

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**IMPLEMENTING THE RIGHT TO HOUSING FOR RESIDENTS
OF SLUMS AND INFORMAL SETTLEMENTS IN KENYA:
LEGAL, POLICY AND INSTITUTIONAL CHALLENGES
AND PROSPECTS**

**THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
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LAW DEGREE (LLM)**

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DECLARATION

I, BENARD ODONGO MATANGA, 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.

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ABSTRACT

This thesis evaluates the legislative, policy and institutional framework on housing in Kenya and the challenges and prospects it presents for the effective realization of the right for residents of slums and informal settlements. The study compares the statutory, policy and institutional approaches to securing the right in Kenya with those of Tanzania and South Africa with a view to borrowing best practices that can help enhance the realization of the right in Kenya particularly for those living in slums and informal settlements. This is then followed with some recommendations.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	African Commission on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CAJ	Commission on Administrative Justice
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic and Social Rights
COHRE	Centre on Housing Rights and Evictions
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
KENSUP	Kenya Slum Upgrading Program
KNCHR	Kenya National Commission on Human Rights
NEMA	National Environment Management Authority
NGEC	National Gender and Equality Commission
NHRIs	National Human Rights Institutions

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Satros Ayuma and Others v Kenya Railways Corporation and Others, Nairobi High Court Petition No 65 of 2010 (Unreported)

2. South African Cases

City of Johannesburg v. Rand Properties Ltd and Others (10330/04) (2006) ZAGPHC 21

Port Elizabeth Municipality v Various Occupiers (CCT 53/03) 2005 (1) SA 217 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2009 (9) BCLR 847 (CC)

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The Distress for Rent Act Cap 293 Laws of Kenya

The Housing Act CAP 117 Laws of Kenya

The Landlords and Tenants (Shops, Hotels and Catering Establishments) Act No 35 of 1959

The National Gender and Equality Commission Act No 15 of 2012

The Rent Restrictions Act Cap 296 Law of Kenya

2. Kenyan Statutes- Repealed

The Constitution of Kenya (Repealed) Act

The Government Lands (Repealed) Act Cap 280 Laws of Kenya

The Registered Lands (Repealed) Act Cap 300 Laws of Kenya

The Registration of Titles (Repealed) Act Cap 281 Laws of Kenya

3. Statutes from Other Countries

The Constitution of the Republic of South Africa Act No 108 of 1996

The South African Human Rights Commission Act No 40 of 2013

The Housing Act No 107 of 1997 (South Africa)

The Rental Housing Act No 50 of 1999 (South Africa)

The Social Housing Act No 16 of 2008 (South Africa)

The Constitution of the United Republic of Tanzania Cap 2 Law of Tanzania

The Court (Land Disputes Settlement) Act 2002 (Tanzania)

The Land Act No. 4 of 1999 (Tanzania)

The Land Registration Act Cap 334 Laws of Tanzania

Local Government Act No 8 of 1982 (Tanzania)

Rent Restrictions Act (Repealed) (Tanzania)

TABLE OF INTERNATIONAL AND REGIONAL TREATIES

- The African Charter on Human and Peoples' Rights (Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)
- The African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999)
- Covenant on the Elimination of All Forms of Discrimination against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13
- Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
- Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106
- International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p.195
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158
- International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
- Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
- Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the African Union in Maputo, 11 July 2003
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 5 March 2009, A/RES/63/117

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CHAPTER 1

INTRODUCTION

1.1 Background

Housing is a universally recognized human need.¹ Mankind needs it not just for shelter but also in order to fulfil various other needs such as provision of space for family gatherings.² Thus, the need to guarantee everyone access to adequate and affordable housing has over time gained recognition as a basic human right.³

Despite the universal nature of the right, Kenya's independence Constitution did not recognize it.⁴ Furthermore, although the country had ratified various international human rights instruments which recognize the right such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) it did not domesticate most of them.⁵ Thus, neither these instruments nor the Constitution protected the right at national level.

For a long time, fulfilment of housing requirements for the public in the country remained, in large part, a policy rather than a rights issue. If there was statutory protection for the right, it existed minimally.⁶ As a result, the country witnessed a rapid deterioration of accessibility to quality and affordable housing mostly manifested in the proliferation of slums and other informal settlements.

Slums and informal settlements have rapidly spread across the nation with approximately 71% of the country's urban population currently living in these settlements.⁷ As at 2000, it is estimated that Nairobi alone housed an estimated 55% of its population in these settlements.⁸ In Mombasa, it is estimated that approximately

¹ Henry Onoria, 'Guaranteeing the Right to Adequate Housing and Shelter in Uganda: The Case of Women and People with Disabilities (PWDs)' (2007) 1

<http://www.huripek.mak.ac.ug/pdfs/working_paper_6.pdf> accessed 25 November 2012.

² Ibid.

³ Ibid 6.

⁴ 1963 Constitution of Kenya cpt II.

⁵ Dan Juma, 'Taking these Rights Seriously: Civil Society Organization' Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (2008) 1, 10

<http://www2.ohchr.org/english/bodies/cescr/docs/ngos/K-HIRINET_Kenya_CESCR_report.pdf> accessed 3 December 2014.

⁶ The Rent Restrictions Act Cap 296 Laws of Kenya s 2 for instance restricts its application to dwelling houses whose rental value does not exceed two thousand five hundred Kenyan shillings.

⁷ Emmanuel Mutisya and Yarime Masaru, 'Understanding the Grassroots Dynamics of Slums in Nairobi: Dilemma of Kibera Informal Settlement' (2012) International Journal of Engineering, Management and Applied Sciences and Technology 197.

⁸ Margaret Oriaro, 'Bridging the Finance Gap in Housing and Infrastructure in Kenya: A Case Study' (2000) 1, 10<<http://www.ucl.ac.uk/dpu->

23% of the town's population lives in slums.⁹ Similarly, other towns such as Kisumu (with a slum population of approximately 56% of its population)¹⁰ and Eldoret also house a substantial portion of their population in slums and informal settlements, a factor that demonstrates the severity of the problem of access to quality and affordable housing in the country.¹¹

Some scholars tie the emergence of slum and informal dwellings to Kenya's colonial history. It is believed that the land expropriation policies implemented by the colonialists led to many indigenous communities losing their land to the colonialists.¹² The communities were pushed into colonial reserves and as population pressure piled on the reserves, informal settlements emerged.¹³ In essence, slum proliferation and the emergence of informal settlements in the country are viewed, in part, as a direct consequence of the increased landlessness amongst the indigenous Kenyans following the takeover of their productive land by the colonialists.

However, in addition to the above factors, other reasons account for this problem. These include: the rapid growth in and transfer of population from rural to urban areas; the high cost of housing; high levels of poverty; and poor planning policies in the land and housing sectors in Kenya.¹⁴

Of importance are the implications of these dwellings on the right to housing in Kenya. Often, residents of slums and other informal settlements suffer exclusion from the development programs of the state.¹⁵ They are deprived of essential services such as sanitation, clean water, satisfactory roads, schools and hospitals.¹⁶ Invariably, these dwellings also deprive the occupants of sufficient space and privacy. In sum,

projects/drivers_urb_change/urb_infrastructure/pdf_shelter_settlements/HI_Margaret_Bridging_Ga p.pdf> accessed 3 December 2014.

⁹ Republic of Kenya's Second-Fifth Report to the Committee on Economic, Social and Cultural Rights (2013) 51-52 <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/E_C-12_KEN_2-5_6034_E.doc> accessed 25 November 2014.

¹⁰ *ibid* 52.

¹¹ Paul Syagga, 'Land Tenure in Slum Upgrading Projects' (2012) 1-4<https://hal.archives-ouvertes.fr/docs/00/75/18/66/PDF/Paul_Syagga_-_LAND_TENURE_IN_SLUM_UPGRADING.pdf> accessed 25 November 2014.

¹² Laurence Juma, 'Nothing but a mass of Debris: Urban Evictions and the Right to Access to Adequate Housing in Kenya' (2012) 12 African Human Rights Law Journal 470, 486-490 <<http://www.ahrl.up.ac.za/juma>> accessed 3 December 2014.

¹³ *ibid*.

¹⁴ UN-HABITAT, 'The History of Urbanization and Proliferation of Slums in Kenya' (2007) 1-2 <http://www.preventionweb.net/files/1710_46287273GC202120History20of20Urbanization20in20Kenya.pdf> accessed 3 December 2014.

¹⁵ Amnesty International, 'The Unseen Majority: Nairobi's Two Million Slum-Dwellers' (2009)1, 6-11

¹⁶ *ibid*.

living conditions in the settlements constitute a gross violation of the right to housing.¹⁷

The promulgation of the Constitution of Kenya 2010 saw the entrenchment of the right to housing under the country's bill of rights.¹⁸ The intention was to deploy a rights-based approach in resolving the housing needs of Kenyans.¹⁹ With the right entrenched in the Constitution, it is expected that the public should be able to gradually access quality housing at affordable rates and thus improve the deplorable housing conditions of a majority of the poor.

Despite the prospects presented by the Constitution for protecting the right, access to adequate and affordable housing in a clean environment remains a considerable challenge in the country particularly in slums and informal settlements. Although the national government has embarked on a slum upgrading program in some slums,²⁰ these efforts are yet to significantly ameliorate the problem of poor and inadequate housing in these settlements. Various reasons could account for this reality.

First, the private sector which is mainly profit driven remains a dominant player in the housing sector in the country with the government only playing a secondary role in housing development.²¹ As a result, investment in low cost housing remains significantly low with approximately 80% of new housing units annually accessible only to the upper middle and high income individuals.²² Some observers have argued that this state of affairs persists as a result of the state's failure to provide policy directions in housing development for low income households in Kenya.²³

¹⁷ *ibid.*

¹⁸ Constitution of Kenya 2010 art 43.

¹⁹ Centre for Economic and Social Rights and Kenya National Commission on Human Rights, 'Rights-Based Policy Monitoring: KNCHR Primer on Assessing Compliance with Economic and Social Rights Obligations' (2013) 1 <<http://www.cesr.org/downloads/knchr.esr.primer.pdf?preview=1>> accessed 25 November 2014.

²⁰ Vincent Achuka, 'Nubians Fear Losing Land over Slum Upgrade' *The Sunday Nation* (Nairobi, 30 November 2014) 31.

²¹ Rockefeller Foundation, 'More than Shelter: Housing as an Instrument of Economic and Social Development' (Bellagio Housing Conference, May 2005) 1, 2-3 <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/kenya_background.pdf> accessed 3 December 2014.

²² Economic and Social Rights Centre, Assessment of the Realization of the Right to Housing in Kenya 2011-2012 (Jewish World Foundation, 2012) 1, 3 <<http://www.hakijamii.com/publications/assessment.pdf>> accessed 25 November 2014.

²³ Mwaghesha Mkala, 'Africa Blamed for not doing Enough to end Housing Woes' *The Standard-Home and Away* (23 October 2014) 1, 3.

Second, it is believed that the legal framework on the right to housing is yet to be fully developed to facilitate effective implementation of the right.²⁴ Although international instruments on the right that have been ratified by Kenya now apply directly at national level,²⁵ it has been argued that the state is yet to fully adopt the international standards that these instruments present on protection of the right to housing in its national legal framework.²⁶

Third, it has been suggested that the multiple laws and institutional frameworks in the building industry create overlaps and confusion in the effective implementation of, inter alia, housing development.²⁷ Although many urban centres have development master plans to regulate the quality and quantity of, inter alia, housing, these plans are hardly effectively implemented due to inefficiencies associated with institutional overlaps that arise from the uncoordinated activities of the many institutions in the sector.²⁸ Furthermore, some of the institutions suffer severe shortage of capacity and resources to enforce building standards with the result that housing quality remains poor and unsafe.²⁹

Furthermore, the cost of housing finance and construction remains considerably high. As a result, a very limited portion of the population can access housing finance. For instance, as at October 2014 the mortgage uptake in Kenya stood at approximately twenty two thousand accounts against the country's approximate population of forty million people suggesting inability by the public to access mortgage funding for housing.³⁰ This significantly limits access to adequate and affordable housing for a majority of the public.

The direct consequence of housing inaccessibility due to the high housing cost and inadequate supply of housing units in the formal sector is to push the poor further into informal housing.³¹ This has exacerbated slum development with the attendant deplorable living conditions which violate the right to housing

²⁴ Laurence Juma (n 12) 473.

²⁵ Constitution of Kenya art 2(5) & (6).

²⁶ Laurence Juma (n 12) 473.

²⁷ Kimani M & Musungu T, 'Reforming and Restructuring the Planning and Building Laws and Regulations in Kenya for Sustainable Development' (2010) 1, 7-8 <http://www.isocarp.net/data/case_studies/1813.pdf> accessed 3 December 2014.

²⁸ *ibid* 2, 7-8.

²⁹ *ibid* 5.

³⁰ Mkala (n 23) 3.

³¹ Yannis Arvanitis, 'African Housing Dynamics: Lessons from the Kenyan Market' (2013) 1, 4 <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Economic%20Brief%20>

This policy, legislative and institutional challenges arguably deem the prospects of effective delivery of quality and affordable housing to a majority of Kenyans notwithstanding that the right to housing is protected under the Constitution. As a result, it has been argued that housing conditions in both urban and rural parts of the country remain poor with many housing units lacking adequate space, privacy, water and sanitation.³²

1.2. STATEMENT OF THE PROBLEM

The right to housing is now constitutionally protected in Kenya. By virtue of Article 43 of the Constitution, ‘every person has the right to accessible and adequate housing and reasonable standards of sanitation.’ In essence, the entrenchment of the right is intended to facilitate improvement of life for many people in Kenya who have hitherto lived in deplorable conditions without access to adequate privacy, space, sanitation, clean water, health services, infrastructure and other social amenities in their residences and their environs.

As Laurence Juma argues, the fact that the Constitution declares the right as due to ‘everyone’ reiterates the fact that housing rights are entitlements of all irrespective of their status.³³ Thus, even those who enjoy no property rights over land are entitled to accessible, affordable and adequate housing in equal measure as the propertied.³⁴

The Constitution provides for the direct application of international human rights law that Kenya has ratified without the need for its domestication.³⁵ Thus, instruments such as the ICESCR which provide an elaborate interpretation of the right to housing are expected to shape the process of protection and implementation of the right in the country.

Despite these positive developments in the legal framework of the country on the right, access to adequate and decent housing in Kenya remains problematic particularly for the poor. Millions of Kenyans still cannot access affordable and decent housing with a substantial portion of them living in slums and other informal

%20African%20Housing%20Dynamics%20Lessons%20from%20the%20Kenyan%20Market.pdf
>accessed 2 December 2014..

³² Oriaro (n 8) 6.

³³ Laurence Juma (n12) 477.

³⁴ ibid 477-478.

³⁵ Constitution of Kenya 2010 art 2 (5) and 2 (6).

settlements where they have no access to adequate sanitation, water, space or privacy. Indeed, the government estimates that approximately 0.05% of Kenyans remain homeless.³⁶

A preliminary reading points to various policy, legislative and institutional challenges that appear to constrain the full realization of the right. According to Mores Njiru, the housing market in Kenya is still prohibitively expensive thus excluding most people from accessing quality housing.³⁷ The sector which is largely private driven hardly provides for the housing needs of the poor and average Kenyans³⁸ suggesting a policy lacuna in the housing sector.

Furthermore, a number of housing units particularly in slums and unplanned settlements are in poor condition due to a weak regulatory framework in the housing sector.³⁹ A preliminary survey suggests the failure to enforce housing standards as one of the possible reasons for poor housing conditions in these settlements. This is compounded with a weak institutional framework in the sector. For instance, institutions such as the National Housing Corporation are unable to adequately meet the housing needs of Kenyans.⁴⁰

The result is that notwithstanding the constitutionalisation of the right to housing, access to adequate and affordable housing remains a pipedream for a majority of Kenyans particularly those living in slums and other informal settlements. This study seeks to examine how the country's legal, policy and institutional framework on housing impacts on the process of fulfilment of the right to housing for Kenya's poor. This is done with a specific focus on slums and other informal settlements.

1.3. THEORETICAL FRAMEWORK

This study relies on the theory of natural law to advance a case for equal protection and enjoyment of the right to housing that is now entrenched in the Constitution of Kenya 2010. The philosophical foundations of natural law presuppose

³⁶ Republic of Kenya's Second-Fifth Report to the CESCR (n8) 51.

³⁷ Mores Mwirigi Njiru, 'Factors Affecting Growth of Mortgage Industries in Kenya: A Case Study of National Housing Corporation' (2013) 1 (7) International Journal of Social Sciences and Entrepreneurship 1, 2 <http://www.ijssse.org/articles/ijssse_v1_i7_26_35.pdf> accessed 3 December 2014.

³⁸ Rockefeller Foundation (n21) 2.

³⁹ Njiru (n37) 2.

⁴⁰ Rockefeller Foundation (n21) 11-12.

the equality of mankind. As equal beings, men are entitled to equal enjoyment and protection of certain rights by the very fact of being human.⁴¹ These include such rights as the right to life and human dignity.

