysis Report*, 2014, 39.

⁷⁹ UN HABITAT, “*Nairobi Urban Sector Programme*,” (UN HABITAT, 2006).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Patricia Mbote & Collins Odote, “Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru,” In Collins Odote & Patricia Mbote, *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya*, Strathmore University Press, 2016, 53. See also SDI available at <http://www.sdinet.org/blog/2013/04/26/women-wash-kenya/>, accessed on 22/08/2013; See also Amnesty International, “*Kenya-The Unseen Majority: Nairobi’s Two Million Slum-Dwellers*,” (Amnesty International, 2009).

⁸³ Amnesty International, “*Kenya-The Unseen Majority: Nairobi’s Two Million Slum-Dwellers*,” (Amnesty International, 2009)

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

unless measures are also taken to reduce the need for new slums and informal settlements. This will require a parallel approach to increase the supply of planned, legal and affordable land on a scale equal to present and future demand.⁸⁶ Such is the state of land tenure and access in squatter settlements despite the existence of literature suggesting that access to secure land and shelter is a necessary precondition for securing basic living conditions, livelihood opportunities and a necessary means to reduce poverty.⁸⁷

Access to land in informal settlements, particularly in Nairobi is through the provincial administration mostly the office of the chief. For fear of repercussions from the central government many of the allocations are recorded and managed by their agents who are non-civil servants. Invasion of land by organized groups and gangs is another popular way of accessing land in informal settlements for development. Transactions and dealings, dispute resolution and land information management are equally mostly handled by the chiefs through their agents who include village elders.⁸⁸ This inefficiency in land administration makes access to land in informal settlements insecure and unpredictable.

As Okoth-Ogendo⁸⁹ observes, the legal systems' development in Kenya has been heavily influenced by the propensity of legal systems to consider law as written law and to differentiate it from custom. He found out certain norms embraced by the government and prescribed to by development agencies, that profound the grounds for reform of legal systems for land. Okoth-Ogendo's insights provide useful understandings for analyzing the recent land governance reforms in Kenya. The first norm is that a primary problem for developing countries in informality. A cause-effect correlation of poverty and informality is established as developing countries are poor and thus the conclusion that informality causes poverty.

According to Nduku⁹⁰, tenure insecurity in both law and practice makes very difficult, protection against forced eviction leaving the most vulnerable at risk of human rights violations,

⁸⁶ UN-HABITAT 2004.

⁸⁷ Knut Laksa & Noha El-mikawy, "Reflections on land tenure security indicators" (UNDP, OGC DISCUSSION PAPER 11– JUNE 2009).

⁸⁸ Ronald Omwoma, "Land tenure systems in the slum settlements of Nairobi: implications for slum upgrading programmes," *op.cit.*

⁸⁹ Okoth-Ogendo, H.W.O. (2006). "Formalising informal property systems: The problem of land rights reform in Africa" *Background paper prepared for the commission for the legal empowerment of the poor, Nairobi.* http://www.undp.org/Legalempowerment/Reports/National%20Reports/Country%20files/15_Kenya/15_4_Property_Rights.pdf

⁹⁰ Nduku, M. I. "Securing tenure rights in informal settlements." available at <http://www.digital.labirary.strathmore.edu>

including inhabitants of informal settlements. Nduku further observes that whereas processes are in place by the government to tackle tenure insecurity in informal settlements, they are inadequate as there is a shift to a more harmonized legal framework, from many land laws.

Some scholars argue that access to land and tenure security are related because the strongest form of access to land one can have is full rights of ownership such as freehold.⁹¹ However, it is impossible to provide such full rights in urban areas because of scarcity of land and the problem of protecting and defending land rights.⁹² There are therefore programmes aimed at providing tenure security notwithstanding the lack of full ownership rights. This is necessary because formal titles are not the only means of tenure security. Tenure security is largely a matter of perception.⁹³ It is for this reason that some opine that tenure doesn't necessarily mean ownership, or even collective, community ownership; it can be as simple as a promise that the people will not be moved.⁹⁴

1.7.4. Securing tenure in squatter or informal settlements

Different studies have proposed various measures which should be undertaken to deal with the urban squatter problem and secure tenure security of inhabitants. These measures include the establishment of a legal framework for eviction based on internationally acceptable guidelines; facilitating the regularization of existing squatter settlements found on public and community land for the purposes of upgrading or development; and the establishment of a legal framework and procedures for transferring unutilized land and land belonging to absentee land owners to squatters and people living in informal settlements.⁹⁵

Some have also recommended the recognition of informal land tenure as a form of community land. Syagga argues that informal tenure must be recognized in order to address tenure insecurity which characterizes informal systems of tenure.⁹⁶ However, it is worth noting that the current legal framework has recognised community land tenure and it is arguable that informal settlers can fit within this typology. Kameri Mbote and Collins Odote assert that land within informal settlements can be held on the basis of a community interest which shares

⁹¹ D. Mitchell, "Assessing and Responding to Land Tenure Issues in Disaster Risk Management, Training Manual," (FAO, 2011).

⁹² *Ibid* 7.

⁹³ UN-HABITAT, "The Challenge of Slums-Global Report on Human Settlements 2003" (UN-HABITAT, 2003).

⁹⁴ Foreword in UN-HABITAT, "Urban land for all," (UNHABITAT, NAIROBI, 2004).

⁹⁵ Akiba Mashinani, *Situation Analysis Report*, 39-40.

⁹⁶ Syagga, P. M. (2011) *Land Tenure in Slum Upgrading Projects*, Nairobi.

similar socio-economic interests⁹⁷ as recognised in the Community Land Act.

Others see titling as being an important way of securing tenure within squatter or urban informal contexts. Syagga, for example, argues that the most logical way of issuing titles in informal settlements is through the creation of Community Land Trusts.⁹⁸ Such would entail informal settlements being categorized under community land tenure and being registered in accordance with the relevant statutory law. This is so because informal settlements manifest aspects of both communal and individual use.⁹⁹ They are communal in that residents living in informal settlements use the land on which the settlement exists communally and as a community, and they may enjoy in particular the provision of particular services such as water and electricity communally. They are individual in so far as individual families occupy individual structures and they may also pay for particular services such as toilets and bathrooms individually. Consequently, private land tenure cannot adequately address the titling and registration needs within the informal settlements.¹⁰⁰

The Government has also been pushing for titling within informal settlements. For instance, within Kibera slums titling has been used. However, titling may actually create perverse incentives and increase informality and insecurity. According to Okoth Ogendo formalization without the accompanying support services results in the poor losing as a result of operation of the market. Therefore, according to him the assertion that formalization through titling is the basis for tenure security is false.¹⁰¹ He further, observes that titling should only come in to confirm and not distort or redefine the already existing rights as it may distort the social organization of property as to prevent individuals and communities from drawing benefits anticipated from it.¹⁰²

The UN-HABITAT¹⁰³ has identified measures that can provide a sustainable, practical and socially progressive way of improving tenure security and rights of the urban poor and the

⁹⁷ Patricia Mbote & Collins Odote, "Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru," In Collins Odote & Patricia Mbote, *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya*, Strathmore University Press, 2016, 69.

⁹⁸ Syagga, Land Tenure in Slum Upgrading Projects.

⁹⁹ Akiba Mashinani, Situation Analysis Report, 39-40.

¹⁰⁰ Mbote & Odote, "Innovating Tenure Rights for Communities in Informal Settlements", 60.

¹⁰¹ OKoth-Ogendo, H.W.O, "Formalising Informal Property Systems: The Problem of Land Rights Reform in Africa" Unpublished paper available at https://learning.uonbi.ac.ke/courses/GPR203_001/document/formalising_the_informal.pdf.

¹⁰² *Ibid.*

¹⁰³ UN-HABITAT, "Urban Land for All," *op. cit.*

functioning of urban land and housing markets. It identifies four critical measures. First, there is need to provide basic short-term security for all households in slums and unauthorized settlements which can be achieved through land proclamations or moratoriums by the relevant Minister to reduce uncertainty and stabilise situations. Second, there is need to survey all extra-legal settlements and identify if there are some in areas subject to environmental hazards or required for strategic public purposes. These should be subject to independent review. Third, residents should be offered priority for relocation to sites that offer close access to existing livelihood opportunities and services e.g. Temporary Occupation Licences or Permits. Four, all other extra-legal settlements should be designated as entitled to medium term forms of tenure with increased rights, but not necessarily full titles. Such tenure forms should be based on tenure systems already known to local communities.

Clearly, in view of the tenure security problems in squatter settlements as particularised above, it is evident that the constitutional requirement for equitable access to land for these people remains a platitude. However, that is not to say that there are no success stories in addressing the urban squatter problem. The World Bank reports of an Urban Poor Program in Naga City Philippines.¹⁰⁴ The program consists of a social amelioration program firstly designed to empower squatters and slum dwellers comprising 25 percent of the city population residing in 21 urban barangays of Naga City. The programme has so far achieved a resettlement of 2,017 families, secured home lots for 789 squatter families and upgraded 27 urban poor communities.¹⁰⁵ These communities host around 2,700 families.¹⁰⁶ The program is driven by the belief that consideration of the urban poor cannot be overlooked in Naga's quest for total development and on that basis addresses the sector's two main problems: the absence of security of land tenure and the lack of basic infrastructure and facilities in their communities - primarily by adopting a 'partner-beneficiary' perspective in dealing with clients.¹⁰⁷ By looking at the urban poor as both a beneficiary and a stake holder in the form of a partner, the integral element is active participation in the search of a resolution.¹⁰⁸ The program has a two-pronged approach. One facet is land acquisition whereby a sense of permanence is provided to the beneficiaries and

¹⁰⁴ Clearing House Best Practices: An Urban Poor Program in Naga City Philippines <<http://www.unesco.org/most/asia8.htm>> Accessed on 3rd August, 2015.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

the other is upgrading of the urban area to give the beneficiaries a decent environment.¹⁰⁹

1.7.5 Challenges in Implementation of Existing Laws and Practices

Chege¹¹⁰ interrogated the limitations of the current land statutes in resolving the squatter land problem in Kenya. The study showed that the principles that hinder attempts at solving the problem still persists, in spite of minimizing of the registration regimes and a change in the law. Chege continues to argue that though the courts in the country are granted abilities to solve the problem through the Constitution and the supporting statute, other applicable laws are limited and this would make the courts unproductive in dealing with the squatter land problem

The Constitution provides that the main dispute is title to land, even though the Land Act offers that courts will hear wide-ranging disputes relating to land and environment. As such, squatter land problems lie within the matters that the court can address and determine. The court is given powers to issue orders of restitution, specific performance, declaration, compensation and costs.¹¹¹ The rights of squatters can therefore be addressed by the court in accordance with the statute's provision. The other land laws however, that are to be depend on by the court are incomplete in resolving the squatter land problem. As such, in spite of having a liberal procedural law, the applicable laws remain inadequate and the problem at hand cannot therefore be sufficiently addressed.

As part of the initiatives aimed at dealing with the squatter land problem in Kenya, within the ministry, there is a department that deals with settlement which includes settling squatters.¹¹² The initiatives are however not backed by any legal framework, even though they are good, and consequently they are not as effective as they should be. Accordingly, whereas the settlement department of the ministry has been carrying out programmes to settle squatters, partly due to lack of legislative structure of the way it should effectively carried out, the problem still persist.

1.7.6 Critique of the Literature

The foregoing body of literature reviewed makes a considerable attempt at espousing on

¹⁰⁹ Clearing House Best Practices: An Urban Poor Program in Naga City Philippines <<http://www.unesco.org/most/asia8.htm>> Accessed on 3rd August, 2015.

¹¹⁰ Chege, S. N. (2013). Limitations of the Current Land Laws in Addressing The Squatter Land Problem In Kenya. Masters of Laws (LL M) School of Law, University of Nairobi.

¹¹¹ Section 13(2) of the Act provides that the court determines matters relating to environment planning and protection as well as other aspects in land including climate issues, title, tenure, compulsory acquisition and issues relating to public, private and community land.

¹¹² www.lands.go.ke accessed on 15th July 2013.

the issue of tenure security in informal settlements in general and squatters in particular. A vast majority of the studies reviewed however delves into the concept of tenure security in relation to the various extant land tenure systems, giving less weight to the extent laws aimed at addressing the same. It is further evident from the foregoing literature that a programme that addresses the question of tenure insecurity while upgrading the slums and providing basic infrastructural services for informal settlements in Kenya is elusive. This is in spite of the existence of laws and institutions with the mandate of guaranteeing Kenyans access to land and securing their land rights. It is for this reason that the study assesses the adequacy of the prevailing laws and institutional frameworks in dealing with the land rights of informal settlers in urban areas.

1.8. Analytical Framework

This section gives a guide on the analytical framework detailing the theoretical and conceptual frameworks applicable to the study, the principal proponents and how their theoretical positions inter-lace. It entails a “description of the study site, the data needs, types and sources, the sampling and data collection procedure as well as the method of data analysis.”

1.8.1 Theoretical framework

The present study is underpinned by the ‘replacement’ theory, coined by Adam Smith, Jeremy Bentham and John Locke (MacPherson, 1978).¹¹³ The theory has its philosophical roots in neo-classical economic thought and the works of institutional economists such as Alchian and Demsetz (1973)¹¹⁴, Demsetz (1967)¹¹⁵, Ault and Rutman (1979)¹¹⁶ and Johnson (1972).¹¹⁷ According to this group, individualization, titling and registration is a prerequisite to land management, improvement and development. The private property rights group proposes individualization, titling and registration as a means of solving land administration and management problems currently facing the African region.

¹¹³ Macpherson, C.B. (1978). *Property: Mainstream and Critical Positions*, edited by C.B. MacPherson, Toronto: University of Toronto Press.

¹¹⁴ Alchian A. A. and Demsetz, H. (1973). "The Property Right Paradigm." *American Economic History* 33(1): 16-27.

¹¹⁵ Demsetz, H. (1967). "Toward a Theory of Property Rights." *American Economic Review* 57(2), 347-359.

¹¹⁶ Ault D.E. and G. L. Rutman (1979). The Development of Individual Rights to Property in Tribal Africa. *Journal of Law and Economics*, 22: 163–182.

¹¹⁷ Johnson O. E. G. (1972). "Economic Analysis, the Legal Framework and Land Tenure Systems." *Journal of Law and Economics* 15: 259-276.

The group views customary land tenure as unfriendly to the modernization of the economy and land markets and should therefore be replaced, hence the “replacement” theory. This replacement theory sees the associated markets and land markets as the foundation for economic development. According to the proponents of the theory, successful land improvement and development, promotion of land markets, and increasing credit opportunities presuppose the individual private property rights paradigm. Since land rights and land transactions are recorded in land registers, references can be made to them, and hence the most effective way by which extra-legal tenure arrangements, land disputes, litigations and unofficial land markets can be reduced is individualization, titling and registration.

In the present study context, the theory is deemed relevant as it relates to the urban squatter problem in the country. In this context, the study presupposes that to solve the urban squatter problem in the country, there is need for the Nation Land Commission to embark on proper land titling and registration of private property in urban centers.

1.8.1. Conceptual framework

This research is based on three fundamental concepts tenure security, urban governance, and intervention strategy. The World Bank¹¹⁸ defines governance as “a process by which an authority is conferred on leaders who in turn use this authority to legislate and regulate activities under their control.”¹¹⁹ According to FAO¹²⁰ governance is “a process of governing which encompasses modalities for managing, prioritizing and reconciling the interests of different stakeholders.”¹²¹ Within this context,¹²² FAO defines good governance as “the outcome of a properly managed and inclusive public administration.”¹²³ “Governance implies institutions initiating certain processes and overseeing implementation of specific programs to achieve certain goals.”¹²⁴ Stoker¹²⁵ on the other hand proposes five different perceptions of what

¹¹⁸ World Bank, (2013). What is Governance? Retrieved July17, 2013, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXTMNAREGTOPGOVERNANCE/0~theSitePK:497024,00.html>

¹¹⁹ *Ibid.*

¹²⁰ FAO. (2007). Good governance in land tenure and administration Land Tenure Studies. Rome: United Nations Food and Agriculture Organization, FAO.

¹²¹ *Ibid.*

¹²² *Ibid 2.*

¹²³ *Ibid.*

¹²⁴ UN-Habitat. (2008). Secure Land Rights for all. Nairobi: United Nations Human Settlements Programme (UN-HABITAT).

governance entails to include: (i) the intersecting duties and scope necessary to address socioeconomic issues; (ii) a collection of stakeholders and institutions including actors non-governmental organizations; (iii) recognition of relationship among governance institutions and power dependence; (iv) government's ability of to employ innovative tools in the process of regulation; and (v) self-governing capacity and autonomy of all stakeholders in the governance network.¹²⁶ The government's ability to employ ground-breaking tools in the governance of land can generate appropriate strategies for intervention for tenure security among squatters.

The quality of urban governance defines the settlement structure and pattern.¹²⁷ Urban governance can be defined as the tools and mechanisms for decision-making concerning accountability and civic participation.¹²⁸ The quality of urban governance furthermore implies a valuation of the degree to which inclusive policies and economic well-being characterize an urban area contrary to social segregation and impoverishment.¹²⁹ Urban governance infers a conjunction of tools and mechanisms from pertinent participants essential to support decision-making that may ultimately lead to more tenure security for urban squatters.¹³⁰ Relevant intervention strategies can be used to address the issue of how tools of urban governance can be used to secure land rights.¹³¹

Within the context of urban governance, as explained earlier, for tenure security, intervention strategies are programs and policies applied by government to control the use of land and access.¹³² In this context, intervention strategies are “approaches that can be adopted to change or improve an existing situation, which in this case is a transition from lack of tenure security to a more secure tenure for squatters.”¹³³ This study examines strategies that can ensure tenure security for squatters who lack formal land rights hence leading to the acknowledgment of

¹²⁵ Stoker, G. (1998). Governance as theory: five propositions. *International Social Science Journal*, 50(1), 17.

¹²⁶ *Ibid.*

¹²⁷ Kombe, W. J., & Kreibich, V. (2000). Reconciling informal and formal land management: an agenda for improving tenure security and urban governance in poor countries. *Habitat International*, 24(2), 231-240. doi: [http://dx.doi.org/10.1016/S0197-3975\(99\)00041-7](http://dx.doi.org/10.1016/S0197-3975(99)00041-7).

¹²⁸ UN-Habitat, IIRR, & GLTN. (2012). *Handling Land: Innovative tools for Land Governance and Secure Tenure*. Nairobi: United Nations Human Settlements Programme (UN-Habitat) and International Institute of Rural Reconstruction (IIRR).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

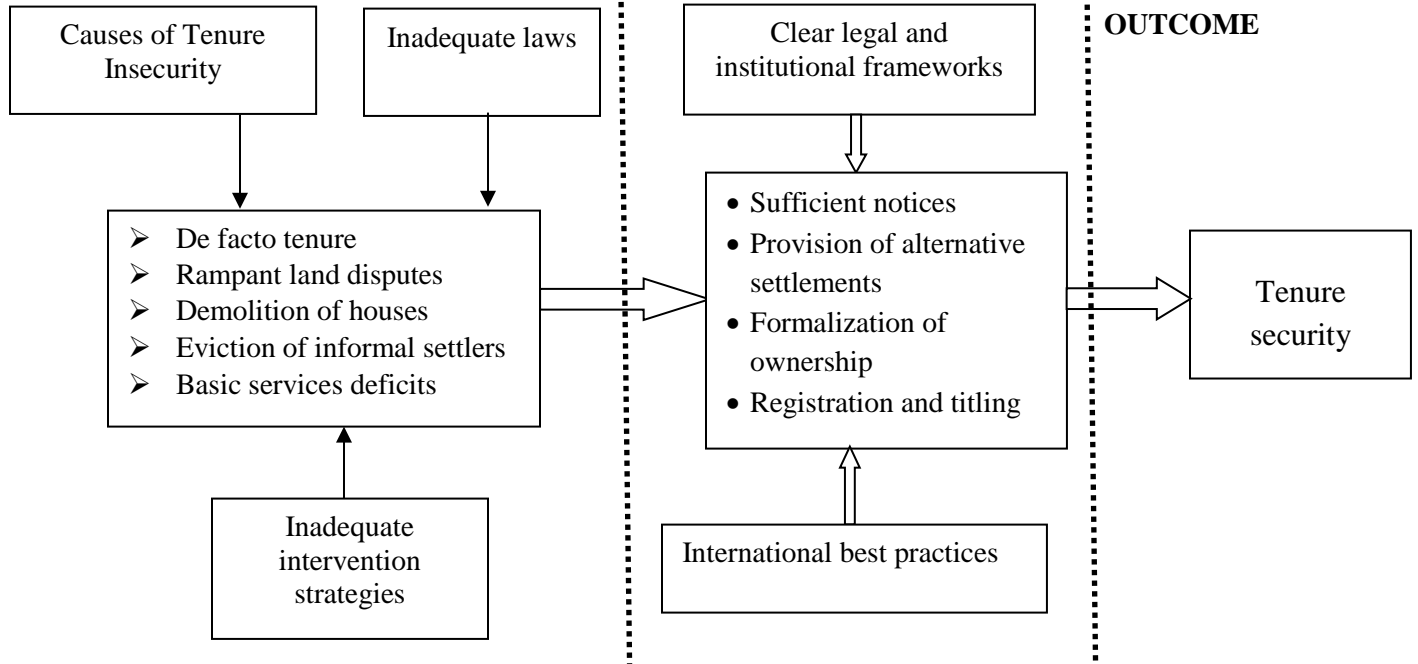
¹³¹ *Ibid.*

¹³² Ogero, B. (1997). *Highlights of Kenyan Experience in Urban Upgrading. Innovative Land Management Systems for the Urban Poor*, Nairobi, Kenya, GTZ Small Towns Development Project.

