

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**TOWARDS AN EFFECTIVE REALIZATION OF THE RIGHT  
TO ACCESSIBLE AND ADEQUATE HOUSING IN KENYA: A  
COMPARATIVE STUDY WITH SOUTH AFRICA.**

**THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF MASTERS DEGREE  
IN LAW (LL.M).**

**BY:**

**ARISI, EVERLYN MONYANGI**

**G62/68942/2011**

**OCTOBER 2013**

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**SUPERVISOR: ERIC OGWANG**

**OCTOBER 2013**

## **DECLARATION**

I, EVERLYN MONYANGI ARISI, do hereby declare that this is my original work which has not been submitted nor intended to be submitted for a degree in any other University.

**DECLARANT:**

.....

**EVERLYN MONYANGI ARISI**

Date.....

This thesis has been submitted for examination with my approval as the University Supervisor.

**SUPERVISOR:**

.....

**ERIC OGWANG**

Date.....

## **Acknowledgement**

I thank God for the breath of life and for his unconditional love.

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I am grateful to everyone whose input assisted me in completing this Thesis.

## **Dedication**

I dedicate this thesis to my loving husband Dsouza; son Ian; daughter Ivy and my dear parents Mr. and Mrs. Arisi.

## **Abstract**

Article 43 of the Constitution of Kenya explicitly provides for economic and social rights. As part of these rights, sub article (1) (b) specifically provides that, every person has the right to accessible and adequate housing, and to reasonable standards of sanitation. To fully appreciate the content, impact and the enforceability of the right to housing, this study focuses on making sense of the right to accessible and adequate housing by establishing the duties it entails while engaging with some of the key issues in the area. The main focus has been on the way courts have interpreted these rights and enforced them. This study extensively compares the Kenyan experience with that of South Africa in the implementation of the right to housing. It further reviews the past and existing government efforts in upholding the right to housing in the two countries. An exploration of the challenges experienced in these efforts has been done before concluding by offering appropriate recommendations on how best to realize the right to accessible and adequate housing in Kenya.

## Table of Contents

<b>DECLARATION.....</b>	<b>i</b>
<b>Acknowledgement .....</b>	<b>ii</b>
<b>Dedication .....</b>	<b>iii</b>
<b>Abstract.....</b>	<b>iv</b>
<b>Table of Contents .....</b>	<b>v</b>
<b>Abbreviations .....</b>	<b>viii</b>
<b>Table of Statutes and Policies .....</b>	<b>ix</b>
<b>List of Policies and Programmes .....</b>	<b>x</b>
<b>Table of Cases.....</b>	<b>xi</b>
<b>CHAPTER ONE. ....</b>	<b>1</b>
<b>Introduction and Background to the Study. ....</b>	<b>1</b>
1.1 Introduction.....	1
1.1.1 Chapter Outline .....	1
1.2 Background of the Study .....	3
1.3 Statement of the problem .....	5
1.4 Justification of the Study .....	7
1.5 Theoretical Framework .....	8
1.6 Objectives of the Study .....	10
1.6.1 Main Objective.....	10
1.6.2 Specific Objectives .....	10
1.7 Research Questions .....	10
1.8 Research Hypotheses .....	11
1.9 Research Methodology .....	11

1.10 Limitation of the Study .....	12
1.11 Literature Review.....	12
<b>CHAPTER TWO .....</b>	<b>16</b>
<b>Implementation of the Right to accessible and adequate Housing under the Constitution of Kenya, 2010 .....</b>	<b>16</b>
2.1 Introduction.....	16
2.2 The State’s obligations on the right to accessible and adequate housing .....	17
2.3 The normative content of the right to accessible and adequate Housing.....	19
2.4 The application of the right to accessible and adequate housing in Kenya .....	21
2.5 The role of the Judiciary in the adjudication of the right to accessible and adequate housing.....	26
2.6 The Statutory and Policy implementation of the Right to Housing in Kenya. ....	29
2.6.1 Housing Act .....	30
2.6.2 The National Housing Policy of Kenya .....	30
2.6.3 Kenya Vision 2030 .....	31
2.6.4 Land Act, No. 6 of 2012 .....	31
2.6.5 Rent Restriction Act Cap 296 .....	34
2.6.6 The Land Registration Act, No. 3 of 2012.....	34
2.6.7 National Land Commission Act, No. 5 of 2012 .....	34
2.6.8 Evictions and Resettlement Procedures Bill, 2012 .....	35
2.7 Other challenges and programmes.....	38
2.8 Conclusion .....	40
<b>CHAPTER THREE .....</b>	<b>42</b>
<b>The South African Constitutional Perspectives on the Enforcement of the Right to adequate Housing.....</b>	<b>42</b>



3.1 Introduction.....	42
3.2 The Constitutional provisions with regard to the right to Housing. ....	43
3.2.1 The Constitutional text.....	43
3.2.2 South Africa’s Jurisprudence on Housing Rights .....	46
3.2.3 The operationalization of the Right to Housing in South Africa .....	49
3.2.3.3 The Rental Housing Act 50 of 1999. ....	51
3.3 Conclusion .....	55
<b>CHAPTER FOUR.....</b>	<b>57</b>
<b>Findings and Recommendations.....</b>	<b>57</b>
4.1 Findings.....	57
4.2 Recommendations .....	59
<b>REFERENCES: .....</b>	<b>63</b>
BOOKS AND JOURNALS .....	63
<b>WEBSITES VISITED .....</b>	<b>67</b>

## **Abbreviations**

COHRE - Centre on Housing Rights and Evictions

UDHR- Universal Declaration of Human Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ESC rights - Economic, Social and Cultural Rights

## **Table of Statutes and Policies**

### **Laws of Kenya**

1. Constitution of Kenya, 2010.
2. Environmental and Land Court Act, No. 19 of 2011.
3. Housing Act, Cap 117 of the Laws of Kenya
4. Judicature Act, Chapter 8 Laws of Kenya.
5. Land Registration Act, No. 3 of 2012.

### **South African Statutes**

1. Constitution of the Republic of South Africa Act 108 of 1996.
2. Extension of Security of Tenure Act 62 of 1997.
3. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
4. Rental Housing Act 50 of 1999.
5. Housing Act 107 of 1997

### **International Instruments**

1. Universal Declaration of Human Rights, 1948.
2. International Covenant on Economic, Social and Cultural Rights, 1966.
3. Istanbul Declaration and Habitat Agenda, 1996.
4. Declaration on Cities and other Human Settlements in the new Millennium, 2001.

## **List of Policies and Programmes**

1. National Housing Policy for Kenya, Sessional Paper no. 3 of 2004.
2. The White Paper on Housing: A New Housing Policy and Strategy for South Africa (1994)
3. Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004)
4. Upgrading of Informal Settlements Programme Part 3, Volume 4 of the National Housing Code (2009)
5. Emergency Housing Programme Part 3, Volume 4 of the National Housing Code (2009)
6. the private- public partnership arrangement (PPP) by the National Housing Corporation
7. Protection Working Group on Internal Displacement (PWGID)
8. Kenya Slum Upgrading Programme(2005)

## Table of Cases

1. The Supreme Court of Kenya Advisory Opinion No. 2 of 2012. *the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] e KLR.
2. *John Kabui Mwai and others v. KNEC and Others* [2011] Petition no. 15 e KLR.
3. *Famy Care Limited v. Public Procurement Administrative Review Board and Another* Petition No. 43 of 2012.
4. *Republic v. Big M. Drug Mart Limited* [1985] 1 SCR 295
5. *Mitu-Bell Welfare Society v. Hon. Attorney General and 2 others* (2011) Nairobi Petition No. 164.
6. *Charles Kinya vs. Attorney General and others* [2011] Nairobi HCC JR No.95.
7. *Pattni and Another v. Republic* (2001) eKLR
8. *Okunda v. Republic* (1970) EA 453
9. *Engineer Charo wa Yaa v. Juma Abdi Noor, Attorney General and 4 others* (2011) Mombasa HCMA No.8
10. *The Matter of the Interim Independent Electoral Commission* (2011) Constitutional Application No. 2 of 2011.
11. *State v. Acheson* (1991) 20 SA
12. *Satrose Ayuma and others v. The Registered Trustees of the Kenya Railways Retirement Benefits Scheme* NRB, HCCP 65 of 2010.
13. *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* Embu HCCP No. 2 of 2011.
14. *Susan Waithera and others v. The Clerk, Nrb City Council and others*. NRB HCCP 66 of 2010.
15. *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security* eKLR [2011]
16. *Republic of South Africa v. Grootboom* [2000] ZACC 19.
17. *Port Elizabeth Municipality v. Various Occupiers* [2004] ZACC 7
18. *Occupiers of 52 Olivia Road and others v. City of Johannesburg and others* [2008] ZACC.
19. *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and others* [2009] ZACC.

## **CHAPTER ONE.**

### **Introduction and Background to the Study.**

#### **1.1 Introduction**

The Constitution of Kenya explicitly provides for economic and social rights.<sup>1</sup> As part of the economic and social rights the Constitution provides that, every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.<sup>2</sup>

To fully appreciate the content, impact and the application of the right to housing, I have explored the provisions in the Kenyan Constitution that enable the enforcement and implementation of economic and social rights and in particular the right to housing. The main focus has been on the way courts have interpreted these rights and enforced them.

This study extensively compares the Kenyan experience with that of South Africa in the implementation of the right to housing. The work further reviews the past and existing government efforts in upholding the right to housing in the two countries. I have also explored the challenges in terms of the legal and economic challenges experienced in these efforts before concluding by offering appropriate recommendations on how best to realize the right to accessible and adequate housing in Kenya.

##### **1.1.1 Chapter Outline**

The chapters that form the main body of this thesis include this introductory chapter which provides background information into the research, including the justification and the methodology used. It also includes the statement of the problem, definition of key concepts used in the study, theoretical framework and literature review.

Chapter two studies the legal framework governing housing rights and the government's policy and actions in upholding the right to housing in Kenya. This chapter is based on the premise that Kenya having concluded a constitutional revision process which resulted in economic and social

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<sup>1</sup> Article 43 of the Constitution of Kenya, 2010.

<sup>2</sup> Article 43(1) (b) of the Constitution of Kenya, 2010.

rights being explicitly included in the Constitution 2010, under Article 43, a need arises to focus on its implementation. The research under this chapter, therefore explores the provisions in the Kenyan Constitution and statutes that enable the enforcement and implementation of the right to housing. A review of the past and existing government efforts in upholding the right to housing in Kenya also forms part of the study under this section. The chapter finally explores the challenges including the legal, economic and political, policy and institutional challenges experienced in these efforts.

Chapter three is a comparative study of the South African experience in the implementation of the right to housing. Under this, I have examined the South African courts' approach to the adjudication and enforcement of socio-economic rights with particular focus on the right to housing. The choice of South Africa has been exemplified by the fact that the South African Constitution and its early jurisprudence have been discussed extensively among comparative constitutional law scholars and other academics. The South African Constitutional Court, the highest court in post-apartheid South Africa, has often been lauded by human rights activists for advancing the cause of equality and justice. One of the most distinctive elements of this jurisprudence has been its willingness to adjudicate socio-economic rights in addition to traditional civil and political rights. It is argued,<sup>3</sup> that although the approach taken by these courts is not devoid of criticism, it tones down the fears typically associated with socio-economic rights adjudication and enforcement.

Finally, chapter four entails conclusion of the study as well as observations and recommendations in the form of criticism on the shortcoming of the existing policy, legal and the administrative framework in Kenya.

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<sup>3</sup> Brennan, M. (2009). To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option. *QUT Law Review*, 9, 64-84.

## 1.2 Background of the Study

The right to accessible and adequate housing has been and continues to be characterized by a sorry state of affairs. This is evidenced from the various analyses of statistics as captured by various researchers and authors. Cheserek and Opatia in their analysis of the world's statistics as at 1988 capture a rather grim picture. They provide that it is estimated that one-fifth of the world's population does not have adequate shelter whatsoever, while more than a million people, mainly children, die daily because of lack of adequate housing, and majority of these are found in the developing world.<sup>4</sup> In figures it is estimated that over one billion people worldwide lack adequate housing whilst one hundred million people are homeless.<sup>5</sup>

In Kenya, the Centre on Housing Rights and Evictions (COHRE)<sup>6</sup> estimates that about two million people constituting half of Nairobi's population live in slums and informal settlements. It states that the situation is characterized by lack of running water and sanitation, discrimination, insecurity and marginalization.<sup>7</sup> The Kenyan situation has been worsened by the state of landlessness and the 2007-2008 post-election violence.<sup>8</sup>

The consequences of housing rights problems in Kenya include worrying statistics of gender discrimination, HIV/AIDS infection rates and crime in economically depressed neighbourhood.<sup>9</sup> Indeed Cheserek and Opatia<sup>10</sup> in their paper based on a research conducted in Eldoret Municipality among low-income estates, namely Langas, Huruma and Kamukunji reveal that low-income housing has impacted negatively on human health and the environment. The impact,

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<sup>4</sup> Cheserek, G. J. and Opatia, G. P. (2011). Environmental and Housing Problems of Low Income Households in Eldoret Municipality, Kenya. *Journal of Emerging Trends in Economics and Management Sciences (JETEMS)* 2 (4):320-324. Available at <http://jetems.scholarlinkresearch.org/articles/Environmental%20and%20Housing%20Problems%20of%20Low-Income.pdf>. Accessed on 12/5/2013.

<sup>5</sup> Kothari, M. *Report of the Special Rapporteur on Adequate housing*. Available at [http://daccessdds.un.org/doc/UNDOC/GEN/G05/117/55/PDF/GO511755.pdf](http://daccessdds.un.org/doc/UNDOC/GEN/G05/117/55/PDF/GO511755.pdf?Open+Element) Open Element. Accessed on 12/5/2013.