According to Robert George these inalienable rights must ‘as a matter of justice’ be respected by other individuals and state organs.⁴² In his view natural law is concerned with the fulfilment of and wellbeing of mankind.⁴³ This will, in the writer’s view, include securing the wellbeing of mankind in terms of housing as well.

Indeed, this is the view the Constitution 2010 takes of socio-economic rights in general and the right to housing in particular. In the Constitution’s own words ‘every person has a right to accessible and adequate housing and reasonable standards of sanitation.’⁴⁴ In Laurence Juma’s view, the term ‘everyone’ denotes the very fact that these rights are to be enjoyed by all devoid of status.⁴⁵ Thus in Juma’s view, these rights belong to all by the very fact of their being human.⁴⁶ This reasoning resonates well with and is founded upon the natural law school.

Violation of the right to housing for residents of slums and other informal settlements is an assault on their dignity⁴⁷ in contravention of the very tenets of the natural school of law. Episodes of brutal evictions of people without provision of alternative accommodation, deprivation of adequate privacy, sanitation and other essentials such as clean water in their residences are a direct affront to the dignity of man and an affront to the natural law conceptualization of the natural right to human dignity.

Thus, this study will help us understand the theory of natural law from the viewpoint of how it can be applied to limit discrimination in access to affordable and decent housing for all. The study proceeds on the premise that housing rights should be enjoyed equally devoid of the discrimination that is glaring in the conditions of life in slums and informal settlement.

⁴¹ Robert P George, ‘Natural Law’ 31 *Harvard Journal of Law and Public Policy* 171, 172 <http://www.law.harvard.edu/students/orgs/jlpp/Vol31_No1_Georgeonline.pdf> accessed 3 December 2014.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Art 43.

⁴⁵ Laurence Juma (n12) 477-478.

⁴⁶ *ibid.*

⁴⁷ Malcolm Langford and Jean du Plessis, ‘Dignity in the Rubble? Forced Evictions and Human Rights Law’ 1, 15 <<https://www.jus.uio.no/smr/english/people/aca/malcolm/dignity-in-the-rubble-human-rights-law-and-forced-evictions.pdf>> accessed 25 November 2014.

However, an apparent limitation to the theory is how it can find application in a liberal economy such as Kenya where property rights are individualized. As was mentioned in the background to the study, the housing sector in Kenya remains primarily a private sector enterprise which is driven more by the need to make profit as opposed to social transformation.⁴⁸ In these circumstances, the poor are likely to suffer exclusion from adequate housing on account of the high cost of accessing housing notwithstanding the natural law supposition that this right should be enjoyed by all merely by reason of their being human.

1.4. LITERATURE REVIEW

In this section, we review some limited literature that relates to the right to housing. The intention is to provide clarity of understanding of the subject of the research while at the same time identifying some gaps in knowledge in the writings that this research may contribute to filling. The review is approached thematically. First, we look at some writings that conceptualize the right. Second, we look at the literature on the housing situation in Kenya. Third, we review some literature on enforcement of the right to housing. Finally, we examine some literature on the legal, policy and institutional challenges in the building industry in Kenya which may impact on the process of implementing the right to housing.

1.4.1. Meaning of the Right to Housing

A plethora of literature underscores the fact that housing is larger than the four walls that encase the physical structure. Nicholas Wasonga, for instance, argues that housing is not just any form of shack- it must be adequate.⁴⁹ Adequacy of housing here denotes some guarantees including security of tenure for the occupants and their privacy and adequacy of space.⁵⁰ Peter Karari takes this argument further by emphasizing that adequate housing must be: affordable; culturally appropriate; secure;

⁴⁸ Nora Matindi, 'Affordable Housing for Low and Middle Income Earners in Nairobi-Kenya' <http://www.lth.se/fileadmin/hdm/alumni/papers/SDD_2008_242b/Nora_Matindi_Kenya.pdf> accessed 6 December 2014.

⁴⁹ Nicholas Wasonga Orago, 'Poverty, Inequality and Socio-Economic Rights: A Theoretical Framework for the Realization of Socio-Economic Rights in the 2010 Kenyan Constitution' (Doctor of Law Thesis, University of the Western Cape, South Africa 2013)1, 353-354 <http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2174/Orago_LLD_2013.pdf?sequence=1> accessed 3 December 2014.

⁵⁰ *ibid.*

accessible without discrimination; and located in close proximity of other essential services such as schools.⁵¹

According to Wasonga housing is essential for the dignity and self fulfilment of mankind.⁵² This is because housing provides the foundation for the enjoyment of other rights including the rights to basic services, infrastructure and health. Thus, housing according to these scholars must be conceptualized broadly.⁵³

These articles help elucidate the nature of the right. This is essential in conceptualizing what constitutes violation of the right to housing in the context of this study.

1.4.2. The Housing Situation in Informal Settlements in Kenya and the Implications for the Right to Housing

Karari traces the origin of slums and informal settlements in Kenya to the state's failure to formalize land tenure rights in parts of the country.⁵⁴ He attributes this failure to the absence of effective housing policies for low income earners. On the other hand, Juma argues that the crisis of slums and informal settlements in Kenya is largely a legacy of the land expropriation policies by the colonial government that saw the creation of native reserves in which unplanned constructions begun.⁵⁵ Despite their difference in opinion on the exact origin of slums and informal settlements in Kenya, the two scholars agree that these settlements are the epitome of violation of the right to housing. Violations of the right in these settlements manifest in various forms including arbitrary evictions,⁵⁶ poor sanitation and lack of basic facilities.⁵⁷

The Centre on Housing Rights and Evictions (COHRE) underscores the poor living conditions in informal settlements in Kenya.⁵⁸ It observes that in slums such as Kibera, 94% of the housing units lack basic facilities such as toilets.⁵⁹ Most of the

⁵¹ Peter Karari Mwaura, 'The Challenges Facing Kenya Slum Upgrading Programme in the Realizing the Right to Housing: A Special Focus on Kibera Slum in Nairobi Kenya (2009) 1, 14-16 <http://www.iso2.ovgu.de/iso2_media/downloads/arbeitsberichte/56.pdf> accessed 3 December 2014.

⁵² Orago (n49) 353.

⁵³ Karari (n51) 1.

⁵⁴ *ibid* 3.

⁵⁵ Laurence Juma (n12) 487-492.

⁵⁶ *ibid* 486-487.

⁵⁷ Karari (n51) 1-3.

⁵⁸ Centre on Housing Rights and Evictions, 'Listening to the Poor? Housing Rights in Nairobi, Kenya (2005) 1-114.

⁵⁹ *ibid* 23.

informal settlements have very limited or no garbage disposal mechanisms thus exposing the residents to health risks. According to the Centre, lack of certainty of property rights in informal settlements fuels this state of affairs. Most landlords and shack owners have no guarantee that their structures will not be demolished often without notice to them.⁶⁰ This uncertainty discourages them from investing in more durable structures or maintaining the existing ones. As a result, the quality of housing is adversely compromised.

Further, the Centre argues that the failure to recognize informal settlements in Kenya exacerbates violation of the right to housing.⁶¹ Because of non-recognition of these settlements, the state often excludes them from provision of essential services such as roads, hospitals, schools and even water.

The Centre also notes that housing affordability remains a major challenge in the country.⁶² In respect of rental housing, the centre attributes this crisis in pricing to the failure by the state to raise the floor of regulation of rent from the current Ksh. 2,500/= fixed under the Rent Restrictions Act and the severe shortage of housing stock for the poor and average citizens in the country. Thus, it proposes a review of rent control regulations and an increase in the supply of housing units as a mechanism of enhancing access to affordable and decent housing.⁶³

This publication is helpful to this research insofar as it contextualizes the nature of violation of the right to housing in Kenya's informal settlements. However, it does not discuss how institutional weaknesses in the housing sector contribute to the crisis.

1.4.3 The Need to Facilitate Justiciability of the Right to Housing

In an earlier publication, COHRE discusses the right to decent shelter in the context of other rights such as the rights to: life; freedom from discrimination; family and privacy at home.⁶⁴ It suggests that a majority of Kenyans live in slums and informal settlements without security of tenure.⁶⁵ As a consequence, these individuals are constantly exposed to the risk of violation of other rights such as the right to life

⁶⁰ *ibid* 61-62.

⁶¹ *ibid* 18.

⁶² *ibid* 63.

⁶³ *ibid*.

⁶⁴ Centre on Housing Rights and Evictions, 'Civil and Political Rights in Kenyan Informal Settlements' (2005) 1-33.

⁶⁵ *ibid* 1.

and freedom from arbitrary evictions, one of the main manifestations of violation of the right to housing.⁶⁶

According to the centre, the poor living conditions in informal settlements can be ameliorated by the state recognizing the settlements and granting residents the ability to demand for essential services such as garbage collection, water supply and provision of health facilities.⁶⁷ In the centre's view, one way of doing this is by expanding the justiciability avenues for the right. For example, the Kenya National Commission on Human Rights should be empowered to determine residents' demands for these services by providing effective remedies for them.⁶⁸ On the other hand, Juma extends the justiciability debate in protection of the right to housing for vulnerable members of society (such as indigent slum dwellers) to considerations of whether these people should, by law, be afforded legal aid in order to enhance their access to courts to protect these rights.⁶⁹

Apart from shading light on the forms of violation of the right to housing, these articles contribute to the justiciability debate on socio-economic rights. They are therefore useful to this research insofar as they explore ways of enforcing these rights. However, the articles do not examine how institutional weaknesses in the housing sector contribute to the non-implementation of the right.

1.4.4. Legal, Policy and Institutional Challenges in the Building Sector in Kenya

Mary Kimani and Titus Musungu examine the planning and building laws and regulations in Kenya and advance a case for reform of the legal framework in order to ensure sustainable development of the building sector.⁷⁰ They argue that the sector is saddled with multiple laws and institutions with overlapping roles. Besides, most institutions tasked with regulation of the sector are constrained in terms of their capacity and resources. As a result, enforcement of building standards in the country remains poor allowing for the rapid development of substandard structures.

This article is essential to the research because it points to some challenges to the full realization of the right to housing. The proliferation of slums is, in part, a

⁶⁶ *ibid.*

⁶⁷ *ibid* 14.

⁶⁸ *ibid* 5-6.

⁶⁹ Laurence Juma (n11) 500-504.

⁷⁰ Kimani and Musungu (n27) 1-11.

consequence of the failure to enforce building standards. This compromises habitability of the housing units in violation of the right to housing.

1.5. BROAD OBJECTIVE

The study seeks to evaluate the challenges and prospects presented by the current legislative, policy and institutional framework to the effective realization of the right to housing for residents of slums and other informal settlements in Kenya.

1.5.1. SPECIFIC OBJECTIVES

1. To discuss the nature, scope and content of the right to housing and undertake an analysis of the status of access to housing by residents of slums and informal settlements in Kenya in the period before 2010.
2. To identify and discuss the post 2010 legal, policy and institutional framework for the protection of the right to housing in Kenya and how it promotes or constrains effective realization of the right in slums and informal settlements.
3. To examine the statutory, policy and institutional interventions in protection of access to housing in Tanzania and South Africa with a view to determining whether they provide lessons for Kenya.
4. To make appropriate recommendations for legislative, policy and institutional reforms in the housing sector in order to enhance protection of the right to housing for residents of slums and other informal settlements in Kenya.

1.6. HYPOTHESES

This study is premised on two assumptions

1. Despite the prospects for protection of the right to housing presented by entrenchment of the right in the 2010 Constitution, its realization in Kenya particularly for residents of slums and other informal dwellings continues to encounter challenges because of absence of an effective legislative, policy and institutional framework to protect the right.
2. Unlike Kenya, Tanzania and South Africa have been able to secure better access to housing for their citizens and particularly those in slums and informal settlements because the two countries have a more effective legal, policy and institutional framework for implementing access to affordable housing and protecting the right to housing. Thus, the two provide a useful framework that Kenya can learn from.

1.7 RESEARCH QUESTIONS

The study seeks to answer the following questions:-

1. What are the nature, scope and content of the right to housing and how was the right protected with regard to residents of slums and informal settlements in Kenya prior to August 2010?
2. What is the post 2010 legal, policy and institutional framework for protecting the right to housing in Kenya and how does it impact on protection of the right for those living in slums and informal settlements?
3. What is the statutory, policy and institutional framework on housing in Tanzania and South Africa and what lessons does it offer Kenya?
4. What are the appropriate legal, policy and institutional reforms required to enhance protection of the right to housing for residents of slums and informal settlements in Kenya?

1.8. JUSTIFICATION FOR THE RESEARCH

The entrenchment of the right to housing in Kenya's Constitution calls for an exploration of the impact of the right in improving the housing needs of Kenyans particularly the poor and vulnerable. The right must not merely exist in abstract. Rather, it ought to be implemented in order to engineer social transformation in the housing sector for the benefit of all.

As a result, it is essential to examine the process of implementing the right in order to ensure it benefits the rights-holders particularly the poor, who for the most part, reside in slums and informal settlements and face the greatest challenge in exercising it. This raises the need to examine closely the legislative, policy and institutional mechanisms intended to breathe life into the right with a view to ensuring they do not place obstacles in the process of realizing the right. And where they do, it is imperative to explore solutions for them. This, in a nutshell offers a justification for this research.

1.9. RESEARCH METHODOLOGY

The study was primarily a desktop research. Collection of data was undertaken by means of identifying and evaluating various documentary data that exists on the subject.

The study, in part, focused on evaluation of statutory documents such as national Constitutions and statutes and as well international and regional law instruments that have relevance to the right to housing. Some of the instruments evaluated include the Constitutions of Kenya, Tanzania and South Africa. Regional instruments considered include the African Charter on Human and Peoples' Rights while International instruments include the ICESCR.

The research undertook a historical survey of existing literature on the research subject. Among the documents reviewed are journal articles, conference papers, policy documents and research theses. The essence here was to understand the research issues from a historical perspective while identifying gaps that can be filled through new insights on the area of study.

Some of the data was collected directly from documents available in libraries. However, a substantial amount of data was collected through internet research.

Secondary data was preferred because time and resource constraints could not permit collection of primary data. Nevertheless, the writer remains alive to the limitations of this method of data collection. For example, some of the data was not very current. This raises the possibility that some of it could be inaccurate. Furthermore, there is always the danger of such data being biased, or even incomplete, factors which can distort the results of the study.

As it was necessary to borrow best practices on protection of the right to housing from other jurisdictions, a comparative methodology of research became inevitable. Thus, the research also undertook a limited comparative approach of data collection by looking at relevant data on the area of study from Tanzania and South Africa. In doing this, the researcher remained alive to the fact that factors that are country specific could limit the applicability of the data collected from the comparators to make generalizations on Kenya. For example, while Tanzania has largely embraced a socialist approach to development, Kenya has not. Therefore, the manner in which Tanzania addresses its housing issues may not be wholly applicable to Kenya.

1.10. CHAPTER BREAKDOWN

The study is covered in five chapters. Chapter one introduces the research but also undertakes other processes such as describing the methodology for the research.

Chapter two theorizes the right to housing and also considers the pre 2010 housing situation in informal settlements in Kenya against the tenets of the right to housing.

Chapter three analyzes the post 2010 legislative, policy and institutional framework for protecting the right in Kenya with a specific focus on slums and informal settlements.

Chapter four undertakes a limited comparative analysis of housing in Tanzania and South Africa. The intention here is to consider whether these jurisdictions offer lessons on implementation of access to affordable housing to Kenya,

Chapter five offers a conclusion to the research and as well some recommendations.

CHAPTER 2

THE RIGHT TO HOUSING: ITS NATURE, SCOPE, CONTENT AND APPLICATION IN KENYA FROM A HISTORICAL VIEW POINT

2.0. INTRODUCTION

In this chapter, we discuss the nature scope and content of the right to housing. We then consider access to adequate housing in Kenya prior to the entrenchment of the right to housing under the 2010 Constitution. This is done with specific focus on slums and informal settlements. Finally, we offer a brief conclusion.

2.1. THE RIGHT TO HOUSING: NATURE, SCOPE AND CONTENT

The right to housing is, as will be seen in this chapter, mentioned in a number of legal and policy documents and as well judicial pronouncements across the world. Together, these various instruments and pronouncements conceptualize and contextualize the nature, scope and content of this right. In this section we focus on exploring these aspects of the right.

2.1.1 The Nature and Scope of the Right

The right to housing was first authoritatively recognized under article 25 of the Universal Declaration of Human Rights (UDHR) as a component of the wider right to an adequate standard of living which also includes the rights to adequate food, clothing and healthcare.¹ Since then, the nature and scope of the right has been elaborated in various other legal instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).² The Committee on Economic, Social and Cultural Rights (CESCR), a committee constituted under the ICESCR, in its General Comment number 4 defines this right as ‘the right to live somewhere in security, peace and dignity.’³ Looked at from this perspective, the right to housing is

¹ Universal Declaration of Human Rights [1948] 217 A (III)
<<http://www.un.org/en/documents/udhr/index.shtml#a25>> accessed 10 July 2014.

² International Covenant on Economic, Social and Cultural Rights [1966] United Nations, Treaty Series, vol. 993, p. 3 art 11 (1) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> accessed 10 July 2014.