¹³³ *Ibid.*

informal rights which are associated with social tenure relationships between parcels of land and people.

As earlier explained within informal contexts, land tenure spans from “formal ownership to social tenure relationships such as right of occupation, tenancy, customary rights, informal rights, and possession.”¹³⁴ This relates well with the three concepts of tenure discussed earlier, *de jure* tenure security, *de facto* tenure security, and perceived tenure security.¹³⁵ Within the context of squatter settlements, land tenure security infers squatters’ perspective regarding their relationship’s strength with their shelter or land.¹³⁶ This is since tenure security does not rely so much on legal rights conferment on land but on reactions and experience of citizens to governance.¹³⁷ This formed the basis for this study, as illustrated in the diagram below.



¹³⁴ Sliuzas, R. (2004). Managing Informal settlements; A study Using geo-information science and earth observation (ITC), Enschede. (OTC Dissertation No. 112)

¹³⁵ Van Gelder, J.-L. (2010). What tenure security? The case for a tripartite view. *Land Use Policy*, 27(2), 449-456. doi: <http://dx.doi.org/10.1016/j.landusepol.2009.06.008>

¹³⁶ Farvacque, C. & Godin, L. (1998). *The Future of African Cities: Challenges and Priorities for Urban Development*. Washington, DC, The World Bank.

¹³⁷ Payne, G. (2001). Lowering the Ladder: Regulatory Frameworks for Sustainable Development. *Development in Practice* 11 (2 & 3), 308-318.

Figure 1: Conceptual Framework on Securing Tenure in Informal Settlements

1.9. Research Methodology

1.9.1. Research design

This study adopts descriptive and evaluative research designs. Interviews are conducted with the top and middle level employees at the Ministry of Land, as this is the country's focal institution as regards the implementation and enforcement of policies and legislation on land, including land policy and physical planning, land transactions, survey and mapping, land adjudication and settlement matters, land registration, valuation and administration of state and trust land.

To achieve its objectives, the study purposively samples three key departments in the ministry of lands: Lands, Physical Planning and Land Adjudication and Settlement. It will also sample top level managers at the National Land Commission. Considering the relatively manageable number of individuals in the top and middle management levels in these organisations, the study takes a 30% sample size.

The researcher used both primary and secondary data. Primary data was collected by the use of researcher administered semis-structured key informant interview guides containing both open and closed-ended questions administered to respondents from the Lands ministry. Secondary data includes data obtained from; books, journals articles, government records and reports, magazines, and the internet. A key part of the secondary sources is the pre-existing data from the situational analysis report on informal settlements in Mukuru in Nairobi, prepared by Akiba Mashinani Trust in partnership with the University of Nairobi, Strathmore University, and Katiba Institute in October 2014. This is on the premise that Mukuru informal settlements are 'to a large extent...representative of Nairobi's informal settlements and those in the Country as well.' The situational analysis covered Mukuru kwa Njenga and Mukuru kwa Reuben, which is established on 450 acres on the eastern part of Nairobi City County and has over 690,000 people.

Secondary sources were accessed from online journals and published resources as well as non-published sources. Both descriptive statistics and content analysis are employed in data analysis.

1.9.2. Study Site

The study primarily focuses on secondary data on Kibera Informal settlement, which is its study site. Kibera informal settlement is located on land about 500 acres, which is mostly public land,¹³⁸ and has a population of over 950,000 people, settled in various villages.¹³⁹ It is described as the biggest slum in Africa.¹⁴⁰ In this way, it is bale to appropriately demonstrate most of the intricacies in issues of tenure security, and access to basic services, and the coping mechanisms of people dwelling in informal settlements.

1.9.3 Sampling and data collection

The following sampling frame is employed, from Mugenda and Mugenda,¹⁴¹ who suggest a 30% sample for small populations and 10% for large populations. They further propose a census survey for extremely small populations. Considering the relatively manageable number of individuals in the top and middle management levels in Ministry and the National Land Commission, the study takes the 30% sample size in both institutions. This means that the target population for the top management level is 3 top level managers. The sample proportion of that group in percentile is 16.2% meaning that the sample size remains 3. Therefore, the ideal number of top level management interviewed is 3. When it comes to the second category which is middle management level, the target is 10 managers. Applying the 30% sample proportion to the target number of 10, the ideal number of middle level managers is 3. Convenient sampling procedure was further applied in convening 5 Focus Group Discussions (FGDs) of 8 respondents each in five different locations within the Kibera slum, adding up to 40 respondents.

1.9.4 Data analysis

Both descriptive statistics and content analysis are employed in data analysis because the data collected is qualitative in nature. Content analysis is used in that the qualitative data

¹³⁸ Amnesty International, 'Kenya: The unseen majority - Nairobi's two million slum-dwellers' (Amnesty International Publications 2009), 4.

¹³⁹ Emmanuel Mutisya, Masaru Yarime, 'Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements' *International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies* (2011), 201.

¹⁴⁰ *The Economist*, "Boomtown slum: A day in the economic life of Africa's biggest shanty-town" 22 December 2012 <<http://www.economist.com/news/christmas/21568592-day-economic-life-africas-biggest-shanty-town-boomtown-slum>> accessed 24 April 2017.

¹⁴¹ Mugenda, O. M and Mugenda, A. G (2003). *Research Methods: Quantitative and Qualitative approaches*. Nairobi, Acts Press.

gathered is synthesised, coded thematically and analysed in light of the stated problem, hypotheses, research objectives, research questions and conceptual frameworks and inferences made descriptively.

1.10 Anonymity

Protecting respondent confidentiality in qualitative research is the very key to getting honest unbiased correspondence. Interviewees ask for anonymity because their responses to the questions may be sensitive in that they may not paint a good picture of certain organizations forming the substratum of this research. The names of the interviewees are, therefore, changed to protect their identity.

1.11 Study Limitations

The researcher anticipated some limitations in the course of the study, particularly in data collection and resource constraints. During primary data collection, some respondents withheld information for the sake of privacy or fear of possible victimization. Another limitation encountered was the scarcity of material on squatters in Kenya. There is lack of a verse library on academic writing regarding squatters in Kenya and thus a lot of reliance was placed on news articles.

1.12 Chapter Breakdown

Chapter One: Introduction to the Study: Chapter 1 sets the scene for the study and contains the broad parameters of the study. It covers the background to the study, the statement of the problem, research questions, research objectives, hypotheses, theoretical and conceptual frameworks, literature review and justification of the study.

Chapter Two: Land Rights of Informal Settlers in Kenya: This Chapter discusses how the Kenyan legal framework has legislated on the rights of informal settlers including the various land tenure systems recognised in law. It is historical in focus looking into the factors that contribute to the proliferation of squatter settlements in urban areas in Kenya and legal responses to the problem. It will also analyse the land tenure systems that are practiced within informal systems to offer a basis for evaluating whether existing legal strategies by the government will engender tenure security to urban squatters. The Chapter will benefit from the responses from the interviewees within the Ministry of Lands.

Chapter Three: Best Practices in Securing Tenure within Urban Squatter Settlements: In this chapter the study explores best practices from other jurisdictions (Philippines in particular) and how they have been able to resolve the problem. The aim is to assess how different sound urban governance and adoption of appropriate innovative strategies can be useful in securing tenure security within urban settlements. It also explores the correlation between tenure security and other socio-economic rights of informal settlers.

Chapter Four: Securing Tenure Security in Informal Settlements in Kenya: In view of the legislative gaps highlighted in Chapter Two and drawing from the best practices in Chapter Three, this Chapter aims at coming up with appropriate innovative strategies that can secure the tenure rights for communities within informal settlements in Kenya. It also incorporates the feedback from the respondents in assessing the appropriate intervention strategies.

Chapter Five: Conclusion: The Chapter contains a summary of the findings and the recommendations of the study on how to better secure the land rights of informal settlers in Kenya.

CHAPTER TWO: LAND RIGHTS OF INFORMAL SETTLERS IN KENYA

2.1 Introduction

This Chapter discusses how the Kenyan legal framework has legislated on the rights of informal settlers including the various land tenure systems recognized in law. It is historical in focus looking into the factors that contribute to the proliferation of squatter settlements in urban areas in Kenya and legal responses to the problem. It also analyses the land tenure systems that are practiced within informal systems to offer a basis for evaluating whether existing legal strategies by the government will engender tenure security to urban squatters.

2.2 Informal Settlements in Kenya

2.2.1 Definition of informal settlements

Informal settlements can be defined as residential areas inhabited by individuals who have no tenure security in the land they dwell in, with the inhabited area lacking proper access to basic services, the houses falling short of the planning and building regulations, and the areas are generally not environmentally fit for human habitation.¹⁴² It is critical to note that the discourse on informal settlements is yet to arrive on a generally accepted definition. This is owing to the fact that what are referred to as informal settlements manifest themselves in different places in different contexts and are caused by various interrelated factors. The issues covered, for example, by the United Nations Human Settlements Programme in the definition of slums include construction materials used, the temporary nature, legality of construction, legality of land occupation, health and hygiene, basic services, infrastructure, crowding, poverty, low income, environment, compactness and crime and violence.¹⁴³ It is, therefore, observed in this regard that ‘slums are too multifaceted to define using a single parameter.’¹⁴⁴

¹⁴² United Nations Conference on Housing and Sustainable Urban Development, ‘Habitat III Issue Papers: 22 – Informal Settlements’ (New York 2015) 1.

¹⁴³ United Nations Human Settlement Programme, ‘The Challenge of Slums: Global Report on Human Settlements’ (Earthscan Publications 2003) 197.

¹⁴⁴ Peter Karari, ‘The Challenges Facing Kenyan Slum Upgrading Programme in the Realizing the International Elements of the Right to Housing: A Special Focus on Kibera Slum in Nairobi, Kenya’ (Universitat Magdeburg, 2009) 2.

These forms of settlement characterise all the urban areas in the world as ‘*a global urban phenomenon*’,¹⁴⁵ manifesting themselves in different forms, dimensions and locations. Although they can be found in the urban areas of developed countries, they are more pronounced in the developing world.¹⁴⁶ They are also described using different terms, for example, unplanned settlements, squatter settlements, marginal settlements, unconventional dwellings, non-permanent structures, inadequate housing, slums, and, housing in compliance.¹⁴⁷

Informal settlements are a result of various factors at play, for example: population growth and migrations to urban centres; unavailability of affordable housing for the poor in urban centres; failure in land governance structures in urban areas; discrimination and marginalization; and natural calamities.¹⁴⁸

2.2.2 Land tenure systems

Land tenure outlines the manner in which individuals can access, acquire or use rights over land, and the period in which such takes place.¹⁴⁹ It seeks to answer the tripartite question of who owns, what interest, in what land.¹⁵⁰ The land tenure systems in the informal settlements do not fit the conventional systems nor those prescribed by law. In Kenya, land tenure is either public, community or private.¹⁵¹ These forms of tenure are recognized by the law of the land – the Constitution and statutes. They are safeguarded by the law while the tenure systems in the informal settlements are pushed to the periphery since formality is equated with legality.¹⁵²

¹⁴⁵ See, United Nations Human Settlement Programme, ‘The State of the World’s Cities Report’ (2009, 2011, 2013); World Bank, ‘Dimensions of Urban Poverty in Europe and the Central Asia Region’ (2006); and United Nations Human Settlement Programme, ‘Informal Urban Development in Europe’ (2010).

¹⁴⁶ United Nations Conference on Housing and Sustainable Urban Development, ‘Habitat III Issue Papers’, 2.

¹⁴⁷ <<http://www.who.int/ceh/indicators/informalsettlements.pdf>> accessed 24 April 2017.

¹⁴⁸ United Nations Conference on Housing and Sustainable Urban Development, ‘Habitat III Issue Papers’, 2.

¹⁴⁹ Francis Kariuki, Smith Ouma, Raphael Ng’etich, *Property Law* (Strathmore University Press 2016) 192.

¹⁵⁰ *Ibid* 195.

¹⁵¹ Article 61(2), *Constitution of Kenya* (2010).

¹⁵² Kariuki, Ouma and Ng’etich, *Property Law*, 201.

(a) Public tenure

Public land is the category land held by the state in trust for the people of Kenya, and is administered by the National Land Commission.¹⁵³ The land falling under this tenure was held and administered by the government before the promulgation of the 2010 Constitution.¹⁵⁴

(b) Community tenure

Community land is that vested in the communities identified on the basis of ethnicity, culture or similar interest,¹⁵⁵ and is to be administered by the respective community land management committee.¹⁵⁶ Land traditionally occupied by communities and trust lands held by county governments are some of the pieces of land constitute this category of land.¹⁵⁷

(c) Private tenure

Private land is that registered to persons, and are held and used by such persons as provided by law.¹⁵⁸ This has and continues to be the most protected form of tenure under law.¹⁵⁹ It is also the form of tenure that has posed threats to the existence of the other forms of tenures due to the illegal and irregular conversion of land to private ownership.¹⁶⁰

(d) Tenure in the informal settlements

In the informal settlements, land tenure does not fit within any of these classes. The people in informal settlements are occupying public, community or private land that does not belong them.¹⁶¹ They have, therefore, come up with their own means of accessing and using land which are in line with the *de facto* security of tenure. This form of security of tenure is based on actual control of the land, and does not speak as to its legal status.¹⁶² It is endorsed and enforced through social relations as opposed to the land tenure laws.¹⁶³ This is in contradiction with the *de jure* security of tenure, where the ownership, occupation and access to land is backed by the land

¹⁵³ Article 62, *Constitution of Kenya* (2010).

¹⁵⁴ Section 3, Government Land Act (Chapter 280, Laws of Kenya) (now repealed).

¹⁵⁵ Article 63, *Constitution of Kenya* (2010).

¹⁵⁶ Part III, *Community Land Act* (Act No 27 of 2016).

¹⁵⁷ Article 63(2), *Constitution of Kenya* (2010).

¹⁵⁸ Article 64, *Constitution of Kenya* (2010).

¹⁵⁹ Kariuki, Ouma and Ng'etich, *Property Law*, 215.

¹⁶⁰ See, Republic of Kenya, *The Final Report of the Truth, Justice & Reconciliation Commission of Kenya*, vol IIB, 3 May 2013 Version, 273.

¹⁶¹ See *Gabriel Dolan & 23 others v County Government of Mombasa & another* [2016] eKLR.

¹⁶² Jean-Louis van Gelder, 'What Tenure Security? The Case for a Tripartite View' (2010) 27(2) *Land Use Policy* 449-456.

¹⁶³ *Ibid.*

law regime in the country.¹⁶⁴ The residents of informal settlements, therefore, are dwelling in land in which they do not have legal title to. The consequences of their lack of a legally recognized tenure security are dire, especially in accessing basic services and infrastructure¹⁶⁵ and the ensuing disputes:¹⁶⁶

The end result has been contested property rights, frequent evictions and destruction of property and incessant conflicts between de jure tenure rights and de facto tenure rights. This complex web of relationships has been further compounded by the lack of a clear constitutional and legal underpinning for tenure rights within informal settlements.¹⁶⁷

The tenure systems recognized by the Constitution – public, community and private – are the formal systems of holding land in the country. And being that ‘formality in property holding has been equated with legality’,¹⁶⁸ the law has been jealous in its protection of the formally registered rights with the effect that informal land holding as happens in the informal settlements, as finding itself in the periphery.¹⁶⁹ However, the informal land holding continues to exist in the informal settlements since it responds to the needs of the inhabitants – they are able to access, acquire and use rights over land on the basis of social relations and legitimacy.¹⁷⁰ Therefore, the informal tenure implies the tenure security is affected and, as shown below, the consequences also go to access to basic services and infrastructure. This shows, as pointed out under the statement of problem, that the present legal framework does not cater for the tenure security in informal settlements. The problems of informal settlements were in existence before enactment of the current land law regimes but the same not directly catered for, just as was the case in the previous regime.

¹⁶⁴ *Ibid.*

¹⁶⁵ Patricia Kameri-Mbote and Collins Odote, ‘Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru’ in Collins Odote and Patricia Kameri-Mbote (eds), *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya* (Strathmore University Press 2016) 47.

¹⁶⁶ *Ibid* 48.

¹⁶⁷ *Ibid.*

¹⁶⁸ Kariuki, Ouma and Ng’etich, *Property Law*, 201.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

(e) Informal Settlement on Public Land

Informal settlements are prevalent in public land.¹⁷¹ The informal settlers encroach on public land since in most instances public is left vacant. This is the case in many informal settlements in Nairobi, for example, in Kibera, which is settled on land of about 550 acres, most of it is owned by the government.¹⁷² In Mathare, part of the land is public land but most of it is privately owned.¹⁷³ In Korogocho, over half the land falls under the category of public land, while the Mukuru Kwa Njenga settlement is situated on about 80 acres of public land.¹⁷⁴ These are just examples of informal settlements that have cropped up in public land in the urban areas. The presence of the informal settlers on public is attributable to various factors. One key factor is the lack of political will by the government to secure all the public resources, for example, by evicting informal settlers, restricting their settlement on public land, or find a long-lasting solution by allocating land where they are settled or elsewhere. As noted by the High Court in *Gabriel Dolan & 23 others v County Government of Mombasa & another*,¹⁷⁵ informal settlers are present on public land due to endorsement by the government – ‘Their right to settle comes from the **local government** both the national and county government operatives, the Chiefs and Ward Administrators, and no doubt, the Honourable Members of the County Assemblies.’ Their presence on public land is condoned and indirectly encouraged primarily due to political reasons – ‘The informal settlements are their mines not for gold and silver, but for votes in the five-year circle when they are called to exercise their political right to vote in their political leaders. Beyond that, society and the leadership forget them.’

The informal settlement on public land has led to various conflicts between governmental institutions and the informal settlers. This is mostly in cases where the government is seeking to implement development projects on the land occupied by informal settlers. Some of these conflicts end up in courts. In *Gabriel Dolan & 23 others v County Government of Mombasa & another*,¹⁷⁶ for example, the government had left the land vacant and only sought to evict the residents of Bangladesh Informal Settlement in Mombasa when the need to put up Bangladesh-

¹⁷¹ Republic of Kenya, *Sessional Paper No 3 of 2009 on National Land Policy* (2009), para 210.

¹⁷² Amnesty International, ‘Kenya: The unseen majority - Nairobi’s two million slum-dwellers’ (Amnesty International Publications 2009), 4.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ [2016] eKLR.

¹⁷⁶ [2016] eKLR.

Mikindani Road Project arose. Similarly, in *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others*,¹⁷⁷ the government sought to evict the resident of Kaptagat village along Kaptagat road within Kitsuru location, Dam Village at Kabete Veterinary Research within Kitsuru location, Ndumbuini village along Kapenguria/Fortsmith Roads within Kitsuru location, Maasai Village, Consolata on Kurema road off 2nd Parklands Avenue, Highridge within Parklands location, Kabete Native Industrial Training and Development (NITD) in Kabete. The residents were given a two-day notice to vacate the place. High Court noted ‘unconstitutional to forcefully evict such a large number of people from dwellings where they have lived for more than forty years and render them homeless overnight.’ This case clearly demonstrates how informal settlements begin on public land. The government was at all times aware that such constituted public land, but allowed the residents to live there for more than forty years.