<sup>6</sup> The Centre on Housing Rights and Evictions (COHRE) is an independent, international, non-governmental, not-for-profit human rights organization whose mission is to ensure the full enjoyment of the human right to adequate housing for everyone, everywhere.

<sup>7</sup> See <http://www.cohre.org/about-us>. Accessed on 12/5/2013.

<sup>8</sup> See Commission of Inquiry into Post-Election Violence Report (CIPEV) - Waki Report.

<sup>9</sup> National Housing Policy for Kenya, Sessional Paper No. 3 of 2004. Available at <http://mail.housing.go.ke/home/ict@housing.go.ke/Briefcase/Website%20Downloads/National%20Housing%20Policy%20for%20Kenya.pdf>. Accessed on 12/5/2013.

<sup>10</sup> Ibid, note 4.



the research reveals, is characterized by health problems including malaria, typhoid and cholera; and environmental problems including congestion, house pests, poor drainage, wastewater, air pollution and garbage. Research has revealed that this deplorable housing situation in the world and Kenya in particular has been catalyzed by the rapid growth of low income population in cities and towns majorly due to rural –urban migration occasioned by poverty and the need for job opportunities.<sup>11</sup>

At the international level and in order to address the housing right problems, the Universal Declaration of Human Rights (UDHR) of 1948 recognizes the right to adequate housing as an important component of the right to adequate standard of living. This has been further reaffirmed by subsequent various international instruments including the International Covenant on Economic, Social and Cultural Rights (ICESC) of 1966, the Istanbul Declaration and Habitat Agenda of 1996 and the Declaration on Cities and Other Human Settlements in the New Millennium of 2001. At the regional level the African Charter on Human and Peoples rights protects the right to property as it protects the family unit. In all these instruments, housing is understood in the broader context of the shelter fabric together with the living/surrounding environment.

In Kenya, the Constitution promulgated on 27<sup>th</sup> August 2010 provides a paradigm-shift from the old by explicitly providing for socio-economic rights to which the right to adequate housing is part.<sup>12</sup> It upholds principles of equality and recognises in the preamble that Kenyans aspire for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution proclaims national values and principles that include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.<sup>13</sup> The bill of rights is very clear on its prohibition of discriminative acts and decisions<sup>14</sup> and further provides that every person is equal before the law

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<sup>11</sup> Obudho, R.A. and Mhlanga, C.C. (ed.). (1988). *Slum and Squatter Settlements in Sub-Saharan Africa: Towards a Planning Strategy*. Nairobi: Kenya Literature Bureau.

<sup>12</sup> Article 43 (1) (b) of the Constitution of Kenya, 2010.

<sup>13</sup> Article 10 of the Constitution of Kenya, 2010.

<sup>14</sup> Ibid.

and has the right to equal protection and equal benefit of the law.<sup>15</sup> Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

The Constitution, 2010 also changed the status of international law instruments ratified in Kenya into a source of law in Kenya. Prior to the promulgation of the Constitution, the sources of law in Kenya were the Constitution; Acts of Parliament; some specified UK statutes; the common law, doctrines of equity and statutes of general application in force in England on 12th August 1897; and finally customary law.<sup>16</sup> Thus, international law and principles were considered not to form part of Kenyan law unless they were domesticated.<sup>17</sup> In other words, Kenya adhered to the dualist approach of international law. The Constitution has adopted an approach almost similar to the monist application of international law. In this regard, it provides that international treaties and conventions that are ratified by Kenya shall form part of the laws of Kenya.<sup>18</sup> Further, the general rules of international law form part of the law of Kenya. The implication of the monist approach is that the provisions of international law instruments providing for the right to housing as enumerated earlier applies in equal force of the law to Kenya. It should however be made clear in this case, that the requirement under Article 94(5) refers to the authority of ratification which is a requirement under Article 2 (6) above. In describing the relationship between international law and national law, Musila however notes that the new Constitution locates Kenya somewhere between dualism and monism – that Kenya leans towards dualism where a ratified treaty has been domesticated and monism where such a treaty has not been domesticated.<sup>19</sup>

### **1.3 Statement of the problem**

While Article 43 (1) (b) gives every person the right to accessible and adequate housing, Article 21 places the duties to observe, respect, protect, promote and fulfil the rights on the state. Some of these duties impose a negative obligation while others impose positive obligations upon the state. The government of Kenya is on the path of realization of these rights for it has taken steps

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<sup>15</sup> Article 27 of the Constitution of Kenya, 2010..

<sup>16</sup> Section 3 of the Judicature Act, Cap Laws of Kenya .

<sup>17</sup> Example of cases include *Pattni and Another v. Republic* (2001) eKLR and *Okunda v. Republic* (1970) EA 453

<sup>18</sup> Article 2 (6) of the Constitution of Kenya, 2010.

<sup>19</sup> ICJ Kenya, (2012). Judicial Enforcement of Socio- Economic Rights under the New Constitution: Challenges and opportunities for Kenya. *Judiciary watch Report*, 10, 64-65.

towards discharging its obligations. It is however noted that there are instances where the same government has been cited as a violator of these rights which include the right to housing. Cases of such violations have been on the increase and recorded against the government of Kenya. There have been reports of unjustified evictions, demolition of houses without sufficient notice or abrogation of existing legislation on provision of safe and clean water. Questions of justiciability of these rights in Kenya have been brought to focus and thus there is need to study this critical issue, to find out their status of implementation. Kenya has also witnessed instances where government officials blatantly disobey court orders. This presents a major setback in the development of jurisprudence in the area. The study picks on these and other setbacks and draws comparisons and useful lessons from South Africa. The principle criterion for the selection of South Africa is that in Africa, the jurisdiction is considered to have a reasonably mature jurisprudence on this area. It is also easy to relate issues in these two countries since they are both African countries. The constitutional provisions, in the two countries, relating to the right to housing are also framed in a similar manner. It is further noted that the South African history in terms of the bill of rights is worse as these were completely lacking in their previous constitutions.

The interpretation of two key provisions of the Constitution is also important with regard to interpretation. The Constitution at Article 20 (3) provides that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Despite this progressive and most favoured clause of the Constitution, a proviso captured in Article 20(5) of the Constitution may hinder the effective realization of Article 43 rights which include that of housing. In as much as the principles are directed to the courts, it somehow justifies the defence of resources not being available by the state. It is rather obvious that resources will always be scarce and that the responsibility of showing that they are scarce will always be on the state. The provision provides that,

“20(5) in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles-

- (a) it is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) the court, tribunal or other authority may not interfere with a decision by State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.”

These principles should properly be understood, not only by courts but also by state actors who are most likely to misconstrue their meaning. The principles are meant to guide the courts, and by extension the political branches of government, on relevant policy or budgetary matters. Accordingly, the statement of the problem is that of interpretation of Article 43 (1) (b) as read alongside Articles 20(5) and 21 in terms of what amounts to the responsibility of the State to fulfil the right to housing and how it should be done, the import of priority in resource allocation and non-interference by the courts in resource allocation. The understanding of these will be used as a benchmark in evaluating the policy and administrative framework of the government of Kenya in fulfilling the right to accessible and adequate housing.

#### **1.4 Justification of the Study**

At present, Kenya is in transition. Legal reforms are at centre-stage given that the country is still in the process of implementing the constitution promulgated in August 27, 2010. With the new constitutional order, new interpretation of the existing laws is needed. There is also currently global movement towards engendering human rights practices in all systems to ensure that there is a human rights approach to executive, legislative and judicial activities in all states. The country is therefore, at the moment, a fertile ground for comprehensive research and scholarly out-look on the issues that are likely to be impacted by the current Constitution such as the implementation of socio-economic rights and the right to housing in particular.

Of particular import is the interpretation of Article 20(5) in terms of what amounts to the responsibility of the State to fulfil the right to housing and how it should be done, the import of priority in resource allocation and non-interference by the courts in resource allocation.

Accordingly, apart from aiming to clearly understand the normative justification of socio-economic rights and the contents thereof, this research shall proceed a step further to examine how these rights should be implemented and to some extent, the policy implications on the state.

While various researches have been undertaken in this field and there are quite a number of texts and scholarly articles which highlight the right to housing in Kenya,<sup>20</sup> none or only a few, if any specially addresses the issues of applicability of the law after the enactment of the Constitution 2010. In most cases, these studies are merely thematic and mainly intended on asserting a particular perspective.

As indicated earlier in this report, unjustified evictions have always presented a major challenge to the realization of the right to housing in Kenya. This is mainly because it the same government with the responsibility of upholding human rights that has often been cited as the major violator through unlawful evictions. This is not to say that the state has not taken any steps towards fulfilling its positive obligations as required by the Constitution. As it will be seen, various programmes and initiatives have been conducted towards this end. This report draws useful comparisons from South Africa on government's effort in protecting this right.

This research, cannot realistically aim to cover all these aspects within the limits of this thesis. However, the discourse will create a background for further future research, that will comprehensively cover this area. The final research finding and discussion will be relevant to legal practitioners, policy-makers, government officials, law reform agencies and advocates in Kenya.

## **1.5 Theoretical Framework**

This research deploys John Locke's Natural Law theory as well as John Rawl's theory of justice as its theoretical framework. John Locke<sup>21</sup>, the chief proponent of the Natural Law Theory

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<sup>20</sup> Some may be found in ICJ Kenya, (2012). Judicial Enforcement of Socio- Economic Rights under the New Constitution: Challenges and opportunities for Kenya. *Judiciary watch Report*, 10. articles by Japhet Biegon, Godfrey Musila, Waruguru Kaguongo, and Irene Ndegwa. See also Gathii, J. (2008). *A case for justiciability of Social- economic Rights in Kenya: Drawing from the experience in South Africa, India and United States, Hungary*. LL.M Thesis, Central European University, Hungary.

<sup>21</sup> John Locke, *The Second Treatise Government* (N19T5 2).

imagined the existence of human beings in a state of nature. In that state, men and women were in a state of freedom, able to determine their actions, and also in a state of equality in the sense that no one was subjected to the will or authority of another. However, to end the hazards and inconveniences of the state of nature, men and women entered into a "social contract" by which they mutually agreed to form a community and set up a body politic. Government was obliged to protect the natural rights of its subjects, and if Government neglected this obligation, it forfeited its validity and office.<sup>22</sup>

The above theory squarely places the responsibility of the realization and protection of these rights on the Government which is in line with Article 43 of the Constitution as read with Articles 21 and 20(5) of the Constitution. However, from a philosophical viewpoint, the critical problem that natural rights doctrine faced is how to determine the norms that are to be considered as part of the law of nature and therefore inalienable. Under Locke's view of human beings in the state of nature, all that was needed was the opportunity to be self-dependent; life, liberty, and property were the inherent rights that met this demand. But one would ask, what about a world unlike the times of Locke, in which ample resources are not available to satisfy human needs? Does Natural Law Theory have the flexibility to satisfy new claims based on contemporary conditions and modern human understanding?<sup>23</sup> In simple terms if one talks about the right to accessible and adequate housing, what is the degree of accessibility and adequacy required? What kind of housing is adequate? As the research attempts to answer these questions, it will be noted that the inclination is largely towards this school of thought.

John Rawls' theory of justice<sup>24</sup> postulates that rights are an end of justice. Rawls identifies the principles of justice which according to him define the appropriate distribution of the benefits and burdens of social cooperation. The first principle focuses on the basic liberties. Rawls does not enumerate them precisely, but indicates, roughly speaking, that they include political liberty, freedom of speech and assembly, liberty of conscience and thought, freedom of the person (along with the right to hold personal property), and freedom from arbitrary arrest and seizure. This

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<sup>22</sup> Jerome, J. S. (1998). The Philosophic Foundations of Human Rights. *Human Rights Quarterly* 20, 201-234.

<sup>23</sup> Ibid.

<sup>24</sup> Rawls, J. (1971) Explaining the essence of Rawls' theory: *Theory Of Justice* 1-4, 9, 11-17, 20-30, 33-35, 39-40

principle requires that these liberties be equal because citizens of a just society are to have the same basic rights. Rawls' second principle deals with distributive justice. It holds that: "Social and economic inequalities are to be arranged so that they are both: to the greatest benefit of the least advantaged, consistent with the just savings principle, and attached to offices and positions open to all under conditions of fair equality of opportunity. The general conception of justice behind these two principles reached in the original position is one of 'fairness.'<sup>25</sup> This theory is useful in determining the priority and the reasonableness in determining the satisfaction level of the right to accessible and adequate housing.

## **1.6 Objectives of the Study**

The study seeks to achieve the following objectives:-

### **1.6.1 Main Objective**

To analyze the effectiveness of Kenya's legal, judicial jurisprudence and policy framework in realizing the right to accessible and adequate housing.

### **1.6.2 Specific Objectives**

1. To analyze the legal provisions and the judicial jurisprudence thereof governing social economic rights in Kenya with a particular emphasis to housing rights.
2. To discuss the government's policy framework geared towards the implementation of the right to accessible and adequate housing in Kenya.
3. To investigate how the South African Courts in comparison to the Kenyan courts have interpreted their Constitution in enforcing the right to accessible and adequate housing and determine whether the South African jurisprudence on housing rights can be imported to Kenya.

## **1.7 Research Questions**

The study explores the following research questions:-

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<sup>25</sup> Supra, note 22 above -Jerome, J. S. (1998).

1. What is the normative content of the right to adequate and accessible housing in Article 43 and, by extension, the government's duties in relation to the right?
2. What does the South African housing rights jurisprudence model offer to the constitutional courts in Kenya?
3. What are the appropriate legal and policy recommendations to ensuring the full and effective realization of the right to accessible and adequate housing in Kenya?

### **1.8 Research Hypotheses**

The study seeks to answer the following hypotheses:-

1. South Africa having developed in its jurisprudence and policies, in the implementation of the right to accessible and adequate housing, may be emulated by Kenya in its development.
2. There is need for a clear and progressive jurisprudence on the implementation of the right to accessible and adequate housing in Kenya.