³ Office of the United Nations High Commissioner for Human Rights, ‘The Right to Adequate Housing’ Fact Sheet 21/Rev.1, 1, 3 (UNHRCHR)
<http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> accessed 30 April 2014.

broad than the mere provision of a roof over one's head.⁴ It includes other guarantees such as security of tenure, peace and dignity of the individual.⁵ The guarantees ensure that the individual is protected from the risk of arbitrary eviction and has access to other necessities of life including water, sanitation and healthcare.⁶

According to the African Commission on Human and Peoples' Rights, this right is intricately intertwined with other rights including the rights to health and family.⁷ This is because provision of housing directly impacts on the quality of enjoyment of the other rights.⁸

The guarantees on security of tenure, peace and dignity in respect of housing can only be assured if the right enjoys legal protection. Accordingly, the instruments that recognize the right impose a number of obligations on the duty bearers with respect to the right. These include the obligations to respect, promote, protect and fulfil the right.⁹ The European Social Charter aptly contextualizes these obligations.¹⁰ Under the charter, state parties are required to take all reasonable steps to: promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; and to make the price of housing accessible to those without adequate resources.¹¹ By discharging these various obligations under the charter, a state party honours its duty to respect, protect, promote and fulfil the right to housing.

These obligations which further illustrate the nature and scope of the right have been further developed through various other international and national instruments. For example, the Convention on the Rights of Persons with Disabilities requires state parties to discharge the obligation to promote and fulfil the right to housing for persons living with disabilities by taking appropriate steps to safeguard

⁴ Christophe Golay and Melik Ozden, 'The Right to Housing' (1992) 1, 4
<<http://www.cetim.ch/en/documents/bro7-log-A4-an.pdf>> accessed 30 April 2014

⁵ *ibid.*

⁶ *ibid.*

⁷ Lilian Chenwi 'The Right to Adequate Housing in the African Regional Human Rights Systems: Convergence or Divergence between the African Commission and South African Approaches' (2013) 342, 344-346 <<http://dx.doi.org/10.4314/ldd.v17i1.16>> accessed 10 July 2014.

⁸ *ibid.*

⁹ *ibid.* 349.

¹⁰ The European Social Charter (Revised) [1996] European Treaty Series No. 163
<<http://www.coe.int/t/dGHI/monitoring/Socialcharter/Presentation/ESCRBooklet/English.pdf>>
accessed 10 July 2014.

¹¹ *ibid.* art 31.

realization of the right by them devoid of discrimination.¹² Similarly, the CESCR under General Comment number 7 obliges state parties to prevent arbitrary evictions in fulfilment of the obligation to protect the right.¹³ Where evictions occur, the state will be deemed to fulfil housing rights only when it promptly and adequately compensates the victims of the eviction.¹⁴

At national level, the 2010 Constitution of Kenya imposes similar obligations on state organs to respect, protect, promote and fulfil all rights including the right to housing.¹⁵ The Constitution requires the state to discharge these obligations by legislating and formulating policies that facilitate the enjoyment of the right by all including vulnerable groups such people living in slums and other informal settlements.¹⁶

The nature and scope of the right has also been amplified in various judicial pronouncements. For example, in the South African case of *City of Johannesburg v. Rand Properties* the court observed that housing ensures human dignity.¹⁷ It observed that adequate housing means more than just the four walls of a room and a roof over one's head. The court argued that housing ensures healthy living and meets one's psychological needs for privacy. In *Port Elizabeth Municipality v. Various Occupiers* Justice Sachs observed that 'a home is [...] a zone for personal intimacy and family security as well as the only relatively secure space of privacy and tranquillity in what is a turbulent and hostile world'.¹⁸

2.1.2 The Content of the Right to Housing

General Comment number 4 by the CESCR emphasizes that the right to housing must be read not merely as signifying access to any form of housing but

¹² Convention on the Rights of Persons with Disabilities [2007] A/RES/61/106 art 28
<<http://www.un.org/disabilities/convention/conventionfull.shtml>> accessed 10 July 2014.

¹³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing (Art 11(1)): Forced Evictions [1997] E/1998/22
<<http://www.refworld.org/docid/47a70799d.html>> accessed 10 July 2014.

¹⁴ *ibid* art 13.

¹⁵ Constitution of Kenya 2010 art 21.

¹⁶ *ibid*.

¹⁷ *City of Johannesburg v. Rand Properties Ltd and Others* (10330/04) (2006) ZAGPHC21 (3 March 2006)

¹⁸ *Port Elizabeth Municipality v. Various Occupiers* (CCT 53/03) 2005 (1) SA 217 (CC) Par 17.

adequate housing at reasonable cost.¹⁹ Indeed, the 2010 Constitution of Kenya reiterates this requirement by declaring that ‘every person has the right to accessible and adequate housing and reasonable standards of sanitation.’²⁰ Thus, housing as a right both at national and international level must be understood in this wide context.

According to the United Nations High Commissioner for Human Rights, the measure of adequacy of housing is undergirded by a number of indicators.²¹ These include: legal security of tenure; affordability; location and availability of services; habitability; equitable and non-discriminatory accessibility; and cultural acceptability.²² These indicators amplify the content of this right. For housing to be considered adequate the state must strive to meet every one of these indicators.

2.1.2.1 Security of Tenure

Legal security of tenure is an integral component of the right.²³ It applies both to owner-occupied and rental premises.²⁴ Security of tenure requires the state to take measures that enhance protection of individuals from arbitrary eviction and harassment.²⁵ It provides the requisite peace of mind that motivates one to invest in improving the condition of one’s residence thus enhancing access to decent housing.²⁶

Importantly, security of tenure must not be confused with the existence of full legal title over housing.²⁷ While the presence of a full legal title (absolute or leasehold) provides the best form of security of tenure for housing, it has been argued that de-facto recognition of entitlement to housing (also referred to as perceived security of tenure) can greatly enhance protection of housing rights for the poor

¹⁹ UN Committee on Economic and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art.11 (1)) [1991] E/1992/23 art

7<<http://www.refworld.org/docid/47a7079a1.html>> accessed 10 July 2014.

²⁰ Constitution of Kenya 2010 art 43.

²¹ UNHCHR (n3) 3-4.

²² South African Human Rights Commission on Human Rights, ‘The Right of Access to Adequate Housing’ (2004) 1, 7 <http://www.sahrc.org.za/home/21/files/Reports/5th_esr_housing.pdf > accessed 21 April 2014.

²³ United Nations Human Settlements Programmes (UN-HABITAT) and Office of the High Commissioner for Human Rights, ‘United Nations Housing Rights Programme’ (2004) 1, 13 (UN-HABITAT and OHCHR) <<http://ww2.unhabitat.org/programmes/housingrights/documents/UNHRP-ProDoc-PublicX.PDF>> accessed 30 April 2014.

²⁴ *ibid.*

²⁵ General Comment no.4 (n19) art 8.

²⁶ UN-HABITAT and OHCHR (n23) 13.

²⁷ Gabriel Luke Kiddle, ‘Informal Settlers, Perceived Security of Tenure and Housing Consolidation: Case Studies from Urban Fiji’ (Doctor of Philosophy in Geography thesis, University of Wellington 2011) 1, 23-30 <<http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/.../thesis.pdf>> accessed 30 June 2014.

including slum dwellers even in the absence of formal titles.²⁸ Thus, notwithstanding that some housing units may lack legal security of tenure it is necessary for the state to guarantee the occupants de-facto security through policy interventions in order to ensure that all enjoy access to secure housing.²⁹

2.1.2.2. Affordability

This requires that the cost of accessing housing should, as much as possible, be commensurate with the general income levels in the state.³⁰ For example, leasehold premises should attract rents which fall within the general means of a majority of the citizens.³¹

Affordability also means that individuals should be able to easily acquire a home based on the ease of access to factors of production in the housing sector such as finance and land.³² The state should for instance, consider granting tax waivers on construction materials and introducing other incentives in the housing sector such as negotiating with the private sector for low interest rates on mortgage facilities in order to spur home acquisitions.³³

Furthermore, the dream of affordable housing can be significantly realized if the state increases public spending on housing.³⁴ Such interventions can greatly subsidize provision of social and affordable housing.

2.1.2.3. Availability of Services and Location

Availability of services and location requires the state to provide basic services such as safe water, sanitation and healthcare within reasonable range of

²⁸ *ibid* 24-27.

²⁹ *ibid* 27.

³⁰ General Comment no.4 (n19) art 8.

³¹ Centre On Housing Rights and Evictions, 'Listening to the Poor? Housing Rights in Nairobi, Kenya' (2005) 1, 62 (COHRE) <<http://www.begakwabega.com/documents/COHRE-KenyaReports2005.pdf>> accessed 30 April 2014.

³² Wafula Nabutola, 'Affordable Housing-Some Experiences from Kenya' (2004)1, 1-17<http://www.fig.net/pub/athens/papers/ts12/TS12_2_Nabutola.pdf> accessed 30 April 2014.

³³ Kenneth Gibb and Chris Leishman, 'Delivering Affordable Housing in Troubled Times: Scotland National Report' (2011) 1, 7-10< <http://www.jrf.org.uk/sites/files/jrf/Scotland.affordable-housing-full.pdf>> accessed 30 June 2014.

³⁴ *ibid* 26-32.

living quarters.³⁵ Provision of housing must have regard for other essential services such as access roads and fire services.³⁶

Lack of essential services such as sanitation can constitute a potential health hazard with adverse socio-economic ramifications.³⁷ Similarly, lack of or poor infrastructure can impede the socio-economic productivity of a society and hence the need for housing zones to be served with good infrastructure to ease communication.³⁸

2.1.2.4. Habitability

Habitability envisages proper planning of living quarters so that they are adequately spaced and protected from hazardous conditions.³⁹ This enhances the decency of the housing units in the sense that it ensures they offer those living in them protection from disease and other threats to their health.⁴⁰ Housing must provide adequate sanitary facilities to guarantee acceptable decency and habitability.⁴¹

Habitability also denotes the requirement that housing units be kept in a tenantable state in order to ensure the safety of occupants.⁴² Thus, the state must legislate to impose a duty to maintain buildings to acceptable levels of safety.⁴³

The duty to ensure habitability of housing has been further amplified in judicial decisions. For example, in *Techer v. Pierce*, the court tied the obligation on tenants to pay rent to the landlord's duty to ensure the premises were decent and

³⁵ General Comment no.4 (n19) art 8.

³⁶ International Human Rights Law Clinic, University of California, Berkeley School of Law, 'Human Rights at Home: The Right to Housing, Water and Political Participation in San Joaquin Valley Unincorporated Communities' (2007) 1, 7
<<http://www.law.berkeley.edu/files/IHRLC/HumanRightsatHomeNovember2007FINALVERSION.pdf>> accessed 30 April 2014.

³⁷ UN-HABITAT, 'Better Information, Better Cities: Monitoring the Habitat Agenda and the Millennium Development Goals-Slum Target' (2009) 1, 15-17
<http://www.ine.pt/ngt_server/attachfileu.jsp?look_parentBoui=14321630&att_display=n&att_download=y> accessed 30 June 2014.

³⁸ *ibid* 17.

³⁹ General Comment no. 4 (n19) art 8.

⁴⁰ Henry Onoria, 'Guaranteeing the Right to Adequate Housing and Shelter in Uganda: The Case of Women and Persons with Disabilities' (2007) 36-37
<http://huripec.mak.ac.ug/pdfs/working_paper_6.pdf> accessed 30 April 2014.

⁴¹ *ibid* 36.

⁴² Rachel Camber, 'The Incorporation of the Implied Warranty of Habitability in Public Housing Programs' (1990) 38 *Urban Law Annual; Journal of Urban and Contemporary Law* 205-213
<<http://digitalcommons.law.wustl.edu/urbanlaw/vol38/issu1/8>>

⁴³ *ibid* 208-213.

habitable.⁴⁴ The court went further to emphasize that this duty on landlords applied irrespective of whether they were private or public entities.⁴⁵

2.1.2.5. Equitable and Non-Discriminatory Access to Housing

The state is also required to guarantee equitable and non-discriminatory access to quality and affordable housing by all.⁴⁶ Everyone should have access to reasonable housing irrespective of their status.⁴⁷ Consequently, the government should design policies that promote the realization of the right to housing by all and more particularly the impoverished and marginalized groups in society.⁴⁸ For instance, housing policies must be pro-poor and as well gender-sensitive in order to maximize access to housing by these vulnerable groups.⁴⁹

Equally significant is the need to ensure good land governance to enable equitable access to this factor of production in the housing sector.⁵⁰ This is particularly so when it is appreciated that access to land greatly improves access to housing.

2.1.2.6. Cultural Acceptability

Housing must also be culturally acceptable.⁵¹ The state should not sacrifice cultural expressions of its citizens while undertaking housing projects.⁵² Housing policies must endeavour to accommodate the expression of the cultural identity and diversity of the various communities in society.⁵³ Commenting on the need for housing provisions to respect cultural peculiarities of the consumers, the European

⁴⁴ *ibid* 205.

⁴⁵ *ibid*.

⁴⁶ General Comment no. 4 (n19) art 6.

⁴⁷ Human Rights Project Urban Justice Center, 'Measuring Support for the Human Right to Adequate Housing' 1-3 <<http://hrpujc.org/document/HousingStandards.pdf>> accessed 30 April 2014.

⁴⁸ Olotua A O and Bobadaye S A, 'Sustainable Housing Provision for the Urban Poor: A Review of Public Sector Intervention in Nigeria' (2009) 2 *The Built and Human Environment Review* 51, 59-60.

⁴⁹ UH-HABITAT, 'Sustainable Urban Development through Expanding Equitable Access to Land, Housing, Basic Services and Infrastructure' (2010) 1-14 <http://mirror.unhabitat.org/downloads/docs/9416_62947_HSP-GC-23-4%20Dialogue%20on%20the%20Special%20Theme%20for%20the%2023rd%20Session.pdf> accessed 30 June 2014.

⁵⁰ *ibid* 7-8.

⁵¹ General Comment no. 4 (n19) art 8.

⁵² Human Rights Project Urban Justice Center (n47).

⁵³ *ibid*.

Committee on Social Rights lamented the cramming of Roma residents in small housing units in total disregard for their family sizes contrary to their cultures.⁵⁴

2.2. A PROPER CONCEPTUALIZATION OF THE RIGHT BY THE DUTY-BEARER AND RIGHT-HOLDER

States and state organs that recognize the right, as broadly captured under the UDHR, are bound to construe it as a right to ‘continuous improvement of living conditions’ of the human race⁵⁵ without discrimination. This understanding of the right further amplifies its nature, scope and content as manifested in the reality that unlike civil and political rights which are often considered as subject to immediate realization,⁵⁶ its realization can only be progressive.⁵⁷

Accordingly, the state is obliged to take measures to promote the realization of the right in the fullness of time.⁵⁸ These include; adopting legislative, financial, and administrative actions conducive to the promotion of the right; and establishing appropriate oversight bodies to oversee the progressive realization of the right.⁵⁹ However, certain aspects of the right must be realized immediately. These include the obligation not to carry out arbitrary evictions without provision of alternative accommodation.

Although the right has sometimes been understood as imposing an obligation on the state to provide affordable housing the reality is that the duty imposed is in

⁵⁴ *European Roma Rights Centre v. Portugal* (2010) Complaint No. 61, 12-13.
<https://www.coe.int/t/dghl/monitoring/socialcharter/complaints/61Merits_en.pdf> accessed 30 June 2014.

⁵⁵ Rebecca J Barber, ‘Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law’ (2008) 432, 441-443
<http://www.creatingroadhome.com/new/wp-content/uploads/protecting_the_right_to_housing_in_the_aftermath_of_natural_disaster_standards_in_international_human_rights_law.pdf> accessed 11 July 2014.

⁵⁶ Smyth Ciara Mary, ‘The Common European Asylum System and the Right of the Child: An Explanation of Meaning and Compliance’ (2013) 217, 217-218
<<https://openaccess.leidenuniv.nl/bitstream/handle/1887/20462/06.pdf?sequence=12>> accessed 1 July 2014.

⁵⁷ Catalin Stefan Rusu, ‘The Right to Adequate Housing viewed through the Lens of the South African Constitutional Court’s Grootboom Decision’ (2004) 1, 1-5
<http://revcurrentjur.ro/arhiva/attachments_200412/recjurid041_21F.pdf> accessed 22 April 2014.

⁵⁸ Amnesty International, ‘Human Rights for Human Dignity: A Premier on Economic, Social and Cultural Rights’ (1995) 1, 20
<<http://www.amnestyusa.org/sites/default/files/pdfs/humanrightsforhumandignity.pdf>> accessed 21 April 2014.

⁵⁹ *ibid.*

large part, a facilitative one.⁶⁰ Thus, the right should not be understood as suggesting, in literal terms, that the state must provide housing for everyone immediately and free of charge.⁶¹ Rather, the obligation imposed on the state is that it should design and implement proper policies and laws that can facilitate the realization and enjoyment of the right by everyone.⁶² However, the state is sometimes required to provide actual social housing and temporary shelter to those most in need including the extremely poor and those affected by natural disasters or other conflicts.⁶³

2.4. THE RIGHT TO HOUSING IN KENYA: A HISTORICAL SURVEY

As was mentioned in chapter one, Kenya had no statutory framework that expressly recognized the right to housing prior to August 2010.⁶⁴ However, it remained a live to the need to facilitate access to affordable housing for its citizens. As a result it formulated a series of policies and enacted a number of laws that indirectly impacted on the right.