(f) Informal Settlement on Private Land

Informal settlers also encroach on privately owned land¹⁷⁸ that has been left idle by the registered owners.¹⁷⁹ This is because in most instances the registered owner has an alternative piece of land or a place to stay. Informal settlers move onto the land since no one is using it or preventing them from entering and occupying. They then put up temporary housing structures and begin their livelihood activities on the piece of land. This is the case in informal settlements in Nairobi, which are partly established on privately owned land. They include Kibera, Mathare, and Korogocho.¹⁸⁰ In Mukuru, the land registered to private persons but now occupied by informal settlers, was allocated by the government to the private persons with the understanding that they were to carry out certain activities on land but they in turn left the land vacant, leading to informal settlers moving in. the land was allocated by the government for reasons including development of light industries, but the private persons obtained loans from financial institutions and used the land as security.¹⁸¹ The result is that the residents are occupying private land.¹⁸²

Informal settlers continue to enjoy possession of the land until the time when the registered owner seeks to evict them in order to carry out development projects on the land. This

¹⁷⁷ [2011] eKLR.

¹⁷⁸ Republic of Kenya, *Sessional Paper No 3 of 2009 on National Land Policy* (2009), para 210.

¹⁷⁹ Akiba Mashinani Trust, ‘Situation Analysis Report’ (October 2014), 56.

¹⁸⁰ Amnesty International, ‘Kenya: The unseen majority - Nairobi’s two million slum-dwellers’, 4.

¹⁸¹ Akiba Mashinani Trust, ‘Situation Analysis Report’, 56.

¹⁸² *Emmanuel Siakilo*, Characteristics and the State of Land Ownership in Informal Settlements in Nairobi, Kenya, *International Journal of Innovation and Scientific Research*, Vol. 3 No. 2 Jun. 2014, pp. 218-226, 224.

is the time when the conflicts ensue and cases on the contestation of the legality of the eviction process also arise. The case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*,¹⁸³ offers an example. The registered owners of the property, the Registered Trustees of the Kenya Railways Staff Retirement Benefits scheme, sought to evict the residents of Muthurwa Estate in order to develop a ‘a micro-metropolis with shopping malls, office blocks, petrol stations and “high class apartments”’.¹⁸⁴

2.2.3 Ownership, control and access to infrastructure and basic services

Informal settlements are characterized by ‘basic service deficits’.¹⁸⁵ This is due to the land tenure issue highlighted above, that the residents are not the legally recognized owners of the land they dwell in. Their form of land holding is neither recognized nor protected by the law.¹⁸⁶ Therefore, the residents remain unable to access the basic services since, “The government refuses to supply these services, as that would amount to legitimization of the ‘rights’ of the slum dwellers, who are viewed as being on the land illegally.”¹⁸⁷ Access to basic services is dependent on legally recognised ownership of interests in land, and since the slum dwellers do not have these rights, they are left on their own as the following quote illuminates:

This is Kibera. Often, and probably rightly, described as Africa’s biggest slum, it is home to perhaps a million people. Nobody knows for sure, since *Kibera is left to its own devices. Government is absent: it offers the residents (regarded as squatters) no services, opens no schools, operates no hospitals, paves no roads, connects no power lines and pumps no water into homes.*¹⁸⁸

The issue of access to basic services and infrastructure is further complicated by the fact that the ‘Informal settlements in Nairobi are characterized by high population densities, which outstretch

¹⁸³ High Court at Nairobi, Petition Number 65 of 2010.

¹⁸⁴ *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* High Court at Nairobi, Petition Number 65 of 2010.

¹⁸⁵ United Nations Conference on Housing and Sustainable Urban Development, ‘Habitat III Issue Papers’, 2.

¹⁸⁶ Kameri-Mbote and Odote, ‘Innovating Tenure Rights for Communities in Informal Settlements’, 56.

¹⁸⁷ Francis Kariuki, ‘Environmental Challenges in Informal Settlements: The Case of Mukuru Slums in Nairobi’ (Third Contemporary Challenges of International Environmental Law Conference, Ljubljana, August 2016) 1.

¹⁸⁸ *The Economist*, “Boomtown slum: A day in the economic life of Africa’s biggest shanty-town” 22 December 2012 <<http://www.economist.com/news/christmas/21568592-day-economic-life-africas-biggest-shanty-town-boomtown-slum>> accessed 24 April 2017.

the carrying capacity of the land.¹⁸⁹ This limits the access to electricity, water, sewerage and other social amenities.¹⁹⁰

The settlements do not have proper drainage and sewerage services. In Mukuru slums, for example, the houses measure ten by ten feet, with cement floors, roof and walls made of iron sheets but have no tap water, toilet or bathrooms.¹⁹¹ Obtaining sanitation services is more expensive than in the case of formal settlements due to the entrepreneurship involvement. The fecal and other waste is collected, at a fee, and disposed in open sewers or latrines.¹⁹² There are no dumping sites – the waste is disposed of on roads and terraces.¹⁹³ The bad situation worsens in the informal settlements whenever there is rain. The Economist reports that,

When it rains, Kibera floods. Open sewers are covered with planks worn smooth by water and constant trampling. Scavengers rake over debris before it is washed downhill. Residents burn the rest, enveloping homes in acrid smoke. Laundry on washing lines is covered in soot.¹⁹⁴

These open sewers are a great risk to life. They contribute to diseases, for example, they form breeding grounds for malaria-causing mosquitoes. This is more prevalent since the houses are congested and the open sewers pass just outside the houses.¹⁹⁵

Obtaining water for household use is difficult. The inhabitants have to buy water from individuals who sell at a higher cost than in the formal settlements. This is the case in Kibera and the other informal settlements:

Mr Mwega's wife fetches water from a privately run street tap, paying a few shillings to fill a 20-litre jerry can, and does the washing up. Mr Mwega says in the wealthy parts of Nairobi the residents get municipal water and pay a tenth of what it costs here.¹⁹⁶

¹⁸⁹ Kameri-Mbote and Odote, 'Innovating Tenure Rights for Communities in Informal Settlements', 53.

¹⁹⁰ *Ibid.*

¹⁹¹ Akiba Mashinani Trust, 'Situation Analysis Report' (October 2014) 83.

¹⁹² *Ibid* 91.

¹⁹³ Ezekiel Chege, 'Challenges of Slum Upgrading for Urban Informal Settlements; Case of Soweto East Village in Kibera Informal Settlements, City of Nairobi' (Postgraduate Diploma in Housing Administration, University Of Nairobi 2013) 29.

¹⁹⁴ *The Economist*, "Boomtown slum".

¹⁹⁵ Amnesty International, 'Kenya: The unseen majority - Nairobi's two million slum-dwellers', 9.

¹⁹⁶ *The Economist*, "Boomtown slum".

The absence of toilets in the area further worsens the sanitary condition. Furthermore, due to the insecurity at night, the residents are afraid to go to the privately run toilets,

Most people are too scared to even visit a public toilet at night. Those who need to instead use a plastic bag at home and throw it over a wall. This is known as a “flying toilet”. Anyone out walking late is advised to look up as well as down.¹⁹⁷

Access to electricity is also a great challenge and comes with great risk.¹⁹⁸ The Kenya Power and Lighting Company does not supply power to the settlements but the inhabitants have power which they obtain,

...through illegal and dangerous connections. The vendors tap electricity from Kenya Power installations and sell it to the residents. The power lines recklessly crisscross the area since the housing structures and business premises are crowded. That area experiences a lot of power outages due to the fact that the illegal connections exceed the capacity of the transformers.¹⁹⁹

These illegal power connections pose serious consequences to the lives of the inhabitants of the informal settlements.²⁰⁰ It is not only that it is more expensive than in the formal settlements. The Kibera situation offers a good example:

Life in Kibera can be harsh. Disease is rife, food is short for some, and death can come suddenly. *Just after eleven o'clock an explosion thunders past the paraffin seller. Lights in the shops along the lane expire instantly, then a mob charges past, accompanied by sharp screams and a sizzling, dancing power cable that has blasted off a faulty transformer overhead.* The cable eventually goes limp and the crowd disperses. Minutes later the lights come back. *The transformer, like all power in Kibera, is run by shady types who tap into the city grid. They are less than scrupulous when it comes to safety and they charge heavily.*²⁰¹

¹⁹⁷ *Ibid.*

¹⁹⁸ Kariuki, ‘Environmental Challenges in Informal Settlements’, 7.

¹⁹⁹ *Ibid.*

²⁰⁰ Amnesty International (n 35) 7.

²⁰¹ *The Economist*, “Boomtown slum”.

Slums also lack adequate infrastructure development, for example, roads. An examination of informal settlements with respect to infrastructure reveals that they have fewer public facilities, for instance, roads, schools, drainage, and play grounds.²⁰² The settlements are generally accessible from the outside but there are inadequate roads within them, so that movement within is very difficult.²⁰³ The lack of proper infrastructure implies serious consequences for the inhabitants in these settlements.²⁰⁴ In the Mukuru-Sinai settlements, for example, a fuel spill and fire disaster led to over 100 people losing their lives and several others injured. The drainage system increased the risks but the disaster operations were partly handicapped due to the lack of proper access roads within the settlements. The lack of infrastructure also affects the security situation in the area. A report by Amnesty International, examining the human rights situation in Kibera, quotes a resident saying that ‘The police are usually resistant to come here because they say there are no roads...’²⁰⁵ in the end, the observation that can be made in this respect is that in the informal settlements, ‘public amenities such as roads are lacking and where present, are in a bad condition.’²⁰⁶

These challenges faced by the inhabitants in accessing basic services and infrastructure highlights the importance of tenure security and the consequences where one cannot have it. Due to the fact that the government does not provide access to basic services and infrastructure, the inhabitants have to resort to private providers who offer the services at much higher rates.²⁰⁷ In most instances, the private service providers are gangs and slum cartels who charge exorbitant prices.²⁰⁸

2.3 Policy, Legal and Institutional Framework on Informal Settlements

2.3.1 Pre-2010 eon

Informal settlements in the Kenyan urban centres are a colonial relic.²⁰⁹ Colonial urban planning was underpinned by ‘government-sanctioned population segregation into separate

²⁰² United Nations Human Settlement Programme (n 2) 87.

²⁰³ *Ibid.*

²⁰⁴ Kariuki, ‘Environmental Challenges in Informal Settlements’, 7.

²⁰⁵ Amnesty International, ‘Kenya: The unseen majority - Nairobi’s two million slum-dwellers’, 6.

²⁰⁶ Kameri-Mbote and Odote, ‘Innovating Tenure Rights for Communities in Informal Settlements’, 54.

²⁰⁷ Amnesty International, ‘Kenya: The unseen majority - Nairobi’s two million slum-dwellers’, 8, 10.

²⁰⁸ Kameri-Mbote and Odote, ‘Innovating Tenure Rights for Communities in Informal Settlements’, 54.

²⁰⁹ Godwin Murunga, ‘The cosmopolitan tradition and fissures in segregationist town planning in Nairobi, 1915–23’ (2012) 6(3) *Journal of Eastern African Studies*, 467.

enclaves for Africans, Asians and Europeans.’²¹⁰ In the case of Nairobi, for example, the 1898 *Plan for a Railway Town* catered for European employees of the railway and the European and Asian traders but had nothing for the Asian labourers and the Africans.²¹¹ They were to find their own shelter. This trend also continued with the 1926 *Plan for a Settler Capital* which allocated 90 percent of the land to Europeans and 10 percent for Asians and Africans.²¹² The 1948 *Master Plan for a Colonial Capital* was no different. It perpetrated socio-spatial segregation through zoning regulations²¹³ and the result of its marginalization of the Africans was the emergence of informal urbanisation in the outskirts of the capital.²¹⁴ Racial approaches resulted in a pecking order where ‘Whites occupied the highest rung, Blacks occupied the lowest, and the rest fell in between.’²¹⁵ This was reflected in urban planning which ensured that the ‘order remained unaltered in space.’²¹⁶ The result was that,

‘...in terms of location, *the areas designed to be inhabited by Africans were situated at the outskirts of the city and surrounding the so-called inoffensive industrial zone*; the areas inhabited by Asians were located adjacent to the commercial areas and the university; and finally, the European areas were located next to the educational center and recreational facilities.’²¹⁷

The same theme was reflected in area of social amenities. Basic services were accessed on the basis of race: ‘the best areas and amenities went to the Whites, whereas the next best went to the Coloured, and the least preferred went to the Blacks.’²¹⁸

After independence, the colonial urban movement restrictions were relaxed, allowing more people to move from the rural areas to urban centres.²¹⁹ Many natives were able to access

²¹⁰ United Nations Human Settlement Programme, ‘The Challenge of Slums: Global Report on Human Settlements’, 219.

²¹¹ Soren Emug and Zahir Ismail, ‘Notes on the Urban Planning of Nairobi’ (PhD dissertation, Royal Academy of Fine Arts 1980) 9.

²¹² *Ibid.*

²¹³ Claire Medard, ‘City Planning in Nairobi’ in Helene Charton-Bigot and Deyssi Rodriguez-Torres (eds), *Nairobi Today* (Mkuki na Nyota 2010).

²¹⁴ Martina Vogel, ‘History of Urban Planning in Nairobi’ (ETH Studio Basel 2008) 2.

²¹⁵ Ambe Njoh, ‘Colonial Philosophies, Urban Space, and Racial Segregation in British and French Colonial Africa’ (2008) 38(4) *Journal of Black Studies*, 591.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

Nairobi. However, housing problems increased as urban planning was still coloured by the segregationist approaches from the colonial period save for the fact that the defining factors had changed - spatial segregation moved away from racial basis to socio-economic and cultural stratification.²²⁰ No one took issue with the mushrooming of urban shacks 'as long as they were not located near the central business district.'²²¹ The rapid increase in population put a lot of pressure on infrastructure and service delivery in the city.²²² In 1973, the Nairobi Metropolitan Growth Strategy was developed in an attempt to reform the policies in employment, transport and land use in the city.²²³ The strategy also aimed at expanding the City and decentralization by encouraging the growth of the nearby towns, for example, Thika, Athi River and Machakos.²²⁴ However, the strategy was not keenly implemented partly due to lack of adequate funds.²²⁵

The failure to implement these policies led to the development of informal settlements in the urban areas. In the case of Nairobi, Kibera Slum started as a place given by the colonial government for the Sudanese soldiers of the King's African Rifles to settle, but has today turned out to be the largest urban slum in Africa.²²⁶ The Nubi tribe settled on the land and were joined by the native Kenyans who came to the urban centre in search of jobs, as time passed.²²⁷ However, as Nairobi grew and its boundaries expanded, the European community became disinterested in having the Nubis settle in Kibera – the land 'was too precious to be used for an African settlement, and that removing the Nubis would provide valuable building land for the growing city.'²²⁸ A decision was, therefore, made to resettle the Nubis, with the Nairobi District Commissioner saying 'I admire the Nubi, but would like to see him happily settled say 10 miles

²¹⁹ Samuel Owuor and Teresa Mbatia, 'Nairobi' in Simon Bekker and Göran Therborn (eds), *Capital Cities in Africa: Power and Powerlessness* (CODESRIA 2011), 123.

²²⁰ United Nations Human Settlement Programme, 'The Challenge of Slums: Global Report on Human Settlements', 219.

²²¹ *Ibid.*

²²² Brad McDearman, Greg Clark and Joseph Parilla, 'The 10 Traits of Globally Fluent Metro Areas' (The Brookings Institution 2013) 2.

²²³ *Ibid.*

²²⁴ Vogel, 'History of Urban Planning in Nairobi', 4.

²²⁵ McDearman, Clark and Parilla, 'The 10 Traits of Globally Fluent Metro Areas', 2.

²²⁶ Johan Victor Adriaan de Smedt, 'The Nubis of Kibera: A Social History of the Nubians and Kibera slums' (Doctoral Thesis, Leiden University 2011).

²²⁷ *Ibid* 71.

²²⁸ *Ibid* 73.

from Nairobi.²²⁹ However, the attempts always failed due to the likelihood of resistance from the local natives and Europeans in acquiring land for resettlement.²³⁰

The Nubis raised complaints to the 1932 Kenya Land Commission due to the reduction in the land but were told that they were ‘tenants at will of the Crown, liable to termination at any time.’ This trend continued with the government refusing to basic services, for example, clean water to the residents. To the government, ‘it.[was]...undesirable that the settlement there should be permanent’²³¹ and that neglect might force out the inhabitants. After independence, the neglect of the area continued. An attempt was made in 1969 by Yunis Ali, a Nubi elected Member of Parliament for Lang’ata Constituency, to resolve the land issue. He tabled a motion in Parliament and which was passed by the house stating

‘that pursuant to Government’s declared policy on slum clearance in Kibera Village and the fact that Kibera inhabitants are entitled to full rights to plot ownership like any other citizens in the country, this house urges the Government to introduce a scheme at Kibera whereby demarcated plots with title deeds will be allocated to the residents for putting up decent houses either on their own or with Government assistance, as opposed to the present housing scheme by the Ministry of Housing’.²³²

However, the same was never implemented and the land law never changed due to the absence of political will.²³³ The population in Kibera has since grown to become the largest slum in sub-Saharan Africa, and is made up of various ethnic groups, but access to land and basic services is characterized by deficits, as described above.

One of the laws that governed access to infrastructure and basic services was the now repealed Local Government Act.²³⁴ This Act empowered local authorities to conduct planning by prohibiting and controlling development and use of land and buildings in order to ensure proper and orderly development.²³⁵ The local authorities were also further empowered to undertake

²²⁹ Letter from DC Nairobi Hosking, to PC Nyeri, 27/4/31, KNA RCA (MAA) 2/1/3/i.

²³⁰ de Smedt, ‘The Nubis of Kibera’, 73.

²³¹ Letter from DC Nairobi to Director Medical Services, 1941.

²³² *Daily Nation*, ‘New Kibera housing scheme agreed’, 28 November 1970.

²³³ de Smedt, ‘The Nubis of Kibera’, 96.

²³⁴ Chapter 265, Laws of Kenya.

²³⁵ Section 166, *Local Government Act* (Chapter 265, Laws of Kenya) (repealed).

sewerage and drainage services,²³⁶ housing,²³⁷ water supply²³⁸ and electricity supply²³⁹ for the inhabitants of their areas. This, therefore, empowered them to plan for the infrastructure and basic services. However, as already mentioned above, these services could not be extended to those in the informal settlements as proof of ownership of land is a requirement in application for such services.

The now repealed Physical Planning Act of 1996 also vested in the local authorities a development control power – it empowered them to consider and approve development applications and grant permissions for development and ensure that such plans are properly executed.²⁴⁰ And because informal settlements are constructed by individuals who have no ownership of land, they are, therefore, not going to seek permission for development plans when constructing houses in the land.²⁴¹ However, the local authorities still had an obligation with respect to the informal settlements in that the Act prohibited any development within the area of a local authority without a development permission by the local authority.²⁴² The presence of informal settlements in urban areas, therefore, shows the failure by the local authorities to carry out this mandate as required. In an effort to address such weaknesses in the Act, it was amended in the Physical Planning Act of 2017²⁴³, which provides for the procedures, principles and standards for the implementation and preparation of physical development plans at the regional, national, county, cities and urban levels; a dispute resolution mechanism with regard to physical planning among others.

These challenges are captured in the 2009 National Land Policy.²⁴⁴ In dealing with the land use planning principles, the Land Policy points to the functional disconnect between the planning and implementing agencies as one of the key issues resulting in inefficient and unsustainable use and management of land.²⁴⁵ It also recognises that one of the ways in which the problems of land use planning are manifesting themselves is through the spread of slum

²³⁶ Section 168, *Local Government Act* (Chapter 265, Laws of Kenya) (repealed).

²³⁷ Section 177, *Local Government Act* (Chapter 265, Laws of Kenya) (repealed).

²³⁸ Section 178, *Local Government Act* (Chapter 265, Laws of Kenya) (repealed).

²³⁹ Section 181, *Local Government Act* (Chapter 265, Laws of Kenya) (repealed).

²⁴⁰ Section 29, *Physical Planning Act* (Act No 6 of 1996).

²⁴¹ Amnesty International, 'Kenya: The unseen majority - Nairobi's two million slum-dwellers', 10.

²⁴² Section 30(1), *Physical Planning Act* (Act No 6 of 1996).

²⁴³ The Physical Planning Act of 2017

²⁴⁴ Republic of Kenya, *Sessional Paper No 3 of 2009 on National Land Policy* (2009).