### **1.9 Research Methodology**

This study involved the analysis of the various literature materials and the various legal instruments at the international, regional and national levels dealing with the socio-economic rights with a particular focus on the right to housing. This method involved a comprehensive analysis of the relevant sampled books, articles, essays, reports and analysis reports that have been prepared including case law. The information unearthed was used to justify the legal basis of housing rights and how best to implement the same. In essence it should be expected that as and when the recommendations of the research are implemented, the country shall have put a notch higher in terms of its commitment to uphold and respect the rights to housing.

Based on this methodology the study has basically been library oriented. I largely utilized secondary sources of information. These included the legal and various national instruments, regional treaties, charters, conventions, protocols and declarations in the field of social economic rights. Textbooks, journals and articles on the subject were also of primary importance.



I majorly relied on the university library to obtain the text books and other materials. On the legal texts I relied on the various countries' legal websites, for example, [www.kenyalaw.org](http://www.kenyalaw.org) where various legal texts are published.

### **1.10 Limitation of the Study**

In carrying out the study I experienced a number of challenges. The key one is that the research will not, realistically, be able to adequately cover all aspects within the scope of the subject matter of the study including that of reasonable standards of sanitation provided under Article 43 of the Constitution. The study, therefore, analyzes the various literature materials and focuses on the status of the government's strategy to progressively and fully implement and guarantee the right to housing as opposed to discussing the socio-economic rights as whole. Finally, due to time constraints and the maximum pages allowed for this study, only a handful of relevant literature materials have been analyzed.

### **1.11 Literature Review**

This section gives a brief overview of some literature identified and which I relied on in the conduct of this research. This is done by reporting the findings from other researchers, scholars and practitioners in the area of economic and social rights. An analysis has been done to reveal gaps that need attention and also show how the literature relates to the objectives of this research. The report of the International Commission of Jurists (ICJ),<sup>26</sup> analyzes and counters some of the traditional objections to the justiciability of socio-economic and cultural rights. Some of these objections have been debated in the academic field.

The report uses the term 'economic, social and cultural rights' ('ESC rights') as used in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other universal human rights instruments. While the report indicates some reluctance by common law countries to recognize the existence of ESC rights as 'fundamental' or 'constitutional', it also shows that some of these rights are already enshrined in statutes and sometimes in national Constitutions..

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<sup>26</sup> ICJ, (2008). Report of the International Commission of Jurists on Courts and the Legal Enforcement of Economic, Social and Cultural Rights. *Human Rights and Rule of Law Series* No. 2. Available at: <http://www.unhcr.org/refworld/docid/4a7840562.html> [accessed 29 December 2011].

Nolan, Aoife, Porter, Bruce and Langford, Malcolm,<sup>27</sup> in their paper, consider the question of the justiciability of social and economic rights from both a conceptual and an experiential perspective. They first review some of the major concerns that are frequently raised in relation to whether social and economic rights can, or should be, adjudicated by courts, drawing on commentary from experts and judicial and quasi-judicial bodies considering this question. This is followed by an overview of the growing body of jurisprudence from domestic courts and regional and international bodies that have adjudicated social and economic rights.

The authors thereby convey a better sense of how the adjudication of social and economic rights operates in practice, and the way in which courts and other bodies address the issues that have been raised with regard to the justiciability of these rights.

In his book, Mbazira<sup>28</sup> focuses on judicial enforcement of the socio-economic rights as protected in the South African 1996 Constitution. He makes reference to case law dealing with civil and political rights. This is because some of the principles that the courts have enunciated in these cases apply to all constitutional litigation, including litigation in the area of socio-economic rights. South Africa has been selected as the focus of Mbazira's book because of its extensive protection and judicial enforcement of socio-economic rights. However the author notes that in spite of such protection and enforcement, the country still faces a number of challenges in the alleviation of poverty through justiciable socio-economic rights.

In this respect, as suggested by Mbazira, South Africa offers a number of lessons to be learnt not only by other domestic jurisdictions but also by international human rights bodies. This means that, although the study is South African-based, it is deemed relevant to international and many other domestic jurisdictions including Kenya. Many of the challenges the literature addresses are not exclusive to South Africa. South Africa, as the author puts it, is merely presented as a 'guinea pig' for the domestic enforcement of socio-economic rights.

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<sup>27</sup> Nolan, Aoife, Porter, Bruce and Langford, Malcolm, (2009) *The Justiciability of Social and Economic Rights: An Updated Appraisal* . CHRGI Working Paper No. 15. Available at SSRN: <http://ssrn.com/abstract=1434944> Accessed on

<sup>28</sup> Mbazira, C. (2009). *Litigating social-economic rights in South Africa: A choice between corrective and distributive justice*. Pretoria: Pretoria University Law Press.

This study therefore picks from here and illustrates the enforcement of social economic rights in Kenya. From the challenges experienced in South Africa, this particular report proposes recommendations for Kenya. Kenya's experience may also inform South African courts and state actors in realizing the right to housing.

Gathii John<sup>29</sup> in his thesis looks at the arguments raised against judicial enforcement of social economic rights. He addresses the moral and philosophical concerns that are associated with judicial enforcement of these rights. The paper finds that there have been significant developments of social economic rights jurisprudence to how best these rights should be subject to judicial enforcement rather than whether or not they should be in the first place. The paper suggests best practices from Indian courts: the need to relax the rules of standing to allow for public interest litigation.

By the time of publication of this book, Kenya had not constitutionalized social- economic rights. Kenya has since gone ahead and is now producing jurisprudence in this area. The Constitution of Kenya now allows for public interest litigation. This research therefore is what I call 'a post 2010 Constitution research'.

Akumu<sup>30</sup> in his paper begins with a theoretical study of statistics in general and housing statistics in particular. From here it undertakes a comparative study of housing statistics in other countries especially the US for which statistical programmes are found to be comprehensive, objective oriented and rational. The review proceeds to the Kenyan scene, where in contrast, statistical programmes are found to be unfocussed, at times erroneous, irrelevant, incomplete, or stale, and generally deficient. This deficiency is observed to have serious implications for policy decision making, housing development, housing investment, capacity building, and policy analysis. In this regard proposals are made for development of statistical system for Kenya whose main feature should include a housing statistics strategy. Recommendations are also made for institutional development for housing statistics.

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<sup>29</sup>Gathii, J. (2008). *A case for justiciability of Social- economic Rights in Kenya: Drawing from the experience in South Africa, India and United States, Hungary*. LL.M Thesis, Central European University, Hungary.

<sup>30</sup> Akumu O.A.K. (2004). *Evaluation of housing statistics in Kenya*. Available at [http://kpda.or.ke/wp-content/uploads/2011/12/Evaluation\\_of\\_housing\\_statistics\\_in\\_Kenya.pdf](http://kpda.or.ke/wp-content/uploads/2011/12/Evaluation_of_housing_statistics_in_Kenya.pdf)

The paper is useful in providing the required statistics up to 2004, when it was published. Nine years after the publication, this thesis analyzes the current situation in Kenya largely finding a rather slow progress.

In their paper based on a research conducted in Eldoret Municipality among low-income estates, namely Langas, Huruma and Kamukunji, Cheserek and Opata<sup>31</sup> reveal that low-income housing has impacted negatively on human health and the environment. The impact, the research reveals, is characterized by health problems including malaria, typhoid and cholera; and environmental problems including congestion, house pests, poor drainage, wastewater, air pollution and garbage. The results showed that the government policy is inadequate and mechanisms for enforcement are lacking and as such calls for a real overhaul and commitment to the realization of the right. Being a rather recent research, this particular study reveals similar findings indicating slow development in the area of housing rights.

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<sup>31</sup> Supra, note 4 above: Cheserek, G, J. and Opata, G, P. (2011).

## CHAPTER TWO

### Implementation of the Right to accessible and adequate Housing under the Constitution of Kenya, 2010

#### 2.1 Introduction

The right to accessible and adequate housing is now part of the fundamental human rights. The right is categorized under the economic and social rights to which the Constitution provides that every person has the right to accessible and adequate housing in Kenya.<sup>32</sup> Within the wider chapter on the Bill of Rights, the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.<sup>33</sup> Further to this, the Constitution defines the purpose of such recognition and the protection of the rights as being fundamental to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.<sup>34</sup> The High Court of Kenya<sup>35</sup> has had an opportunity to pronounce itself on the import of the inclusion of socio-economic rights in the Constitution. In the case of *John Kabui Mwai and Others v. KNEC & Others*<sup>36</sup> the court rendered itself thus;

“The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10(2) (b).”

It is with the aforementioned understanding that this chapter shall critically evaluate the normative content and application of the right to accessible and adequate housing, the means or

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<sup>32</sup>Article 43(1) (b) of the Constitution of Kenya, 2010.

<sup>33</sup>Article 19(1) of the Constitution of Kenya, 2010.

<sup>34</sup>Article 19(2) of the Constitution of Kenya, 2010.

<sup>35</sup>Is established under Article 165 of the Constitution of Kenya, 2010 with the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

<sup>36</sup>HCCC Petition no. 15 (2011) e KLR.

the parameters to its achievement and the emerging jurisprudence on the enforceability of the right under Kenya's domestic courts.

## **2.2 The State's obligations on the right to accessible and adequate housing**

By dint of Article 21 of the Constitution of Kenya, 2010, the State has been given the duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. These obligations are not defined. However, from the various literature reviews the obligations have the following meanings. The obligation to observe means to monitor the implementation of the right; 'respect' means that the State must refrain from interfering with their enjoyment; 'protect' means the state must prevent violations by third parties; and 'promote' means that the State must encourage and advance the realization of these rights, which includes ensuring public awareness. To fulfil means that the State must take appropriate legislative, administrative, budgetary, judicial and other measures towards their realization.<sup>37</sup>

The duty to observe, respect and protect have been described by Irene as imposing negative duties on the state<sup>38</sup>, in that the state is refrained from doing certain things in regard to housing that would lead to a violation of the rights of those entitled. An example is where the state un-procedurally evicts persons leaving them homeless or without making alternative housing arrangements for them. The duty to promote and fulfil however impose positive duties on the state where it is required to take certain steps in furtherance of the right to housing. This can take the form of legislating relevant laws that promote the realization of housing rights. The state can also fulfil its positive obligations by generally providing its citizens an enabling environment to access the right.

The Constitution obligates the State to realize the implementation of the rights by providing for a 3 pronged clear roadmap plan. The first mandate is to ensure that legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the economic and social rights.<sup>39</sup> The second mandate is to place the burden on all State organs and

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<sup>37</sup> Boven, V.T.C, Flinter, C. & Westendorp.(1998). *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. Utrecht: Netherlands Institute of Human Rights.

<sup>38</sup> ICJ Kenya, (2012). Judicial Enforcement of Socio- Economic Rights under the New Constitution: Challenges and opportunities for Kenya. *Judiciary watch Report*, 10,160- 164.

<sup>39</sup> Article 21(2) of the Constitution of Kenya, 2010.

all public officers.<sup>40</sup> While the third mandate is for the State to enact and implement legislation in order to fulfil its international obligations in respect of human rights and fundamental freedoms.<sup>41</sup>

The principle of progressive realization<sup>42</sup> required above is based on the fact that states may not have sufficient resources to immediately take all steps needed towards realization of the economic, social and cultural rights. The use of the word progressive realization of the Socio-economic rights has found meaning in the Advisory Opinion No. 2 of 2012 in the matter of *the Principle of Gender Representation in the National Assembly and the Senate*<sup>43</sup> where the Supreme Court held that;

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

The State’s obligation was aptly put in practical perspective in the case of *Mitu-Bell Welfare Society v. The Hon. Attorney General and 2 Others*<sup>44</sup> where Justice Ngugi observed;

“In the present case, the State had an obligation to protect the petitioner’s existing homes, rudimentary as they were, while doing what it could, to the extent of its available resources, to ensure their progressive access to adequate housing. It cannot properly argue, as it has in this case, that since the petitioners had no right to the land, their houses

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<sup>40</sup>Article 21(3) of the Constitution of Kenya, 2010.

<sup>41</sup>Article 21(4) of the Constitution of Kenya, 2010.

<sup>42</sup> Captured under Article 2 (1) of the ICESR and explained by the CESR General comment 3, The Nature of State Parties’ obligation para.9.

<sup>43</sup> [2012] e KLR. Note that the opinion does not relate to economic, social and cultural rights but the court’s take on the concept of progressive realization is relevant.

<sup>44</sup> Nairobi Petition No. 164 of 2011.

in Mitumba village could be demolished arbitrarily without providing them with alternative accommodation. The State has an obligation to observe, respect, protect, promote and fulfil the petitioners' right to adequate housing, and the action by the 2<sup>nd</sup> respondent in this case was unlawful and unconstitutional.”

As the above case indicates, progressive realization imposes both immediate and long term obligations upon the state. In the case, the State had an immediate obligation to respect the petitioners' rights, by refraining from negatively interfering with the enjoyment of their right to housing and further from impairing that right. In the alternative, the state had an immediate obligation of providing alternative shelter to the evictees. As a long term obligation the state, in the matter, was also obliged to legislate to prevent unfair evictions.

The Kenya Vision 2030, as will be discussed later in this chapter, envisages progressive realization of the right to accessible housing. This has informed the formulation of various programme initiatives in collaboration with non-state actors. The courts have on their part offered meaning the concept as provided for under article 21(2) of the 2010 Constitution. The case of *Engineer Charo wa Yaa*<sup>45</sup> should however be distinguished in as far as the court's reasoning that the right to housing is an aspirational right because this right is justiciable as the High Court empowered is empowered under Article 165(3) (b), to determine whether or not there is a violation of the right. Neither does the concept imply that housing rights should be suspended indefinitely. Long term obligations arising from the concept should be fulfilled within a reasonable time. Later on this chapter I will give an illustration of how the Kenyan Courts have endeavoured to give content to these duties.