2.4.1. Policy Interventions

In 1966, Kenya issued its first national housing policy vide Sessional Paper No. 5 of 1966 which underscored the need for the government to facilitate the realization of affordable housing.⁶⁵ The policy recommended the establishment of a national housing authority to oversee the realization of this objective.⁶⁶ This resulted in the establishment of the National Housing Corporation under the Housing Act as a facilitative mechanism for effectuating the housing policy.⁶⁷

⁶⁰ Lilian Chenwi and Kate Tissington, 'Engaging meaningfully with the Government on Socio-Economic Rights: A Focus on the Right to Housing' (2010) 1, 6-7
<<http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/228/ChenwiCommunityParticipation.pdf?sequence=1>> accessed 22 April 2014.

⁶¹ *ibid* 7.

⁶² *ibid*.

⁶³ Golay and Ozden (n4) 21.

⁶⁴ Dan Juma, 'Taking these Rights Seriously: Civil Society Organizations' Parallel Report to the Initial State Report of the Republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (2008) 1, 13 <http://www.rtfn-watch.org/uploads/media/Reports_Kenya.pdf> accessed 30 April 2014.

⁶⁵ Wafula Nabutola, 'Affordable Housing in Kenya: A Case Study of Informal Settlements' (2004) 1, 11
<https://www.fig.net/pub/jakarta/papers/ts_01/ts_01_2_nabutola.pdf> accessed 22 April 2014.

⁶⁶ *ibid*.

⁶⁷ Housing Act No. 117 s.3.

The mandate of the Corporation was to provide low cost housing while stemming the proliferation of slums in urban centres in Kenya.⁶⁸ However, the Housing Act did not recognize access to affordable housing as an enforceable right.⁶⁹ As a result, the policy was not fully realized as it was not backed by enforceable housing rights in any national legislation.⁷⁰

In 2004, the government issued a new national housing policy vide Sessional Paper No. 3 of 2004 to replace the 1966 policy.⁷¹ The 2004 policy recognized the right to housing and the need to have the right realized progressively.⁷² According to Wafula Nabutola, this policy was intended to redress the deteriorating housing conditions in the country.⁷³ It sought to introduce good governance practices in the housing sector by, inter alia, seeking to promote public participation in slum upgrading programs and enhance efficiency and effectiveness in the management of the housing sector.⁷⁴ Unfortunately, the right to housing remained at policy level and was thus not justiciable.

In 2009, the government formulated the National Land Policy vide Sessional Paper No. 3 of 2009.⁷⁵ This policy is still in force. It, inter alia, underscores the need to undertake slum upgrading programs in order to improve housing conditions in informal settlements in Kenya.⁷⁶ It also recommends the promulgation of appropriate laws to regulate evictions in the country in line with accepted international human rights standards.⁷⁷ Importantly, the policy seeks to infuse the virtues of good governance in the land management process in the country by for instance requiring that slum upgrading programs be undertaken in consultation with the affected

⁶⁸ Nabutola (n65) 11.

⁶⁹ Christine Bodewes and Ndaisie Kwinga, 'The Kenyan Perspective on Housing Rights' in Scott Leckie (ed) *National Perspectives on Housing Rights* (Kluwer Law International, The Hague, Netherlands, 2003) 227.

⁷⁰ Nabutola (n65) 12.

⁷¹ Economic and Social Rights Centre (Hakijamii), 'Assessment of the Realization of the Right to Housing in Kenya 2009-2010' (2011)1, 14-15 <<http://www.hakijamii.com/publications/hr-finalreport.pdf>> accessed 22 April 2014.

⁷² Miloon Kothari, *A Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari, on his Mission to Kenya (2004) 1, 7 <http://directoamoradia.org/wp-content/uploads/2012/08/relatorio_Quenia_ES.pdf> accessed 22 April 2014.

⁷³ Nabutola (n 65) 12.

⁷⁴ *ibid.*

⁷⁵ Hakijamii (n71) 14-15

⁷⁶ *ibid.*

⁷⁷ *ibid.*

parties.⁷⁸ This is essential in institutionalizing public participation in the slum upgrading process.

In 2008 the government formulated a development policy master plan christened Vision 2030.⁷⁹ The policy requires the state to work towards the realization of adequate and decent housing for all Kenyans by the year 2030.⁸⁰

2.4.2. Legislative Interventions

Apart from the various policy approaches to securing adequate housing in the country, a number of statutes also indirectly impacted on the right to housing. These include the Rent Restriction Act and the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act.⁸¹ The Acts, which are still in force, provide a regulatory framework to guide the relationship between landlords and tenants.⁸² Thus, the two pieces of legislation did to some extent contribute, as they still do to date, to promoting the right to housing in Kenya prior to the entrenchment of the right in the 2010 Constitution by for instance curbing arbitrary evictions by landlords.⁸³ However, owing to their very low jurisdictional limits, the contribution of the Acts to the effective protection of the right to housing has been described as relatively insignificant.⁸⁴

Other pieces of legislation such as the Registered Lands Act, the Government Lands Act and the Registration of Titles Act which have since been repealed were intended to secure land tenure rights.⁸⁵ This was also essential for the protection of the right to housing so far as it secured tenure rights.⁸⁶ However, the statutes only secured protection for those who had recognizable absolute or leasehold interest in land. They did not contemplate de-facto title as providing security of tenure. As a result, a large number of squatters and slum dwellers could not secure their rights to housing basing on these laws.

Although the independence Constitution did not recognize the right to housing it had clauses which could broadly be interpreted to secure the right.⁸⁷ For example,

⁷⁸ *ibid* 14.

⁷⁹ *ibid* 13-14.

⁸⁰ *ibid* 13.

⁸¹ Act no. 35 of 1959 and Act no. 13 of 1995.

⁸² Hakijamii (n71) 13.

⁸³ *ibid* 13.

⁸⁴ Bodewes and Kwinga (n69) 227.

⁸⁵ Hakijamii (n71) 13.

⁸⁶ *ibid*.

⁸⁷ Constitution of Kenya (Repealed) Act.

article 75 provided for the recognition and protection of private property. This included housing. Further, the Constitution provided for protection of privacy of one's home.⁸⁸ This again could be interpreted to afford the right to housing protection. This argument has however not escaped criticism by other scholars. Bodewes and Kwinga for instance argue that article 75 of the independence Constitution only provided protection to those who had legal titles leaving scores of other Kenyans without security of tenure totally exposed to violation of their housing rights.⁸⁹ Indeed, the scholars contend strongly that the complex web of conflicting land laws that Kenya inherited from its colonial masters read together with the independence Constitution only served to protect property rights that had sometimes been irregularly acquired thus derogating from rather than offering effective protection of access to housing.⁹⁰

2.4.3. THE IMPACT OF THE HOUSING POLICY AND LEGISLATIVE MEASURES ON THE RIGHT TO HOUSING FOR RESIDENTS OF SLUMS AND INFORMAL SETTLEMENTS KENYA- 1963-2010

Notwithstanding the foregoing policy and regulatory approaches, the right to housing in Kenya remained under-secured⁹¹ particularly for those living in slums and other informal settlements.⁹² This was largely due to a number of factors including: corruption; a weak legal framework for land tenure rights; and failure of policies in the housing sector.⁹³

The failure to formalize land tenure in parts of the country such as Kibera⁹⁴ and plan urban development encouraged the proliferation of slums and other unplanned informal settlements in most urban centres.⁹⁵ This resulted in people building residences on public land including land reserved for infrastructure

⁸⁸ *ibid* art 70.

⁸⁹ Bodewes and Kwinga (n 69) 227.

⁹⁰ *ibid* 226-227

⁹¹ Kothari (n72) 7.

⁹² *ibid* 18-20.

⁹³ *ibid*.

⁹⁴ Peter Karari Mwaura, 'The Challenges Facing Kenya Slum Upgrading Programme in the Realizing the International Elements of the Right to Housing: A Special Focus on Kibera Slum in Nairobi Kenya' (2009)1, 3.

⁹⁵ Amnesty International, 'We are like Rubbish in this Country: Forced Evictions in Nairobi, Kenya' (2013) 1, 6-8 (Amnesty International, 'We are like Rubbish in this Country') <<http://www.amnesty.org/en/library/assets/AFR32/005/2013/en/c7123be-bd7-bd4a-46e5-bf14-2e300e09b869/af320052013.pdf>>accessed 22 April 2014.

development such as airports and roads.⁹⁶ Thus, the emergence of informal settlements such as City Carton estate reportedly built on government land was a direct result of these failures.⁹⁷

Notably, an estimated one hundred communities were thought to be housed in slum areas of Nairobi alone as at 2003 accommodating more than two million people on just 1.5% of the city's landmass.⁹⁸ The crisis of slums in the country has often been viewed as a manifestation of poor land governance policies in the country that encouraged unscrupulous allocation of land to a few politically correct individuals thus pushing a majority of the poor in urban areas to public and other marginal lands over which they had no security of tenure.⁹⁹

Due to lack of security of tenure for slum dwellings, they were often, as they are now, the subject of constant demolitions. For example, the City Carton estate was subsequently demolished leaving more than 400 families homeless.¹⁰⁰

Thus, from the time Kenya gained independence until 2010 when socio-economic rights gained constitutional recognition, the management of the housing sector showed little regard for the right to housing particularly for those living in informal settlements and slums.¹⁰¹ The absence of a comprehensive policy and legislative framework on some aspects of housing such as slum upgrading became a great impediment to efforts to protect the right.¹⁰² As Korathi has argued, these weaknesses meant that the right to housing in the country was neither acknowledged nor respected.¹⁰³

The entrenchment of the right in the country's new Constitution is intended to reverse this trend by providing better protection for it. Regrettably, bottlenecks to the full realization of the right still remain. Comprehensive review of laws and policies in the housing sector to complement the new Constitution and provide effective means of protecting the right remains unfulfilled. For example, amendments to important pieces of legislation such as the Housing Act to align it to the constitutional

⁹⁶ *ibid* 6.

⁹⁷ *ibid*.

⁹⁸ Bodewes and Kwinga (n69) 221-222.

⁹⁹ *ibid*.

¹⁰⁰ Amnesty International, 'We are like Rubbish in this Country' (n95) 6.

¹⁰¹ Kamukam Ettyang, 'Empowering the Urban Poor to Realize the Right to Housing: Community- Led Slum Upgrading in Huruma, Nairobi' (2011) 1-9 <<http://halshs.archives-ouvertes.fr/halshs-00755879>> accessed 4 May 2014.

¹⁰² *ibid* 1-2.

¹⁰³ Korathi (n72) 7.

requirement to provide effective protection of the right appear to have stalled.¹⁰⁴ Similarly enactment of laws to regulate evictions appears to have been shelved exposing residents of slums and other informal settlements to the risk of continued violation of the right.¹⁰⁵

2.5. CONCLUSION

This chapter set out to inter alia discuss the nature, scope and content of the right to housing. As has been demonstrated, the right must be conceptualized in a broad manner. It transcends the mere provision of shelter. Beyond the physical walls, the right entails other guarantees such as security of tenure, peace and dignity of the individual. The entrenchment of the right under the 2010 Constitution has heralded a new dawn for the housing sector in the country. Nevertheless, a lot remains to be done to translate the right into a living reality for all including the indigent.

¹⁰⁴ Economic and Social Rights Centre, 'Assessment of the Realization of the Right to Housing in Kenya, 2011-2012' (2012)1, 13-15.

¹⁰⁵ *ibid* 13.

CHAPTER 3

THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK ON THE RIGHT TO HOUSING IN KENYA: CHALLENGES AND PROSPECTS

3.1. INTRODUCTION

In this chapter we look at the legal, policy and institutional framework on housing applicable to Kenya. In chapter two, we reviewed some policy and legislative interventions on the right to housing in Kenya prior to 2010. However, in this chapter, the focus is on the post 2010 period.

The intention here is to evaluate the challenges and prospects this framework presents for the effective realization of the right. This is done with specific focus on slums and other informal settlements. Due to constraints of space, only a few international, regional and national instruments and institutions are discussed.

3.2. THE INTERNATIONAL LEGAL FRAMEWORK

Since 1945 when the United Nations Charter first recognized the need to enhance the standards of living among the community of nations, the right to housing has gained recognition through various international instruments and guidelines.¹ These include the Universal Declaration of Human Rights (UDHR),² the International Covenant on Economic, Social and Cultural Rights (ICESCR),³ the International Covenant on Civil and Political Rights (ICCPR),⁴ the International Covenant on the Elimination of all Forms of Discrimination against Women (CEDAW),⁵ the Convention on the Rights of the Child (UNCRC),⁶ the International Convention on

¹ David Hulchanski and Scott Leckie, 'The Human Right to Adequate Housing; Chronology of United Nations Activity, 1945-1999' (2000) 1, 7-8 <<http://www.hnc.utoronto.ca/publish/rth.pdf>> accessed 5 July 2014.

² Universal Declaration of Human Rights [1948] 217 A (III).
<http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 22 April 2014.

³ International Covenant on Economic, Social and Cultural Rights [1966] United Nations, Treaty Series, vol. 993, p. 3. <<http://www.unhcr.centraleurope.org/pdf/resources/legal-documents/international-refugee-law/international-covenant-on-economic-social-and-cultural-rights-1966.html>> accessed 22 April 2014.

⁴ International Covenant on Civil and Political Rights [1966] United Nations, Treaty Series, vol. 999, p. 171. <<http://www.refworld.org/pdfid/3ae6b3aa0.pdf>> accessed 22 April 2014.

⁵ International Convention on the Elimination of all forms of Discrimination against Women [1979] United Nations, Treaty Series, vol. 1249, p. 13.
<<http://www.un.org/womenwatch/daw/cedaw/cedaw27/tun3-4.pdf>> accessed 22 April 2014.

⁶ Convention on the Rights of the Child [1989] United Nations, Treaty Series, vol. 1577, p. 3.
<http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf> accessed 22 April 2014.

the Protection of the Rights of all Migrant Workers and Members of their Families,⁷ the Convention on the Elimination of All forms of Racial Discrimination (CERD)⁸ and the International Convention Relating to the Status of Refugees.⁹

Kenya has ratified most of these instruments.¹⁰ Consequently and by virtue of article 2(5) and 2(6) of the country's 2010 Constitution, these instruments shape the realization of the right to housing, as would, other national laws.

3.2.2. The Universal Declaration of Human Rights

The UDHR was the first of the international instruments to declare the right of every individual to enjoy a reasonable standard of living.¹¹ This right encompasses a conglomeration of various rights including the rights to adequate provision of food, clothing and housing for everyone.¹² Although, the instrument is not binding on state parties it set the pace for the recognition and realization of the right to housing across the world including Kenya.

3.2.3. The International Covenant on Economic, Social and Cultural Rights

The ICESCR is considered as the most authoritative articulation of the right to housing.¹³ Essentially, this thinking is informed by the fact that the instrument not only recognizes the right but also provides and extensive interpretation of it. Through its General Comments, the Committee on Economic Social and Cultural Rights (CESCR) is credited with extensively elaborating on the nature of the right. For instance, in General Comment No 4 it underscores the primacy of non-discrimination

⁷ International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families [1990] A/RES/45/158. <<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>> accessed 22 April 2014.

⁸ United Nations Human Settlements Programme (UN-HABITAT), Office of the High Commissioner for Human Rights (OHCHR), Housing Rights Legislation; A Review of International and National Legal Instruments' (2002) 1, 3-4 (UN-HABITAT & OHCHR,) <<http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf>> accessed 22 April 2014.

⁹ *ibid.*

¹⁰ Kenya Human Rights Commission, 'Towards Equality and Anti-discrimination in Kenya: An Overview of International and Domestic Law on Anti- Discrimination in Kenya' (2010) 1-15 <http://www.khrc.or.ke/component/docman/doc_download/4-an-overview-of-international-and-domestic-law-on-discrimination-in-kenya.html> accessed 29 November 2014.

¹¹ UDHR (n2) art 25 (1).

¹² *ibid.*

¹³ Jeff King, An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights (Law & Society Trust and Centre for Economic and Social Rights, USA 2003) <http://www.cesr.org/downloads/CESR_sActivistsManual.pdf> accessed 30 November 2014.

in the enjoyment of the right.¹⁴ It further declares housing as comprising the right for ‘everyone to live somewhere in peace, security and dignity.’¹⁵ This declaration is significant to securing the right for residents of slums and informal settlements in Kenya. It reminds the state and the public that the right to housing belongs to all irrespective of their status thus promoting the prospects of equal enforcement of the right.

Significantly, General Comment No. 4 emphasizes the importance of involving the public in the decision making process on housing issues.¹⁶ Public participation in this regard serves an important function. First, it recognizes the human dignity of the rights-holder.¹⁷ Second, it provides the rights-holder a chance to contribute ideas to the process of realization of the right.¹⁸ Third, it enhances prospects of transparency and accountability in protection of the right.¹⁹ Public involvement in decision-making on all aspects of the right reduces the opportunities for corruption and other malpractices in implementation of the right thus enhancing prospects for its equitable enforcement.