²⁴⁵ *Ibid* para 103.

developments.²⁴⁶ And it is in this regard that it places slum dwellers as one of the vulnerable groups with respect to land rights.²⁴⁷ It considers the lack of tenure security and planning as the essence of informal settlements²⁴⁸ and recognises that informal settlements pose a challenge for land planning development.²⁴⁹ The Policy also attempts to address that ownership and tenure security issues. It proposes that the government facilitates negotiation between private owners and the occupiers, come up with measures to prevent further slum development, regulate disposal of land allocated to informal settlers, and formulate laws to govern eviction based on internally acceptable guidelines.²⁵⁰

2.3.2 Post-2010 eon

The post-2010 eon has been marked by the progressive constitutional provisions. Constitution of Kenya 2010 highlights equitable access to land and security of land rights as some of the principles of land policy.²⁵¹ The interpretation of some of the constitutional provisions in the Bill of Rights have generated a lot of contention. Article 40 recognises the right to private property while Article 43 captures the economic and social rights. Informal settlements have formed a ground for contention between these two constitutional rights, through eviction of the inhabitants in these areas.²⁵²

The Courts have had the occasion to interpret these provisions. In the case of *Gabriel Dolan & 23 others v County Government of Mombasa & another*,²⁵³ the residents of Bangladesh Informal Settlement in Mombasa, through a public interest litigation suit, sought to stop the demolition of their houses by the government for the purpose of putting up the Bangladesh-Mikindani Road Project. They based their suit on Article 27 on equality and freedom from discrimination, Article 35 on the right to information, Article 40 on the right to property, Article 42 on the right to a clean and healthy environment, and Article 43 on the economic and social rights. However, according to the Court, ‘the **REAL ISSUE** raised in...

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid* 194.

²⁴⁸ *Ibid* 209.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* 211.

²⁵¹ Article 60(1)(a) and (b), *Constitution of Kenya* (2010).

²⁵² Doris Matu, ‘Walking the Tight Rope: Balancing the Property Rights of Individuals With the Right to Housing of Informal Settlers’ (2016) 1(2) *Strathmore Law Review*, 95.

²⁵³ [2016] eKLR.

[the]...petition...[was].. the rights of **dwellers of informal settlements.**' The Court went on to state that,

Dwellers in informal settlements have no title to the land in which they have erected their dwellings. They are physical and spiritual families. Their income comes from what we call the **informal sector**. Their factories and manufacturing premises are road **side kiosks**, the pavements next to their informal settlements. Their right to settle comes from the **local government** both the national and county government operatives, the Chiefs and Ward Administrators, and no doubt, the Honourable Members of the County Assemblies. The informal settlements are their mines not for gold and silver, but for votes in the five-year circle when they are called to exercise their political right to vote in their political leaders. Beyond that, society and the leadership forgets them. They may get drips of water at water points of sale, not taps in their house. They are the new "**les miserable**" of Victor Hugo, the French writer...The cry to court for protection.

The Court highlighted a dilemma in this situation: it is necessary to construct roads for the welfare of the dwellers but they also need street lighting and recreational facilities. The two objectives are competing for the same space: 'Often the pace of physical development such as construction of roads becomes a challenge to those informal settlements.'²⁵⁴ Therefore, 'The challenge is how to reconcile these apparently conflicting, but in effect, mutually beneficial contradictions.'²⁵⁵

According to the Court, the dilemma is partially solved by having recourse to Article 40(3) and (4) of the 2010 Constitution. Article 40(3) protects the persons who have title to property, while Article 40(4) caters for the rights of the occupants in good faith who have no title. The Court, in this regard, called upon the government to ensure that the interests of the informal settlers were protected and that public participation be incorporated in the process. It observed that,

Construction of roads and street lights, and sewage facilities needs land, and some or many of the Petitioner's will, or may be affected. The acquisition of their dwellings, their

²⁵⁴ *Gabriel Dolan & 23 others v County Government of Mombasa & another* [2016] eKLR.

²⁵⁵ *Ibid.*

clinics, their maternity (for pre-and post-natal care), their nursery school, their community hall, their residential homes and the residential houses of their spiritual leaders, the priests, imams, will be a subject of detailed discussion between the government at the national and county levels. That is the requirement of public participation under Article 10(2(a) – the national values and principles of governance – patriotism, national unity, sharing and devolution of power and **participation of the people**.

In granting its orders, the Court refused to declare the intended construction of the road null and void but ordered that the government must adhere to the constitutional principles of participation and inclusivity before the road could be constructed and that the property of the informal settlers could not be arbitrarily demolished without compensation for the damage. It also found that the government had violated Article 35 on the right to information, Article 40(3) and (4) on the right to property, Article 42 on the right to a clean and healthy environment, Article 43 on the economic and social rights, and Article 47 on the right to fair administrative action.

Where there has been violation of court orders not to demolish the houses of informal settlers, the Courts have not been hesitant to find such as contempt of court. In *Mitu-Bell Welfare Society v Attorney General & 2 Others*,²⁵⁶ the Court found the managing director of the Kenya Airports Authority as being in contempt of court after proceeding with the destruction of the informal settlements known as Mitumba Village, near Wilson Airport, despite the existence of court orders prohibiting such until the matter before the Court was dealt with. The conservatory orders had been served on a representative of the legal department of the Authority who accepted service, and the Authority went ahead to instruct a firm of advocates to represent it in the matter, and the corporation secretary swore an affidavit in opposition to the proceedings.

During the hearing of the contempt proceedings, the managing director claimed that he had not been served personally, and that in any event the demolitions were being carried out by what he referred to amorphously as ‘the government of the Republic of Kenya’. The Court could not entertain any of these. According to the Court, this was an attempt by the director to ‘not take responsibility for its disobedience of the court order.’ The fact that the Authority is a state

²⁵⁶ [2012] eKLR.

corporation, and therefore, part of ‘the government of the Republic of Kenya’, led the Court to find that it could not ‘be heard to argue that it was not aware of or party to the demolitions.’ The Court was emphatic that the managing director could not hide behind a technicality so as to deny justice to the slum dwellers:

“The members of the petitioner are the ‘people of Kenya’ from whom judicial authority is derived as provided in Article 159(1). *While they may be deemed of low social status as residents of a slum settlement, they, too, are entitled to justice, such justice to be administered without undue regard to procedural technicalities.*”

The Court did this with the rationale being that failure to abide by the rule of law will result in violation and non-realization of the constitutional provisions and aspirations, especially where the defaulter is the state, which is supposed to be the one spearheading and safeguarding the constitutional rights:

As Kenya embarks on the implementation of the new Constitution with its provisions on the rights of citizens, all parties must be reminded of the need to observe the rule of law which is the core and the foundation of our society. *Without observance and obedience of the orders of the court by parties in the position of the 2nd respondent and indeed by all organs of state and all persons, the aspirations of Kenyans set out in the Constitution will remain a mirage.* The court must be on guard to prevent this.

The demolition of structures and eviction of inhabitants in informal settlements has been a major issue after the promulgation of the 2010 Constitution. It presents an instance where the right to property, on one side, and the right to accessible and adequate and compensation of inhabitants having no title, on the other.²⁵⁷ Even where the courts have been of the opinion that the eviction of informal settlers is right, they have insisted that such eviction must be carried out in line with the internationally accepted principles. In *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others*,²⁵⁸ the City Council of Nairobi had issued a 72-hour eviction notice to the inhabitants of the informal settlements of Kaptagat and Masai villages. The Court found that the informal settlers were dwelling on land constituting a public road and that their

²⁵⁷ Matu, ‘Walking the Tight Rope’, 95.

²⁵⁸ [2013] eKLR.

eviction was justified. Their occupation of the road was a private interest which was in conflict with the interest of the larger public, and their private interest had to give way to the public interest – their right to housing could not be properly asserted over a public road. This, however, did not mean that the informal settlers had lost the right to be evicted as required by the law. Court thus noted that,

‘...the petitioners are entitled to be given adequate notice to vacate the said public road. They cannot be required to vacate the places said to be their homes within a matter of hours. Even though they are in occupation of a public road, they deserve to be given adequate notice to vacate the said premises.’

The Court went ahead to stop the intended eviction and required that a notice of at least 90 days be issued at the end of which the evictions be conducted according to the internationally recognised principles:

Should the eviction of the petitioners from the said roads be necessary after the expiry of the notice period, then the same shall be carried out in accordance with the international standards contained in the **UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)** cited with approval by the court in the case of **Satrose Ayuma & Others -vs- The Kenya Railways Retirement Benefits Scheme & Others High Court Petition No. 66 of 2010**. These Guidelines require at paragraphs 45-49 thereof, among other things, the mandatory presence of government officials or their representatives and neutral observers on site during evictions; that the evictions are not carried out in a manner that violates the dignity and human rights to life and security of those affected; that the evictions are not carried out at night or during bad weather; and that no one shall be subjected to indiscriminate attacks during the eviction.

From the above discussion, it can be said that the courts are giving an interpretation which is positive with respect to the protection of the property rights of the informal settlers. However, this judicial protection is not enough – all it does is at best is to ensure that the informal settlers’ rights are not violated in the current state they are in – it keeps them just where they are. What is required is goodwill from the legislative and executive arms of government to move the informal settlers from their current condition to a better one, for example, through resettlement.

The informal settlers also have a recourse within the current land law regime. Under the Land Act, for example, the state can compulsorily acquire land for a public purpose subject to compensation.²⁵⁹ Public purpose is defined to include the purposes of ‘settlement of squatters, the poor and landless, and the internally displaced persons’.²⁶⁰ There is also established a Land Settlement Fund to be administered by a Board of Trustees.²⁶¹ The Board is responsible for, among other things, provision of access to land for squatters and displaced persons.²⁶² It is also in charge of coordinating the ‘provision of shelter and a livelihood to persons in need of settlement programmes’.²⁶³ The Fund is to be applied in the realization of these functions, including the purchase of private land for settlement programmes.²⁶⁴ These Land Act provisions, therefore, offer an avenue for ending the informal settlement challenges. Proper use of the fund can be used to resettle informal land dwellers through purchase of the land they occupy from the private owners.

Additionally, there is also an opportunity to tackle the challenge of informal settlements under the Land Act provisions on conversion of land from one category to another.²⁶⁵ Land may be converted from public to private or community land, from private to public land, and from community to private or public land.²⁶⁶ The conversion of land from private to public, and from public to private or community, offers a good opportunity for the government to end the informal settlement challenge. Land can be acquired from private persons, through compulsory acquisition, and once it is under public land, the land can be used to settle squatters, as this falls under the definition of a public purpose.²⁶⁷ Therefore, the land currently occupied by informal settlers can be compulsorily acquired and the owners compensated.

The laws on physical planning in urban areas also emphasise the fact that the urban areas and cities should have integrated plans in order to ensure order in urban centres.²⁶⁸ Urban areas

²⁵⁹ Section 2, *Land Act* (Act No 6 of 2012).

²⁶⁰ Section 2, *Land Act* (Act No 6 of 2012).

²⁶¹ Section 135(1), *Land Act* (Act No 6 of 2012).

²⁶² Section 135(1C)(a), *Land Act* (Act No 6 of 2012).

²⁶³ Section 135(1C)(c), *Land Act* (Act No 6 of 2012).

²⁶⁴ Section 135(3)(b), *Land Act* (Act No 6 of 2012).

²⁶⁵ Section 9, *Land Act* (Act No 6 of 2012).

²⁶⁶ Section 9(2), *Land Act* (Act No 6 of 2012).

²⁶⁷ Section 2, *Land Act* (Act No 6 of 2012).

²⁶⁸ See Part V, *Urban Areas and Cities Act* (Act No 13 of 2011), and Part XI, *County Governments Act* (Act No 17 of 2012).

and cities are also under a mandate to ensure that they deliver essential services to the residents.²⁶⁹ In carrying out the development plans, county governments, urban areas and cities are required to taken into consideration marginalised communities and to undertake affirmative action in access of services.²⁷⁰ Coordination between the planning authorities and the Land Settlement Board would ensure that the informal settlers challenge is resolved.

The constitutional and the statutory provisions affecting the tenure security of informal settlers are not comprehensive as they are. More needs to be done to ensure that the informal settlers are moved from the position they are in to where they can have a secure tenure and, consequently, proper access to basic services. It must be noted, therefore, that even though the current legal framework does not cover all the issues, proper implementation would ensure that informal settlers are afforded protection even if not fully.

2.4 Summary of Gaps in the 2010 Legislative Framework

In summary, the 2010 Legislative Framework presents a number of gaps that still bedevil effort to address the urban squatter problem, including that: though the courts in the country are granted abilities to solve the problem through the Constitution and the supporting statute, other applicable laws are limited and this would make the courts unproductive in dealing with the squatter land problem; whereas the Constitution provides that the main dispute is title to land, the other land laws however, that are to be depend on by the court are incomplete in resolving the squatter land problem. Therefore, in spite of having a liberal procedural law, the applicable laws remain inadequate and the problem at hand cannot therefore be sufficiently addressed; initiatives aimed at dealing with the squatter land problem in Kenya, within the ministry are not backed by any legal framework, even though they are good, and consequently they are not as effective as they should be.

²⁶⁹ Sections 5, 9 and 10, *Urban Areas and Cities Act* (Act No 13 of 2011).

²⁷⁰ Section 40, *Urban Areas and Cities Act* (Act No 13 of 2011), and Section 102, *County Governments Act* (Act No 17 of 2012).

2.5 Conclusion

The observation of the Court in the case of *Gabriel Dolan & 23 others v County Government of Mombasa & another*²⁷¹ highlights a greater challenge in urban governance – political capture. In the opinion of the Court,

Their right to settle comes from the **local government** both the national and county government operatives, the Chiefs and Ward Administrators, and no doubt, the Honourable Members of the County Assemblies. The informal settlements are their mines not for gold and silver, but for votes in the five-year circle when they are called to exercise their political right to vote in their political leaders. Beyond that, society and the leadership forgets them. They may get drips of water at water points of sale, not taps in their house. They are the new “**les miserable**” of Victor Hugo, the French writer.

This brings to light the challenges bedevilling urban governance, and by extension, the informal settlements in Kenya. The political class is keen to ensure that they obtain votes and consolidate their power through the large following in the slums. Therefore, what better way to get their support than to keep them in the state of poverty they are in, so that they can be easily enticed with a few coins in return for votes. From this, it can be concluded that political will is not in favour of finding a long-lasting solution for the informal settlement challenges. The effect of political interference is that the well-meaning steps taken in development control, planning and infrastructure development functions in the urban areas are quietly disengaged.²⁷² Furthermore, the fact that some of these settlements constitute areas of political representation, worsens the situation as the elected representatives need the areas maintained in order to remain in power.²⁷³ The politically well-connected individuals in these areas are able to access the lands and are in most cases the ones who are landlords despite the fact that they do not own the land.²⁷⁴

Having examined all these issues, it can be pointed out that indeed the inhabitants of informal settlements are paying a higher price for their lack of tenure security. The prices, as shown above, can be in monetary form in accessing basic services and infrastructure, or the

²⁷¹ [2016] eKLR.

²⁷² Blessings Chinsinga, ‘The political economy analysis of urban governance and management in Malawi’ (Tilitonse Fund Advisory 2015) 22.

²⁷³ Florence Dafe, ‘No business-like slum business? The political economy of the continued existence of slums: A case study of Nairobi’ (2009) No. 09-98 Development Studies Institute Working Paper Series, 8.

²⁷⁴ *Ibid.*

effects, for example, diseases or even the loss of lives. It is also evident, as discussed above, that the existing legal and policy framework is not enough to completely eradicate this challenge. It needs more than the law. Political goodwill, for example, is a key requirement in facing this challenge especially with the emotive position of land in the discourses in the country. The protection after the promulgation of the 2010 Constitution is better but more is required to be done to ensure that avenues in the new constitutional and statutory provisions are translated into practice.

CHAPTER THREE: BEST PRACTICES IN SECURING TENURE WITHIN URBAN SQUATTER SETTLEMENTS

3.1 Introduction

This chapter explores best practices from other jurisdictions and how they have been able to resolve the urban squatter problem. It assesses how different sound urban governance and adoption of appropriate innovative strategies can be useful in securing tenure security within urban settlements. It also explores the correlation between tenure security and other socio-economic rights of informal settlers.

Philippines has been picked as a case study due to the features of the approaches undertaken and the results of the measures undertaken in curbing the urban squatter problem. It uses a participatory approach, which incorporates all the stakeholders, and most importantly the communities in the slums. This avoids the top-down approach where policies are developed by top government agencies without local input. The top-down approach reduces the legitimacy of the programs and increases the chances of failure since the communities feel the program is imposed on them as opposed to when they would have ownership through participation.

South Africa is picked as a case study in the resolution of the problems facing urban informal settlements due to the approach it adopts. It uses a human rights approach where the courts are giving judgments favourable to the protection of the inhabitants of informal settlements. The rights to housing are enshrined in the 1996 Constitution, and the civil society and advocacy groups have taken up the responsibility of seeking redress before the courts on behalf of the urban poor.

3.2 Governance of urban squatter settlements in Philippines

This part discusses the background of informal settlements in urban Philippines, and looks into the tenure arrangements and its implications of the inhabitants. It also highlights the responses by the Philippine government and suggests key lessons that may assist in tackling the urban informal settlement problem in Kenya.

The Philippine approach also seeks to develop localised solutions to the squatter problem. This ensures that the measures to be implemented are relevant to the context and increases the chances of success since it takes into account all the circumstances in the area.

3.2.1 Overview and background on informal settlements in Philippines

Urban squatter settlements are on the rise due to reasons including rural urban migration. Drought and the continued reduction in farming productivity leads some of the rural inhabitants to move to the urban centres in the hope of finding some opportunities to improve their living conditions. This holds true for Philippines.²⁷⁵ When many of them get to the urban centres, they are not able to secure a place to live and are left in the outskirts of the town. This situation has seen 44 percent of the Philippine urban population live as urban squatters.²⁷⁶ The urban squatters live on government and private land, exposing them eviction in addition to the social, environmental and economic challenges they face.²⁷⁷

Poverty in rural Philippines is one of the major factors that has powered the increase in urban squatter settlements. Approximately 80 percent of the residents in the Manila, the capital city of Philippines, are migrants. The rural population is generally poor leading to some of the residents to migrate to towns in search of better living conditions. Poverty in the rural areas is partly attributable to the high inequality in the land distribution, and the consequent income variation in the residents.²⁷⁸ Additionally, the rural farming has low productivity yet it is depended upon by many people, and of the rural families, almost half of them are landless labourers:

Well over three –quarters of them fall below the poverty threshold, particularly those working in sugarcane, coconut, maize and rice farms and in fishing or forestry. Most employers in those industries have low capacity to pay higher wages, but even those who

²⁷⁵ Ooi , Giok Ling & Phua, Kai Hong, 2007: “Urbanization and Slum Formation” in *Journal of Urban Health*, Vol. 84, No. 1, 28-29.

²⁷⁶ Pernille Olesen, ‘The Challenge of Squatters: An Assessment of Housing Provision in the Philippines in the Context of Decentralisation’ Thesis, Aalborg University, 2009, 1.

²⁷⁷ Olesen, ‘The Challenge of Squatters’, 1.

²⁷⁸ Krinks, Peter, *The Economy of the Philippines: Elites, inequalities and economic restructuring*, Routledge, London and New York, 2002, 79.

*could do so - as in the sugar and forestry industries - can avoid it simply because of the large numbers desperate for paid work.*²⁷⁹

The rural poverty, therefore, acts a push factor in the urban migration, and contributes to the increased informal settlements in the urban areas.

The movement to the urban areas is motivated by the tendency in social and economic policies to favour the urban over the rural areas of the country.²⁸⁰ However, due to the fact that many people move to the urban areas, the urban population ends up exceeding the carrying capacity of the urban facilities. Some of the urban facilities are also expensive and inaccessible to the poor migrants. Their only option is therefore to live in the informal settlements. The informal settlements have poor living conditions. They are not environmentally friendly, have shortages in water supply, flooding and poor and inadequate infrastructure.²⁸¹ Access to basic services is a major challenge. The housing conditions are inadequate, and it is the same case for sewerage services.²⁸²

3.2.2 Tenure arrangements within informal settlements

The inhabitants of the slums in Philippines do not have the legal security of tenure while squatting in private and public lands. They are therefore susceptible to evictions.²⁸³ The lack of legal tenure over the lands they squat on implies various challenges, which are social, environmental, and economic in nature.²⁸⁴ They are not able to access proper social amenities, for example, adequate housing, sewerage and sanitation, and healthcare. The environment they live in is also characterised by air, soil and water pollution. Due to the absence of proper dumping sites, the inhabitants dump waste materials near their housing structures. In this way the surroundings are not kept clean. The water sources near the houses are polluted and so is the air due to the burning of the waste materials after accumulation.

The inhabitants are also susceptible to disasters such as fire. Due to the fact that the houses are cramped together, there are no adequate spaces for use by emergency response teams.

²⁷⁹ Krinks, *The Economy of the Philippines*, 83.

²⁸⁰ Olesen, 'The Challenge of Squatters', 19.

²⁸¹ *Ibid.*

²⁸² *Ibid* 20.

²⁸³ *Ibid* 1.