### **2.3 The normative content of the right to accessible and adequate Housing**

The words 'accessible' and 'adequate' are pronouns that are meant to effect a real right to the concept housing. They are the basis upon which there will be a determination as to whether there

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<sup>45</sup> *Engineer Charo wa Yaa v. Juma Abdi Noor, Attorney General and 4 others* Mombasa HC Misc.Application No.8 of 2011. Following a court order, the petitioners had been evicted from a private land they had occupied. They petitioned the court to allow the evictees living in makeshift structures in the property to obtain humanitarian support to construct temporary tents, portable bathrooms and toilets in the property so as to safeguard their housing right until the determination of their case. The application was rejected with the court ruling that 'the right to housing as provided for in Article 21(2) of the Constitution is not a final product for direct dispensation, *but is an aspirational right which the state is to endeavour to reach progressively.*(Emphasis added.)



has been a violation of the right or not. Though the words are not defined in the Constitution, by dint of Article 2(4) and (6) of the Constitution, their meaning can be derived from the application of the international law. Under the General comment No. 4 paragraph 8 of the Economic, Social and Cultural Rights, accessibility has been defined as follows;

“Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV positive individuals, persons with persistent medical problems ... and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.”

Under the new dispensation therefore, housing should be equally available to everyone including the disadvantaged in society. This means that state policies on land must also ensure access to all. For these policies to have the force of law, they must be reduced into a law that can be enforced. The policies can further be translated into programmes that seek to address the housing needs of the people.

On the other hand adequate is defined as;

“while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors,...it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following: (a) legal security of tenure including legal protection against forced evictions (b) availability of services, materials, facilities and infrastructure (c) affordability (d) habitability (e) accessibility (f) location and (g) cultural adequacy.”

Accordingly, it is emerging that land is a critical factor in the realization of the right to accessible and adequate housing to which the government must take proactive steps to address including the issue of landlessness, the size of land holding and the slum upgrading programmes.

The meaning of both accessible and adequate housing has aptly been described by Kothari, Karmali and Chaudry<sup>46</sup> where they captured that;

“It is important to recognize that the human right to adequate housing is not limited exclusively to a physical structure, a house. It is conceived in a much broader sense that integrates housing, shelter and habitat environment as a whole. This includes the cultural, historic, social, economic, political, and legal environment as well as physical and territorial dimensions. Though the human right to land is not articulated specifically as a separate human right in international law, the human right to adequate housing has increasingly been interpreted as including the human right to land as is evident in reports of the UN Special Rapporteur on adequate housing.”

This also implies that accessible and adequate housing is determined by so many other factors including land and physical surrounding of the shelter fabric. In order to achieve this right therefore, a country should ensure that even these other determinants are equitably distributed.

## **2.4 The application of the right to accessible and adequate housing in Kenya**

The Constitution of Kenya sets clear benchmarks on the implementation of the economic and social rights to which the right to accessible and adequate housing is part. These benchmarks include: the fact that the right applies to all law and binds all state organs and all persons<sup>47</sup>; the development of the law to give effect to the right<sup>48</sup>; and the principles to be considered in the application of the right.<sup>49</sup>

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<sup>46</sup> M. Kothari, S. Kaemali and S. Chaudhry. *The Human Right to Adequate Housing and Land*. National Human Rights Commission, India, 2006 p.14.

<sup>47</sup> Article 20(1) of the Constitution of Kenya, 2010.

<sup>48</sup> Article 20(3) of the Constitution of Kenya, 2010.

<sup>49</sup> Article 20(5) of the Constitution of Kenya, 2010.

Under the first benchmark, it is important to evaluate the two key words used. That is the “State” and “person.” State is defined under Article 260 of the Constitution to mean the collectivity of offices, organs and other entities, comprising the governments of the Republic of Kenya. Accordingly, every organ or institution of government has an obligation to ensure provision of accessible and adequate housing without necessarily restricting it to one arm of government. This in effect means that a person can effectively bring an action against any arm, organ or institution of government for failure to respect, promote and protect the right. An example would be where a parastatal in deducting the house allowance from its employees but end up providing substandard housing or even not adequate housing can be sued for breach of such a right. Further, the right can be enforced against Kenyan universities if and when they fail to provide the right to accessible and adequate housing because of sharing of rooms by many and which is not recommended for health reasons or where the houses are far away and the means of transport are not provided.

On the use of the word person, the critical question is whether the person here refers to natural or artificial persons and further, whether the person is limited to Kenyan citizens or every inhabitant in Kenya. Person here includes both the duty bearers and beneficiaries. Article 260 of the Constitution defines a person to include a company, association or other body of persons whether incorporated or unincorporated. Majanja J. in the case of *Famy Care Limited v. Public Procurement Administrative Review Board and Another*,<sup>50</sup> held that;

“The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. *Unlike other rights which are available to ‘every person’ or ‘a person’ or ‘all persons’ this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term ‘person’ and ‘citizen’ as applied in Article 35*”. (Emphasis added)

In terms of the beneficiaries of this right, serious governance issues if taken into perspective may complicate the realization of the right. For example, if there are budgetary constraints to satisfy

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<sup>50</sup> HCC Petition No. 43 of 2012.

the socio-economic rights of citizens, why bother with the rights of non citizens? Further, what would then prevent non Kenyans who cannot achieve their rights to accessible and adequate housing from coming to Kenya and claiming such? Should we have entitled this particular right to citizens only for starters?

It is my argument considering the nature of the right that the right applies only to Kenyan citizens and natural persons. By this I mean that its justiciability should only be open to citizens rather than all persons. In deed the Constitution provides for the limitation of a right to the extent that the limit is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Among the considerations are the nature of the right or fundamental freedom and the importance of the purpose of the limitation.<sup>51</sup> The purpose of this particular limitation would be inadequate resources.

This approach resonates well with the principle of the purposive interpretation of the Constitution. Under this I am enjoined to be guided by the provisions of Article 259(1)<sup>52</sup> which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. In essence, Article 259(1) of the Constitution, 2010 commands a purposive approach to interpretation of the Constitution. Purposive interpretation was explained by the Supreme Court of Canada in the case of *R v. Big M. Drug Mart Limited*.<sup>53</sup>

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<sup>51</sup> Article 24(1) (a) and (b) of the Constitution of Kenya, 2010.

<sup>52</sup> The Constitution of Kenya, 2010.

<sup>53</sup> [1985] 1 SCR 295 at paragraph 116 and 117. Where the Court stated, “[T]he proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect... [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore be placed in its proper linguistic, philosophic and historical contexts.”

This is the same reasoning that was adopted by our Supreme Court in *The Matter of the Interim Independent Electoral Commission*<sup>54</sup> where it adopted the words of Mohamed A. J. in the Namibian case of *State v. Acheson*<sup>55</sup> where he stated that,

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”

On the second benchmark, persons, the government and courts are enjoined to develop the law in a manner that promotes the respect, promotion and guarantee of fundamental human rights and freedoms. Accordingly, all laws which are repugnant to the realization of the rights are deemed modified to conform to the spirit and tenure of the Constitutional chapter on human rights.<sup>56</sup> In this regard, therefore, the government and its organs, institutions and offices is enjoined to align the laws and policies to accord to the spirit of the Constitution.

Of further fundamental importance are the set principles in the application of the rights. The Constitution enjoins the courts to follow these principles in the application of the social and economic rights to which the right to accessible and adequate housing is part. Article 20(5) of the Constitution provides that;

“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles-

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

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<sup>54</sup> Constitutional Application No. 2 of 2011 at paragraph 51.

<sup>55</sup> (1991) 20 SA 805 Page 813.

<sup>56</sup> See Article 21(3) of the Constitution of Kenya, 2010; and section 7 of the Sixth Schedule to the Constitution.

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

(c) the court, tribunal or other authority may not interfere with a decision by State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.”

These principles have been the subject of debate in academic and litigation circles. Jotham Okome Arwa<sup>57</sup> notes that the principles make the right lack the essential quality of absolutism which is a characteristic of all rights to the extent that their realization is resource dependent.<sup>58</sup> In deed opponents of the socio-economic rights have argued that adjudication of socio-economic rights disputes involve allocation of resources and prioritization of needs which should be left to democratically elected representatives of the people.<sup>59</sup>

However, the limits of the judicial pronouncements without necessarily encroaching of the doctrine of separation of power has been elaborated in the case of *John Kabui Mwai and Others v. KNEC & Others*<sup>60</sup> where the court rendered itself thus;

“Socio-economic rights are by their very nature ideologically loaded. The realization of these rights involves the making of ideological challenges which, among others, impact on the nature of the country’s economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.”

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<sup>57</sup> Jotham Okome Arwa,(2012).*Litigating Socio-Economic Rights in Domestic Courts-The Kenyan Experience*. Paper presented at the colloquium on the African Charter on Human and Peoples Rights held in Cape Town South Africa between 7<sup>th</sup> and 10<sup>th</sup> November, 2012.

<sup>58</sup> Bossuyt, M.(1975). The legal distinction between civil and political rights and economic social and cultural rights. *8 Human Rights Journal* 783.

<sup>59</sup> Fabre C. (1998). Constitutionalizing socio-economic rights. *Journal of Political Philosophy* 263,280.

<sup>60</sup> (2011) e KLR

The burden of proof being placed on the State to show that the resources are not available to implement the right is key to informing the appropriate orders to be given by the adjudicating courts as shall be seen in the later part of this chapter.

The fact that the constitution recognizes separation of powers and non interference in certain aspects of policy making, the same goes ahead to grant the courts powers to decide on certain issues of resource allocation. This provision is good in the sense that the debate on whether courts can adjudicate matters which may have huge financial and policy implications is kind of settled. The focus will not be on if the court should but how the courts should adjudicate. This therefore calls for caution on the part of the judiciary to maintain and respect separation of powers while adjudicating social economic rights. This is where the minimum core content and reasonableness test approaches come in handy. In providing checks and balances on separation of powers, Article 20(5) (c) to ‘interfere’ with the decisions of the political arm through limited control. Judiciary’s role, as aptly put by Waruguru<sup>61</sup> should be understood as not to have the final word on socio economic questions but rather to provoke engagement with other arms of government.

## **2.5 The role of the Judiciary in the adjudication of the right to accessible and adequate housing.**

This sub topic shall concern the interrogation of the jurisdiction of the courts to adjudicate on violations of the right to accessible and adequate housing, their mandate in terms of possible reliefs they can grant, and the limits of such reliefs.

On jurisdiction, the power to determine questions on whether a human right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened is vested on the High Court.<sup>62</sup> Parliament is empowered to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

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<sup>61</sup> ICJ Kenya, (2012). Judicial Enforcement of Socio- Economic Rights under the New Constitution: Challenges and opportunities for Kenya. *Judiciary watch Report*, 10, 104.

<sup>62</sup> Article 165(3) (b) as read with Article 23 (1) of the Constitution, 2010.

In terms of relief, the Constitution has provided a paradigm shift in terms of relief the courts can grant. It has in effect liberalized the relief to ensure practicality in enforcing and protecting human rights and fundamental freedoms. Article 23(3) of the Constitution provides that;

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-

- (a) A declaration of rights;
- (b) An injunction;
- (c) A conservatory order;
- (d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) An order for compensation; and
- (f) An order of judicial review.”

The remedies are not exhaustive as listed. This is because of the use of the word ‘including.’ Of critical importance is the power of the court to grant appropriate relief. As opposed to the traditional methods of making declarations, Kenyan courts have gone beyond their way to devise appropriate methods of protecting the right to accessible and adequate housing. In the case of *Mitu-Bell Welfare Society v. The Hon. Attorney General and 2 Others*,<sup>63</sup> Justice Ngugi J. apart from making declarations as to the breach of the right to adequate housing ordered the government to comply with some directions. She so held that;

“ in the circumstances, before I can make any further orders with regard to the appropriate relief for the petitioners in this matter, I direct as follows:

- a. That the respondents do provide by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.

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<sup>63</sup> Nairobi Petition No. 164 of 2011.



- b. That the respondents do furnish copies of such policies and programmes to the petitioners other relevant state agencies, pamoja trust as the petitioners and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioners grievances, to analyse and comment on the policies and programmes provided by the respondents.
- c. That the respondents do engage with the petitioners, pamoja trust and other relevant state agencies and civil society with a view to identifying an appropriate resolution to the petitioners grievances following their eviction from Mitumba village.
- d. That the petitioners report back on the progress made towards a resolution of the petitioners grievances within 90 days from today.”

The above quote shows that the courts should not be willing to bend too low to the government in the adjudication of the right to housing despite the progressiveness clause and the reasonableness test. The court also embraced the principles of inclusiveness and participation where it ordered the parties including state actors and non state actors to engage each other and come up with an amicable solution. These ‘brainstorming sessions’ allowed by courts may be useful in developing the country’s unique approach to adjudicating economic and social rights.

In terms of interpretation of social economic rights, I am enjoined to briefly outline two concepts that the courts have in the past used to give content to these rights David Bilchitz<sup>64</sup> observes that the purpose of minimum core obligations approach is to ensure that irrespective of scarcity of resources, people have access to basic needs required for survival.

This concept can be related to the conditions captured in Article 20(5) of the Constitution. On the notion of priority and the minimum core approach, David Bilchitz postulates that the concept embodies the understanding that there are millions living in deplorable poverty; but it also involves the recognition that there are some who are more vulnerable than others, some whose

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<sup>64</sup> Bilchitz, D (2007). *Poverty and Fundamental Rights-The justification and enforcement of socio economic rights*. Oxford: Oxford University Press.

very survival is threatened by the conditions in which they live and by their lack of access to such goods as food, water and shelter. Such individuals are to be given priority in terms of the minimum core approach such that the threat to their survival is removed. This is the exact terms of Article 20(5) (b) where it states that,

"in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals."

This will enhance equal enjoyment of the resources available by elimination of discrimination on the basis of the vulnerability of those groups.