In the past, public involvement in slum upgrading programs in Kenya has not been consistently upheld sometimes with unpleasant consequences. For example, the 2004 Kenya Slum Upgrading Project (KENSUP) in Kibera failed to involve the public in the program resulting in fears that the proposed new housing units would not be affordable to the intended beneficiaries.²⁰ Public participation in the project would have obviated these fears by bringing on board the views of the beneficiaries on what was affordable.²¹ Thus, the ICESCR provisions on public involvement in protection of housing rights are important in the housing rights discourse for informal

¹⁴ General Comment No. 4: The Right to Adequate Housing (Art 11 (1) of the Covenant [1991] E/1992/23 art 6 <<http://www.refworld.org/docid/47a7079a1.html>> accessed 30 November 2014.

¹⁵ *ibid* art 7.

¹⁶ *ibid* arts 9&12.

¹⁷ Lilian Chenwi and Kate Tissington, *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing* (Community Law Centre, University of the Western Cape, 2010) 1, 18.

¹⁸ Kamukam Etyang, ‘Empowering the Urban Poor to Realize the Right to Housing: Community-Led Slum Upgrading in Huruma, Nairobi’ (2011) 1, 2<<http://halshs.archives-ouvertes.fr/halshs-00755879>> accessed 30 November 2014.

¹⁹ Chenwi and Tissington (n17) 17-18.

²⁰ Laura MacPherson, ‘Participatory Approaches to Slum Upgrading and Poverty Reduction in African Cities’ (2013) 1 (1) *Hydra-Interdisciplinary Journal of Social Sciences* 85, 89-90 <<http://journals.ed.ac.uk/hydra/articles/downloads/198/98>> accessed 30 November 2014.

²¹ *ibid*.

settlements in Kenya as they guarantee a participatory approach to implementing the right which enhances the prospects for its effective implementation.²²

Furthermore, General Comment No 4 provides a clear articulation of the indicators of adequate housing including: affordability; accessibility; habitability; and availability of other services.²³ As was noted in chapter two, these indicators are lacking in most slums and informal settlements in Kenya as indeed in all places where these settlements exist. This articulation provides prospects for the proper realization of the right to housing for those who live in these settlements in Kenya because it clarifies the content of the right as captured in the country's Constitution thus providing an appropriate framework for its enforcement.

Importantly, the CESCR through General Comment No 7 provides a framework to regulate evictions,²⁴ one of the main manifestations of violation of the right to housing in informal settlements and slums in Kenya.²⁵ In essence, the Comment does not purpose to outlaw but regulate the process of evictions in order to ensure they do not occasion a violation of the right. For example, it emphasizes the need for involvement of the victims in deliberations that lead to an eviction.²⁶ The essence here is to provide them with an opportunity to question the propriety of the process and as well negotiate for an exit plan that will ensure they are afforded alternative accommodation. As has been pronounced by the constitutional court in Kenya, these procedures lie at the heart of protecting the right to housing for everyone and particularly the poor who, for the most part, live in informal settlements and slums.²⁷

However, Kenya is yet to ratify the Optional Protocol to the ICESCR which provides an international forum for litigating socio-economic rights in the event of a failure by national institutions to effectively protect these rights.²⁸ This presents a challenge to the residents of slum and informal dwellings seeking protection of the

²² *ibid* 87-89.

²³ General Comment No. 4 (n14) art 8.

²⁴ General Comment No. 7: The Right to Adequate Housing (Art 11 (1): Forced Evictions [1997] E/1998/22<<http://www.refworld.org/docid/47a70799d.html>> accessed 30 November 2014.

²⁵ Laurence Juma, 'Nothing but a mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) *African Human Rights Law Journal* 470-507<<http://www.ahrlj.up.ac.za/juma-l>> Accessed 30 November 2014.

²⁶ General Comment No. 4 (n14) art 15.

²⁷ *Satros Ayuma and 11 Others v Registered Trustees of the Kenya Staff Retirement Benefits Scheme and 2 Others* [2011] eKLR <<http://www.kwnyalaw.org/caselaw/cases/view/90359>> accessed 30 November 2014.

²⁸ Kenya Human Rights Commission (n10) 2.

right to housing in an international forum whenever national institutions fail to protect it.

3.2.4. Other International Law Instruments

Most of the other international legal instruments only recognize the right to housing. However, there are those that seek to protect specific vulnerable groups such as women,²⁹ persons living with disabilities³⁰ and children.³¹ Like the ICECSR and the CERD, these instruments emphasize the right to non-discrimination in the enjoyment of human rights including the right to housing. The CEDAW, for instance, seeks to protect the right of women to access housing without discrimination.³² The proscription of discrimination in the enjoyment of human right by these instruments is of special significance in the protection of the right to housing for residents of slums and other informal settlements in Kenya.

In its research on the rights of women in Kenya conducted in 2009, the Centre on Housing Rights and Evictions observes that women suffer discrimination disproportionately in access to housing and land due to the patriarchal customary practices in the country.³³ Sadly, because of the entrenched discrimination against them in relation to access to property, a substantial portion of women are pushed into slums and informal settlements for housing.³⁴ Women in these settlements are sometimes subjected to extreme indignity because of absence of suitable sanitation services. For instance, they at times cannot access public toilets due to high levels of insecurity in the settlements.³⁵ If they venture out to use the available public toilets at night, they risk being sexually abused.³⁶ Yet, disposal of waste in the one roomed structures that are their homes is no easy task either. Most of them have to suffer the

²⁹ CEDAW (n5).

³⁰ Convention on Persons with Disabilities [2007]

A/RES/61/106<<http://www.refworld.org/docid/45f973632> > accessed 30 November 2014.

³¹ UNCRC (n6).

³² CEDAW (n5) art 14 (2) (h).

³³ Centre on Housing Rights and Evictions, 'Shelter from the Storm: Women's Housing Rights and the Struggle against HIV/AIDS in Sub-Saharan Africa' (2009) 1, 17<http://www.cohre.org/news/documents/shelter_from_the_storm_-_womens_housing_rights_and_the_struggle_against_hiv_aids_in_sub-saharan_africa_31_july_2009.pdf> accessed 30 November 2014.

³⁴ Centre on Housing Rights and Evictions, 'Civil and Political Rights in Kenyan Informal Settlements' (2005) 1, 6-11

³⁵ Njonjo Kihuria, 'The All- Important '4 am Service' at Mukuru Slums' *The Star* (Nairobi 18 November 2014) 28-29.

³⁶ *ibid.*

indignity of using plastic bags as toilets and disposal bins for items such as sanitary towels.³⁷

Other groups that suffer disproportionately in access to housing in slums and informal settlements include persons living with disabilities and children.³⁸ Children in slums are overly exposed to abuse and exploitation due to the poor living conditions they are exposed to in these settlements. Similarly persons living with disabilities cannot access suitable facilities for them in these shacks.

Thus, international law instruments which proscribe discrimination in access to adequate and decent housing that have been ratified by Kenya such as CERD and CEDAW offer prospects for improving access to housing for these vulnerable groups in Kenya. The instruments complement the national legal framework on housing and can be used as a springboard for enforcing better provision of services and decent housing in slums and informal settlements.

3.5. INTERNATIONAL POLICY FRAMEWORK

The most significant policy pronouncements on the right at international level that apply to Kenya are the Vancouver³⁹ and Istanbul⁴⁰ declarations on Human Settlement. Together, these instruments recognize the housing crisis across the world and urge state parties to take progressive steps to facilitate access to affordable and decent housing for their citizens.

The Vancouver declaration emphasizes the need for creation of habitable settlements and mechanisms that can enable the public participate in the planning, building and management of human settlements.⁴¹ The essence is to improve the quality of life for all human beings. The declaration reiterates the right for everyone to access affordable and decent housing and live in a clean and healthy environment.⁴²

³⁷ *ibid.*

³⁸ Centre on Housing Rights and Evictions, 'Listening to the Poor? Housing Rights in Nairobi, Kenya' (2005) 1, 2-27.

³⁹ The Vancouver Declaration on Human Settlements
<<http://www.fomento.gob.es/NR/rdonlyres/0FEB1F5E-90F1-4F77-85382248FCB1/95779/VancouverDeclaration.pdf>> accessed 30 November 2014.

⁴⁰ Istanbul Declaration on Human Settlements <<http://unhabitat.org/wp-content/uploads/2014/07/The-Habitat-Agenda-Istanbul-Declaration-on-Human-Settlements-2006.pdf>> accessed 30 November 2014.

⁴¹ Vancouver Declaration (n39) 4.

⁴² *ibid* 7.

On the other hand, the Istanbul declaration underscores the need to progressively improve access to decent and affordable housing.⁴³ It urges state parties to enhance the right to housing particularly by facilitating provision of clean water, health facilities and effective waste management in residential areas.⁴⁴

These policy pronouncements provide significant guidelines to states on how to improve housing particularly for disadvantaged groups such as people living in slums and informal settlements. Thus, they provide prospects for improving access to housing in informal settlements in Kenya. However, as has been pointed out, the two declarations are merely policy guidelines that are not binding on state parties.

3.6. REGIONAL LEGAL FRAMEWORK

3.6.1. The African Charter on Human and Peoples' Rights and its Protocol

The most significant regional instrument on human rights in Africa is the African Charter on Human and Peoples' Rights.⁴⁵ Kenya is a signatory to this instrument which also proscribes discrimination in the enjoyment of human rights.⁴⁶ It has been argued that the instrument has no provisions that directly recognize the right to housing.⁴⁷ However, the African Commission on Human and Peoples' Rights has held that the effect of the charter's provisions on property, health and life, is to protect the right to housing as well.⁴⁸

The charter provides prospects for protection of the right to housing in Kenya generally and in particular for those who suffer denial of the right such as residents of informal settlements. Through the commission, these groups can seek declarations at regional level that their right to housing has been violated. The commission can also issue directions to the state requiring it to redress the violations.

However, the commission can only entertain complaints on rights violations when it is demonstrated that the complainants have exhausted national mechanisms

⁴³ Istanbul Declaration (n40) 2.

⁴⁴ *ibid.*

⁴⁵ African (Banjul) Charter on Human and Peoples' Rights [1981] OAU Doc. CAB/LEG/67/3rev.5, 21 .L.M.58 (1982) (ACHPR) <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> accessed 30 November 2014.

⁴⁶ Kenya Human Rights Commission (n10) 4.

⁴⁷ Lilian Chenwi, 'The Right to Adequate Housing in the African Regional Human Rights System: Convergence or Divergence between the African Commission and South African Approaches' (2013)342, 345<http://reference.sabinet.co.za/webx/access/electronic_journals/lddev/lddev_v17_si1_c3.pdf> accessed 30 November 2014.

⁴⁸ *ibid.*

for protecting the rights.⁴⁹ This, in the writer's view is the main challenge to enforcing housing rights for residents of slums and informal settlements in Kenya at regional level as it effectively limits access to the tribunal for purposes of seeking protection of the rights.

The charter is complemented by the Maputo protocol which recognizes the right to housing for women.⁵⁰ Unfortunately, Kenya is yet to ratify this protocol⁵¹ thus denying women including those living in slums and other informal settlements its protection.

3.7. NATIONAL LEGAL FRAMEWORK

3.7.1. The Constitution of Kenya 2010

The Constitution recognizes 'the right to accessible and adequate housing and [to] reasonable standard of living.'⁵² According to Laurence Juma, the use of the word 'everyone' (read 'every person') in the rights' clause underscores the fact that the right to housing as captured in the Constitution belongs to all irrespective of their status.⁵³ These include residents of slums and informal settlements who, for the most part, experience the greatest challenge in accessing adequate housing.

Importantly, the Constitution does not just entrench the right. It also makes it justiciable.⁵⁴ Furthermore, it imposes specific duties on both state and non-state actors 'to observe, respect, protect, promote and fulfil the right[s].'⁵⁵ The obligations imposed by the Constitution can be described as both positive and negative in the sense that in some cases, they require positive action by the duty bearer in protection of human rights while in others, they demand refrain.⁵⁶ For example, the state is required to take positive measures to provide basic services such as water and sanitation in informal settlements in protection of the right. Significantly, the Ministry of Devolution and Planning has been trying to do this in the Kibera slums by for

⁴⁹ ACHPR (n45) art 50.

⁵⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [2003] art 16 <<http://www.maputoprotocol.com/maputo-protocol.pdf>> accessed 30 November 2014.

⁵¹ Kenya Human Rights Commission (n10) 4.

⁵² Art 43.

⁵³ Juma (n25) 477.

⁵⁴ Art 22.

⁵⁵ Art 21.

⁵⁶ Geoff Budlender, *Sandy Liebenberg, Gootboom Community in Centre on Housing Rights and Evictions, Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Primavera Quint, Amsterdam 2003) 95-105 <<http://globalinitiative-escr.org/wp-content/uploads/2012/06/Litigating-ESCR-Report.pdf>> accessed 30 November 2014.

instance building public toilets for the residents.⁵⁷ On the other hand, the state must for instance, abstain from taking action whose effect is to violate the rights such as carrying out unregulated evictions.

The Constitution also underscores the need to prioritize the rights of vulnerable groups in allocating resources for implementing socio-economic rights including housing.⁵⁸ Besides, it provides for ease of access to justice for anyone whose rights are violated.⁵⁹ Thus, anyone can sue to protect the right to housing for residents of informal settlements.

Furthermore, no court fees are required to commence these proceedings.⁶⁰ These provisions resolve two significant drawbacks in protecting human rights- the questions of locus standi and prohibitive court fees. Thus, vulnerable groups can now seek to protect their right to access decent and affordable housing through courts at minimum cost.

Significantly, the Constitution incorporates international law in the national legal framework once ratified without the need for its domestication.⁶¹ Thus, the elaborate procedures for protecting the right to housing for vulnerable groups such as those set out in commentaries to the ICESCR now apply directly within the country's domestic context. This is significant in protecting the right to housing for residents of slums as they can now rely on the provisions of international law to resist violation of the right. Thus, the Constitution offers prospects for protecting housing rights in slums and other informal settlements in Kenya.

3.7.2. Other Legislations

The Rent Restrictions Act has application both before and after 2010.⁶² The Act protects housing affordability, habitability and accessibility particularly for low income earners by regulating rent reviews and imposing obligations for house repairs for low income houses whose rental income does not exceed Ksh. 2,500.⁶³ Landlords whose premises fall within this range cannot increase rent without the approval of the

⁵⁷ Vincent Achuka, 'Nubians Fear losing Land over Slum Upgrade' *The Sunday Nation* (Nairobi 30 November 2014) 31.

⁵⁸ Art 20 (4) (d).

⁵⁹ *ibid* art 22.

⁶⁰ *ibid* art 22 (3) (c).

⁶¹ *ibid* art 2 (5) and (6).

⁶² Cap 296 Laws of Kenya.

⁶³ *ibid* s 5 (1) (a) (h).

Rent Tribunal established under the Act. Similarly, they are required to execute repairs to the premises failing which the tenants can undertake the repairs and recover the cost from the rent payable. This is significant in ensuring affordability and habitability of housing particularly for low income earners most of whom stay in informal settlements and slums.

It has however been observed that the protection offered to the right to housing by the Act is increasingly losing significance even for those in informal settlements as most rents are currently above the ceiling set by it.⁶⁴ In effect, the Act needs to be reviewed to expand its jurisdiction to cover houses that attract higher rent if it has to remain relevant in protection of the right to access affordable housing. Furthermore, most rent agreements in the informal sector are to a large extent informal and unwritten.⁶⁵ Thus, enforcement of the regulations set out in the Act in the sector has, in large part, proved difficult.⁶⁶ In effect, residents of slums and informal settlements have not been able to effectively secure their right to affordable and decent housing basing on this law.

The Housing Act⁶⁷ though dealing with housing matters does not recognize the right to housing.⁶⁸ For instance, despite the truism that access to housing for low income households in Kenya is limited by the prohibitively high cost of housing, the Act neither provides for social housing for the poor nor house construction subsidies for the low income citizens who mostly reside in informal settlements. In recognition of these limitations, there were proposals to amend the Act to provide mechanisms for investing in low cost housing and development of social housing.⁶⁹ Unfortunately, the proposals are yet to gain legal status. Thus, it does not offer sufficient protection to the right in Kenya.

⁶⁴ Charles Khamala, 'Exit the Rentier State: Legislation to Provide Affordable and Secure Tenure in Kenya' (2011) 1, 8-9 <<http://www.nai.uu.se/ecas-4/panels/81-100/panel-85/Khamala-Full-paper.pdf>> accessed 4 December 2014.

⁶⁵ Isaac Karanja Mwangi, 'The Nature of Rental Housing in Kenya' (1997) 141, 148-149 <<http://eau.sagepub.com/content/9/2/141.full.pdf>> accessed 3 December 2014.

⁶⁶ *ibid.*

⁶⁷ Housing Act Cap 117 Laws of Kenya.