²⁸⁴ *Ibid.*

The closeness of the houses worsens the situation since some inhabitants illegally tap electricity and make haphazard connections. This forms a route for the fire to spread throughout the settlement. The primary factor contributing to this situation is the lack of legal tenure in the land. The inhabitants put up temporary and regulation non-compliant houses since they are always living in fear of eviction.²⁸⁵ This has led to a lot of fires in the slums which destroy belongings and endanger lives. According to the 2010 Philippines Disaster Report, for example, 123 incidences of fire were reported in 2010 and most of them were in ‘urban centres, particularly in congested urban poor communities.’²⁸⁶ This resulted in 65 injuries, 8 fatalities, and damage estimated at £2, 940,000.²⁸⁷

However, due to the implementation of programs, for example, the Community Mortgage Program, discussed below, the slum inhabitants have been afforded a way in which they can obtain the legal security of tenure. Through the Program many slum dwellers have been able to form organizations and acquired land and developed their own houses. They buy the land they have been squatting on or other pieces of land. This has assisted them obtain security of tenure and avoid the evictions that characterised their life in the slums.²⁸⁸

Additionally, the government launched the ‘assets formation campaign’ and established a taskforce to facilitate formalisation of the informal land tenure through leases and sale of land.²⁸⁹ This enables some of the slum dwellers to purchase some of the land they are dwelling in, through their local organisations.

3.2.3 Legal responses and governance interventions aimed at securing tenure security

Various innovative approaches have been used to combat the urban squatter problem in the Philippines, with these approaches taking both a political and legal nature. They include: the Community Mortgage Program (CMP); presidential land proclamations; and the usufruct arrangement.²⁹⁰

²⁸⁵ Christopher Westwell, ‘Fires in informal settlements in India and the Philippines’ Master of Science Thesis, Loughborough University, 2011, 29.

²⁸⁶ Westwell, ‘Fires in informal settlements in India and the Philippines’, 20.

²⁸⁷ *Ibid* 22.

²⁸⁸ Olesen, ‘The Challenge of Squatters’, 49.

²⁸⁹ *Ibid* 50.

²⁹⁰ United Nations Human Settlements Programme, *Innovative Urban Tenure in the Philippines: Challenges, Approaches and Institutionalization*, 2011, 14.

The government put in place legislation to deal with the issue of forced evictions. In 1992, through the lobby of the organizations of the urban poor, the Urban Development and Housing Act was enacted to establish the legal safeguards against forced evictions, and require that social housing programs be developed for informal settlers. This statute also provided the legal backing for the other approaches, for example, the Community Mortgage Program.²⁹¹

The government also withdrew from the direct production of housing. Its role is now to assist in the financing of housing acquisition by way of mortgage financing.²⁹² This move was undertaken on the basis that the state could not be able to cater for the huge housing needs, and that market liberalisation in housing would provide more houses and reduce corruption and heavy government spending in the sector.²⁹³

The Local Government Code of 1991 has been instrumental in the Philippine's legal framework, particularly the decentralisation measures in governance under. The Code empowered the provinces and municipalities to exercise local autonomy in the provision of services to the communities:

*It is hereby declared the policy of the state that the territorial and political subdivisions of the State shall enjoy genuine and meaningful local autonomy to enable them to attain their fullest development as self-reliant communities and make them more effective partners in the attainment of national goals. Toward this end, the State shall provide for a more responsive and accountable local government structure instituted through a system of decentralization whereby local government units shall be given more powers, authority, responsibilities, and resources. The process of decentralization shall proceed from the national government to the local government units.*²⁹⁴

The local governments were then allocated part of national revenue and allowed to charge local taxes in order to undertake service provision to the communities. The services include housing in the urban areas. There is also the Priority Development Assistance Fund which is used to finance

²⁹¹ *Ibid* 17.

²⁹² Emma Porio, Christine Chrisol, Nota Magno, David Cid and Evelyn Paul, 'The Community Mortgage Program: An Innovative Social Housing Programme in the Philippines and Its Outcomes' in Mitlin, Diana Mitlin and David Satterthwaite, *Empowering Squatter Citizen: Local government, Civil Society and Urban Poverty Reduction*, Eartscan Publications, 2004, 55.

²⁹³ Olesen, 'The Challenge of Squatters', 44.

²⁹⁴ Section 2(a), Local Government Code, 1991 (Philippines).

projects approved by the Congress, and the projects implemented by the National Government Agencies.²⁹⁵

However, the move has not been without challenges. Some of the local government do have the financial and human capacity to handle the housing concerns:

*Decentralisation has meant that local governments must rely increasingly on revenue generated through local property taxes and localities that lack commercial and office facilities therefore often lack the fiscal capacity to address housing issues. In the city of Navotas—for example, one of Metro Manila’s most resource-poor local governments has devoted only one half-time staff member to the concerns of the municipality’s 80 000 informal settlers.*²⁹⁶

This further highlights the fact that it is difficult to develop measures that can effectively combat the informal settlement problem.

The Urban Development and Housing Act was also central to the decentralisation measures. It empowered local governments to provide housing facilities through slum upgrading, mortgage financing, and partnership with the private sector in the provision of social housing. It also shifted the focus from evictions and relocation to participation by the urban poor in local land use planning.²⁹⁷ The local governments were further mandated under the Act to establish local housing boards and to require that 20 percent of the costs of housing development by private developers be dedicated to social housing.²⁹⁸

One of the most successful measures implemented is the Community Mortgage Program. The Program affords poor families a loan facility with low interest and a longer repayment period, and focuses on squatters on public and private land.²⁹⁹ The features of the loan are: squatters form community organisations; the organisations obtain the loan to buy and develop

²⁹⁵ Gera, Weena J. S., 2008: Institutionalization in Philippine Decentralization: Rethinking the Bureaucratic Imperative. For presentation at the conference “New Public Management and The Quality of Government”, Gothenburg, November 13-15, 2008, 12.

²⁹⁶ Shatkin, Gavin, 2004:” Planning to forget: informal settlements as ‘forgotten places’ in globalising metro Manila” in *Urban Studies*, Vol. 41, No. 12, pp. 2469-2484, 2480.

²⁹⁷ Emma Porio, Christine Chrisol, Nota Magno, David Cid and Evelyn Paul, ‘The Community Mortgage Program’, 55.

²⁹⁸ Section 18, Urban Development and Housing Act (Philippine).

²⁹⁹ Olesen, ‘The Challenge of Squatters’, 48.

land; the loan is given by a non-governmental organisation, a local government unit or the National Housing Agency; 6 percent annual interest rate; and a term of 25 years.³⁰⁰ The Program has enabled many people across Philippines to access housing:

‘The CMP has presented many successful stories across the country of communities able to obtain security of tenure and thus no longer facing the insecurity of eviction. Typically communities either buy the land they squat on or they buy land off-site, depending on which solution is attainable. Compared to other loan types there is a high collection rate under the CMP...This can be ascribed to several factors. Firstly, state policy requires communities to organise, which means that families are more inclined to repay loans. Secondly, NGOs stand behind individual families, which also means that they are more inclined to work hard to obtain the money for amortisation. Thirdly, families may find new opportunities of generating income, through new investments, such as for instance renting out space on their new land...Most important though, the accomplishments may serve as a boost of confidence for residents to climb up the income ladder.’³⁰¹

These measures have assisted the urban squatters in gaining tenure security. Through the organisations they form, they are able to purchase land and put up their own housing. They may buy the land they are squatting on or other pieces of land. In this way, they gain tenure security since they are not susceptible to evictions in their own pieces of land, and can have access to the basic and infrastructural services since they can proof ownership of the land. Furthermore, the program is sustainable since loans are advanced to the urban squatters, and given a long period of time to repay.

3.2.4 Lessons for Kenya

Kenya can derive two major lessons from the Philippine situation. One key lesson is the need to develop approaches that are relevant to the local circumstances. The local circumstances play an important role in implementation of approaches, and dictate the failure or success of the approaches in question:

³⁰⁰ Emma Porio, Christine Chrisol, Nota Magno, David Cid and Evelyn Paul, ‘The Community Mortgage Program’, 57.

³⁰¹ Olesen, ‘The Challenge of Squatters’, 49.

*Contextual conditions in the socio-economic, policy, and institutional environment either facilitate or hinder the application of particular approaches aimed at assisting poor people in gaining secure land tenure. Whether land is predominantly privately-owned or under the control of the state expands or restricts the scope of applying certain approaches. Similarly, the existence of democratic systems of governance, of institutions that support people's processes, and of laws that recognize the rights of poor people permits the application of approaches that would otherwise not be feasible in countries where, for instance, public institutions are weak or non-functioning.*³⁰²

In the case of Philippines, the solutions developed incorporated the organizations of the urban poor, which were key in advocating for the measures and monitoring their implementation. For example, through their lobby, the Urban Development and Housing Act was enacted in 1992 to prohibit forced evictions and mandate the implementation of social housing programs in the urban settlements.³⁰³ These community organisations formed an integral part of the advocacy for the rights of informal settlers and were also involved in the development of the solutions and their implementation. Kenya has also to look into its own unique circumstances and come up with measures that take into account all the factors involved so that in the end the approaches can bear fruit and be sustainable.

Another key lesson from the Philippine situation is the central role of participatory approaches in slum upgrading measures. There is need to develop a bottom-up approach instead of a top-down approach in coming up with solutions for the slum problem. It is important to appreciate that the communities know their situations better and can manage their resources better than outsiders.³⁰⁴ Solving societal problems in an effective manner requires that the communities are involved so that they are not merely the recipients of the policies, but are treated as agents who are actively involved in the improvement of their living conditions.³⁰⁵ Participation also enhances self-governance by the people and affords them the opportunity to take part in decision-making processes that affect their lives, and in this way there is increased legitimacy for the resultant measures. It is in this respect that

³⁰² United Nations Human Settlements Programme, *Innovative Urban Tenure in the Philippines*, 16.

³⁰³ *Ibid* 17.

³⁰⁴ Davis, Mike, 2006: "Planet of Slums". Interview in *New Perspectives Quarterly*, Vol. 23, no. 2, pp.6-11, 11.

³⁰⁵ See, Amartya Sen, *Development as freedom*, Oxford University Press, 1999.

*The participatory approach demands a great deal of cooperation on the part of communities, local governments, NGOs and grassroots organisations, where government carries a facilitative role and is often accountable for the financial aspects of programs...Participatory slum improvements involve to varied degrees the participation of residents themselves in improving their living situation...Accordingly, it is the intention of project facilitators to facilitate commitment and responsibility on the part of residents, and to foster autonomy and leadership in poor communities...To be fully integrated in the participatory process and the responsibilities that they need to comply with, it is generally considered important that communities are involved in the initial stages of projects.*³⁰⁶

It is, therefore, evident that the participatory approach has more benefits than the top-down approach. By including the communities in the conceptualisation of the measures to be undertaken, the process fosters responsibility and a feeling of ownership on their part. The community is committed and takes care of the project more than would have been the situation where they feel it is imposed on them.

Furthermore, a participatory approach enables the conceptualisation process to appreciate all the various interconnected factors that contribute and affect the informal settlements. A top-down approach is more likely to take a simplistic manner in approaching the problem while the participatory approach takes into account all the nuances, therefore comes up with more context-specific solutions:

*'The recognition of the importance of participation has generated the current best practice of participatory slum upgrading. As squatter problems are often closely related to social problems and poverty, they can often not be addressed outside this context. Slum and squatter settlements are almost invariably connected to poverty and inequality, whether it is income-inequality or other inequalities in a society. To address the wider context of housing problems, current best practice models involve participatory slum improvement...'*³⁰⁷

³⁰⁶ Olesen, 'The Challenge of Squatters', 31.

³⁰⁷ *Ibid.*

The Philippine situation uses the participatory approach through involvement of organisations formed by the urban poor in the conceptualisation and implementation of the slum upgrading programs.³⁰⁸

3.3 Governance of urban squatter settlements in South Africa

This part discusses the background of informal settlements in urban South Africa, and looks into the tenure arrangements and its implications of the inhabitants. It also highlights the responses by the South African government and suggests key lessons that may assist in tackling the urban informal settlement problem in Kenya.

3.3.1 Overview and background on informal settlements

Informal settlements in South Africa date back to the colonial and apartheid era. The colonial and apartheid policies called for the segregation of the population so that the black Africans did not have the right to live within the boundaries of cities. They lived on the outskirts of the cities where access to basic services was not adequate. This is why in South African cities, for example, Durban, informal settlements ‘have developed on marginal land that formerly lay beyond the city boundaries.’³⁰⁹ The segregation also accounts for the reason why in Durban ‘The population living in informal areas is overwhelmingly African, and, indeed, nearly half of the black population of the entire municipal area lives in informal dwellings.’³¹⁰

The apartheid housing policy was made of ‘fragmented patchwork of inequitable, unsustainable and disconnected interventions’.³¹¹ The differential treatment on the basis of race had negative impact on sectors including housing:

Durban’s current pattern of informal settlement is largely a product of apartheid factors during the second half of the 20th century. The 1913 Land Act alienated Africans from most of the land, forcing them wholesale into wage employment for survival. During the 1930s, massive informal settlements formed just beyond the urban fringes. In addition, the creation, during the 1960s and 1970s, of ‘independent states’ adjacent to city boundaries, and including formal African residential areas, further spurred the growth of

³⁰⁸ United Nations Human Settlements Programme, Innovative Urban Tenure in the Philippines, 17.

³⁰⁹ United Nations Human Settlements Programme, The challenge of slums: Global report on human settlements, Earthscan Publications 2003, 83.

³¹⁰ *Ibid.*

³¹¹ *Ibid* 128.

*informal settlements along the urban edge. Informal settlements grew as a result of a lack of housing alternatives, as well as the devastating drought of the late 1970s and early 1980s, which forced people to seek livelihoods in urban areas.*³¹²

The inequity perpetrated in the housing sector had spread and became one of the push factors for self-rule in South Africa. It also had political implications. The African National Congress (ANC) gained power in 1994 with one of its major promises being the ‘million homes programme’.³¹³ On gaining power the government operated schemes for construction of house for many of the informal settlers but the efforts reduced to budgetary constraints.³¹⁴

The inhabitants of informal settlements face a lot of challenges. Due to the lack of tenure insecurity, the informal settlers are living in constant fear of eviction – ‘in the past, there has been extensive harassment and physical destruction of informal dwellings’.³¹⁵

3.3.2 Tenure arrangements within informal settlements

In South Africa, the inhabitants of the informal settlements do not have secure legal tenure. Their dwelling in the land is recognised between themselves as a matter of fact but this is often overridden by instances of evictions.³¹⁶ Their interpretation of tenure is different from the legal one. To most of the inhabitants, ownership is derived from the fact that the housing structures belong to them mean – ‘On the one hand those who say they own their dwellings may be communicating a strong sense of belonging and permanence despite the informal nature of the dwelling.’³¹⁷ However, this does not amount to tenure security as required by the law since they own the structures but not the land on which the structures stand. The lack of legally recognised tenure implies that the inhabitants cannot be able to access the basic services:

‘Lack of tenure has repercussions, first in terms of the obligation of network utilities to provide services, and second in terms of the absence of information on the settlements. The remit of network utilities to provide water services to the population depends on residents having secure tenure of their property, outlined either in legislation for public

³¹² *Ibid* 208.

³¹³ *Ibid* 128.

³¹⁴ *Ibid*.

³¹⁵ *Ibid* 83.

³¹⁶ Colin Marx and Sarah Charlton, ‘Urban Slums Reports: The case of Durban, South Africa’, *Understanding Slums: Case Studies for the Global Report on Human Settlements 2003*, 15.

³¹⁷ National Development Agency, South Africa: *Informal settlements status*, 2012, 46.

*utilities or in contracts for private utilities. Secondary to the issue of land tenure is the status of the buildings themselves. Depending on local regulations, if they are not constructed to a suitable standard they will also be exempt from statutory service provision...It has been widely observed...that across the developing world, network utilities are commonly not obliged to expand service provision to those without secure land tenure. This is true for both public and private utilities...*³¹⁸

The fact that their tenure arrangements are legally insecure and informal means that they do not access the basic services and, are susceptible to evictions at any time.³¹⁹

The new programs by the government seek to formalize the informal tenure of the slum dwellers. Through programs such as Reconstruction and Development Programme (RDP), succeeded by Breaking New Ground (BNG) in 2004, the government relocates the squatters to zoned and surveyed lands away from the urban centres and allocates them houses.³²⁰ However, some of the measures have not succeeded since the inhabitants deem the new houses as smaller than their initial dwellings.

Even as the programs continue to develop housing for the urban poor, it is important they are afforded tenure in the new structures so that they can undertake meaningful activities for their lives. In this way, they are able to take part in utilization of the opportunities that are presented by the urban setting:

In summary, the security of tenure is a key element for the integration of the residents...Residents are normally said to have secure tenure only when they are protected from intermittent evictions from their land. Protection of residents...from evictions is a requirement for the inclusion of informal settlements into the cities. However, provision of security of tenure for the residents has been weakened by the decline in the revenue of many urban families, and growing disparities. The problem of

³¹⁸ Hulya Dagdeviren and Simon Robertson, 'Access to water in the slums of the developing world' *International Policy Centre for Inclusive Growth*, Working paper no. 57, 2009, 7.

³¹⁹ United Nations Human Settlements Programme, *the state of African cities 2014: Re-imagining sustainable urban transitions*, 2014, 113.

³²⁰ Mardeusz, Julia, 'Housing Policy and Formalization Strategies in Africa's Growing Cities: A Case for the Informal Settlement' *The Trinity Papers* (2014), 12

*illegal occupants has also led to the increased social exclusion and spatial segregation.*³²¹

3.3.3 Legal responses and governance interventions aimed at securing tenure security

The South Africa response and governance intervention in securing tenure security for the urban informal settlers takes a human rights approach. Article 26 of the 1996 Constitution entitles all South Africans to ‘access adequate housing’. This provision is a positive step in the provision of adequate housing to the inhabitants of informal settlements. However, the challenge still persists due to the fact that the rights under Article 26 are to be realized progressively. The Article mandates the state to ‘take reasonable progressive legislative and other measures to secure this right.’

There has also been the use of subsidies in housing provision. In this case, urban and rural households that fall below certain minimum are given the subsidies to enable them afford housing. In 1994, the government and various players in the civil society gave subsidies to more than 1,334,200 households. A total of 1,155,300 houses had been put up in 2001 to accommodate about 5,776,300 people.³²² There have also been challenges in the subsidy program. Some of the houses are of poor quality and are in peripheral locations.³²³ Additionally, housing rights cannot be separated from other livelihood rights. Therefore, provision of houses in areas that are away from the jobs in urban centres makes the program unattractive.³²⁴ The slum dwellers are afraid to move for that would imply more difficult living conditions, especially in obtaining food.

The government has also attempted in some instances the in-situ upgrading rather than eradication of the informal settlements. The in-situ upgrading has some benefits:

‘Overwhelming evidence suggest that, a well-administered slum upgrading, has significant linkages with the socio-economic well-being of the poor in every society. It

³²¹ Tshikotshi Victor, ‘The Challenges of Eradicating Informal Settlements in South Africa by 2014: The Case of Seraleng Sustainable Human Settlement, Rustenburg Local Municipality, North West Province’ Master of Science Thesis, University of the Witwatersrand, 2009, 88.

³²² United Nations Human Settlements Programme, The challenge of slums, 129.

³²³ Tshikotshi Victor, ‘The Challenges of Eradicating Informal Settlements in South Africa by 2014’, 49.

³²⁴ *Ibid.*

*can help in combating poverty and vulnerability, achieving sustainable human development, and promoting environmental sustainability...*³²⁵

In-situ upgrading implies that the inhabitants are still located in the urban centres. This is important to them since they moved from the rural to urban areas in search of better opportunities. Therefore, removing them from the urban centre through slum eradication leads to a backlash in the program. They feel that they are being excluded from exploitation of the opportunities that the urban setting has to offer.

The South African judiciary is one of the judiciaries most spoken on the rights to adequate housing. It has played a key role in the protection of the inhabitants of informal settlements. In *Government of the Republic of South Africa and others v Grootboom and others*,³²⁶ the inhabitants of an informal settlement invaded a private property after having waited for over 7 years to be allocated permanent housing by the City of Cape Town. On being evicted from the private property, they petitioned the High Court to order the state to give them temporary housing as they wait for allocation of permanent housing. The prayers were granted but the government appealed. The Constitutional Court reversed the orders of the High Court on the basis that the right to housing was not subject to immediate realisation. However, it emphasised that it is the mandate of the state to ensure realisation of the right, and to show the actual steps it is taking in that regard. It stated that,

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's

³²⁵ Alhassan Ziblim, 'The Dynamics of Informal Settlements Upgrading in South Africa: *Legislative and Policy Context, Problems, Tensions, and Contradictions*' A Study Commissioned by Habitat for Humanity International/EMEA Office, 2013, 5.