The reasonableness test on the other hand has been described as deferential to government in the sense that it allows government a margin of discretion relating to the specific policy choices adopted to give effect to these rights. The courts apply this approach by asking whether the means chosen by the state are reasonably capable of facilitating the realisation of the rights in question.<sup>65</sup> An analysis of the current jurisprudence reveals that both approaches have been adopted by the Kenyan Courts.<sup>66</sup> This is a good indication as it also shows that there is a willingness to explore the approaches that have been tested in a bid of developing an approach that best suits the circumstances in the country.

## **2.6 The Statutory and Policy implementation of the Right to Housing in Kenya.**

Constitutions basically provide the basic structure governing a given subject matter. Accordingly, the operationalization and implementation of the constitutional provisions are done through Parliamentary enactment of statutes and executive formulation of policies.

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<sup>65</sup> ICJ Kenya, (2012). Judicial Enforcement of Socio- Economic Rights under the New Constitution: Challenges and opportunities for Kenya. *Judiciary watch Report*, 10, 78.

<sup>66</sup> See *Satrose Ayuma and others v. The Registered Trustees of the Kenya Railways Retirement Benefits Scheme* NRB, HCCP 65 of 2010.

*Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* Embu HCCP No. 2 of 2011.

*Susan Waithera and others v. The Clerk, Nrb City Council and others.* NRB HCCP 66 of 2010.

In this part I shall highlight on the key legislations, policies and programmes geared towards the achievement of the right to housing in Kenya. I shall adopt a broad based approach in discussing the legislations. For instance, because the right to housing has a bearing on the administration and management of land right in Kenya, I shall seek to discuss that.

### **2.6.1 Housing Act<sup>67</sup>**

It is an Act of Parliament to provide for loans and grants of public moneys for the construction of dwellings; to establish a housing fund and a housing board for these purposes; and for connected purposes.<sup>68</sup> The Act establishes the National Housing Corporation with the mandate as so captured in the preamble.<sup>69</sup> The Housing Fund is established with the mandate of promoting the mandate of the Corporation.<sup>70</sup> The Corporation through its officers is given the power of entry and inspection of premises to check on the condition and status of dwelling houses.<sup>71</sup> Notably this law has not been reviewed to align it to the constitution 2010.

### **2.6.2 The National Housing Policy of Kenya<sup>72</sup>**

This National Housing Policy is intended to arrest the deteriorating housing conditions countrywide and to bridge the shortfall in housing stock arising from demand that far surpasses supply, particularly in urban areas. This situation has been exacerbated by population explosion, rapid urbanization, widespread poverty, and escalating costs of providing housing.

The ultimate goal of the policy is to facilitate the provision of adequate shelter and a healthy living environment at an affordable cost to all socio-economic groups in Kenya in order to foster sustainable human settlements.<sup>73</sup> The Policy intends to achieve this through numerous initiatives including: legislative enactment; institutional strengthening; public private sector collaboration; land use planning; encouragement of saving culture for home buying schemes; reduction in cost of getting mortgage facilities; and poverty alleviation.

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<sup>67</sup> Cap 117 of the Laws of Kenya

<sup>68</sup> Preamble to the Act.

<sup>69</sup> Section 3 of the Act.

<sup>70</sup> Section 7 of the Act.

<sup>71</sup> Section 28 of the Act.

<sup>72</sup> Sessional Paper No. 3 of 2004.

<sup>73</sup> Para. 2.1 of the Policy.

The National Housing Policy too has not been reviewed to conform to the current constitution that has allocated counties certain functions including planning and development of housing in the counties.<sup>74</sup> There is an urgent need for specific allocation of responsibilities to the different levels of government to enable implementation.

### **2.6.3 Kenya Vision 2030**

Kenya Vision 2030<sup>75</sup> can be termed as the country's master policy document from which all other policies borrow from. It is the country's new development plan covering the period from 2008 to 2030 based on three pillars, the economic, the social and the political. Under the social pillar, vision 2030 provides for housing and urbanisation<sup>76</sup> where aspects such as access to adequate and affordable housing for the population, enhanced access to adequate finance for developers and buyers and targeted key reforms to unlock the potential of the housing sector through private-public partnerships, feature. To illustrate the progressive realization of the right to accessible housing as also captured under international law, Vision 2030 sets medium term<sup>77</sup> goals and long term<sup>78</sup> objectives.<sup>79</sup>

Since the National Housing Policy of 2004 is yet to be reviewed, vision 2030 can be said to bear the current housing policy. Interestingly, enactment of a housing legislation was among the targets under the flagship projects for 2012.<sup>80</sup>

### **2.6.4 Land Act, No. 6 of 2012<sup>81</sup>**

It is an Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.<sup>82</sup>

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<sup>74</sup> Section 8(d) part 2, fourth schedule of the Constitution of Kenya, 2010.

<sup>75</sup> Republic of Kenya, Kenya Vision 2030: Popular version, 2008.

<sup>76</sup> Republic of Kenya, Kenya Vision 2030: Popular version, 2008, at page 19.

<sup>77</sup> 'to increase the annual production of housing units from the current 35,000 annually to 200,000.'

<sup>78</sup> The 2020 vision for housing and urbanisation is "an adequately and decently housed nation in a sustainable environment."

<sup>79</sup> Sessional Paper No. 3 of 2004 at page 19.

<sup>80</sup> Others include the Metropolitan and Investment Plans Initiative, the Housing Development Initiative and the mortgage Financing Initiative.

<sup>81</sup> Act No. 6 of 2012.

The Act defines Land in terms of the Constitutional definition under Article 260 thereof which defines land to include among other things, natural resources completely contained on or under the surface. The natural resources are defined to include among other things the forests, biodiversity and genetic resources.<sup>83</sup>

The management of public land is vested on the National Land Commission which shall take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. The Commission shall identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change. In carrying out these functions the Commission is required to consult existing institutions dealing with conservation.<sup>84</sup> Accordingly, the provision is key in defining settlement schemes in Kenya. For example, on the issue of resettlement of those who have encroached on a country's natural resources.

With regard to natural resources to which forests are a part, the Act provides that the Commission shall hold the same as reserved areas to which allocation shall not issue.<sup>85</sup> This is intended to protect the forests from unscrupulous allocations. The Commission is further empowered to make rules and regulations concerning the sustainable conservation of land based natural resources. Even though, the provision sounds good and progressive, if not, properly checked it might lead to encroachment on the functions of other institutions such as the Kenya Forestry Service which is a specialized agency tasked with the management of forests in Kenya.

In order to recognize the customary rights and or use of public land, the Act empowers the Commission to lease or license an entity to occupy or use land for a period of not more than five years on specified conditions.<sup>86</sup>

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<sup>82</sup>Preamble to the Act.

<sup>83</sup>Section 3 of the Act.

<sup>84</sup>Section 11 of the Act.

<sup>85</sup>Section 15 of the Act.

<sup>86</sup>Sections 19 and 20 of the Act.

The Act provides the necessary legal apparatus to repossess illegally acquired land. In order to deal with the problem of innocent purchasers for value without notice of irregularities, the Act captures the concept of compulsory acquisition which can be used to acquire land from third parties who might have acquired the forests land from the fraudulent purchasers.<sup>87</sup> The Commission is empowered however, to reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under Article 40(3) of the Constitution. The acquisition is subject to prompt and adequate payment of compensation.<sup>88</sup>

The National Land Commission (NLC) is empowered to issue a notice to person or entity it suspects to be in illegal occupation of public land to vacate. Failure to comply with the terms of the notice empowers NLC to move to court to validate the notice and thereafter obtain appropriate orders for vacation.<sup>89</sup>

The Act further empowers the Environment and Land Court established by the Environment and Land Court Act<sup>90</sup> to hear and determine disputes, actions and proceedings concerning land.<sup>91</sup> The Act also makes the fraudulent and corrupt transactions a criminal offence liable on conviction to a fine not exceeding five million shillings or imprisonment for a term not exceeding five years or both.<sup>92</sup>

The Act does not differentiate first and subsequent registrations, giving right to invalidate all transactions tainted by corruption. It, thus, goes against indefeasibility of first registration as provided for in the previous land laws.

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<sup>87</sup> It provides that whenever the national or county government is satisfied that it may be necessary to acquire some particular land for public use, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.

<sup>88</sup>Section 108 of the Act. On sanctity of title, sec.158 provides that all land transactions tainted by corruption, for which corrupt practices are proved in a court of law, are deemed null and void and the party to that transaction is not entitled to any compensation.

<sup>89</sup> Section 155

<sup>90</sup> Act No. 19 of 2011.

<sup>91</sup>Section 101 of the Land Registration Act.

<sup>92</sup>Section 103 of the Act.

### **2.6.5 Rent Restriction Act Cap 296**

This Act makes provision for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house. It details a procedure to be followed before an order for eviction can be issued. It however only applies private individuals, does not bind the Government and protects those who stay in dwelling houses with rent below Kshs.2, 500.

### **2.6.6 The Land Registration Act, No. 3 of 2012<sup>93</sup>**

This Act came into force on 2<sup>nd</sup> May, 2012. It sought to revise, consolidate and rationalize the registration of titles to land and to give effect to the principles and objects of devolved government in land registration. The Act applies to registration of interests in all public land as declared by Article 64 of the Constitution and registration and recording of community interests in land.<sup>94</sup>

The Act guarantees sanctity of title, but limits that to only legally acquired titles. It provides that the certificate of title shall be held as conclusive evidence of proprietorship except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.<sup>95</sup> The words ‘fraud’, ‘corruption’, ‘illegality’ and ‘un-procedurally’ mentioned in the Act are matters of facts which require proof in a court of law. This provision serves two purposes: enhancing public confidence in land holding and giving the government the roadmap to recover illegally alienated public land.

### **2.6.7 National Land Commission Act, No. 5 of 2012**

The object and purpose of this Act is to provide: for the management and administration of land in accordance with the principles of land policy set out in Article 60 of the Constitution and the national land policy; for the operations, powers, responsibilities and additional functions of the

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<sup>93</sup> Act No. 3 of 2012.

<sup>94</sup> 3(a) and (c).

<sup>95</sup> Section 26 of the Act.

Commission pursuant to Article 67(3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250 (2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions.<sup>96</sup> The Act provides that its functions shall be decentralized in order to enhance accessibility and wider public reach.<sup>97</sup>

The Commission is given a wide array of functions which include: to manage public land on behalf of the National and County governments; to recommend a national land policy to the national government and to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.<sup>98</sup> Accordingly, the Commission is mandated to address the historical injustices with regard to housing rights.

In carrying out its functions, the Commission shall work in consultation and co-operation with the National and County governments subject to Article 10<sup>99</sup> and Article 232<sup>100</sup> of the Constitution.

#### **2.6.8 Evictions and Resettlement Procedures Bill, 2012**

I note that there is already a Bill pending in Parliament which should accordingly be fast tracked. The Bill is called the Evictions and Resettlement Procedures Bill, 2012 and was informed by the very fact that several forests in Kenya are occupied illegally by either squatters or developers through illegal alienation and as such there will be need for evictions. Further consideration has been the numerous court declarations obtained by several Petitioners who have challenged the past Government efforts on evictions particularly from public land. A case in point is the case of

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<sup>96</sup>Section 3 of the Act.

<sup>97</sup>Section 4 of the Act.

<sup>98</sup> Section 5 lists other functions to include: to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country. In order to enhance the expertise of the Commission in the performance of its functions, sec.10 provides that the Chairperson and the members of the Commission shall be persons who are knowledgeable and experienced in land matters.

<sup>99</sup> National values and principles of governance.

<sup>100</sup> Values and Principles of public service



*Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*<sup>101</sup>  
where the court held that-

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

In this case, the Petitioners were evicted from Bularika, Bulamedina, Sagarui, Naima, Bulanagali and Gesto (commonly known as “Medina location”) on 24<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> December 2010 by the officers of Provincial Administration. Those evicted included children, women and the elderly. Some of the children were school-going. The Petitioners were evicted from un-alienated public land in respect of which title deeds have not been issued. The land is within the jurisdiction of the Government. It had been occupied by the Petitioners since 1940s, initially as grazing land but in the 1980s they put up permanent and semi-permanent dwellings in which they were living prior to eviction.

In order therefore, to address these challenges the Government has come up with the Evictions and Resettlement Procedures Bill, 2012. In its preamble the Bill sets out the appropriate procedures applicable to forced evictions, to provide protection, prevention and redress against forced evictions for all persons occupying land including squatters and unlawful occupier and all matters incidental and connected thereto.

The principal purpose of this Bill is to set out the procedures that must be followed before, during and after the forced evictions of all persons occupying land, including squatters and unlawful occupiers of land. The Bill seeks to protect the occupiers of land from unlawful and

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<sup>101</sup> eKLR [2011]

un-procedural evictions. To this extent, the Bill aims to give further effect to Article 43 (1) (b) of the Constitution which Article declares the right of every person to accessible and adequate housing.

Part II of the Bill provides the procedures to be followed prior to forced evictions. Clause 4 provides that no person shall be evicted from their homes without a court order authorizing the eviction. Clause 5 provides that forcibly evicting a person without a court order is an offence punishable by a fine not exceeding one million shillings or imprisonment for term not exceeding two years, or both. Clause 6 of the Bill sets out the pre-eviction procedures to be followed. These procedures include a requirement for a notice of at least three months of the eviction date and provision of adequate opportunity for legal redress.

Part III of the Bill sets out the procedure to be followed during forced evictions which have been authorized by the Court. These procedures include a requirement for a notice of at least 21 days before the eviction is carried out.

Part IV of the Bill provides for the Court procedures during eviction proceedings. Clause 8 of the Bill sets out a special procedure to be applied by Courts during eviction proceedings. The clause explicitly provides that an order for eviction shall not be granted where it is clear to the Court that such an order would render the affected persons homeless. Clause 9 of the Bill proposes procedures where circumstances allow for expeditious eviction of unlawful occupiers when irreparable damage or loss is likely to be occasioned in case of any delay.