⁶⁸ Nicholas Wasonga Orago, 'Poverty, Inequality and Socio-Economic Rights: A Theoretical Framework for the Realization of Socio-Economic Rights in the 2010 Kenyan Constitution (Doctor of Law Thesis, University of Western Cape 2013) 1, 369 <http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/2174/Orago_LLD_2013.pdf?sequence=1> accessed 3 December 2014.

⁶⁹ The Housing Bill 2009 <[http://www.kecosce.org/downloads/SIPLIFIED_HOUSING_BILL\[1\].pdf](http://www.kecosce.org/downloads/SIPLIFIED_HOUSING_BILL[1].pdf)> accessed 3 December 2014.

The Act provides for mechanisms of accessing loans for house construction which could significantly ameliorate the housing needs for those who live in informal settlements. However, in Kenya most mortgage facilities (including those under the Act) are securitized against formal titles to land.⁷⁰ This in effect excludes those in slums and informal settlements from accessing the facilities contemplated under the Act as most of them have no titles for the parcels on which they have erected homes.⁷¹ The result is that these groups are further deprived of the right of access to decent and affordable housing because they cannot access resources for home improvement.

The Children Act⁷² merely recognizes the right to adequate shelter for children. Beyond this, it does not provide a comprehensive mechanism for implementing the right. However, one can rely on the elaborate provisions of international law on housing to implement the right under the Act in view of the fact that most of these instruments have been ratified by Kenya and apply to the country as if they were part of its national laws.

The Public Health Act⁷³ the Physical Planning Act⁷⁴ and the Building Code also impact on the right to housing.⁷⁵ Together, they address matters that are central to the right such as the safety, quality and environmental health of housing.⁷⁶ However, these laws are poorly enforced.⁷⁷ As a consequence, poor housing in most informal settlements and slums continues to be experienced.

Despite the strides made in protecting the right to housing in Kenya through its entrenchment into the Constitution, there has been a general failure by the state to breathe life into the right by failing to enact and amend the various national laws to actualize the constitutional text on the right.⁷⁸ This is particularly so for slums and informal settlements where there is no law to guide the upgrading of these

⁷⁰ UN-HABITAT, 'Housing for all: The Challenges of Affordability, Accessibility and Sustainability; The Experiences and Instruments from the Developing and Developed Worlds' (2008) 1, 2-3.

⁷¹ *ibid.*

⁷² Act No 8 of 2010 s 21.

⁷³ Cap 242 Laws of Kenya.

⁷⁴ Cap 286 Laws of Kenya.

⁷⁵ Nora Nthule Matindi, 'Affordable Housing for Low and Middle Income Earners in Nairobi-Kenya' 1, 7<http://www.lth.se/fileadmin/hdm/alumni.papers/SDD_2008_242b/Nora_Matindi_Kenya.pdf> accessed 3 December 2014.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ Wafula Nabutola, 'Legalization Framework for Informal Development and the Built Environment in Kenya' (2013) 1, 20<http://www.fig.net/pub/fig2013/papers/ts03d/TS03D_nabutola.pdf> accessed 3 December 2014.

settlements.⁷⁹ The government has itself noted that the absence of such law inhibits realization of the right to housing in these settlements and has suggested that there is need to enact a Slum Upgrading Act.⁸⁰

3.8. NATIONAL POLICY FRAMEWORK

Two policy instruments are significant here- the Vision 2030 framework and the National Housing Policy of 2004. The Vision 2030 provides a policy framework for facilitating provision of, inter alia, decent and affordable housing for all Kenyans including those in slums and other informal settlements by 2030.⁸¹ The policy proposes to attain this by increasing housing stock from the current supply approximated at 35,000 units a year to over 200,000 units every year.⁸² It focuses on improving living conditions in slums by enhancing provision of affordable and adequate housing and as well facilitating equitable access to housing in Kenya.⁸³ Thus, the policy offers prospects for realizing the right to housing in Kenya.

However, it has been pointed out that Kenya has yet to develop a National Spatial Plan.⁸⁴ This plan facilitates the even distribution of development (including for housing) across the nation. In essence, it limits congestion and slum proliferation through a clear national development plan. It has been observed that implementation of the housing program contemplated under the policy is constrained by the absence of a National Spatial Plan.⁸⁵ The implications of this finding are that the mere existence of the policy has not impacted positively on the realization of adequate housing for Kenyans including those living in slums and other informal settlements.

While Kenya has a general housing policy that provides a broad overview of most housing issues including slum upgrading, it has been observed that the policy lacks a comprehensive guide on upgrading of slums and other formal settlements.⁸⁶ As a result, implementation of the right to housing in these areas faces severe policy

⁷⁹ Government of the Republic of Kenya, 'Background Document: The National Slum Upgrading and Prevention Policy' (2013) 1, 7.

⁸⁰ *ibid* 13.

⁸¹ Government of the Republic of Kenya, 'Kenya Vision 2030' (2007) 182-194 <<https://www.opendata.go.ke/download/jih3-amby/application/pdf>> accessed 3 December 2014.

⁸² *ibid* 192.

⁸³ *ibid* 193.

⁸⁴ Mary Kimani and Titus Musungu, 'Reforming and Restructuring the Planning and Building Laws and Regulations in Kenya for Sustainable Development' (2010) 1, 3 <http://www.isocarp.net/data/case_studies/1813.pdf> accessed 3 December 2014.

⁸⁵ *ibid*.

⁸⁶ Kamukam (n18) 1.

limitations.⁸⁷ Reportedly, the government has been working on a draft policy to guide the upgrading programs but the same is yet to get parliamentary approval.⁸⁸ This has impacted negatively on the realization of the right for residents of slums and other informal settlements. An example here is the ongoing slum upgrade in Kibera, Nairobi.⁸⁹ The project faces the threat of shutdown because of resistance to it by sections of the intended beneficiaries.⁹⁰ They have argued that the project was commenced without consultations with the community.⁹¹ As a result, they fear its implementation will lead to loss of their land and they want it suspended altogether. This development demonstrates that there is no clear policy on how to infuse public participation in slum upgrading in Kenya.

Furthermore, the housing policy does not provide for a housing subsidy system.⁹² Thus, it virtually locks out the poor from a mechanism for accessing affordable housing.⁹³ These deficiencies have in effect derailed prospects of provision of affordable and decent housing for those in informal settlements.

3.9. THE INSTITUTIONAL FRAMEWORK

3.9.1. Central and County Governments

Under the Constitution, the role of the national government in provision of housing has been limited to providing policy.⁹⁴ Housing development has since been devolved to the county governments.⁹⁵

In its policy pronouncement on Vision 2030, the government acknowledges the housing crisis in informal settlements and slums in Kenya.⁹⁶ According to it, the proliferation of these settlements is as a result of the failure to implement planning requirements.⁹⁷ As a result, residents of these settlements contend with poor housing,

⁸⁷ *ibid.*

⁸⁸ Economic and Social Rights Centre (Hakijamii), *Assessment of the Realization of the Right to Housing in Kenya 2011-2012* (American Jewish World Foundation, Misereor, Kios and Civil Society Urban Development Program 2012) 1, 13.

⁸⁹ Achuka (n57) 31.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² J G Mutero, 'Access to Housing Finance in Africa: Exploring the Issues -Overview of the Housing Finance Sector in Kenya' (2007) 1, 11.

⁹³ *ibid.*

⁹⁴ Constitution of Kenya 2010 Fourth Schedule pt 1 art 20.

⁹⁵ *ibid* Fourth Schedule Pt 2 art 8.

⁹⁶ Vision 2030 (n81) 1184-186.

⁹⁷ *ibid.*

pollution and absence of sanitation services with approximately 35% of Kenyan households living in one roomed units.⁹⁸

Accordingly, the central government has in liaison with other organizations, embarked on a slum and informal settlement upgrading program in order to improve access to quality housing.⁹⁹ The program intends to roll out construction of public toilets and bathrooms, rehabilitate roads and undertake garbage collection in these settlements.¹⁰⁰

However, implementation of the right to housing by both the national and county governments still remains problematic. This is particularly so with regard to efforts to improve access to housing for the poor and vulnerable most of whom stay in slums and informal settlements.

It has been argued that the Ministry of Lands and Housing (MLH) which is charged with the housing portfolio lacks the institutional capacity to oversee effective implementation of housing provision and slum upgrading.¹⁰¹ Despite the pressing need for housing improvement for those in informal settlements and slums the MLH hardly exhausts its annual budgetary allocations on housing.¹⁰² This implies that the MLH has been unable to initiate sufficient programs that will enable it to fully utilize its budgetary allocations to cushion access to housing particularly for the poor.

Furthermore, despite MLH's inability to exhaust its annual budgetary allocations on housing there has been a gradual reduction in budgetary allocations to the sector thus compromising efforts to improve access to affordable housing particularly for poor Kenyans. For example, in its 2010/2011 budget the government allocated only 1% of its national budget to the MLH.¹⁰³ It has been argued that with such a small allocation, the MLH is unlikely to bridge the housing deficit especially for the majority poor who reside in informal settings.¹⁰⁴

⁹⁸ *ibid* 186.

⁹⁹ Nanjina Wamuswa, 'Mixed Reactions as Kibera Slum gets much needed Facelift' *The Standard Digital* (Nairobi 13 November 2014) <<http://www.standardmedia.co.ke/thecounties/article/2000141229/mixed-reaction-as-kibera-slum-gets-much-needed-facelift?pageNo=1>> accessed 30 November 2014.

¹⁰⁰ *ibid*.

¹⁰¹ Economic and Social Rights Centre, *Housing Sector Finance in Kenya* (American Jewish World Foundation, 2013) 1, 29.

¹⁰² *ibid*.

¹⁰³ Hakijamii (n88) 3-4.

¹⁰⁴ *ibid*.

The MLH has also faced accountability and transparency challenges in implementing its mandate on housing particularly in informal settlements.¹⁰⁵ For instance, its recent records on slum upgrading do not provide sufficient information on how funds set aside for the programs were spent thus compromising accountability measures in the process.¹⁰⁶ Furthermore, funds set aside for infrastructure development such as road construction in some slums have sometimes been diverted to other votes thus compromising the effective implementation of slum upgrading programs with adverse results for the right to housing.¹⁰⁷

Despite devolution of certain aspects on housing, the central government still plays more than a policy role in the housing sector sometimes eclipsing the county governments. For instance, despite clear constitutional provisions requiring the central government to handle policy aspects of housing only it still is involved in the actual execution of certain aspects of housing such as the ongoing slum upgrading of Kibera. Significantly, the law is yet to be amended to clarify the role of the National Housing Corporation (NHC), a central government agency, in provision of housing in the counties.¹⁰⁸ This has sometimes led to the two levels of government tussling over the housing mandate.¹⁰⁹ The result is that provision of housing appears to have been devolved only on paper thus affecting service delivery in the sector.

A major drawback to accessing affordable housing for the poor in informal settlements has been the failure by the government to accord these settlements formal recognition through the issuance of titles.¹¹⁰ Settlements such as Kibera have remained without titles since they evolved. This failure has affected realization of the right to housing in these settlements in two ways. First, the government has neglected to accord them essential services such as garbage collection.¹¹¹ Second, without titles, residents of these informal settlements cannot access loans against their properties for home improvement.

¹⁰⁵ Economic and Social Rights Centre (n101) 14.

¹⁰⁶ *ibid* 20.

¹⁰⁷ *ibid* 18.

¹⁰⁸ Hakijamii (n88) 16.

¹⁰⁹ Otiato Guguyu, 'New Ley a Threat to Housing, Says Kidero' *Daily Nation* (Nairobi, 1 July 2014) 27.

¹¹⁰ Emmanuel Mutisya and Masaru Yarime, 'Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements' (2011) *International Transaction Journal of Engineering, Management and Applied Sciences and Technologies* 197, 201.

¹¹¹ *ibid* 210.

3.9.2. National Housing Corporation

The NHC is a creature of the Housing Act.¹¹² It was established in 1967.¹¹³ The Corporation is the main institutional mechanism through which the government gets involved in provision of affordable housing in Kenya.¹¹⁴ It is tasked with the responsibility of conducting research on housing matters and operating housing finance through provision of loans for housing development.¹¹⁵

From its inception, NHC has played a significant role in providing affordable housing for Kenyans.¹¹⁶ It undertakes the task of providing affordable housing through tenant-purchase agreements and construction of houses for rental hire.¹¹⁷ As at 2005, it had developed an estimated 40,000 housing units.¹¹⁸

However, NHC continues to face resource constraints which limit its capacity to provide low cost housing.¹¹⁹ With limited resources at its disposal, the NHC cannot access sufficient serviced land to undertake development of low cost housing for the poor.¹²⁰ This limitation is exacerbated by the scarcity of serviced land in the country which has seen the price of the limited serviced land skyrocket.¹²¹ Thus, the few housing units NHC undertakes on such land are highly priced in order to accommodate the high price of land. The premises necessarily go outside the financial capacity of most low level and middle class citizens with the consequence that their enjoyment of the right remains a pipedream.

Furthermore, the housing loans NHC grants are securitized against the titles to the properties that are constructed.¹²² As most people living in slums and other informal settlements in Kenya as indeed elsewhere do not have titles to the lands they

¹¹² Cap 117 Laws of Kenya s 3.

¹¹³ Rockefeller Foundation, 'More than Shelter: Housing as an Instrument of Economic and Social Development' (2005)1, 11

<http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/kenya_background.pdf> accessed 30 November 2014.

¹¹⁴ *ibid* 2.

¹¹⁵ Housing Act (n67) ss 6,-7B.

¹¹⁶ Ositadinma Okonkwo, 'Housing Finance and Housing Delivery Systems in Kenya: Bottlenecks, Recent Developments and the way Forward' (1996)

<http://www.housingfinance.org/uploads/Publicationsmanager/9806_Ken.pdf> accessed 3 December 2014 1, 17-18.

¹¹⁷ *ibid*.

¹¹⁸ Rockefeller Foundation (n113) 11.

¹¹⁹ *ibid* 11-12.

¹²⁰ Tonny Makau Sila and T Olweny, 'Financial Determinants Affecting the Cost of Houses in Kenya: A Case Study of National Housing Corporation' (2014) 1, 13-14.

¹²¹ *ibid*.

¹²² Housing Act (n67) s 14.

reside on, they cannot benefit from financing by the corporation. Thus, the corporation's ability to effectively contribute to increased supply of affordable housing units in informal settlements is severely constrained.

Like the MLH, the NHC faces serious transparency and accountability challenges. Cases of corruption and misapplication of resources meant for improvement of access to affordable housing at the corporation have been reported.¹²³ This, in large part, compromises the ability of the institution to significantly contribute to realization of the right to housing in Kenya generally and in particular for vulnerable groups such as residents of slums and informal settlements.

3.9.3. The Kenya National Human Rights and Equality Commission

The commission is a creature of article 59 of the 2010 Constitution. Its main mandate is to promote and protect human rights. These include the right to housing. The Commission has since been restructured into the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ).¹²⁴

The three agencies have a crucial role to play in protecting access to housing particularly for residents of slums and other informal settlements. The KNCHR is for instance required to: promote a culture for respect of all rights including housing; promote public awareness of the rights; and ensure state compliance with its international obligations on the rights.¹²⁵ The NGEC on the other hand is required to promote non-discrimination in the enjoyment of the rights in the bill of rights particularly for vulnerable groups.¹²⁶ These include housing. The CAJ is required to inter alia, ensure that administrative actions do not infringe on human rights including housing.¹²⁷ Thus, the commissions have a clear role to play in protecting access to housing by vulnerable slum dwellers.

¹²³ Hakijamii (n88) 15-16.

¹²⁴ Kenya National Commission on Human Rights, *It's Hard to be Good: The Work, the Wins and Challenges of the Kenya National Commission on Human Rights* (Kenya National Commission on Human Rights, Nairobi, 2012) 1, 4<http://knchr.org/Portals/0/Reports/Its_Hard_to_be_Good.pdf> accessed 2 December 2014.

¹²⁵ Kenya National Commission on Human Rights Cap 5B Laws of Kenya s8.

¹²⁶ The National Gender and Equality Commission Cap 5C Laws of Kenya s8.

¹²⁷ Commission on Administrative Justice Act Cap102A Laws of Kenya s 8.

However, some of the commissions are poorly funded making it difficult for them to effectively discharge their respective mandates.¹²⁸ Besides, their roles have sometimes been thought to be duplicitous. This has led to the agencies tussling over their exact mandates.¹²⁹ This has the potential of limiting their ability to protect the rights of slum dwellers to access adequate housing.

3.10. CONCLUSION

This chapter set out to review the strengths and weaknesses of Kenya's statutory, policy and institutional framework on housing and the right to housing. As has been discussed the framework offers both challenges and prospect for protection of the right to housing generally and for slum dwellers and those in informal settlements.

While the international framework offers prospects for the right, the national framework has considerable limitations. If residents of informal settlements have to effectively enjoy this right, Kenya needs to make adjustments to its national framework on housing.

¹²⁸ Kenya National Commission on Human Rights, Annual Report 2012/2013 (2013) 1, 9 <<http://www.knchr.org/Portals/0/AnnualReporta/AnnualReport2012-2013.pdf>> accessed 2 December 2014.