³²⁶ 2001 (1) SA 46 (CC).

obligations...In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

This position was later enhanced in the decision of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd.*³²⁷ In this case the Supreme Court of Appeal held that the government was in violation of its obligations to squatters who were threatened with eviction. It ordered that the squatters remain in the piece of land as the state identified alternative land for settlements, and that the state compensate the owner of the land occupied by the squatters.

The issue of eviction of squatters in private lands has also been litigated in South Africa. It is governed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998. The Act stipulates that evictions should be carried out with the appropriate notice and in a humane manner. In the *Government of the Republic of South Africa and others v Grootboom and others*,³²⁸ the Constitutional Court made the following observation with respect to the eviction of the respondents from the private land they had squatted in:

The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

³²⁷ (CCT20/04) [2005] ZACC 5.

³²⁸ 2001 (1) SA 46 (CC).

In *Port Elizabeth Municipality v Various Occupiers*,³²⁹ the Municipality sought to evict individuals who were inhabiting a private land. The individuals had initially been evicted from another piece of land. They made it clear that they were willing to move out of the land if the Municipality found an alternative place for them. The Municipality asked them to move to Walmer Township but they refused on the basis that it was crowded. The Municipality argued that it was not under an obligation to provide housing for them. The Municipality obtained an eviction order from the High Court but was set aside by the Supreme Court of Appeal. The Municipality appealed to the Constitutional Court.

The Constitutional Court unanimously rejected the application by the Municipality and stated that in instances of conflict between article 25 on the right to property and article 26 on the right to housing, it was necessary to interpret the two in order to achieve ‘a fair, equitable, and compassionate outcome’. It held that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act must be interpreted against this constitutional background, and more specifically that there was also need to refer to the compassionate solution as required by *Ubuntu*. It also stated that:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society, as a whole, is demeaned when state action intensifies rather than mitigates their marginalization. The integrity of the rights-based vision of the constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual...Section 6(3) [of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which gives effect to sec 26(3) of the constitution] states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled

³²⁹ 2004 (12) BCLR 1268 (CC).

occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.

These decisions by the South African courts are part of the legal and governance interventions undertaken to solve the urban informal settlement problem. They are key in securing the rights of the inhabitants of informal settlements are protected. Their enforcement of the constitutional right to adequate housing is a constant reminder for the state to continue developing measures and allocating resources to ensuring that all South Africans have access to adequate housing. The judicial decisions are also important in the aspect of evictions. Inhabitants of informal settlements, especially those squatting in private lands, are always living in constant fear of eviction by the private owners. The protection by Section 26 of the Constitution, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, and the court decisions ensures that the process of eviction is carried out humanely and according to the law. Lawful evictions ensure that the belongings of the inhabitants are not destroyed and their lives are not endangered in the process.

3.3.4 Lessons for Kenya

Kenya can learn some lessons from South Africa. One of the lessons is the use of the human rights approach in protecting the rights of urban squatters. The Kenyan Constitution provides for the right to housing and the courts have also had an occasion to give judicial interpretation. However, one thing that is yet to be streamlined in Kenya is the issue of evictions. Kenya is yet to pass the law on evictions and resettlements. Such a law, as is the case in South Africa, would ensure that even though the squatters have to be evicted from private and public land, the eviction ought to be done in a humane and lawful manner. It is not necessary to destroy the belongings and endanger the lives of the inhabitants.

Additionally, Kenya can also from the South African experience that there is need for the government to begin to allocate funds to operationalise the constitutional provision on the right to adequate housing. Even though the right is recognised as one that is to be implemented in a progressive manner, the state needs take actual measures since every day the right is not implemented, there are people whose right to life and the realisation of other rights is jeopardized due to the fact that they do not have access to adequate housing.

3.4 Conclusion

These case studies have brought out some of the major best practices undertaken in the protection of informal settlers. The Philippines case, on the one hand, has brought out the essence of developing solutions relevant to the local context, and taking a participatory approach. It has also shown the impact of implementing these approaches. Where localised solutions are developed, the chances of success of the programs are increased, while where the solutions are not informed by the context, the rates of failure are high. Participation of all the stakeholders, especially the inhabitants of slums, is also a major lesson from the Philippines case. Participation increases the feeling of ownership hence the legitimacy of the project, and the people feel that they are under an obligation to take good care of the project. The South Africa case, on the other hand, has demonstrated the impact of a human rights approach in the protection of the rights of informal settlers. It has shown that the laws and the interpretation by the courts can serve to guarantee some form of protection for the informal settlers. The courts are also in the forefront in ensuring the state complies with its legal obligations in the provision of housing. These lessons are important for Kenya as it undertakes its own measures to curb the urban squatter problem.

CHAPTER FOUR: REALIZING TENURE SECURITY IN INFORMAL SETTLEMENTS IN KENYA

4.1 Introduction

In view of the legislative gaps highlighted in Chapter Two and drawing from the best practices in Chapter Three, this Chapter aims at coming up with appropriate innovative strategies that can secure the tenure rights for communities within informal settlements in Kenya. It also incorporates the feedback from the respondents in assessing the appropriate intervention strategies.

4.2 Innovative Strategies for Securing Land Tenure in Squatter Settlements

A variety of innovative strategies can be identified in literature, including among others: Resettlement of slum dwellers to Alternative Site, Conversion, Land Restitution and Redistribution, Adverse Possession, Cancellation for Violating Grant Conditions, Purchasing Land Compulsory and Acquisition.³³⁰

4.2.1 Resettlement of slum dwellers to Alternative Site

In accordance with the provisions of Part IX of the Land Act, this strategy entails moving urban squatters into a higher standard of accommodation especially in conditions where: safety, life, health, liberty or other essential rights are at risk. This includes instances where the land currently occupied by urban squatters is overpopulated, unsuitable for human habitation, has high environmental value to the larger ecosystem; or is required for critical public utility development. Resettlement shall be effected by the National Land Commission.

4.2.2 Conversion

This strategy entails the conversion of land from one category to the other as stipulated in both the Community Land and the Land Act. The state may opt, as part of tenure regularization, to have as part of one tenure category, all informal settlements say public land. The process of tenure conversion will be undertaken once the tenure choice is made, if the informal settlement is found on a different tenure regime.

³³⁰ Republic Of Kenya (2018). Tenure Regularization in Informal Settlements. Government Printer: Nairobi

4.2.3 Land Restitution and Redistribution

This strategy involves returning the land to those who have been dispossessed illegally, and claim to be historically entitled to the land. The strategy relates to both those found on land claimed by absentee landlords and to those relating to historical land injustices. The successful execution of this strategy presupposes the preparation of procedures and regulations for identifying, recording, and verifying genuine land use needs, as well as equitable and clear criteria for redistribution and/or restitution.

4.2.4 Adverse Possession

The Limitation of Actions Act, Cap 22 provides for the execution of this strategy, applicable to settlements on private land. Urban squatters may in this case apply to the Environment and Land Court for an order that they “lease in place of the person then registered as proprietor of the land” or be registered as proprietors of the land. Proof will be required from such occupants, that they had taken a sufficient degree of control and physical custody of the suit property openly for a period of over 12 years.

4.2.5 Cancellation for Violating Grant Conditions

In accordance with Section 12 of the Land Act, it is possible to review the lease conditions where public land is allocated by the National Land Commission, and where those to whom the land were allocated have not abided by the requirements of the Act and the lease conditions, a cancellation of the allocation can be carried out and the land allocated to settlement of squatters. They can then administratively be allotted plots and given letters recognizing their stay. Once allocated to settling squatters.

4.2.6 Purchasing Land

Applicable on settlements on private land, this strategy entails purchasing the land inhabited by informal settlement dwellers and applying for individual titling. The squatters, in such a case shall negotiate with the landlord to purchase the land at an agreed price. The community of informal settlement dwellers then once purchased the land, applies in accordance with the provisions of the Land Registration Act to the National government to be issued with individual titles..

4.2.7 Compulsory Acquisition

In accordance with Part VIII of the Land Act and Articles 40 of the Constitution, this strategy entails a power exercised through the National Land Commission, by the State. The acquisition takes effect upon prompt payment in full, of just compensation to the landowner and has to be justified on the grounds of public purpose or public interest. The procedure is provided in Part XI of the Land Act 2012.

4.2.8 Urban Governance

Urban governance relates to the manner in which local, regional and national governments and other stakeholders makes decisions on planning, financing and managing urban areas.³³¹ It is characterised by ongoing ‘negotiation and contestation over allocation of social and material resources and political power.’³³² Urban governance plays a crucial role in shaping the character of urban centres, and influences the manner of delivery and the quantity and quality of goods and services, and is a determinant in distribution of resources and the costs among the different groups.³³³ This leads to the existence of various interests, forces, institutions and relationships at play, for example, in resource allocation.³³⁴ Therefore, a strategy needs to be developed in order to ensure partnership among the various actors and institutions in delivering goods and services.³³⁵ The city/urban government is just one of the stakeholders – others include private sector, agencies of the national government, and civil society.³³⁶

The stakeholders must ensure that whatever model of urban governance they adopt results in good governance. They have to realise that:

³³¹ Avis, W. R. (2016). *Urban Governance* (Topic Guide). Birmingham, UK: GSDRC, University of Birmingham, 5.

³³² *Ibid.*

³³³ Slack, E. & Côté, A. (2014). *Comparative urban governance* (Future of cities: working paper). London: Foresight, Government Office for Science, 7.

³³⁴ Avis, *Urban Governance*, 5.

³³⁵ UNESCAP (UN Economic and Social Commission for Asia and the Pacific) & UN-Habitat (UN Human Settlements Programme). (2010). *The state of Asian cities 2010/11*. Nairobi: UN-Habitat/UNESCAP, 211-212.

³³⁶ Avis, *Urban Governance*, 5.

‘Failings in governance have adverse consequences for society as a whole. By contrast, good governance can help achieve economic development and the reduction of poverty. Good governance matters.’³³⁷

The results of failing to incorporate good governance in urban governance negatively affects all the stakeholders and groups in the urban centre and its surroundings. However, it is the poor who are most affected. This is because they do not have adequate resources to acquire alternative goods and services, where the public ones are of bad quality or not available at all. Consequently, informal settlements and economies develop in the urban centre since the poor are excluded from the formal structures on the basis of their poverty.³³⁸ In so doing, the stakeholders responsible for planning are ‘planning to forget’ the poor. They drive them towards the ‘forgotten places’ – the slums.³³⁹ Urban governance is characterised by social inequality.³⁴⁰ The slums become ‘physical manifestations of social exclusion’³⁴¹ from the various aspects of the city life, so that in effect, the poor do not have the ‘right to the city’.³⁴²

The effects of bad governance in land use and planning also occasion more negative effects on the poor:

‘Weak governance, whether in formal land administration or customary tenure arrangements, means that the land rights of the poor are not protected. It affects the poor in particular and may leave them marginalized and outside the law. Weak governance may also mean that land is not used appropriately to create wealth for the benefit of society. Lack of competence in land administration can be an important constraint on

³³⁷ Food and Agriculture Organization of the United Nations (FAO), Good governance in land tenure and administration, FAO Land Tenure Studies 9, Rome, 2007, 1.

³³⁸ Avis, *Urban Governance*, 6.

³³⁹ Gavin Shatkin, Planning to Forget: Informal Settlements as ‘Forgotten Places’ in Globalising Metro Manila, *Urban Studies*, Vol. 41, No. 12, Special Issue: Globalisation and The Politics of Forgetting (November 2004), pp. 2469-2484.

³⁴⁰ *Ibid.*

³⁴¹ Ben C. Arimah, ‘Slums as Expressions of Social Exclusion: Explaining the Prevalence of Slums in African Countries’ United Nations Human Settlements Programme (UN-HABITAT), Nairobi, Kenya.

³⁴² Christine Stenton, Struggling for the ‘right to the city’: *In situ* informal settlement upgrading in Kibera, Nairobi, Master of Arts thesis, Carleton University, Ontario, 2015.

development and the eradication of poverty. Good governance in land administration is one of the central requirements for achieving good governance in society.³⁴³

The weaknesses in land administration in the urban centres could also be part of the general lack of good governance in the country.³⁴⁴ There are various aspects that need to be incorporated in order to ensure that good governance is realised:

‘The avoidance of corruption is one obvious aspect of good governance. However, features of good governance also include accountability, political stability, government effectiveness, regulatory quality and rule of law, as well as control of corruption. Good governance means that government is well managed, inclusive, and results in desirable outcomes. The principles of good governance can be made operational through equity, efficiency, transparency and accountability, sustainability, subsidiarity, civic engagement and security. Governance can be poor if government is incorruptible but tyrannical, or is democratic yet incompetent and ineffective.’³⁴⁵

The impacts of bad or weak governance in land use planning in the urban centres are numerous. Some either cause or exacerbate the problem of informal settlements. They include: poverty and social exclusion; tenure insecurity; land disputes; high transaction costs; informal land transactions/informal property market; reduced private sector investment; land grabbing/illegal transfers of state and private land; limited local revenues; landlessness and inequitable land distribution; social instability, social exclusion and political instability; erosion of ethics and standard behaviour; and unsustainable land and natural resource management.³⁴⁶

Poverty and social exclusion, as already discussed above, results from the fact that the resource allocation and provision of goods and services does not adequately consider the poor in the urban centres. The failure by the city and urban centres to provide quality and adequate goods and services accelerates the poverty situation. The urban poor are not economically stable and their hope would be the accessibility and affordability of the goods and services offered by

³⁴³ Food and Agriculture Organization of the United Nations (FAO), Good governance in land tenure and administration, 1.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid* 6.

³⁴⁶ Wael Zakout, Babette Wehrmann, Mika-Petteri Törhönen, Good Governance in Land Administration: Principles and Good Practices, Food and Agriculture Organization of the United Nations, 6.

the cities. However, when that fails, they have to look for alternative goods and services since they must find food to feed themselves. They therefore resort to measures outside the law, for example, encroaching on public and private lands, and engaging in criminal acts in order to make ends meet. They suffer the most:

‘Weak governance affects the poor particularly strongly. They lack the money to pay the bribes needed to benefit from corruption or to pay for legal protection to defend their rights to land. They may not even know their rights or how to defend them because of illiteracy or marginalization caused by other factors. Weak governance may promote inequality between genders, as poor women tend to be less literate and have fewer resources. It may also promote inequality between social classes, as the rich are able to benefit from the opportunities for self-enrichment while the poor may lose their rights to land and common property resources such as communal grazing areas and forests. The poor who cannot afford the formal legal services are doomed to rely on informal and extra-legal arrangements, effectively becoming excluded from the protection and reach of the law. Politically, the consequences can be severe, as grievances may fuel violent conflict.’³⁴⁷

Insecurity of tenure is also one of the impacts of weak governance in land use planning in urban centres. Where there are no proper structures regulating the use of land, the rights of individuals to land are put at risk:

‘Weak governance reduces security of tenure. Illegal transfers may cause legitimate owners or occupiers to lose their rights. Informal transfers and informal ownership are not protected by law, and the protection offered by customary tenures may be weakened through external pressures, and may not be extended to newcomers. Those who capture the state may use land registration systems to reinforce their claims to land, even when the land has been acquired through land grabbing. Marginalized groups may have the evidence of their land rights suppressed by officials. Insecure tenure can have adverse

³⁴⁷ Food and Agriculture Organization of the United Nations (FAO), Good governance in land tenure and administration, 17.

effects on labour supply, as a family member may be required to stay at home to protect it rather than to seek work.³⁴⁸

Land disputes also increase in instances of weak governance. Due to absence of clear guidelines on land use planning, the interests of various individuals and groups are bound to clash, leading to conflicts. Where, for example, public land in urban area is illegally or irregularly allocated to an individual while there are people squatting on the land, conflicts are bound to arise through demolition of structures and eviction of the squatters. This takes place in the Kenyan context as already discussed in chapter two and the section below on the role of the courts in curbing the challenge of tenure insecurity in informal settlements:

‘Weak governance leads to disputes. It provides opportunities for the powerful to claim the land of others, including the state. Rising land values in areas undergoing rapid urbanization are likely to fuel disputes as land use is shifted from agriculture to housing and commercial activities. The poor may not be able to defend their rights against unfair competition and may lose their livelihoods. Where agriculture or mining is introduced into remote areas, there are likely to be conflicts with indigenous populations. Those acquiring the land may prevent indigenous groups from having access to the natural resources necessary for their livelihoods. At the same time, weak governance impedes the resolution of disputes. Increased litigation may clog the courts, and cases that are heard may be weakly governed. Alternative dispute resolution mechanisms, which could help to ease the workload of courts and provide a transparent alternative to troubled judiciaries, are rare.’³⁴⁹

Therefore, urban governance, and land administration in urban centres specifically, have to ensure that they incorporate good governance in land administration. Good governance requires adoption of approaches that are sensitive to the poor and the recognition of both formal and informal rights.³⁵⁰ Urban governance ought to adopt principles of good governance in land administration including: efficiency of procedures; effectiveness; transparency, consistency and predictability; integrity and accountability; subsidiarity, autonomy and depoliticization; civic

³⁴⁸ *Ibid* 19.

³⁴⁹ *Ibid*.

³⁵⁰ *Ibid* 8.

engagement and public participation; equity, fairness and impartiality; and legal security and rule of law.³⁵¹ These principles are captured under Article 60 of the Constitution of Kenya, on the principles of land policy. The stakeholders in urban governance should therefore ensure that they incorporate these principles in their decision-making processes, and in this way help curb the challenge of informal settlements. They should ensure that there is equitable access to land by all groups in the urban centre, and transparent and cost-effective administration procedures are put in place to ensure sustainability is realised in the holding, using and managing of urban land.

4.2.1 Intervention strategies

a) Appropriate Tenure Arrangements

The current land laws offer a good opportunity for the tenure arrangements in the informal settlements to be recognised and offered legal protection. The recognition and legal protection will enable the residents of informal settlements to overcome the uncertainty they face and, help in resolving the long-standing conflicts evidenced through the demolitions and evictions, as discussed above.

The discussion in the chapter points to the fact that the Land Act allows for conversion of land from one category to another. This is important in tenure arrangements for residents of informal settlements. The private and public land they are living in can be converted to community land, so that the residents can hold and use it in common as provided under the Community Land Act. The communal tenure is the most appropriate in this context since it accommodate the informal tenure practices in the informal settlements. Private tenure will occasion great disruption to the arrangements in informal settlements due to issues including formalisation and exclusivity, which are key features of private land holding. Communal tenure is primarily informal and takes inclusive and participatory approaches.³⁵² This will therefore be of great help to the residents of informal settlements, due to the informal nature of the resource holding, and the fact that most resources and facilities are shared among the squatters.

Furthermore, Article 63(1) of the Constitution provides that ‘Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community

³⁵¹ Wael Zakout, Babette Wehrmann, Mika-Petteri Törhönen, *Good Governance in Land Administration*, 7.

³⁵² Patricia Kameri-Mbote and Collins Odote, ‘Innovating tenure rights for communities in informal settlements: Lessons from Mukuru’ in Collins Odote and Patricia Kameri-Mbote (eds), *Breaking the mould: Lessons for implementing community land rights in Kenya*, Strathmore University Press, Nairobi, 2016, 68.

of interest.’ The residents of informal settlements meet this requirement since they are identified on the basis of common interest. They are of varied ethnic origins but have also developed a culture through the practices and their way of life in the informal settlement. This constitutional provision, therefore, offers an opportunity for residents of informal settlements to hold the land they dwell in as a community.

These opportunities can be realised using the Land Settlement Fund established under the Land Act. The Fund has been used in the case of Waitiki Farm, as discussed above, and this shows that the private and public land used by informal settlers in urban centres can be purchased and used to settle the squatters.

(b) Provision of basic services

Providing sufficient, affordable and quality basic services is a core function of the city/urban governments.³⁵³ They have a mandate of ensuring that they deliver water, electricity, sanitation, and waste management.³⁵⁴ The residents of cities and urban areas are generally able to access the goods and services provided by the urban governments. The residents of informal settlements are excluded from accessing these goods and services due to the contentious issue of ownership of the land they dwell in. The places they dwell in are characterized by ‘basic service deficits’.³⁵⁵ The fact that their tenure is informal, as already discussed in chapter two, implies that the residents of informal settlements are not recognized under law as having rights or interests over the land. Urban governments view the supply of goods and services to informal settlements as an act of legitimizing the claims by the informal settlers to the ownership of the land.³⁵⁶

The effect is that the residents of informal settlements have to look for alternative sources of basic services, and in this way, they pay the poverty penalty.³⁵⁷ They have to pay more for toilets, sanitation, water, transport, security, healthcare, and security, than the amount paid by the

³⁵³ Avis, *Urban Governance*, 32.