Part V contains miscellaneous provisions. These include provisions requiring immediate resettlement of forcibly evicted persons, remedies for forced evictions and saving of existing rights.

I note that the Bill does not categorically state who it binds. It is important that it clearly provides that it binds the state, its organs and private individuals so that the law is standard on any form of forced eviction by any person or state organ. The bill further fails to provide in clear terms the procedure for urgent evictions especially by the state in situations where there is imminent danger to occupiers.

## 2.7 Other challenges and programmes

As mentioned in the previous sections, this part shall briefly highlight major challenges experienced in Kenya and those considered to delay the effective realization of the right to accessible and adequate housing. It shall further list some of the programmes in place. One of the challenges is that of unjustified evictions both by the government and private persons. These cases have become common especially those that involve the government – where the government has failed in its duty to respect, protect and promote these rights. As pointed out earlier in this paper, the Courts have major role to play and must be innovative and tough in enforcing the right to housing.

Despite the progress made the government of Kenya has continued to deny citizens their rights. Early 2012, the government embarked on a demolition exercise where it targeted houses around Eastleigh Moi Air base. The reason was that proximity to the military facility posed a security risk. The Court<sup>102</sup> criticised the demolition of houses in Eastleigh labelling the government a “monster” that must be stopped before it causes more damage to its citizens. On the reason given by the government the Justice boldly stated that:

“This government monster in the name of security ought to be investigated and tamed; otherwise it might run amok and cause more suffering to citizens of this country...The role of the court is to mediate between the State and the citizens since the government has evidently become the major violator of fundamental rights affecting its people.”

The Court quashed a decision by the government to demolish buildings within 12 meters from the Moi Airbase and those within 30 meters which have more than two floors.<sup>103</sup> Justice Warsame said the application involved a matter of great public concern since it has become a

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<sup>102</sup> In, *Charles Kinya vs. Attorney General and others Nairobi* HCC JR 95 OF 2011 In the case, a mother and the son had sought the Courts intervention in the demolitions described as illegal and in breach of their constitutional rights to own property, an injunction was issued stopping further demolitions of the houses.

<sup>103</sup> Esther Njeri Kagio and her son Charles Kinya Kagio submitted that they were never given any notice of the demolitions and that they stand to lose considerable income after the tenants in their premises vacated to avoid their goods being damaged. They said that they validly acquired the plots in 1992 and were issued with genuine title deeds, and that they constructed the buildings with the full authority of the City Council planning department.

norm in this country that that state organs have embarked on a major operation to inflict pain on its citizens on the pretext of national security. He ruled that:

“Security is of paramount importance but it cannot be used to conduct unwarranted, unprecedented displacement of a very large group of people without any notice. It is the responsibility of the government to ensure that security operations are carried out in a humane manner.”

He said it's the court's duty to ensure the government does not use the fear of security to demolish property, and that it was time to intervene to protect the citizens from the government security monster. He ruled that it should be the government's responsibility to protect the people, adding that when security is used to demolish houses and displace people then there is a very big problem. Justice Warsame said the applicants had valid titles after lawfully acquiring the land hence it is irresponsible for the government to destroy their buildings without prior notice.

Consequently to prevent further demolitions, the court granted the orders to stop the exercise with a stern warning that failure to comply will lead to contempt of court, which has a jail term of six months. He directed that due to the urgency of the matter, the Internal Security minister, the Defence minister, their Permanent Secretaries and the Air Force Commander be served with the order through print media while the Attorney General to be served in person. This bold move by the court was very visible as it was publicised by the media and at least it served its purpose effectively.

Most recently the Government through the Ministry of Transport embarked on another demolition exercise, this time to pave way for the construction of a public road. The High Court halted the demolition of houses along the Southern bypass pending the determination of an application filed by Nairobi Senator Gideon Mbuvi.<sup>104</sup> The demolition of houses in Langata's Uzima Gardens started on Saturday 20<sup>th</sup> July, 2013. The Ministry of Transport and Infrastructure bulldozers flattened houses, which officials said stood in the way of the southern bypass whose construction was underway. The Ministry maintained that the homes must be pulled down to

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<sup>104</sup> [www.nation.co.ke/News/Court-stops-Langata-demolitions-/](http://www.nation.co.ke/News/Court-stops-Langata-demolitions-/)

pave way for the completion of the project. In the latter case too, the Government had approved the development of the houses in question.

The above two scenarios not only describe the actions of a government that is meant to promote the rights of individuals but also the boldness of a Judiciary that cannot allow violation of the rights of citizens. Though the matters were not taken to court under housing rights, both involve the eviction of many families and clearly indicate lack of proper guidelines/regulations for evictions. These also call for streamlining of administrative actions of all government departments.

It is noteworthy that there have been other positive actions by the government towards achieving the effective realisation of the right to housing. These include

1. Operationalization of the private- public partnership arrangement (PPP) by the National Housing Corporation
2. Protection Working Group on Internal Displacement (PWGID)<sup>105</sup>
3. Kenya Slum Upgrading Programme (KENSUP) 2005<sup>106</sup>

## **2.8 Conclusion**

Based on the above analysis it is evident that the Constitutional provision on the right to housing is progressive and impressively liberal to address the needs of the marginalized in the society. Apart from the written version, it is time for all including the courts and government to play their crucial part in the realization of tangible results towards the achievement.

The key legislations and policy however seem inadequate and should be realigned with the Constitutional provisions. In fact the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations,

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<sup>105</sup> with the main function of resettling Internally displaced persons by the PEV. It designs and coordinates the implementation of solutions of resolving the challenge of internal displacement in Kenya. It brings together state actors, development partners and civil society.

<sup>106</sup> Was designed from MDG No.7 Target 11. The government in partnership with UN Habitat established a low cost Housing and Infrastructure Trust Fund with the objective of improving the overall livelihood of people living and working in slums through targeted interventions to address shelter and related issues.

adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.<sup>107</sup>

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<sup>107</sup> Section 7 of the sixth schedule to the Constitution, 2010.

## CHAPTER THREE

### **The South African Constitutional Perspectives on the Enforcement of the Right to adequate Housing.**

#### **3.1 Introduction**

This chapter proceeds on a discussion concerning the treatment and methodology employed by South African Constitutional Courts in interpreting their Constitution and its bill of rights with particular attention to the right to adequate housing. Particular attention is paid to the far-reaching judgment by the Constitutional Court in *Government of the Republic of South Africa v. Grootboom*.

The choice of South Africa is based on the fact that the South African Constitutional order is similar to the Kenyan one in its historical and contextual enactment. The human rights abuses characteristic of the previous political dispensation in South Africa led to the adoption of two powerful conceptual approaches when the Constitution was enacted: constitutionalism<sup>108</sup> and the entrenchment of fundamental rights.<sup>109</sup>

A Bill of Rights was enacted as part of the Constitution which specially entrenched the protection of the right to adequate housing. It has been made applicable to all law, and binds the Executive, the Judiciary and all organs of State, as well as natural or juristic persons, provided certain conditions have been met. The State has specifically been given the mandate to give effect to these rights, while an obligation has been imposed upon Courts, tribunals and forums entrusted with interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights.

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<sup>108</sup>The Constitution of South Africa (1996), section 2.

<sup>109</sup> Olivier, M. (2002). *Constitutional Perspectives on the enforcement of socio-economic rights: Recent South African experiences*. Paper presented at Rand Afrikaans University, Johannesburg to the New Zealand Association for Comparative Law in Wellington on 7<sup>th</sup> February 2002. Available at [www.upf.pf/IMG/doc/7\\_Olivier.doc](http://www.upf.pf/IMG/doc/7_Olivier.doc). Accessed on 17<sup>th</sup> July, 2013.

Further, the South African Constitution is considered one of the most progressive Constitutions in the world.<sup>110</sup> This is buttressed by the fact of both emphasis on socio-economic rights within the Constitution<sup>111</sup> and the subsequent jurisprudence developed by South Africa's Constitutional Court.<sup>112</sup>

### **3.2 The Constitutional provisions with regard to the right to Housing.**

#### **3.2.1 The Constitutional text**

The Constitution declares that the Republic of South Africa is one, sovereign, democracy founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>113</sup> It states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.<sup>114</sup> Just like the Kenyan Constitution, the state is obligated to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>115</sup>

In recognizing that the rights are derogable in some circumstances, the Constitution provides for parameters of such derogation.<sup>116</sup> It further provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.<sup>117</sup>

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<sup>110</sup> Govender, V. Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options found in Goldewijk, B.K, Baspineiro, A.C. and Carbonari, P.C.(eds). (2002) *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights*. Oxford :Hart Publishing, 75.

<sup>111</sup> Govender (note 103 above) 75. See also Malan, N. (2005). *Civil Society and the Right to Have Access to Social Security in South Africa*. South Africa pg 553.

<sup>112</sup> Gloppen,S. (2005). *Social Rights Litigation as Transformation: A South African Perspective*. CMI Working Paper 3. Found at 3<<http://www.cmi.no/publications/file/?1965=social-rights-litigation-as-transformation>> accessed 18 July 2013.

<sup>113</sup> Article 1 of the Constitution of South Africa (1996).

<sup>114</sup> Article 7(1) of the Constitution of South Africa (1996).

<sup>115</sup> Article 7(2) of the Constitution of South Africa (1996).

<sup>116</sup> Article 7(3) of the Constitution of South Africa (1996).

<sup>117</sup> Article 36 of the Constitution.



Just like the Kenyan Constitution, the Constitution of South Africa further provides that the Bill of Rights binds every state organ<sup>118</sup> and every person including natural and juristic persons.<sup>119</sup> When applying a provision of the Bill of Rights to a natural or juristic person the court is directed accordingly in the following terms; in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with the set parameters.<sup>120</sup>

With regard to the enforcement of the Bill of Rights, the South African Constitution has also relaxed rules in terms of *locus standi*. It provides that anyone can institute proceedings for enforcement of fundamental rights so long as any of the following exists: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

Accordingly, the court is enjoined when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and must consider international law. Further, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The South African Constitution captures the right to Housing in the following terms;

“26 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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<sup>118</sup> Article 8(1) of the Constitution.

<sup>119</sup> Article 8(2) of the Constitution.

<sup>120</sup> Article 8(3) of the Constitution.

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

In Section 27, titled "Children", the bill of rights defines a further housing- related right:

“(1) Every child has the right -

(c) to basic nutrition, shelter, basic health care services and social services.”

In addition, Section 25, titled "Property", protects existing property rights, and in relation to that, provides the basis for land reform, in particular as it relates to past discrimination under apartheid. Beyond this, it states that

“(4) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

This relates to Section 9, titled "Equality", which is defined as follows:

“(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”

Accordingly, the State has been given a positive duty to take reasonable measures to ensure the full realization of these rights. In particular, the State is required to enact key legislations towards this end. Commenting on the interrelationship of the above Constitutional provisions, Marie Huchzermeye comments that the realisation of the right to housing, in particular the location of such housing, is inextricably tied to right to land, and is hampered by the Constitutional protection of the extremely skewed existing property rights to land.<sup>121</sup> Unlike Kenya, I note that South Africa expressly prohibits arbitrary evictions in the constitution.

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<sup>121</sup> Huchzermeye, M.(2003) Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell. *Urban Forum*, Vol. 14, 1.

### **3.2.2 South Africa's Jurisprudence on Housing Rights**

#### **3.2.2.1 *Republic of South Africa v. Grootboom***<sup>122</sup>

On October 4, 2000 the Constitutional Court of South Africa delivered a decision in respect of the housing rights of persons who were forced to live in deplorable conditions while waiting for their turn to be allocated low-cost housing. In the case, 510 children and 390 adults were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The Appellants were ordered to provide the Respondents who were children and their parents with shelter. The judgment provisionally concluded that "tents, portable latrines and a regular supply of water would constitute the "bare minimum." The Appellants who represented all spheres of life challenged the correctness of that order in the Constitutional Court of South Africa.

#### **3.2.2.2 The significance of the case**

This judgment given by Justice Yacoob was one of the first housing rights judgments of the Constitutional Court and it greatly elaborated upon whether the right to access to housing which is guaranteed in the Bill of Rights under Section 26 of the South African Constitution is justiciable or not. In articulating this issue, Justice Yacoob had said that it is not whether these rights are justiciable or not, but how they can be enforced. He therefore held that in considering these rights, it may be difficult to say if they cast a positive obligation on the State and if so, how much. But at the very least, section 26 places a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.

The Constitutional Court ruled that it was not 'reasonable' for the government not to include emergency provision of housing within its programme.<sup>123</sup> The court made no direct ruling on the plight of Mrs. Grootboom and other claimants, and did not dictate any details of how

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<sup>122</sup> (2000) ZACC 19.

<sup>123</sup> Berger, E. (2003) The Right to Education under the South African Constitution. *103 Columbia Law Review*, 634.

government policy should be changed. Hannah argues that this is out of the respect for separation of powers.<sup>124</sup> In deed national and international precedent worldwide has established a Constitutional principle that allocation of budget and policy formulation is the prerogative of the executive.<sup>125</sup>

The Court however set out the standard of reasonableness as a guide to deciding whether the Government's housing program met constitutional requirements.<sup>126</sup> According to this standard, the Government's measures to provide adequate housing must be comprehensive, coherent and coordinated;<sup>127</sup> capable of facilitating the realization of the right;<sup>128</sup> balanced and flexible, and appropriately provide for short- medium and long term needs;<sup>129</sup> clearly allocate responsibilities and tasks to the different spheres of government, and ensure that financial and human resources are available;<sup>130</sup> and provide for the urgent needs of those in desperate situations.<sup>131</sup> It is noted that the mentioned elements have formed the basis in developing and implementing other social policies and programs in the country.