¹²⁹ Wahome Thuku, 'Kenya's three Human Rights Agencies in Clash over Mandates' *the Standard Digital* (Nairobi 29 September 2014) <<http://www.standardmedia.co.ke/article/2000136461/human-rights-agencies-in-clash-over-mandates>> accessed 4 December 2014>.

CHAPTER 4

HOUSING AND THE RIGHT TO HOUSING IN TANZANIA AND SOUTH AFRICA: LEGISLATIVE, POLICY AND INSTITUTIONAL PERSPECTIVES, CHALLENGES AND PROSPECTS

4.1. INTRODUCTION

Both Tanzania and South Africa continue to grapple with various challenges in providing affordable and decent housing for their nationals. As is the case in Kenya, these challenges are more pronounced in informal settlements and slums.

In this chapter, we examine the legislative, policy and institutional mechanisms adopted by the two nations to address access to housing in protection of the right to housing and what lessons they present for Kenya. This is followed with a brief conclusion.

4.2. TANZANIA

4.2.1. A Historical Survey of Housing

Tanzania, like Kenya has an acute housing problem with a housing deficit in excess of three million houses particularly in urban settings.¹ The situation is particularly poor for low income households most of whom resort to slums and other informal settlements for housing.² It is estimated that close to 80% of all the urban population in Tanzania live in slums and unplanned settlements without access to adequate water, schools and hospitals.³ Like Kenya, the emergence of Tanzania's slums and informal settlements is often attributed to colonial policies which consigned Africans to underserviced and overcrowded settlements that had no essential services such as sewage lines.⁴

¹ Centre for Affordable Housing Finance in Africa, 'Housing Finance in Africa: A Review of Africa's Housing Finance Markets' (2012) 1, 137<<http://www.housingfinanceafrica.org/wp-content/uploads/2012/10/2012-HOUSING-YEARBOOK.pdf>> accessed 1 December 2014.

² Katherine Hughes and Elisabeth Wickeri, 'A Home in the City: Women's Struggle to Secure Adequate Housing in Urban Tanzania' (2011) 5 (34) (4) Fordham International Law Journal 792 <<http://ir.lawnet.fordham.edu/ilj>> accessed 1 December 2014.

³ *ibid.*

⁴ *ibid.*

At independence, the country adopted a socialist development platform under the Ujamaa philosophy.⁵ Under this policy, provision of most services including housing was considered a government duty.⁶ The result was that provision of housing by the private sector (except for owner-occupied homes) was largely non-existent.⁷ Consequently, the housing market was poorly developed and the effects are felt to date.

The housing finance sector is still poorly developed with few institutions undertaking mortgage finance.⁸ Thus, most houses in the formal sector are constructed incrementally from personal savings further exacerbating the housing crisis.⁹ As a result, there has been a surge in the development of slums and informal settlements in the country.¹⁰

From independence however, the government has endeavoured to house its citizens through various approaches as evidenced in the country's legal, policy and institutional framework on housing. The purpose of this section is to examine these approaches with a view to evaluating whether they offer any lessons for Kenya.

4.2.2. Statutory Framework on Housing

Tanzania's Constitution does not recognize the right to housing.¹¹ However, the country has ratified various international and regional instruments that recognize the right. These include the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.¹² Thus,

⁵ GI Touch, 'Housing Study- Tanzania' 1, 5

<<http://www.shelterafrique.org/wp/content/uploads/2012/12/Study-on-the-Housing-Sector-Tanzania-for-Shelter-Afrique.docx>> accessed 2 December 2014.

⁶ Wakuru Magigi and Majani BBK, 'Housing themselves in Informal Settlements: A Challenge to Community Growth Process, Land Vulnerability and Poverty Reduction in Tanzania' (2006) 1, 4-5 <https://www.fig.net/pub/accra/papers/ts03_05_magigi_majani.pdf> accessed 2 December 2014.

⁷ Touch (n5) 10.

⁸ Blasi A Seleki, 'Urban Housing Problems in Tanzania: Some Possible Policy Interventions' 1, 6 <<http://www.ith.se/fileadmin/hdm/alumni/papers/ad2001/ad2001-18.pdf>> accessed 2 December 2014.

⁹ *ibid.*

¹⁰ *ibid* 1.

¹¹ The Constitution of the United Republic of Tanzania Cap 2 Laws of Tanzania <<http://www.judiciary.go.tz/downloads.constitution.pdf>> accessed 2 December 2014.

¹² Joseph Matimbwi, 'Strengthening a Human Rights-Based Approach in the Tanzanian-German Programme to Support Health: Results of a Short Assessment' (2008) 1,3-4 <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/mission_report_strengthening_hr-based_approach_in_tanzanian_german_health_programme.pdf> accessed 2 December 2014.

notwithstanding the absence of the right in its Constitution, Tanzania does recognize it through these various international instruments.

Other than the international instruments, Tanzania has a number of legislations that deal with housing. These include the Land Act (LA)¹³ the Land Registration Act (LRA)¹⁴ and the Court (Land Disputes and Settlements) Act (LDSA).¹⁵ These Acts came into force in place of the Rent Restrictions Act (RRA) which was thought to have offered tenants more protection in access to housing.¹⁶ However, notwithstanding the benefits of the RRA, it was thought to have been too restrictive on landlords.¹⁷ For instance, no landlord could eject a tenant without first obtaining a court order.¹⁸ Similarly, no rent reviews could be allowed without approval under the Act.¹⁹

This, it was argued, discouraged private sector investment in housing thus impacting negatively on the sector.²⁰ With the enactment of the LA and the LRA, these restrictions were removed in order to boost investor confidence in the sector.²¹

On the other hand, the LDSA sets up Village Ward Councils and District Land and Housing Tribunals to adjudicate on matters relating to access to land and housing.²² This contributes to protection of housing rights in the country.

The other Act relevant to the right to housing is the Local Government Act.²³ It mandates local authorities to oversee planning in the building sector by issuing building approvals.²⁴ The intention here is to ensure high building standards are kept in an effort to guarantee provision of decent and safe housing. However, due to technical and resource constraints, the authorities have not been able to effectively

¹³ Act No 4 (1999) Cap 113 (Tanzania).

¹⁴ Cap 334 Laws of Tanzania.

¹⁵ The Court (Land Disputes Settlements) Act, 2002.

¹⁶ Hughes and Wickeri (n2) 834-835.

¹⁷ *ibid.*

¹⁸ Jenny Cadstedt, 'Tenants in Tanzania- Invisible Dwellers?' 1, 3-4

<http://www.iut.nu/Africa/Cadestedt_Tenants%20InTanzania_2006.pdf> accessed 2 December 2014.

¹⁹ *ibid.*

²⁰ Hughes and Wickeri (n2) 834-835.

²¹ *ibid.*

²² Cap 334 Laws of Tanzania pts III& v.

²³ Act No 8 of 1982.

²⁴ L Massoi and AS Norman, 'Dynamics of Land for Urban Housing in Tanzania' (2010) 2 (5) Journal of Public Administration and Policy Research 75, 76<<http://www.academicjournals.org/jpapr>> accessed 2 December 2014.

plan human settlements thus exacerbating the proliferation of slums and informal settlement particularly in urban Tanzania.²⁵

Despite the challenges in accessing housing in Tanzania, the country's statutory framework on housing has unique features that offer lessons to Kenya. For instance, under the LA an individual who has no title to land can apply for a certificate of occupancy.²⁶ This includes residential occupancy certificates.²⁷ These licenses which relate to un-serviced land are for periods of five years subject to renewal. Upon grant of the certificate, it is registered under the LRA.²⁸

The government has used this statutory device to issue temporary occupancy permits to those living in informal settlements and slums.²⁹ This has contributed to securing access to better housing in three ways. First, it has improved security of tenure for residents of slums and informal settlements thus allowing them the confidence to improve their dwellings.³⁰ Second, the licenses are accepted by some financial institutions as security for modest loans which can be applied to improve the living conditions in informal settlements.³¹ Third, the permits provide residents of informal settlements the much needed official recognition in law through a formalization process which has the potential of improving service delivery in these settlements.³²

One of the major challenges Kenya faces in implementing the right to housing in slums and informal settlements is the near absence of recognition of these human habitats. Slum dwellers suffer constant evictions owing to lack of security of tenure over the land on which their residences stand. Similarly, they are deprived of essential services such as collection of waste owing to this non recognition.

The Kenyan state can draw useful lessons from the Tanzanian legal framework on land and housing to offer slum dwellers recognition. For example, the

²⁵ *ibid* 81-83.

²⁶ Pts v & vi.

²⁷ *ibid* s 23.

²⁸ Cap s 334 Laws of Tanzania s 27.

²⁹ James Mutero, 'Access to Housing Finance in Africa: Exploring the Issues' (2010) 1, 14 <http://www.finmark.org.za/wp-content/uploads/pubs/A2hf_Tanzania.pdf> accessed 3 December 2014..

³⁰ *ibid*.

³¹ *ibid*.

³² Silas Shemdoe, 'Policy Initiatives for Informal Settlements Upgrading in Tanzania' (Regional Conference on Approaches to Informal Settlement Upgrading in East Africa, Nairobi 11 July 2012) 37-38 <<http://www.centreforurbaninnovations.com/downloads/file/fid/424>> accessed 3 December 2014.

law can be amended to allow for the issuance of temporary occupancy permits to them. This will improve their security of tenure which in turn will encourage them to invest in improving their housing conditions. Further, issuance of such permits has the potential of enhancing access to credit by slum dwellers as some finance institutions can create credit products that will be securitized against the permits. This in turn will allow residents of informal and slum dwellings access to affordable credit which can be applied to improve their living conditions.

4.2.3 Policy Interventions

Under the Ujamaa philosophy adopted at independence, Tanzania adopted a policy through which the government was to act as a provider and not facilitator of housing both in rural and urban settings.³³ This was to be realized mainly through institutions such as the National Housing Corporation in urban settings³⁴ and villagization programs in rural settings.³⁵ However, these initiatives largely failed to secure the overwhelming housing needs for the nation.³⁶

In 2000, the government adopted the National Human Settlements Development policy to replace the failed policy initiatives on housing since independence.³⁷ The policy underscores the significance of public-private partnerships in housing provision by encouraging the inclusion of nongovernmental organizations and community based organizations in finding solutions to the housing problem in Tanzania.³⁸ Further, it requires that upgrading programs for slums and other informal settlements be participatory.³⁹

In line with the policy, the government has initiated innovative slum upgrading programs. For example, through the Community Infrastructure Upgrading Program, a private-public initiative, the government has been upgrading roads and other infrastructure (including housing) in informal settlements in towns such as Dar as Salaam and Tanga.⁴⁰ The project requires individual households in the settlements

³³ Magigi and Majani (n6) 8.

³⁴ *ibid.*

³⁵ Philip Osafo-Kwaako, 'long-run Effects of Villagization in Tanzania' (2011) 1, 4
<http://www.econ.yale.edu/conference/neudc11/papers_336.pdf> accessed 2 December 2014.

³⁶ Magigi and Majani (n6) 4-5.

³⁷ Cadstedt (n18) 2-3.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Mutero (n29) 14.

to contribute some money annually which is supplemented by donations from World Bank and as well the government to finance these projects.⁴¹

Through other policy initiatives, the communities are also encouraged and allowed to participate in setting development priorities in slums and informal settlements and form co-operatives to acquire subsidized and serviced land for home development.⁴² Through informal community saving schemes, individuals are able to access low interest loans for home development and improvement.⁴³ The essence here is to attain a sustainable informal settlement upgrading process through community empowerment.⁴⁴ This approach is premised on the conviction that an empowered community plays a significant role in finding solutions to its problems including housing.⁴⁵ Through these approaches, slum upgrading is taking shape in various settlements in Tanzania.

These policy initiatives offer useful lessons for Kenya. The Tanzanian approach to slum upgrading underscores the significance of public participation in the process. As was noted in chapter three, the housing policy in Kenya does not appropriately incorporate the principle of public participation in provision of housing and slum upgrading programmes. Involving the public in designing and implementing slum upgrading programmes has the potential of ensuring the success of such programmes in Kenya as the beneficiaries will be allowed to own the process by contributing to it. Thus, Kenya can revise its housing policy to provide for mechanisms that allow the beneficiaries of slum upgrades to modestly contribute to the process in a manner that will enhance community ownership of these programmes.

4.2.4 Institutional Framework

Various institutions are involved in the housing sector in Tanzania. Indeed, some writers contend that because of their large number, the country's institutional

⁴¹ *ibid.*

⁴² Mwanakombo Mkanga, 'Centre for Community Initiative in Tanzania' (Regional Conference on Approaches to Informal Settlement Upgrading in East Africa Nairobi, 11 July 2012)' 22-24.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

housing framework is not only unclear but lacks coordination.⁴⁶ Nevertheless, the roles of some of the institutions will be reviewed here.

4.2.4.1. The National Housing Corporation

This is a creature of statute.⁴⁷ It is the main institutional agency through which the government participates in housing provision. It is tasked with the mandate of providing low-cost affordable housing for the public.⁴⁸

However, the corporation experiences resource constraints that limit its ability to satisfy the country's housing needs.⁴⁹ Helpfully, other agencies have often stepped in to complement its role in housing. For example, pension funds such as the National Social Security Fund and the Public Service Pension Fund have also been involved in housing construction for their members.⁵⁰ It has however been argued that the corporation only serves the middle class Tanzanians largely excluding the low class citizens in informal settlements and slums.⁵¹

4.2.4.2. National Government

From independence up to the early 1990s, the government was directly involved in housing as a provider.⁵² However, this approach has since changed with the state focusing on its policy mandate.⁵³

The role of the government in enhancing access to housing particularly for those in informal settlements has been through legislative and policy interventions. For example, it enacted the LA which provides for issuance of occupancy licenses to those in informal settlements thus enhancing security of tenure for them.⁵⁴ Further, it has adopted a policy of providing serviced land for housing development in order to

⁴⁶ Seleki (n8) 7.

⁴⁷ The National Housing Act, 1990 (Tanzania) as read with the National Housing Act Cap 478 of 1962 (Repealed).

⁴⁸ Cadstedt (n18) 3.

⁴⁹ The National Housing Corporation, 'Strategic Plan for 2010/11-2014/15 (Executive Summary) (2010)1, 4 <http://www.nhctz.com/images/NHC_STRATEGIC_Plan_Exec_Summary.pdf> accessed 2 December 2014.

⁵⁰ Mutero (n29) 13.

⁵¹ *ibid.*

⁵² *ibid* 9.

⁵³ *ibid.*

⁵⁴ Lusagga Kironde, 'Issuing of Residence Licenses to Landowners in Unplanned Settlements in Dar es Salaam Tanzania' (2006) 1, 46 <http://www.tanzania.go.tz/egov_uploads/documents/RESIDENTIAL_LICENCES_PROJECT_DAR_ES_SALAAM_REPORT_sw.pdf> accessed 2 December 2014.

curb the proliferation of slums and informal settlements.⁵⁵ It does this by identifying expansive parcels of land around cities, surveying them, installing basic infrastructure such as roads before letting them out to prospective home owners.⁵⁶ In this way, it plays a crucial role in improving the realization of the right to housing for all including those in slums. However, because of resource limitations, the government can only provide the very basic services under the scheme such as unpaved roads.⁵⁷

Notwithstanding the resource constraints that the above policy approaches have encountered in Tanzania, Kenya can still draw useful lessons from them. For example, it is apparent from the Tanzanian approach that provision of serviced land for housing development can significantly increase access to decent housing for all including the poor. This is because provision of such land ensures housing development is undertaken in areas where other essential services such as roads, waste collection and water provision can be accessed with ease. This can greatly ameliorate the poor housing conditions in slums and informal settlements in Kenya. Kenya can attain this goal by the government designing policies that will focus on provision of such land to those living in slums and other informal settlements.

4.2.4.3. Local Authorities

These authorities play an instrumental role in enhancing access to affordable housing in Tanzania. They are tasked with the role of providing low-cost housing for the public either on rental or sale basis.⁵⁸

Under the Local Government Act, local authorities oversee the process of planning housing within their jurisdictions.⁵⁹ However, some observers argue that due to technical and resource deficiencies, these institutions have not been able to cope with the housing demands by the public resulting in further proliferation of slums and other informal settlements.⁶⁰

⁵⁵ Mutero (n29) 14.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Caddstedt (18) 3.

⁵⁹ Norman (n24) 76.

⁶⁰ *ibid* 81-83.

4.3. SOUTH AFRICA

Like most developing nations, South Africa faces an acute housing deficit.⁶¹ Although approximately 61% of the country's urban population lives in formal settlements, informal settlements are fast increasing because of the government's inability to meet the enormous housing needs of its population.⁶² Most of the settlements lack basic indicators of adequate housing such as running water and sanitation services.⁶³

Proliferation of informal settlements, backyard shanties and slums in the country is partly blamed on its apartheid history which saw Africans crammed in unplanned and underserviced sections of the state.⁶⁴ Furthermore, the segregation policies entrenched social exclusion resulting in high levels of unemployment and poverty, factors which fuelled the growth of informal settlements.⁶⁵ This was exacerbated by the rapid population transfers from rural areas into towns following the collapse of apartheid.⁶⁶

In response to the housing problem, South Africa has taken various measures to improve access to affordable and decent housing. The measures include legislative, policy and institutional steps geared towards facilitating better enjoyment of the right to housing.