³⁵⁴ Danilo Antonio, Nelson Marongwe, Hellen Nyamweru, Julius Okello, Securing Land Rights within the Continuum of Land Rights Approach: Evidence from Tenure Security Innovations in Kenya and Uganda, World Bank Conference on Land and Poverty” The World Bank - Washington DC, March 20-24, 2017, 9.

³⁵⁵ United Nations Conference on Housing and Sustainable Urban Development, ‘Habitat III Issue Papers: 22 – Informal Settlements’ (New York 2015) 2.

³⁵⁶ Kariuki, ‘Environmental Challenges in Informal Settlements’, 1.

³⁵⁷ Akiba Mashinani Trust, ‘Situation Analysis Report’ (October 2014) 10.

residents in the formal settlements.³⁵⁸ The alternative services are offered by groups which charge more than the formal institutions. This effectively commits the residents of the informal settlements to poverty: ‘The Poverty Penalty faced by residents impacts negatively on their well-being and ability to meet other individual and community needs.’³⁵⁹ In this way, it is almost guaranteed that their lives are going to remain in the state they are in – poverty. It is therefore crucial for the urban authorities and all the other stakeholders to take an active role in providing the basic goods and services to the residents of informal settlements.

Under Part V of the Urban Areas and Cities Act, county governments have the mandate of undertaking integrated development planning, which includes: contribution to the progressive realisation of socio-economic rights; provision of physical and social infrastructure and transportation; disaster preparedness and response; and overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management. They also have the responsibility, under Section 36(3) of the Act, of initiating ‘an urban planning process for every settlement with a population of at least two thousand residents.’

County governments have to comply with this responsibility. In the case of *Gidion Mbuvi Kioko v Attorney General & another*,³⁶⁰ which is discussed below on the role of courts, the High Court was emphatic that the County Government of Nairobi could not refuse to provide basic services to the inhabitants of Sinai informal settlement on the basis that the residents did not own the land they lived in. They are under a mandate to provide the services even as there are steps to upgrade the slums. The court stated that:

‘62. Consistently with the right to dignity, clean environment and health, sanitation and other Article 43 rights, the respondents may while taking steps to remove the persons living in the various slums provide them with such services are necessary for the enjoyment of such rights. Therefore, while the respondents are involved in Slum upgrading and prevention programme for various slum settlements in the City and elsewhere in the Country, which may include relocation they must take measures to ensure that the persons living in the said slum settlements enjoy the rights to clean

³⁵⁸ *Ibid* 83.

³⁵⁹ Akiba Mashinani Trust, ‘Situation Analysis Report’ (October 2014) 10.

³⁶⁰ [2017] eKLR.

environment, health and housing in order to live in the dignity which is the object of constitutional guarantees.

63. The respondents are accordingly directed to comply with section 36 (3) of the Urban Areas and Cities Act 2011.’

The court directed the Attorney General and the County Government of Nairobi to include Sinai Settlement as part of the Slum Upgrading and Prevention Programme, and that the residents were to be removed only subject to adequate and reasonable notice. It further directed that:

‘In the meantime, the respondents will provide such services to the persons resident in Sinai Slums as are necessary for the enjoyment of their rights to health, sanitation, adequate housing and dignity in accordance with the Urban Areas and Cities Act 2011.’

This direction by the court supports the provision of basic goods and services to the residents of informal settlements, by requiring the urban authorities to carry out their mandate according to law.

(c) Slum upgrading

Slum upgrading in Kenya is done under the Kenya Slum Upgrading Programme (KENSUP), which is a collaborative initiative between the Government of Kenya, United Nations Human Settlements Programme (UN-Habitat), local communities, civil society, and the private sector.³⁶¹ The aim of the initiative is

‘to improve the livelihoods of people living and working in slums and informal settlements in the urban areas of Kenya through the provision of security of tenure and physical and social infrastructure, as well as opportunities for housing improvement and income generation.’³⁶²

The initiative began with implementation in Nairobi, Mavoko, Kisumu and Mombasa. Through it, many positive steps have been taken in curbing the challenge of tenure insecurity in informal settlements in Kenya. The steps include: attempts to ensure Kisumu is one of cities without

³⁶¹ United Nations Human Settlements Programme (UN-HABITAT), UN-HABITAT and the Kenya Slum Upgrading Programme: Strategy Document, Nairobi, 2008.

³⁶² *Ibid* 4.

slums; Sustainable Neighborhood Programme (SNP) in Mavoko; Kibera Slum Upgrading Initiative in Nairobi; Kibera Integrated Water, Sanitation and Waste Management Project in Nairobi; Youth Empowerment Programme in Thika; and Korogocho Slum Upgrading Programme in Nairobi.³⁶³

These efforts are laudable. They help in remedying the plight of the residents of informal settlements. The challenge, therefore, is to increase the reach of these efforts so that many residents of various informal settlements in the Kenyan urban centers can benefit.

(d) Political support

The lack of political goodwill in the implementation of land policies and laws has continued to be a thorny issue in land governance in Kenya.³⁶⁴ This has been witnessed through the many acts and omissions by the elected leaders, for example, delay in passing the Community Land Act. The interests of the elected leaders have taken priority over the interests of the electorate.³⁶⁵

In the case of informal settlements in urban centres, the problem is more complicated since there are political motivations for keeping the residents in those settlements. This is highlighted in the observation of the High Court in *Gabriel Dolan & 23 others v County Government of Mombasa & another*³⁶⁶ that with regard to the informal settlers,

‘Their right to settle comes from the **local government** both the national and county government operatives, the Chiefs and Ward Administrators, and no doubt, the Honourable Members of the County Assemblies. The informal settlements are their mines not for gold and silver, but for votes in the five-year circle when they are called to exercise their political right to vote in their political leaders. Beyond that, society and the leadership forgets them. They may get drips of water at water points of sale, not taps in their house. They are the new “**les miserable**” of Victor Hugo, the French writer...’

³⁶³ *Ibid* 62.

³⁶⁴ Francis Kariuki, Smith Ouma and Raphael Ng’etich, *Property Law*, Strathmore University Press, Nairobi, 2016, 427.

³⁶⁵ *Ibid* 427.

³⁶⁶ [2016] eKLR.

The political class takes steps to ensure that the residents in the settlements are not moved due to the vested interests – votes. This then acts as one of the factors that contributes to the challenge of informal settlements. It is therefore important that the political leadership especially in urban centres decide to take into account the interests of the residents of informal settlements and take positive steps to remedy the situation.

(e) Public participation

While providing basic goods and services and conducting slum upgrading, it is important for the stakeholders to take inclusive and participatory approaches – “... where municipal councils sit on their own to plan for upgrading, these plans often leave out the priorities and also fail to meet the expectations of the intended beneficiaries.”³⁶⁷

Incorporation of participatory and inclusive approaches has significant impacts on the provision of services and slum upgrading. Public participation allows the development of solutions that take the bottom-up approach,³⁶⁸ and in this way, the residents of informal settlements feel that they have ownership of the measures to be implemented. They have a far better understanding of their circumstances of life than people from outside the informal settlements. Therefore, in developing solutions to the challenges they face, it is important that they are involved in the process. They ought to be seen as agents with the ability to take steps to improve their lives, instead of being perceived just as recipients of help from outside.³⁶⁹

It is also important to note that the inclusion of the residents of informal settlements affects the success of the projects. By involving them, the solutions developed will be more relevant to the contexts in the informal settlements and take into account the prevailing circumstances. This is in line with the realization that “Contextual conditions in the socio-economic, policy, and institutional environment either facilitate or hinder the application of particular approaches aimed at assisting poor people in gaining secure land tenure.”³⁷⁰

In adopting inclusive and participatory approaches, the projects will be more context specific, have local ownership, and the legitimacy will be high, hence higher rates of success in implementation.

³⁶⁷ Antonio, Marongwe, Nyamweru, Okello, *Securing Land Rights within the Continuum of Land Rights Approach*, 12.

³⁶⁸ *Ibid* 9.

³⁶⁹ See, Amartya Sen, *Development as freedom*, Oxford University Press, 1999.

³⁷⁰ United Nations Human Settlements Programme, *Innovative Urban Tenure in the Philippines*, 16.

4.2.2 Role of different actors in guaranteeing tenure security of informal settlers

(a) Court

The most important role of the court in guaranteeing the tenure security of informal settlers is the progressive interpretation of the laws touching on residents of informal settlements, especially those on social economic rights. Social economic rights are enshrined under Article 43 of the Constitution of Kenya, which provides in part that every person is entitled ‘to accessible and adequate housing, and to reasonable standards of sanitation’. The implementation of this right is subject to the provisions of Article 21(2). Article 21(2) on the implementation of rights and fundamental freedoms provides that ‘The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.’

It is the provision on progressive realisation that has generated a lot of contention and acted as a major hindrance to the realisation of social economic rights. Judicial interpretation of the provision is to a large extent pointing to the direction that the rights are to be realised in a progressive manner and that pursuant to the political question doctrine, it is the mandate of the executive arm of government to decide the policies to be put in place. The political question doctrine, developed by the United States Supreme Court in *Marbury v Madison*,³⁷¹ states that certain claims are nonjusticiable on the basis of the constitutional separation of powers, as such would lead to the court encroaching on the powers of the political branches.

In *Gidion Mbuvi Kioko v Attorney General & another*,³⁷² the petitioner, who was then the Member of Parliament for Makadara Constituency, instituted a suit on behalf of the residents of the Sinai informal settlement. A fire had burnt down the settlement leading to loss of lives, injuries and destruction of property. It was a result of spillage from the Kenya Pipeline’s fuel depot due to a damaged gasket. The oil spilled to a storm drainage and found its way into the settlement. The petitioner asked the court to find that the constitutional rights of the residents, including the right to life, clean and healthy environment, adequate housing, dignity and livelihood, were infringed and consequently ought to be compensated, and that the intention and steps to evict them from the settlement be stopped.

³⁷¹ 5 U.S. 137 (1803).

³⁷² [2017] eKLR.

In examining the steps taken by the government with respect to the plight of the residents of informal settlers, the court stated 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.’

The courts therefore appear to be limited by the political question doctrine from interrogating the steps taken by the state in policy decisions. However, there is hope in the boldness by courts to look at the policies in extraneous circumstances. This, for example, in *Gidion Mbuvi Kioko v Attorney General & another*,³⁷³ where the court stated that:

“However, while the Court may not in accordance with Article 20 (5) interfere with the allocation of resources by the government, the Court may properly give directions where it considers that no reasonable provision is made for a particular vulnerable community or groups or persons. Where the government does not make any provision at all, on the explanation as here that the settlement is unplanned the State would have failed to implement under article 21(2) of the Constitution **‘measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43’, and the Court may properly intervene.**”

In noting that that the court will give directions where, for example, the state has allocated nothing at all, the court is preventing the violation of the rights of vulnerable groups on the pretext of the political question doctrine.

The courts should also be in the forefront in stopping illegal and forced evictions of residents of informal settlements where there are pending issues as to the ownership of the land in question. This has been done by the Kenyan courts in various cases. In *Peter Wanyoro Kinuthia & 11 others v Attorney General & 2 others*,³⁷⁴ the respondents sought to evict the residents of the Mathare Village 2 informal settlement on the basis that it was established on

³⁷³ [2017] eKLR.

³⁷⁴ [2013] eKLR.

private land. The residents sought an injunction from the court claiming that they had been residing there for over two decades and that the purported allocation of the land to a private individual was not in line with government policy of upgrading informal settlements. They further petitioned that the intention to evict would contravene their right to adequate housing under the Constitution as no alternative was provided.

The court found that the petitioners made a *prima facie* case for an injunction pending the determination of ownership of the land. It stated that occupation of the land by the petitioners was an important factor in setting aside orders of eviction, and that there had been no evidence of harm to the respondents should the petitioners be allowed to occupy the land until the substance of the case – ownership, was settled. The third respondent was claiming an interest in the property but had neither developed it nor was she in occupation. On a balance of convenience, therefore, the court found in favour of the residents. Furthermore, the court stated that ‘the damage caused by massive eviction of thousands of families from their residences will most certainly be unquantifiable in monetary damages.’

The other cases in which courts have issued injunctions against planned evictions where such would have amounted to violation of the rights of the residents of informal settlements, include *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others*³⁷⁵ and *Gabriel Dolan & 23 others v County Government of Mombasa & another*,³⁷⁶ which are already discussed in chapter two.

It is also important for the court to give appropriate remedies in cases of violation of the right of informal settlers, for example, in instances of illegal and forceful evictions. In the case of *William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others*,³⁷⁷ the petitioners, who were residing in City Cotton and Upendo villages in Nairobi, South C Ward, instituted legal proceedings challenging the legality of their eviction from the settlements. They argued that the destruction of their homes and eviction was conducted in a manner that violated their constitutional rights to dignity, security of the person, housing, and the rights of children and the elderly. They further stated that the eviction was forceful and was done without notice.

³⁷⁵ [2011] eKLR.

³⁷⁶ [2016] eKLR.

³⁷⁷ [2014] eKLR.

The court framed the main issue of determination as whether the eviction violated the rights of the petitioners, and the liability for such. It examined various applicable laws in dealing the issue. The legal provisions included Article 28 on the right to human dignity, Article 43 on social economic rights, and Articles 53 and 57 on the rights of children and elderly people respectively. It also looked at international instruments pursuant to Articles 2(5) and (6). In this regard, it looked at Article 11 of the International Covenant on Economic, Social and Cultural Rights, on the right to an adequate standard of living.

It also examined the pronouncements and commitments made by the government in Sessional Paper No. 3 of 2004 on National Housing Policy for Kenya, with respect to upgrading of slums and informal settlements. In the policy, the state commits to give the upgrading of slums and informal settlements a high priority, and that it will be undertaken with minimal displacement. The state also commits itself to prevent unwarranted destruction of existing housing, and that compensation will be given for those disposed.

The court also noted that the state is under an obligation to provide housing to everyone but may not be able in practice to do so. However, it also stated that the state ‘is under a negative obligation not to deprive citizens of such shelter as they have through evictions and demolition of informal settlements and to protect them from deprivation by others.’ Where the evictions and demolitions have to be carried out, ‘the state and all persons are bound to observe certain procedural requirements on evictions.’ In this regard, the court made reference to General Comment No. 7, “The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR, the United Nations Office of the High Commissioner for Human Rights, which states that:

“15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially

where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts”.

“16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.” (Emphasis Added by the court)

In relation to the argument by first respondent that the Bill of Rights does not apply to private persons but only state organs, the court cited Article 2(1). Article 2(1) states that ‘This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.’ It also cited Article 20(1) which provides that ‘The Bill of Rights applies to all law and binds all State organs and all persons.’, and Article 260 on the interpretation of the Constitution, which defines a person to include ‘a company, association or other body of persons whether incorporated or unincorporated’. It, therefore, took ‘the view that the Bill of Rights applies both vertically-as against the state, and horizontally-against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual.’

The court found that the first respondent evicted the petitioners without using the procedure laid down in law or a court order. The first respondent “seems to have had enough of the ‘trespassers’ on its land, and determined to evict them without bothering to go through a legal process.” It used police officers to monitor the eviction but such was illegal because the eviction did not have the sanction of a court of law. The court also found that the manner in which the eviction was carried out violated constitutional rights of the petitioners. It took place at 4 am in the morning, where the structures of the petitioners were destroyed and a wall erected around the premises. In this regard, the court observed that

‘...even had the sanction of the court been sought by the respondents, the interests of the petitioners would have been taken into consideration, and their eviction considered as a measure of last resort... Thus, even if, as alleged by the respondents, the petitioners were not the lawful owners of the property, they could not be lawfully evicted violently, in the wee hours of the morning, with no notice being given to them, and no alternative accommodation provided... It is therefore somewhat redundant to ask whether the eviction of the petitioners resulted in a violation of their rights under the Constitution. Even the ordinary man in the street, confronted with the facts now before me, would answer the question in the affirmative.’

With respect to the rights violated in the process, the court stated that:

“An eviction of the nature undertaken by the respondents does not just violate the right to housing. Encompassed in a person’s dwelling is their family life, their ability to take care of their children; their ability to live a secure and dignified life. When they are denied their shelter, their dignity, security, and privacy is impaired... Unlike the birds of the air, men women and children whose dwellings have been demolished will not fly away and perch on a tree, and then begin to rebuild their nests afresh. As most of those evicted from informal settlements are often poor, they become homeless, join the ranks of the dispossessed in the streets, or find another vacant piece of land to put up their shacks and continue with their precarious existence. Until the next eviction and demolitions... In such circumstances, given the fact that, as recognized at Paragraph 5 of the 1993 **Vienna Declaration and Programme of Actions** adopted by the World Conference on Human Rights on 25th June 1993 stated in the Geneva ‘*All human rights are universal, indivisible and interdependent and interrelated,*’ all the petitioners rights guaranteed in the Bill of Rights and which the state is under an obligation, under Article 21(1) *to observe, respect, protect, promote and fulfil,* are reduced to mere unattainable aspirations.”

From this, the court concluded that the eviction and demolition violated the rights of the petitioners by rendering them homeless, and that the first respondent was liable even though it was a private person since the Bill of Rights applies both vertically as against the states, and

horizontally as against fellow citizens. The state was liable for the use of police officers in assisting the first respondent to violate the right of the petitioners. The court noted that

‘it is important for its officers to remember that its cardinal duty and the duty of all its officers is to safeguard the rights of all, without discrimination, but particularly so, the rights of the vulnerable in society, the poor, children, the elderly and persons with disability. Its officers should never be used to carry out the unlawful acts of any citizen, however powerful.’

To compensate for the violation of the rights, the court ordered the first respondent to pay Kshs 150,000 to each of the petitioners, and the state to pay Kshs 100,000 to each of the petitioners. The petitioners were also awarded interests on damages as from the date of the judgment until payment in full, and the costs of the petition.

This case serves as a good example where the court gives appropriate remedies for the violation of rights of residents of informal settlements. Additionally, in ordering the state to pay compensation for the use of force in an unlawful activity, the court is holding the executive responsible for the misuse of its power against the vulnerable in the society.

It is also a role of the courts to ensure that the orders they give with respect to the rights of informal settlers are carried out. This helps to give legal backing since residents of informal settlements are weak and vulnerable as compared to the parties that seek to evict them from the places they dwell in. In this regard, the courts should hold in contempt of court public officials and private individuals responsible for violation of its orders.

A case in point highlighting this role is *Mitu-Bell Welfare Society v Hon. Attorney General & 2 Others*.³⁷⁸ The petitioners, who were residing in Mitumba Village informal settlement near Wilson Airport, instituted contempt of court proceedings against the managing director of the Kenya Airports Authority. The petitioners had earlier sought and obtained conservatory orders stopping the Authority from evicting them from the informal settlement pending the hearing and determination of the substantive issues in the case. The Authority was represented in court and served with the conservatory orders, but went ahead to demolish the houses of the informal settlers. The petitioners, therefore, urged that it was ‘necessary for the

³⁷⁸ [2012] eKLR.

purpose of upholding the authority, dignity and integrity of the court that the court should grant the orders sought; that courts do not and should not give orders in vain.’ The Authority argued that there was no personal service of the orders on the managing director and that in any event there were no specific acts of disobedience attributed to the managing director.

The court held that a corporation acts through its principal officer, which in the case in question, was the managing director. It found that the corporation was represented in the proceedings and an affidavit sworn by the corporation secretary in opposition to the proceedings. This, according to the court, could only be done with the authority of the principal officer. It stated in this regard that

‘It would clearly therefore be less than candid for the 2nd respondent to argue that since there was no evidence of personal service on the Managing Director, there was no service and he cannot therefore be held to have been in contempt of the court order.’

The court also held that in any event, it was empowered pursuant to Articles 22(3)(d) and 159(2), to disregard procedural technicalities while dealing with issues on the protection of fundamental human rights. Being that juridical authority is derived from the people of Kenya, the residents of informal settlements even though “they may be deemed of low social status as residents of a slum settlement, they, too, are entitled to justice, such justice to be administered without undue regard to procedural technicalities.” The technicality of stating that there was no personal service on the managing director, would, therefore, not be available to the Authority under the new constitutional dispensation.