### 3.2.2.3 Other cases

In *Port Elizabeth Municipality v. Various Occupiers*<sup>132</sup> the court sought to address negative and positive obligations with respect to the right to housing, the relation between property rights and the right to housing of the landless and whether alternative land could be made available. The PIE Act requires that before granting an eviction order, the courts must be of the opinion that it is just and equitable to do so' after considering all relevant circumstances and where occupants have been there for more than 6 months. The Municipality had embarked on a comprehensive housing development programme. Basing on the Constitutional court's decision in *Grootboom*, it

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<sup>124</sup> Hannah, K..S. (2010) Where Human Rights Law And Development Politics Meet: Housing Rights In South Africa. 3 *UCL Human Rights Review*, 177.

<sup>125</sup> Sunstein, C. (2001) *Designing Democracy: What Constitutions do*. OUP: New York pg. 123.

<sup>126</sup> World Bank (2008). *Realizing Rights through social Guarantees: An analysis of new approaches to social policy in Latin America and South Africa*. Report no.40047, Social Development Department– GLB. Found at <http://go.worldbank.org/P2LXPQU1Z0> accessed on 18th July 2013.

<sup>127</sup> Para 40

<sup>128</sup> Para 41

<sup>129</sup> Para 43

<sup>130</sup> Para 39

<sup>131</sup> Para 44

<sup>132</sup> [2004] ZACC 7

argued that if it were obliged to provide alternative land, the court would effectively be requiring preferential treatment to this particular group of occupiers.

The constitutional court held that considering the lengthy period during which the occupiers had lived on the land, the fact that eviction was not necessary for the land to be put to proper use, the Municipality's failure to consider the problems of this particular group of occupiers among other considerations, it was not 'just and equitable' to order the eviction. The Court further found that the state has a constitutional responsibility to satisfy both the property rights and housing rights on a case by case basis, considering all relevant circumstances.

In essence, the case provides a defense against eviction from private property where no alternative accommodation is available. The jurisprudence developed from this case on private land rights versus occupiers rights and the requirement that the government engages meaningfully with the affected group of occupiers will go a long way to ensuring housing rights are always protected. Looking from another perspective, one wonders what would prevent unscrupulous owners and occupiers from colluding in a bid of acquiring more land for settlement from the government. Such abuse of the right to housing must be prevented so as to maximise the benefits of the little available resources that a country has.

Indeed the court's reasoning in *Port Elizabeth* case was adopted by the constitutional court in *Occupiers of 52 Olivia Road and others v. City of Johannesburg and others*<sup>133</sup> when it held that it was clear that the City had not made any attempt to meaningfully engage with the occupiers, before and after their eviction proceedings, even though it (City) must have been aware of the possibility that the eviction would leave the occupiers homeless. The court stated that section 26(2) of the Constitution imposes a duty on the City to engage with those that are likely to be homeless as a result of the eviction. It went on under paragraph 23 to state that this was because reasonableness embraced every step taken to secure the provision of adequate housing. It held that meaningful engagement played an essential role in the resolution of disputes, and contributed towards an increased understanding and care where both parties were willing to take

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<sup>133</sup> [2008] ZACC. This matter involved more than 400 occupiers of buildings in Johannesburg, who challenged the correctness of the decision of the Supreme Court of Appeal in the constitutional court. The Supreme Court had confirmed their eviction by the City based on the finding that the building they occupied were unsafe and unhealthy.

part in the process. In this matter it was unnecessary for the Court to consider the issue of alternative accommodation as it endorsed an agreement reached by the parties on issues of alternative accommodation.

Part of this reasoning was adopted by the court in *Residents of Joe Slovo Community*<sup>134</sup> case when it issued an eviction order subject to some conditions being met, coupled with a supervisory order with regard to the execution of that eviction order.

In comparison, the Kenyan Courts are also embracing the principles of inclusiveness and participation in their decisions to encourage engagement by parties as seen in the previous chapter.<sup>135</sup> A keen study of the case however indicates that the court failed to address other substantive issues presented before it as it encouraged parties to resolve their dispute. It failed to deal with the substance of the challenge of the housing policy brought by the parties.

### **3.2.3 The operationalization of the Right to Housing in South Africa**

These have been majorly achieved through policies and enactment of the following statutes.

#### **3.2.3.1 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998**

This Act, which for the first time criminalized un-procedural evictions, finally replaced the Prevention of Illegal Squatting Act of 1951. The procedure set out for eviction in PIE Act differs according to the length of occupation. Where this has exceeded six months, it must be considered whether alternative land "can reasonably be made available by a municipality or other organ of the state or another land owner." Where the land has been occupied for less than six months, an eviction order may only be granted 'after considering all the relevant circumstances.' In both cases, the rights and needs of the elderly, children, disabled persons and households headed by women must be considered.

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<sup>134</sup> *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and others* [2009] ZACC

<sup>135</sup> See *Mitu-Bell Welfare Society v. Hon. Attorney General and 2 others* (2011) Nairobi Petition No. 164 and *Satrose Ayuma and others v. The Registered Trustees of the Kenya Railways Retirement Benefits Scheme* NRB HCCP 65 of 2010.

In the same Act, special procedures are prescribed for urgent eviction. These apply in cases where the occupation implies a danger to any person or property, where the owner's or any other person's hardship resulting from the occupation exceeds that of the occupier, if evicted and if there is no effective remedy available.

The Act also sets out procedures relating to effective notice for eviction to the unlawful occupier. This includes an explanation of the grounds on which the eviction is required, and a statement that 'the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.'

### **3.2.3.2 The Housing Act 107 of 1997**

It is the main legislation which aims to give effect to the right to have access to adequate housing. It clarifies the roles and responsibilities of the three spheres of government and provides a framework for housing delivery in South Africa.

The Housing Act principally sets out the basic principles that must guide housing development; defines the roles of national, provincial and local government on housing; commits local government to taking reasonable steps to ensure that all people in its area have access to adequate housing progressively; and places a duty on municipalities to set housing delivery goals and identify land for housing development. Basic principles.<sup>136</sup> that must guide housing development include:

- a. giving priority to the needs of the poor in respect of housing development;
- b. consulting meaningfully with individuals and communities affected by housing development;
- c. providing as wide a choice of housing and tenure options as is reasonably possible;
- d. ensuring that housing development is economically, fiscally, socially and financially affordable and sustainable;
- e. administering housing development in a transparent, accountable and equitable manner;

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<sup>136</sup>Section 2 of the Act.

- f. promoting education, consumer protection and conditions in which everyone meets their obligations in respect of housing development;
- g. promoting racial, social, economic and physical integration in urban and rural areas as well as promoting the provision of community and recreational facilities in residential areas;
- h. establishing, developing and maintaining socially and economically viable communities and safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions;
- i. promoting measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in housing development; and
- j. facilitating active participation of everyone involved in housing development.

### **3.2.3.3 The Rental Housing Act 50 of 1999.**

The purpose of the Act is defined as to define the responsibility of Government in respect of rental housing property; to create mechanisms to promote the provision of rental housing property; to promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market; to make provision for the establishment of Rental Housing Tribunals; to define the functions, powers and duties of such Tribunals; to lay down general principles governing conflict resolution in the rental housing sector; to provide for the facilitation of sound relations between tenants and landlords and for this purpose to lay down general requirements relating to leases; to repeal the Rent Control Act, 1976; and to provide for matters connected therewith.<sup>137</sup>

According to the Act, the government has a robust mandate to promote rental housing including; promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that— improve conditions in the rental housing market, encourage investment in urban and rural areas that are in need of revitalisation and resuscitation, and correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas;

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<sup>137</sup>The Preamble of the Act.



The Act further mandates the government to facilitate the provision of rental housing in partnership with the private sector.<sup>138</sup>

In order to stimulate the supply of rental housing the Act provides that the Minister responsible may as and when circumstances demand introduce Rental Subsidy Housing Programme to be administered separately and accounts so kept from other money votes to be authorized by Parliament.<sup>139</sup>

In seeking to balance the contractual relationship between the tenant and the landlord, the Act provides for the rights of the two parties. Accordingly, the tenant has several rights including: non-discrimination, privacy, due and reasonable notice by the landlord, quiet enjoyment of the tenancy as against the landlord.<sup>140</sup> Further rights incidental to the lease agreement include: issuance of a valid receipt on any costs incurred by the tenant or rent paid; agreed deposit paid to be invested in an interest bearing account with a competent licensed financial institution; and joint inspection of the house by the landlord and tenant before entry and upon expiry of the lease agreement term.<sup>141</sup> The Act provides that these rights apply in equal force to members of the tenant's household and to bona fide visitors of the tenant.<sup>142</sup>

The landlord's rights against the tenant include his or her right to—prompt and regular payment of a rental or any charges that may be payable in terms of a lease; recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law; terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease; on termination of a lease to— receive the rental housing property in a good state of repair, save for fair wear and tear; and repossess rental housing property having first obtained an order of court; and claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any caused by the tenant, a member of the tenant's household or a visitor of the tenant.

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<sup>138</sup>Section 3 of the Act.

<sup>139</sup>Section 4 of the Act.

<sup>140</sup>Section 4(1) and (2) of the Act.

<sup>141</sup>Section 5 of the Act.

<sup>142</sup>Section 4(4) of the Act.

The Act mandates the minister to establish Rental Housing Tribunal<sup>143</sup> with the core functions including: overseeing complaints arising from the contractual rights and duties of the landlord and tenant<sup>144</sup>; and unfair practices by a party.<sup>145</sup>

The Act further provides that where a Tribunal at the conclusion of a hearing is of the view that an unfair practice exists, it may— rule that any person must comply with a provision of the regulations relating to unfair practices; where it would appear that the provisions of any law have been or are being contravened refer such matter for an investigation to the relevant competent body or local authority; make any other ruling that is just and fair to terminate any unfair practice including, without detracting from the generality of the foregoing a ruling to discontinue overcrowding; unacceptable living conditions; exploitative rentals; or lack of maintenance.<sup>146</sup>

The Act is specific that a ruling contemplated therein may include a determination regarding the amount of rent payable by a tenant, but such determination must be made in a manner that is just and equitable to both tenant and landlord and takes due cognizance of; prevailing economic conditions of supply and demand; the need for realistic return on investment for investors in rental housing; and incentives, mechanisms, norms; and standards and other measures introduced by the minister in terms of the policy framework on rental housing.<sup>147</sup>

Tied to the right to housing is the right to information. The Act accordingly provides that a local authority may establish a Rental Housing Information Office to advise tenants and landlords in regard to their rights and obligations in relation to dwellings within the area of such local authority's area of jurisdiction.<sup>148</sup>

#### **3.2.3.4 The Extension of Security of Tenure Act 62 of 1997**

The Act is enacted to protect occupiers against unfair evictions by a land owner; sets out the rights and duties of owners and occupiers, which include the rights to human dignity, privacy, freedom and security of the person, freedom of religion, belief, opinion and of expression, and to

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<sup>143</sup> Section 7 of the Act.

<sup>144</sup> Section 8 of the Act.

<sup>145</sup> Section 13 of the Act.

<sup>146</sup> Section 13(4) of the Act.

<sup>147</sup> Section 13(5) of the Act.

<sup>148</sup> Section 14 of the Act.

freedom of movement; regulates the conditions and circumstances under which the right of people to reside on land may be terminated; regulates the conditions and circumstances under which people whose right of residence has been terminated may be evicted from land; provides special protection to occupiers who are over 60 and have lived on the land for ten years or more or are employees or former employees and because of ill health, injury or disability are unable to supply labour; and criminalises unlawful evictions under the Act.

The Act sets out the circumstances for granting an eviction order for two groups of occupiers: those who became occupiers on or before 4 February 1997; and those who became occupiers after 4 February 1997. A landowner is required to get a court order before evicting an unlawful occupier.

The Act further makes provision for urgent eviction applications for the removal of an occupier from land pending the outcome of proceedings for a final order.<sup>149</sup> For a court to grant an order in this regard, it has to be established that: there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not immediately removed from the land; there is no other effective remedy available; the likely hardship to the owner or any other affected person if an order for removal is not granted exceeds the likely hardship to the occupier if an order for removal is granted; and that adequate arrangements have been made for the reinstatement of anybody evicted if the final order is not granted.

Before commencing urgent eviction proceedings, the owner or person in charge is required to give reasonable notice of the application to the local municipality and to the head of the relevant provincial office of the Department of Land Affairs for his or her information.

### **3.2.3.5 The White Paper on Housing**

The White Paper on a New Housing Policy<sup>150</sup> and Strategy for South Africa was adopted in 1995. This White Paper sets out government's housing policy and outlines the responsibilities of the three spheres of government – national, provincial and local in relation to housing delivery. It also aims at promoting stability in the housing market. The White Paper set out the framework to

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<sup>149</sup>Section 15 of the Act.

<sup>150</sup> The White Paper on Housing: A New Housing Policy and Strategy for South Africa (1994)

be followed in the development in the national housing policies, laws and programs. The legislations mentioned above were all developed under this framework.

The White Paper recognises that: housing is a basic human right and it is the duty of the government to take steps and create conditions that will lead to the effective realisation of the right to adequate housing for all; it is the duty of government not to take steps that encourage or cause homelessness; government must ensure conditions suitable for the delivery of housing; communities must be involved in the housing development process; individuals have the right of freedom of choice in satisfying their housing needs; and the principle of non-discrimination in the delivery of housing.

Other plans and programs of significance after the White Paper include the Comprehensive Plan for Sustainable Human Settlement also known as Breaking New Ground and the Housing Assistance in Emergency Circumstances programme of 2004<sup>151</sup>. The 2004 Programme which was a consequence of the Constitutional Court decision in *Grootboom* case aims at assisting people in urban and rural areas who have urgent housing needs as a result of natural disasters, eviction, demolition, imminent displacement or immediate threat of life.<sup>152</sup>

### **3.3 Conclusion**

Indeed South Africa has a rich legislation flowing from the Constitution on the protection and the guaranteeing of the right to Housing. Such legislations cut across all spheres and spectre of life including the rich, the poor, the whites and Africans. The legislations are all intended to effect a lawful and security of tenure to all residents in South Africa. Clear procedure to deal with illegal ownership with regard to housing is clearly defined. Further, there are clear complaints procedures with clear remedies that are defined. The South African situation also illustrates the important role played by the courts in realizing the right to housing.