4.3.1. Legislative Interventions

South Africa began addressing the right to access decent and affordable housing by entrenching the right in the country's 1996 Constitution.⁶⁷ Like Kenya, the country's Constitution declares the right to adequate housing as belonging to everyone.⁶⁸ However, beyond recognizing the right, the Constitution provides further

⁶¹ Republic of South Africa, Department of Housing, 'A New Housing Policy and Strategy for South Africa' 1, 8
<http://www.dhs.gov.za/sites/default/files/legislation/Policies_Housing_White_Paper.pdf> accessed 2 December 2014.

⁶² *ibid.*

⁶³ *ibid.* 9.

⁶⁴ The Fuller Centre for Housing, 'Housing Delivery in South Africa' (2014) 1, 19-20.

⁶⁵ Alhassan Ziblim, 'The Dynamics of Informal Settlements Upgrading in South Africa: Legislative and policy Context, Problems, Tensions and Contradictions' (2013) 1, 7<<http://globalhousingindicator.org/sites/globalhousingindicators.org/files/The%20Dynamic%20of%20Informal%20Settlements%20Upgrading%20in%20South%20Africa.pdf>> accessed 2 December 2014.

⁶⁶ The Fuller Centre for Housing (n64) 19.

⁶⁷ Constitution of the Republic of South Africa Act No 108 of 1996.

⁶⁸ *ibid.* art 26.

protection for the right by outlawing evictions that are not sanctioned by a court order.⁶⁹

It is arguable that by addressing the problem of forced evictions which are common in informal settlements, this Constitution offers more protection to the right for residents of informal settlements than the Kenyan one does. However, Kenya has incorporated international law on housing in its domestic legal framework. As international law lays out an elaborate procedure for evictions, it becomes clear that the protection offered to the right to housing in respect of forced evictions under the Kenyan law is no less than that provided under the South African Constitution.

Significantly, the Constitution of South Africa makes specific reference to the need to offer special protection for the right to housing by requiring all state organs entrusted with the duty to protect socio-economic rights to file annual returns with the South African Human Rights Commission detailing the measures they have taken to protect the rights.⁷⁰ This requirement is lacking in the Kenyan law. Importantly, the requirement is meant to enhance accountability of the duty-bearers in the process of implementing these rights. This can significantly promote the effective realization of the right to housing for slum dwellers.

There are useful lessons that Kenya can borrow from the South African constitutional design on protection of socio-economic rights. To effectively promote and protect these rights, it is necessary for the process of their implementation to be closely and regularly monitored by independent constitutional bodies such as National Human Rights Institutions. To achieve this goal, the South African Constitution imposes an obligation on state agencies to report to the South African Human Rights Commission on the steps they have taken to implement the rights. Kenya can consider imposing similar constitutional obligations on state organs entrusted with protecting these rights. This can be achieved through a constitutional amendment to entrench such obligations on the state organs. In respect of housing in general and particularly for the vulnerable poor living in slums and informal settlements, such duty is likely to enhance transparency and accountability by state organs in their implementation of these citizens' right to access adequate and decent housing.

⁶⁹ *ibid.*

⁷⁰ *ibid* art 184 (3).

Besides the Constitution, South Africa has a plethora of other statutory provisions to protect the right. These include the Housing Act (as amended),⁷¹ the Rental Housing Act⁷² and the Social Housing Act.⁷³

The Housing Act is in tandem with the Constitution regarding provision of housing. In undertaking housing development, the Act emphasizes the need to prioritize the needs of the poor, facilitate public participation and provide for the widest forms of tenure as possible.⁷⁴ This is cardinal in protecting housing rights of residents of slums and other informal settlements as effective application of the Act will ensure their housing needs are prioritized. Notably, the Housing Act of Kenya does not entrench similar principles thus limiting protection of the right for the poor in Kenya. Kenya can borrow from this Act to amend its Housing Act to prioritize housing needs of the poor by for instance entrenching the need for provision of housing subsidies for them.

The Rental Act on the other hand requires the government to promote provision of affordable rental housing particularly for the disadvantaged members of society by encouraging investment in low cost units through provision of incentives.⁷⁵ It also establishes a tribunal to handle disputes between tenants and landlords.⁷⁶ This Act plays a crucial role in actualizing access to housing for the poor by requiring the government to provide mechanisms to address their specific housing needs in the rental house sector. Kenya lacks a similar statutory framework.

Kenya can draw lessons from this piece of legislation and enact laws to encourage investors in the housing sector to focus on provision of low cost housing. As was noted earlier, most investors in Kenya have focused on provision of housing for the high end market. A legal framework that provides such investors with incentive such as tax reliefs on investments in low cost housing is likely to see an

⁷¹ Act No 107 of 1997

<http://www.dhs.gov.za/sites/default/files/legislation/Housing_Act_107_of_1997.pdf> accessed 3 December 2014.

⁷² Act No 50 of 1999 <<http://www.westerncape.gov.za/Text/2005/10/a50-99.pdf>> accessed 3 December 2014.

⁷³ Act No 16 of 2008

<http://www.parliament.gov.za/live/commonrepository/Processed/20140410/109936_1.pdf> accessed 3 December 2014.

⁷⁴ Housing Act (n71) s 2.

⁷⁵ Rental Housing Act (n72) cpt 2.

⁷⁶ *ibid* cpt 4.

increase in investment in low cost houses which will go a long way in increasing access to affordable housing by those living in poor housing units in slums.

The Social Housing Act provides for social housing for low and medium income groups.⁷⁷ It underscores important values that lie at the heart of housing needs for residents of informal settlements and slums. For instance, it secures the rights of vulnerable groups to be assisted to access adequate housing, water and a clean environment without discrimination.⁷⁸ In contrast, Kenya's framework on housing does not explicitly contemplate provision of social housing for anyone least of all the poor.

Kenya can draw important lessons from this piece of legislation. In order to cushion access to essential services in poor housing areas such as slums, there is need to enact a Social Housing Act that will focus on improving the living conditions in these residences by for instance not only providing essential services such as water and waste collection but also ensuring that the services are substantially subsidized in order to be easily accessible by the poor.

4.3.2. Policy Framework

The main policy on housing is the 1994 White Paper on Housing.⁷⁹ It is the product of the National Housing Forum which was mandated to design a national racial-neutral housing policy.⁸⁰ The policy underscores the need to enhance access to housing for the public particularly the poor. Thus, it provides for housing schemes that allow for government subsidies.⁸¹ Unlike in Kenya, the current policy on housing in South Africa provides various types of housing subsidies. These include:-⁸²

1. Individual ownership subsidies intended to facilitate home acquisitions.
2. Co-operative subsidies for building co-operatives.
3. Social housing subsidies to spur investment in social housing
4. Rental housing subsidies to encourage the public to invest in affordable rental units.

⁷⁷ Social Housing Act (n73) s 2.

⁷⁸ *ibid.*

⁷⁹ Ziblim (n65) 23.

⁸⁰ Kate Tissington, 'Towards an SER Matrix: Monitoring the Progressive Realization of Socio-Economic Rights in South Africa' (1994) 1, 31-35.

⁸¹ *ibid.*

⁸² Government of the Republic of South Africa (n61) 28.

The subsidy initiative in the policy has played a significant role in housing delivery for the poorly housed thus enhancing access to housing. Pursuant to it, the government has been able to construct 1.5 million subsidized houses between 1994 and 2002.⁸³

Even though the Kenyan housing policy underscores the need to enhance resource mobilization for and public expenditure on housing development, it makes no mention of a subsidized housing development scheme. Kenya can consider revising its housing policy to provide for various housing subsidies on similar lines as the South African policy in order to enhance access to housing by all including the poor. Thus, the South African housing policy which is housed in the National Housing Code⁸⁴ provides useful lessons to Kenya regarding the possible policy reforms that are necessary to better secure the right to housing for all particularly the poor and vulnerable.

4.3.3. Institutional Framework

South Africa has a very large number of institutions dealing with provision of housing. The central government is concerned with housing but largely handles policy and legislative aspects on provision of housing and mainly at national level.⁸⁵ On the other hand, the provincial and municipal governments address more specific issues such as housing development.⁸⁶

There are a plethora of institutions through which both levels of government execute their respective mandates. These include the Housing Development Agency.⁸⁷ This institution is tasked with acquiring, managing and disposing of public and private land for purposes of human settlement.⁸⁸ Other agencies include the National Home Building Registration Council, the National Housing Corporation, the National Urban Construction Agency, the Rural Housing Loan Fund, Housing Development Agency and the Social Housing Regulatory Authority.⁸⁹

⁸³ David Gardner, *Getting South Africans under Shelter: An Overview of the South African Housing Sector* (Housing Finance Resource Programme, Johannesburg, South Africa 2003) 1, 7.

⁸⁴ *ibid* 38-39.

⁸⁵ Ziblim (n65) 27-28.

⁸⁶ *ibid*.

⁸⁷ Kate Tissington, 'A Resource Guide to Housing in South Africa 1994-2010' (2011) 1, 23

<http://www.urbanlandmark.org.za/downloads/SERI_Housing_Resource_Guide_Feb11.pdf> accessed 3 December 2014.

⁸⁸ *ibid*.

⁸⁹ Ziblim (n65) 28.

Initially, these multiple institutions had duplicitous mandates resulting in functional overlaps, resource wastage and inefficiencies.⁹⁰ Many of them have been found to lack sufficient resource capacity.⁹¹ This constrained efforts to effectively deliver services in the housing sector.⁹²

In an effort to address the institutional overlaps, the government enacted the Housing Act 1997 which defines the roles of the main institutions at national, provincial and municipal levels.⁹³ Currently, all the institutions have been compartmentalized into umbrella frameworks thus enhancing their service delivery.⁹⁴ These developments offer some lessons to Kenya on how it can review its housing institutional frameworks in order to foster a more integrated approach to delivery of housing and related services in the housing sector in order to improve access to housing for all including the marginalized groups residing in informal settlement and slums.

4.4. Conclusion

In this chapter we undertook a limited comparative study on housing and housing rights for those living in informal settlements in Tanzania and South Africa. This was done by reviewing some of the legal, policy and institutional frameworks on housing and how they promote effective realization of the right.

Although Tanzania does not recognize the right in its Constitution, its policy and legislative approaches to housing provide useful lessons for realizing access to affordable housing. The same can be said of South Africa's housing framework. Thus, the two jurisdictions provide useful lessons for Kenya.

⁹⁰ Government of the Republic of South Africa (n61) 27-28.

⁹¹ David Gardner, 'Getting South Africans under Shelter: An Overview of the South African Housing Sector' (2003) 24-25< <http://abahlali.org/files/gardner%202004%20sharpening%20the%20focus.pdf> accessed 3 December 2014>.

⁹² Government of the Republic of South Africa (n61) 20-28.

⁹³ Gardner (n91) 23-25.

⁹⁴ *ibid.*

CHAPTER 5

TOWARDS BETTER HOUSING FOR RESIDENTS OF SLUMS AND OTHER INFORMAL SETTLEMENTS IN KENYA: PROPOSALS FOR LEGISLATIVE, POLICY AND INSTITUTIONAL REFORMS

5.1. INTRODUCTION

In this final chapter, we offer a conclusion and recommendations. The recommendations are discussed in three broad areas-legislative, policy and institutional reforms.

5.2. CONCLUSION

Kenya entrenched the right to housing in its Constitution in the year 2010. Notwithstanding this, enjoyment of the right remains a pipedream for many Kenyans particularly the poor living in slums and other informal settlements across the country.

The task in this research was to undertake an evaluation of the country's statutory, policy and institutional framework on housing and the right to housing with a view to determining the challenges and prospects it presents in protecting the right with a specific focus on slums and other informal settlements.

Thus, the research proceeded in five chapters. Chapter one introduced the problem of research. Chapter two discussed the theoretical aspects of the right to housing before reviewing the housing situation in slum settlements in Kenya from independence until the year 2010. Chapter three considered the post 2010 policy, statutory and institutional framework on the right with a specific focus on access to housing by residents of slums and informal settlements in Kenya. In order to enable a comparative approach to the right, chapter five evaluated the institutional, policy and statutory framework on housing in Tanzania and South Africa. In this final chapter, we offer some recommendations.

5.3. RECOMMENDATIONS

5.3.1. A POLICY SHIFT

It was noted in the research that although Kenya has a broad policy on housing, there remains policy lacunas on various issues on housing that compromise the effective protection of the right to housing particularly for the poor. For instance, while the country's housing sector is almost entirely controlled by the private sector,

there are no policy interventions to cushion access to housing by the poor most of who reside in slums and other informal settlements.

Therefore, it is proposed that Kenya reviews its housing policy to provide for housing subsidies along the lines of the South African Housing Policy in order to enhance the opportunity of the poor to access affordable housing. Further, Kenya can adopt policy interventions that encourage effective public-private-partnerships in slum upgrading programs along the lines of the housing policy in Tanzania in which the residents contribute minimally to the project cost. This is likely to enhance public ownership of the projects and as well the realization of the right to housing in the informal housing sector.

Further, the policy should be reviewed to emphasize the need for the government to provide serviced land at subsidized rates to the public generally and to institutions such as the National Housing Corporation for home construction. Provision of such land will lower the cost of housing. Besides, it will ensure that those who get housed on the land access other essential services such as water and sanitation.

5.3.2. INSTITUTIONAL REFORMS

From the research, it was found that most of the institutions that are tasked with provision of affordable housing have been unable to effectively discharge this mandate due to various reasons including corruption, inefficiencies occasioned by functional overlaps and lack of a strong resource base. For example, it was found that one of the reasons for the failure of the National Housing Corporation to discharge its mandate in the housing sector efficiently is the reported corruption at the institution which results in misapplication of funds meant for housing development. In sum, the poor mostly resident in slums and other informal settlements continue to experience exclusion from full realization of the right to housing as a result of these institutional challenges. Thus, it is necessary that some institutional reforms be undertaken to enhance the operational efficiency of the institutions in the housing sector. The following reforms are recommended:-

1. Provide for mechanisms through which the duty-bearers such as the NHC and the MLH can account for their actions in protecting the right to housing periodically. Although the Constitution entrenches the right to housing, it does not impose a duty on state organs entrusted with the role of protecting it to

report periodically to the National Human Rights Institutions under the Constitution on the process of realizing the right in similar manner as the law in South Africa. As a result, cases of institutional failures to effectively protect the right due to misdirection of funds and corruption remain. This impairs the mandate of these agencies to effectively implement the right particularly in slums and other informal settlements whose residents experience the most deprivation of housing. It is recommended that a clause be introduced in the law to require such accounting annually. This has the potential of compelling the relevant state organs to act more decisively and transparently in promoting the right in informal settlements.

2. Define and harmonize the roles of the various institutions in the housing sector to minimize institutional overlaps. Currently, the law does not define the role of institutions such as the National Housing Corporation on housing at the county government level. Although the Constitution contemplates the central government performing a policy function in the housing sector, the role of the National Housing Corporation, an agency of the central government does not capture this. It is necessary to amend the Housing Act to define these roles more clearly to avoid institutional overlaps which only derail the process of protecting the right to housing.

5.3.3. LEGAL REFORMS

Although Kenya has incorporated the right to housing in its Constitution, the research demonstrates that it is yet to enact various statutes to operationalize this right. For instance, there is currently no law to facilitate provision of social housing for vulnerable persons. Similarly, there is no law to guide slum upgrading processes. Thus, to enable the effective realization of the right generally but more particularly for residents of slums and informal settlements the following is suggested:-

1. Amend the Rent Restrictions Act to raise the floor of the premises under its jurisdiction. This will allow the tribunal to address matters touching on termination of tenancies, rent reviews and building repairs for a wider population. Such expanded intervention will enable the public access a wider spectrum of decent and affordable housing that is secure thus improving enjoyment of the right to housing by all including those in slums and other informal settlements.

2. Amend the Housing Act to recognize the right to housing and infuse a rights-based approach in provision of housing. The Act should encourage developers to give priority to the housing needs of vulnerable persons such as those who live in slums in their housing projects. This can be attained by providing incentives such as construction subsidies for low cost rental houses in order to attract the private sector to invest in low cost housing. This is likely to increase the supply of low cost houses and thus enhance access to better housing by those in informal settlements and slums.
3. Enact the various pending laws to fast track realization of the right to housing for the poor and marginalized. These include laws to secure provision of and access to social housing for the poor that live in slums and laws to enhance security of tenure by recognizing slums and informal settlements through provision of temporary occupation permits for the residents. Such laws will enhance access to housing by providing social housing to the indigent and allowing those with occupation permits to access credit against the permits which can be used in home improvement. This will lead to improved living conditions in informal settlements.
4. Amend the law (particularly the Housing Act) to recognize more forms of security for mortgages. Currently, the Act has a bias for landed security for loans advanced under it. As was noted in the research, most residents of slums and other informal settlements cannot provide such security as most of the lands they occupy are not titled. The Act can be amended to recognize other forms of security such as pension savings and temporary occupation permits. This will increase accessibility of the public to the housing loans under the Act and hence improve access to housing by those without titles to land as they can use these funds to construct low cost houses for themselves.

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