With respect to the argument that the managing director did not authorize the eviction and demolition, the court stated that the managing director could not blame the demolitions on ‘the government of Kenya’. The notice of eviction issued to the petitioners was from the managing director. There was no evidence as to the involvement of any other arm of government in the eviction and demolition. It was, therefore, the court’s view that the Authority was hiding behind the pretext of ‘the government of the Republic of Kenya’, in order to avoid responsibility for its disobedience of the court order. In this regard, the court observed that:

“As Kenya embarks on the implementation of the new Constitution with its provisions on the rights of citizens, all parties must be reminded of the need to observe the rule of law

which is the core and the foundation of our society. Without observance and obedience of the orders of the court by parties in the position of the 2nd respondent and indeed by all organs of state and all persons, the aspirations of Kenyans set out in the Constitution will remain a mirage. The court must be on guard to prevent this.”

It therefore found and held the managing director guilty of contempt of court for intentionally disobeying Court orders. It ordered the managing director to appear in court for mitigation and sentencing, and that the costs of the application be borne by the Authority.

This decision sets a good precedence for the parties and state agencies dealing with residents of informal settlements to ensure that they comply with the law and court orders. It is crucial that they do not disobey court orders given in favour of residents of informal settlers due to the fact that they have a low social and economic status in the society. In taking such a step also, the court ensures that it is respected and its orders are not in vain.

(b) Civil society

The civil society have a great role to play in securing tenure of the residents of informal settlements. Civil society is instrumental in social accountability, by holding government accountable.³⁷⁹ In holding the government accountable on the promises it has made to the people and in the implementation of the law, civil society assists in the realization of the socio-economic rights. They also act as a checking mechanism against violation of citizen rights by the government, and where such violations occur, the civil society can institute constitutional petitions to seek remedies from courts on behalf of the victims, who in most instances are not able to go against the government due to financial conditions. In this way, the civil society takes up public interest litigation.³⁸⁰ With regard to informal settlements, civil society can institute cases on their behalf, for example, in cases of forced and illegal evictions, as discussed under the role of the courts.

³⁷⁹ Carmen Malena, Reiner Forster, Janmejay Singh, ‘The Role of Civil Society in Holding Government Accountable: A Perspective From The World Bank On The Concept And Emerging Practice Of “Social Accountability”’, December 2004 by the World Bank under the title “Social Accountability: An Introduction to the Concept and Emerging Practice”, Social Development, Paper No. 76.

³⁸⁰ Aisha Ghaus-Pasha, Role of Civil Society Organizations In Governance, 6th Global Forum on Reinventing Government Towards Participatory and Transparent Governance, 24 – 27 May 2005, Seoul, Republic of Korea, 19.

Civil society can also conduct civic education among the citizens in informal settlements to make them aware of their constitutional rights.³⁸¹ This will enable the residents to know their rights, and, most importantly, identify instances of rights violation and take steps to seek remedies.

They also have the role of conducting studies on the prevailing conditions in the informal settlements and making it known to the world, so that there is global awareness on the challenges faced by the inhabitants of informal settlements. This also helps in gaining support in efforts to tackle the challenges. An example is the Akiba Mashinani Trust, a Kenyan based non-governmental organisation, which conducted a situational analysis in 2014 in Mukuru informal settlements in order to bring to light the complexity and dynamics in Mukuru informal settlements.³⁸²

(c) Ministry of Land, Housing and Urban Development

The Ministry of Land, Housing and Urban Development is presently constituted pursuant to Executive Order No. 2 of 2013 on the Organization of the Government of the Republic of Kenya, issued in May 2013. It is charged with responsibilities including: land policy management and settlement matters.³⁸³ These functions can assist in the resolution of the challenges faced by the inhabitants of informal settlements. The Land Act establishes the Land Settlement Fund³⁸⁴ to be used in provision of land for people including squatters.³⁸⁵ The Fund can be applied to purposes including the purchase of private land to be used in settlement programmes.³⁸⁶

This puts the Ministry in a unique position to resolve the challenges in informal settlements. A case in which this has been done by the Ministry is in the case of the Waitiki Land. The land, which was privately owned by Mr Waitiki, had become a ground of contention between Mr Waitiki and squatters who moved into the land. The government purchased the 773 acres and established the Waitiki Land Settlement Scheme, which is an owner assisted settlement

³⁸¹ *Ibid.*

³⁸² Akiba Mashinani Trust, 'Situation Analysis Report' (October 2014).

³⁸³ Republic of Kenya, Executive Order No. 2/2013: Organization of the Government of the Republic of Kenya, May 2013, 13.

³⁸⁴ Section 135(1), *Land Act* (Act No 6 of 2012).

³⁸⁵ Section 135(1C) (a), *Land Act* (Act No 6 of 2012).

³⁸⁶ Section 135(3)(b), *Land Act* (Act No 6 of 2012).

– the cost of purchasing and the logistics is paid by the beneficiaries.³⁸⁷ The project is coordinated by the Ministry, the National Land Commission, the County Government of Mombasa, and the local community.³⁸⁸ Even though the Waitiki Farm case was in a rural context, it is still relevant to the plight of informal settlers in urban centres since it demonstrates the manner in which private land can be acquired and used to settle squatters.

(d) National Land Commission

The National Land Commission is established under article 67 of the Constitution of Kenya, 2010. Its functions include: managing public land on behalf of national and county governments; conducting research related to land and making recommendations to the appropriate authorities; and monitoring land use planning throughout the country. In performing these functions, the Commission has handled issues concerning informal settlements in urban areas. This is primarily through the resolution of conflicts of: informal land acquisition by squatters; evictions; illegal subdivisions resulting in densification and slums; and displacement of settlers by commercially motivated developers or speculators.³⁸⁹

4.3 Conclusion

This chapter has discussed the steps that can be taken towards tenure security in informal settlements. The innovative strategies discussed can enhance tenure security in informal settlements. Urban governance is one of the key strategies, which if implemented can assist in solving the challenge of tenure security in informal settlements. In incorporating the principles of good governance in land administration, urban governance will help the urban poor access basic services, and through integrated planning, the city authorities can create settlements fit for human habitation. This can also be done, as highlighted, through slum upgrading.

It is important that in implementing these and other measures, the key stakeholders ensure that the processes of developing the initiatives are participatory, so that the solutions can have relevance to the contexts, and increase ownership, legitimacy and the rate of success. The roles of the court, civil society, Ministry of Land, and the National Land Commission, have been discussed and it is established that they are the major stakeholders who can help solve the tenure

³⁸⁷ Ministry of Land, Housing and Urban Development, Executive Summary on the Titling Project on Mombasa/Malindi South Block 1/363, 1031 and Block V/109 and 110 (Waitiki Land), January 2016, 1.

³⁸⁸ *Ibid* 5.

³⁸⁹ National Land Commission, Devolving Land Governance: 2015/2016 Annual Report, 2016, 38.

security challenges in informal settlements. The steps taken by these stakeholders have been discussed, and the challenge has been found as the need to spread the measures to all the informal settlement in the urban areas. In doing so, the chapter has also pointed out the most appropriate tenure arrangements that can be employed in order to bring to an end the tenure insecurity in informal settlements.

CHAPTER FIVE: FINDINGS AND RECOMMENDATIONS

5.1 Introduction

This chapter gives the findings, recommendations and conclusions of the study. The study was undertaken in order to evaluate the suitability of the current lands laws in dealing with the urban squatter problem.

5.2 Findings

a) State of Tenure in Urban Informal Settlements

The study has established, in Chapters One and Two, that the informal tenure arrangements in informal settlements are neither recognised nor protected within the legal framework. From the two chapters also, the study has identified that the land administration in urban governance does not cater well for informal settlements both in land services and access to basic services and infrastructure. From the analysis of the responses to the questionnaires from the institutions dealing with informal settlements, the study further established that there is incoherence between the land laws and the planning laws in urban settings. Additionally, the inadequate financing from the government and the lack of good political will have continued to ensure that the tenure arrangements in informal settlements remain outside the ambit of the law. Lack of compliance with law among land owners as well as lack of regard for court orders and rulings was also cited as a challenge.

Asked on factors responsible for tenure insecurity from the squatters' perspective, NGO actors working in the settlements offered that a majority of the squatters attribute their tenure insecurity to poor land administration and land grabbing.

In an FGD, Squatters in Kibera were asked on when and how they came to settle on the land on which they currently reside. A variety of responses were given in this regard, including settling as workers for various establishments, as tenants, as internally displaced persons, as caretakers and others were born and bred in their current settlements. Asked on whether or not the focus group discussion respondents were aware of the owner of the piece of land on which

they live, varied respondents were given, with some affirming, citing individuals, companies, government institutions and other organizations, while some were not aware.

The researcher further asked in the focus group discussions whether or not respondents had ever been evicted for illegal occupation of the land on which they reside, to which a majority affirmed. Asked on whether or not in their respective opinions FGD respondents were entitled to the piece of land on which they reside, a majority affirmed arguing that they had occupied the respective pieces of land over long periods of time, asserting that they were entitled to the same on the basis of adverse occupation.

b) Legal and Institutional Framework on Tenure Insecurity in Informal Settlements

The study has established, in Chapter Two, that the tenure arrangements in informal settlements do not fall under any of the categories of land provided for under the Constitution. The analysis has also established that the non-recognition remains a major stumbling block to the achievement of tenure security in informal settlements.

Interview respondents were asked to indicate the legal and institutional aspects limiting the ability of the Ministry to effectively address the tenure insecurity in informal settlements. With regard to legal limitations, it was found that the law limits the ministry's powers with regard to land administration. A respondent for instance offered that:

“The ministry’s powers are limited by the law. For instance, there are certain recommendations from the previous land commissions that would address the urban squatter problem, but it is not within our powers to implement them. In some cases the buck stops with other institutions such as parliament.”

With regard to institutional capacity, it was found that institutions in land administration and management in the country lack adequate capacity especially with regard to enforcement of the existing land laws, as well as a conflict of roles within the institutional framework. A respondent argued that:

“The main challenge we face is lack of adequate enforcement capacity. Considering the geographical expanse of this country, we are limited

especially in human resources. Our enforcement unit is not adequate enough to enforce the law in full capacity. There are very few personnel vis a vis the country's population."

Accordingly, interview respondents were further asked to indicate the financial challenges the Ministry faces in implementing measures to solve the insecurity of tenure in informal settlements. Respondents indicated in this regard that they lack financial capacity to build the ministry's capacity to adequately oversee land administration in the country, including finances to build adequate systems, staff training and development, among other.

Asked on what political challenges the Ministry faces in implementing measures to solve the insecurity of tenure in informal settlements, it was found that incitements by politicians, lack of respect for the courts and court processes and a general lack of political will are among the major drawbacks in the ministry's efforts to address the squatter problem.

Respondents in the FGDs were further asked on whether or not they were aware of any laws addressing their nature of settlement on the land on which they reside and whether the laws are adequate in addressing the squatter problem within informal settlements in Kenya. A majority were not aware of any laws, indicating low levels of awareness on the legal framework pertinent to squatting and informal settlements in the country.

c) Suitability of intervention strategies in dealing with the tenure in urban informal settlements

The study examined intervention strategies including good governance in urban land administration, provision of basic services and infrastructure, and slum upgrading, under Chapter Three. In so doing, the study established these strategies can help provide long lasting solutions to the tenure insecurity challenges in informal settlements. In Chapter Four, the study undertook a comparative approach in looking at the Philippines and South Africa and the manner in which they have handled the tenure insecurity challenges in informal settlements in their urban centres. From this, the study identified key lessons that Kenya can learn from these jurisdictions: adoption of participatory and inclusive approaches in the Philippines; and the use of a human rights approach in South Africa. The study established that these aspects can help increase the probability of success of the intervention strategies in Kenya.

Interview respondents were asked to indicate the measures undertaken by the Ministry within the existing legal framework to solve the challenges in securing tenure in informal settlements. A range of measures were established in this regard including: *eviction with sufficient notice on either private or public land; provision of alternative settlement for squatters on public land; and formalization of squatters' ownership through processes of registration and adjudication, for squatters on community land.*

Asked on whether in their assessment the approaches adopted by the Ministry aim at retaining and improving the settlements, or they intend to remove them from the current location to other places outside the urban area, the study found that both scenarios apply in the measures taken. A respondent for instance offered that:

“the measures we have taken as a ministry aim at either retaining and formalizing ownership through processes of registration and adjudication, for squatters on community land, or sufficient notices of eviction for those on public land as well as in some cases offering them alternative settlements”

Asked on whether the Ministry draws lessons and experiences from other parts of the world in solving tenure insecurity in the informal settlements. Interviewees responded in the affirmative, citing the participatory informal settlement upgrading measures in the Philippines and the human rights based approach in South Africa

Conversely, NGO respondents were asked on interventions their respective institutions had considered as the possible solutions to the tenure insecurity in the informal settlements. Respondents cited provision of alternative settlements, sufficient notices of eviction as well as formalization of ownership.

Asked on what in their opinions could be done to address the squatter problem within informal settlements in Kenya, a majority of the FGD respondents suggested the provision of alternative settlements and formulation of ownership for occupants for over 10 years.

5.3 Recommendations

From the foregoing findings, the following recommendations are made, categorized as immediate, short term, medium term and long term. The responsible institutions are also indicated for each recommendation.

5.3.1 Immediate

a) Public participation and inclusivity for tenure security

From the discussion in Chapter Four, the study has pointed out the importance of participatory and inclusive approaches in curbing the tenure insecurity challenges in informal settlements. It is therefore necessary to ensure that in formulation and implementation of the laws, especially in urban governance, all the stakeholders are involved. The dwellers of informal settlements need to be included in finding the solutions to the challenges they face. In this was the solutions are bound to be context specific, and therefore have a higher probability of success, as pointed out in Chapters Three and Four. Responsible institutions in this regard also include: urban squatters, the National Land Commission, the Ministry of Lands, Housing and Urban Development and the Judiciary.

b) Need for better and innovative implementation of the current urban land governance laws

As already pointed out in Chapter Four, urban land governance is instrumental in the realization of tenure security in urban informal settlements. It is therefore necessary that there is good governance in land administration, and principles, especially inclusivity and public participation, are adopted in the utilisation of resources in urban centres. It is also important to ensure coherence between land laws and urban planning laws in order to remove any gaps that are likely to occasion negative effects on the dwellers of urban centres, especially those in informal settlements. Responsible institutions in this regard include: the National Land Commission, the Ministry of Lands, Housing and Urban Development and the Judiciary.

c) Role of civil society and other organisations

As pointed out in Chapter Four, the civil society and other non-governmental organisations has an important role in finding solutions to the tenure insecurity challenges in

informal settlements. They keep the government in check and highlight the plight of the dweller of informal settlements. They also assist in the intervention strategies, for example, supply of basic services like water. Therefore, it is important that they keep up these efforts in the fight to ensure that the dwellers of informal settlements have a right to dwell in urban centres. Responsible institutions in this regard include the civil society and other non-governmental organisations working in informal settlement.

5.3.2 Short Term

Need for good political support

The political system of the country is crucial in the enactment and implementation of laws. Where there is no political will, as discussed in Chapter Four, the citizenry continues to languish in poverty as the laws will be providing for rights which can never be truly realized. The political leaders are therefore urged to take into account the interests of the dwellers of informal settlements, and support the efforts undertaken to eliminate the tenure insecurity challenges. Responsible institutions in this regard also include: politicians and the urban squatters.

5.3.3 Medium Term

Reforms to the Constitution of Kenya 2010

Article 60 of the Constitution provides that “the land in Kenya shall be managed in an equitable manner within the principles of equitable access.” By the classification of land under Articles 61 to 64, the Constitution excludes squatters who are hitherto entitled to the land dispossessed from them through the laws and policies. There is therefore need to amend the current Constitution in order to address the above and give the National Land Commission capacity to address the squatter land problem and adequate powers to address the problem of injustices.

5.4 Suggestions for Future Studies

The present study has explored assesses the adequacy of these frameworks, conditions that increase tenure insecurity and makes recommendations on how to secure tenure security in informal settlements in Kenya. It is hereby suggested that future studies focus on the rural squatters so as to establish any pertinent trends and patterns with the present study findings.

5.5 Conclusion

The study achieved its objectives and responded to the statement of problem. The objectives were:

1. To examine the causes of tenure insecurity within informal settlements in Kenya.
2. To assess the adequacy of existing laws in addressing tenure insecurity within informal settlements in Kenya.
3. To highlight intervention strategies that can ensure tenure security for informal settlers in urban areas in Kenya.
4. To identify and recommend some best practices drawn on how to address the urban squatter land tenure problems in Kenya.

Objective 1

The study has highlighted and discussed the various factors responsible for tenure insecurity within informal settlements. Under Chapters One and Two, the study has identified that the factors include the failure of the Constitution to recognize the tenure arrangements in informal settlements, and the lack of political will.

Objective 2

Through the analysis of the legal and institutional framework in Chapter Two, and the responses to the questionnaires from the institutions dealing with informal settlements, the study has identified that there is lack of coherence between land laws and urban planning laws. Additionally, the legal provisions only contemplate the constitutionally recognized forms of tenure, and there is inadequate implementation.

Objective 3

The study has identified and discussed the various intervention strategies that can be taken to address the tenure insecurity challenges in informal settlements. The intervention strategies are good governance in urban land administration, provision of basic services and infrastructure, and slum upgrading.

Objective 4

The study had identified and recommended the best practices suitable in solving the tenure insecurity challenges within informal settlements. Through the comparative analysis in Chapter Three, the study has pointed out that the participatory and inclusive approach used in the Philippines and the human rights approach used in South Africa, are of great benefit to Kenya in dealing with the tenure insecurity challenges within informal settlements.

Hypotheses

1. The existing land laws have not made significant attempts at addressing the urban squatter land tenure problems in Kenya.
2. The National Land Commission and other select institutions are limited in their powers to address the urban squatter land tenure problems in Kenya

The study has tested and proved the hypotheses by examining the current land laws and urban governance laws and highlighting the inherent inadequacies which make them unsuitable in addressing the urban squatter challenges. It has also established that the institutions responsible for dealing with the tenure insecurity challenges are not well-placed to tackle the problem effectively due to their inadequate powers, financing, and political backing.

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ANNEXURE: INTERVIEW GUIDE SCHEDULES

Questions for the Officials at the National Land Commission and Ministry of Lands (Departments of Lands, Physical Planning and Land Adjudication and Settlement):

1. What are the measures undertaken by the Ministry within the existing legal framework to solve the challenges in securing tenure in informal settlements?

2. In your assessment, do the approaches adopted by the Ministry aim at retaining and improving the settlements, or do they intend to remove them from the current location to other places outside the urban area?

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3. What legal and institutional aspects limit the ability of the Ministry to effectively address the tenure insecurity in informal settlements?

4. What financial challenges does the Ministry face in implementing measures to solve the insecurity of tenure in informal settlements?

5. What political challenges does the Ministry face implementing measures to solve the insecurity of tenure in informal settlements?

6. Does the Ministry draw lessons and experiences from other parts of the world in solving the tenure insecurity in the informal settlements? If yes, please state some of the countries and the main things learnt from them.

Questions for Non-Governmental Institutions Dealing With Informal Settlers in Urban Areas:

1. From you interactions with inhabitants in informal settlements in urban centres, what do they say are the factors responsible for tenure insecurity within their settlements?

2. What interventions has your institution considered as the possible solutions to the tenure insecurity in the informal settlements?

3. From your observations and interactions with the inhabitants of informal settlements, what are some of the measures they undertake to curb the challenge of lack of security of tenure in the settlements?

4. How do the informal settlers access basic services (water, electricity, healthcare and sewerage) and infrastructure in the settlements?

5. In what way does your organisation engage with the inhabitants of informal settlements? Does it engage with the settlers individually or through groups formed by the settlers?

6. Does your organisation conduct educational and informational programmes on the rights of the inhabitants in the informal settlements? If yes, please outline and briefly explain some of these programmes

7. From your interactions, what roles do the groups formed by the informal settlers play in tackling the tenure insecurity in the informal settlements?

8. How does your organisation assist the informal settlers in facing the challenge of illegal evictions? Does it institute legal proceedings on behalf of the informal settlers? Does it engage with the political leadership in advocating the rights of the informal settlers?

9. What are the challenges your institution faces in tackling the issues of tenure insecurity in the informal settlements?

Questions for Squatters in Kibera:

1. When and how did you come to settle on the land on which you currently reside?

2. Do you know the owner of the piece of land on which you live?

3. Have you ever been evicted for illegal occupation of the land on which you reside?

4. In your opinion, do you think you are entitled to the piece of land on which you reside?
Please elaborate

5. Are you aware of any laws addressing your nature of settlement on the land on which you reside? If yes, are the laws adequate in addressing the squatter problem within informal settlements in Kenya?

6. What do you think can be done to address the squatter problem within informal settlements in Kenya?