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<sup>151</sup> Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004)

<sup>152</sup> Supra, note 19.

What is striking about South Africa in terms of economic and social rights, as aptly captured in a World Bank report,<sup>153</sup> is the extent to which rights specified in the Constitution have become a major feature of the social policy landscape. The Constitutional guarantees as illustrated have had a great impact on policy, legislation, and judicial/ quasi judicial decisions. In a nutshell the South African legal framework is worth consideration in the Kenya's situation on the implementation, enforcement of the right to housing.

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<sup>153</sup> World Bank, (2008). *Realizing Rights through Social Guarantees: An analysis of New Approaches to Social Policy in Latin America and South Africa*. Social Development Department, Report No. 40047 – GLB.

## **CHAPTER FOUR**

### **Findings and Recommendations**

#### **4.1 Findings**

This study has progressed on the clear understanding that the Constitution of Kenya, 2010 has been more progressive than the independence Constitution and the subsequent amendments. One of the fundamental gains under the 2010 Constitution is the inclusion of socio-economic rights. The study herein zeroed in on the right to housing. Under this right, the study was conducted within the scope of analyzing the Constitutional provisions relevant to the realization of the right, and the government's position in terms of legislative and policy implementation of the same. This was then critically analyzed with regard to the position in South Africa which has been hailed as having the most promising Constitution in the world.

Chapter two of the study particularly discussed the normative content of the right to accessible and adequate housing and the duties entailed therein, finding that the right has a broader meaning integrating housing, shelter and habitat environment as a whole. The chapter concluded that the Constitution obligates the State to realize the implementation of the rights by providing for a 3 pronged clear roadmap plan, in terms of mandates: to ensure that legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the economic and social rights; to place the burden on all State organs and all public officers and for the State to enact and implement legislation to fulfil its international obligations in respect to human rights and fundamental freedoms. The study further observed that current legislations relating to housing and forms of eviction do not bind the government.

In order to guard against the abuses of the right to housing most commonly evident by the forceful eviction the study found out that there is need for the Judiciary to come up with innovative and appropriate judgments without necessarily infringing on the principles of separation of power and the legislative authority in budget making. This I argued requires bold moves to be borrowed from other jurisdictions like South Africa which was discussed in detail in Chapter Three.

Kenya's policy and legislative directions were found to be wanting. In particular there are no laws to adequately deal with the rights and duties of the landlord and tenant. Further, there are no concrete government programmes to deal with the issues of ameliorating the conditions of housing especially for the poor as witnessed in slums such as Kibera. The recent Government actions of evicting squatters and other occupiers also seemed uncoordinated without any legal backing at all. This has led to impoverishing the conditions of the evictees thereby denying them their basic fundamental rights such as the right to adequate housing, among others.

In order to gain an insight from other jurisdictions, chapter three discussed the South African Constitutional perspectives on the enforcement of the right to accessible and adequate housing. The South African Constitution almost has the same provisions with regard to the right to housing apart from a detailed provision on evictions.

Further to this, the chapter noted that there is good will from all the arms of Government to fully realise the right to housing. Parliament has so far enacted key legislations governing rights of the landlord and tenant, promotion of cheaper housing schemes, procedures governing evictions, and the complaints mechanisms. Key to also note is the programme on Housing Assistance in Emergency circumstances that came about from the decision in *Grootboom*.

The Judiciary has also been very innovative and robust in dealing and enforcing the rights to housing as witnessed in the case of *Republic of South Africa v Grootboom*. Apart from formulating the key legislations that have now been enacted into law, the Executive arm of Government has been keen and adopted a policy on housing otherwise known as the White Paper.

## **4.2 Recommendations**

It is against the backdrop of the critical analysis of the Kenya's policy and legislative framework as compared to the South African situation with regard to the right to housing that I recommend as follows:

1. Due to lack of legislation on the process and substance of eviction, I propose the enactment of a law on eviction and resettlement. This should be done immediately since there is already a bill that has been pending for a long time. It is my recommendation that the legislation should accordingly specify the grounds for evictions, the alternative settlement, the procedures for evictions including issuance of adequate notice, and the redress mechanisms either through the existing institutions such as the National Land Commission or the court as a last resort having exhausted the existing redress mechanisms available administratively. The legislation should be categorical that it applies to both the state and private individuals. The Cabinet Secretary for Land, Housing and Urban Development should ensure that the Bill is passed into law as soon as practicable.
2. Security is always a major concern in any form of eviction. The composition of the mediation committee established under the Evictions Bill should include a representative of the National Police Service. Further, under the mandatory guidelines to be observed, a representative should be from the National Police Service rather than from Kenya Police Service.
3. Section 2 of the Rent Restriction Act should be amended to enhance the scope of its application by enhancing the standard rent payable per month as a consideration to jurisdiction of the Tribunal established under section 3 thereof. The amount of the standard rent should be based on the a commissioned study that will take into consideration the current exchange rates, inflations and the costs of living among others. The proposed rent should be Ksh. 25,000.
4. Further, there should be inserted into the Rent Restriction Act new sections expressing



the rights and duties of the landlord and tenants. I propose to borrow from the South African Rental Housing Act where the tenant has several rights including: non-discrimination, privacy, due and reasonable notice by the landlord, quiet enjoyment of the tenancy as against the landlord, issuance of a valid receipt on any costs incurred by the tenant or rent paid; agreed deposit paid to be invested in an interest bearing account with a competent licensed financial institution; and joint inspection of the house by the landlord and tenant before entry and upon expiry of the lease agreement term. The amendment should provide that these rights apply in equal force to members of the tenant's household and to bona fide visitors of the tenant.

5. The landlord's rights against the tenant in the Rent Restriction Act should include his or her right to: prompt and regular payment of a rental or any charges that may be payable in terms of a lease; recover unpaid rental or any other amount that is due and payable after obtaining a ruling by the Tribunal or an order of a court of law; terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease; on termination of a lease to receive the rental housing property in a good state of repair, save for fair wear and tear and repossess rental housing property having first obtained an order of court; and claim compensation for damage to the rental housing property or any other improvements on the land on which the dwelling is situated, if any caused by the tenant a member of the tenant's household or a visitor of the tenant.
6. It is noted that laws relating to housing are scattered in different Acts. The Government should consider reducing all these into a one housing legislation which should clearly define roles of National and County governments. The Housing Act should not only be amended but completely overhauled to comply with the new constitution while consolidating the scattered legislation.
7. From the jurisprudence that is developing, both from Kenyan and South African Courts, it is noted that meaningful engagement by parties is very essential in any process. I recommend that this be the policy and legal requirement before, during and after

evictions.

8. The Judiciary is called upon to be vibrant and innovative in determining cases relating to housing rights. I recommend that the Judiciary continues adopting the minimum core content and reasonableness test approaches to develop a specialized approach that suits the circumstances in Kenya.
9. The Judiciary should also embrace alternative forms of dispute resolution of negotiation, under Article 159(2) (c) of the Constitution, by encouraging parties in petitions to have discussions with a view of reaching amicable settlements out of court. This can be by way of recording consent orders with strong default clauses. Parties here include the Government. All these legislation on housing should further be supplemented by stronger judicial action on the failure or refusal of public officers to comply with court orders. This is the only way to ensure that the laws and policies in place benefit the intended persons and to curb non compliance.
10. The Judiciary should consider issuing supervisory orders to ensure compliance. Further, I strongly recommend that the courts should be requiring the physical presence of concerned state actors while delivering final rulings on housing matters concerning the government. These are normally represented by the Attorney General who later briefs the departments. The presence of the concerned officials will go a long way in ensuring compliance of court orders.
11. I strongly propose the development of a progressive housing policy that complies with the Constitution 2010. The same should lay down guidelines of eviction. I propose to adopt all the requirements set by the Court in *Satrose Ayoma* case as well as relevant parts of General Comment No. 7 of the Committee on Economic Social and Cultural Rights (CESR) on forced evictions.
12. The formulation of the policy should be based on the values and principles of governance anchored in chapter six of the Constitution including transparency, inclusivity and expertise. I specifically propose borrowing from the basic principles to

guide housing development provided under section 2 of the Housing Act of South Africa.

13. It is further recommended that the policy should require each County to have or develop a modern master plan to cater for the rapid population increase. This will go a long way into addressing the issue of uncontrolled and haphazard development, poor housing and forced evictions. It should require counties to set housing delivery goals and identify land for housing development.
14. I propose that the government develops a housing programme that will offer assistance to persons in emergency circumstances. This will go a long way in assisting persons displaced by floods and other emergency situations such as fire.

## REFERENCES:

### BOOKS AND JOURNALS

Akumu O.A.K. (2004). *Evaluation of housing statistics in Kenya*. Habitat International Kenya.

Berger, E. 'The Right to Education under the South African Constitution' (2003) *Columbia Law Review* 634.

Bilchitz, D. (1998). *Poverty and Fundamental Rights-The justification and enforcement of socio economic rights*. Oxford: Oxford University Press.

Bossuyt, M 'The legal distinction between civil and political rights and economic social and cultural right' (1975) *Human Rights Journal* 783.

Boven, V.T.C, Flinter, C. &Westendorp.(1998). *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. Utrecht: Netherlands Institute of Human Rights.

Brennan, M. 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) *QUT Law Review* 9.

Cheserek, G, J. and Opata, G, P.' Environmental and Housing Problems of Low Income Households in Eldoret Municipality, Kenya' (2011) *Journal of Emerging Trends in Economics and Management Sciences* 2.

Commission of Inquiry into Post-Election Violence Report (CIPEV) - Waki Report.

Fabre, C 'Constitutionalizing socio-economic rights' (1998) *Journal of Political Philosophy* 263.

Gathii, J. (2008). *A case for justiciability of Social- economic Rights in Kenya: Drawing from the*

*experience in South Africa, India and United States, Hungary*. LL.M Thesis, Central European University, Hungary.

Gloppen, S. (2005). *Social Rights Litigation as Transformation: A South African Perspective*. CMI Working Paper 3.

Govender, V. (2002). *Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options* found in Goldewijk, B.K, Baspineiro, A.C. and Carbonari, P.C.(eds).(2002) *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights*. Oxford: Hart Publishing.

Hannah, K..S. 'Where Human Rights Law And Development Politics Meet: Housing Rights In South Africa'(2010) 3 *UCL Human Rights Review*, 177.

Huchzermeye, M 'Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell.' (2003) *Urban Forum*, Vol. 14.

Biegon, J and Musila G.M (2012) *Judicial Enforcement of Socio- Economic Rights under the New Constitution: Challenges and opportunities for Kenya*. Nairobi: ICJ-Kenya.

ICJ, (2008). Report of the International Commission of Jurists on Courts and the Legal Enforcement of Economic, Social and Cultural Rights. *Human Rights and Rule of Law Series* No. 2.

Jerome, J. S 'The Philosophic Foundations of Human Rights' (1998) *Human Rights Quarterly* 20.

John Locke, *The Second Treatise Government* (N19T5 2).

Jotham, O, A. (2012). *Litigating Socio-Economic Rights in Domestic Courts-The Kenyan*

*Experience.* Paper presented at the colloquium on the African Charter on Human and Peoples Rights held in Cape Town South Africa between 7<sup>th</sup> and 10<sup>th</sup> November, 2012.

Kothari,M. *Report of the Special Rapporteur on Adequate housing.*

M. Kothari, S. Kaemali and S. Chaudhry.(2006). *The Human Right to Adequate Housing and Land.* National Human Rights Commission: India.

Malan, N. (2005). *Civil Society and the Right to Have Access to Social Security in South Africa.* South Africa.

Mbazira,C. (2009). *Litigating social-economic rights in South Africa: A choice between corrective and distributive justice.* Pretoria: Pretoria University Law Press.

Nolan, Aoife, Porter, Bruce and Langford, Malcolm, (2009) *The Justiciability of Social and Economic Rights: An Updated Appraisal* . CHRGI Working Paper No. 15.

Obudho, R.A. and Mhlanga, C.C. (ed.). (1988). *Slum and Squatter Settlements in Sub-Saharan Africa: Towards a Planning Strategy.* Nairobi: Kenya Literature Bureau.

Olivier, M. (2002).*Constitutional Perspectives on the enforcement of socio-economic rights: Recent South African experiences.* Paper presented at Rand Afrikaans University, Johannesburg to the New Zealand Association for Comparative Law in Wellington on 7<sup>th</sup> February 2002.

Rawls, J. (1971) Explaining the essence of Rawls' theory: *Theory Of Justice.*

Sunstein,C. (2001) *Designing Democracy: What Constitutions do.*OUP: New York.

World Bank, (2008). *Realizing Rights through Social Guarantees: An analysis of New Approaches to Social Policy in Latin America and South Africa.* Social Development

Department, Report No. 40047 – GLB.

## **WEBSITES VISITED**

[www.kenyalaw.org](http://www.kenyalaw.org)

<http://go.worldbank.org/P2LXPQU1Z0>

[www.nation.co.ke/News](http://www.nation.co.ke/News)

<http://www.cmi.no/publications/file/1965=social-rights-litigation-as-transformation>.>

[www.upf.pf/IMG/doc/7\\_Olivier.doc](http://www.upf.pf/IMG/doc/7_Olivier.doc)

<http://ssrn.com/abstract=1434944>

<http://www.unhcr.org/refworld/docid/4a7840562.html>

<http://mail.housing.go.ke/home/ict@housing.go.ke/>

<http://daccessdds.un.org/doc/UNDOC/GEN/G05/117/55/PDF/GO511755.pdf>

<http://jetems.scholarlinkresearch.org/>