

**THE ROLE OF PUBLIC INTEREST LITIGATION IN THE PROMOTION AND
PROTECTION OF THE RIGHT TO ADEQUATE HOUSING: THE CASE OF
MUTHURWA ESTATE IN NAIROBI, KENYA**

BY

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DECLARATION

This Dissertation is my original work and has not been submitted for a degree award in any other university

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DEDICATION

This MA Dissertation is dedicated to my wife Faith Maithya, my children; Seth Mumo and Mary Keni.

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ABSTRACT

Kenya's journey from a period when the enforcement of social and economic rights was considered as a favor from the government has been a long one. It began by Wangari Maathai (the Nobel Laureate) testing this by filing a suit in the High Court in an attempt to protect public land on which construction of a private property was to be made. Although the suit failed for lacking *locus standi*, it formed a basis upon which public interest litigation (PIL) would thrive in future. Upon the promulgation of the Constitution of Kenya in 2010 one of its key pillars was the expansion of *locus standi* and the removal of previous challenges that inhibited access to justice for the poor and marginalized members of society.

The study presents PIL as one of mechanism through which social justice for the poor and marginalized in urban centers can be attained in protecting their right to housing. Using Muthurwa estate in Nairobi, Kenya as a case study, it reviews the challenges the people of this estate underwent in realizing their rights to adequate housing. Without financial resources, they relied on civil society groups to institute a suit that would restore their right to housing. Notwithstanding that the right to adequate housing is a constitutional right in the Bill of Rights (Article 43), it is evident that oftenly the letter of the law is different from the actual practice.

In restoring the right to adequate housing for the residents, the court had to use provisions of international law and best practices from the USA, South Africa and India where courts had successfully given orders in support of the promotion and protection of socio-economic rights. However the legal challenges still persist, Kenya has not established an eviction law to regulate the conduct of evictions thus impunity in eviction in the face of court orders is still common. Poverty is still a factor that makes it difficult for people to institute proceedings that would protect their socio-economic rights. The study recommends that for PIL to be more successful in alleviating socio-economic rights and the right to housing in particular, it would have to be complemented by other measures such as community mobilization in addition to advocacy groups.

LIST OF CASES

- Affordable Medicines Trust and Others v Minister of Health and Another*, [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC)
- Albert Ruturi, J. K. Wanywela & Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya* [2001] 1 EA. 253 Nairobi High Court Misc. Civil Application No.908 of 2001)
- Amoni Thomas Amfry and Another v. Minister for Lands and the Attorney General*
- Brown vs. Board of Education* (347 U.S. 483 [1954])
- Brown v. Plata* 131 S.Ct. 1910 (2011)
- El-Busaidy v. Commissioner of Lands and 2 Others* (2002), 1KLR
- Engineer Charo wa Yaa versus Jama Abdi Noor, Trade Plus International Ltd, Municipal Council of Mombasa, County of Mombasa, and Attorney General* (HC Misc. App. No. 8 of 2011, Mombasa)
- Gouriet vs Union of Post Office Workers and Others* ([1977] 3 All ER 70)
- The Government of the Republic of SA v. Irene Grootboom Yacoob (Grootboom case)*, 1996 [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR
- Halicow Pictures PVT Ltd v. Prem Chandra Mishra and Others* AIR 2008 913
- John Samoei Kirwa and 9 Ors. V. Kenya Railways Corporation.* (High Court of Kenya, Bongo) HCCC No. 65 of 2004.
- Maneka Ghandi v. Union of India*, 1978-AIR-0597-SC
- Minister of Health vs. Treatment Action Campaign (TAC)* (2002[5] SA 703)
- Musyoka v Attorney-General* (Constitutional Petition 305 of 2012)
- Olga Tellis v. Bombay Mun. Corporation* (Tellis, A.I.R. 1986 S.C. 180)
- People's Union for Democratic Rights and Others v. Union of India and Others*, (1982) 3 SCC 235, PIL
- Republic v. Kenya National Commission on Humans Rights Ex-parte Uhuru Muigai Kenyatta*, Republic of Kenya in the High Court of Kenya at Nairobi (Nairobi Law Courts) Miscellaneous Civil Appeal 86 of 2009
- Satrose Ayuma and others v. The Registered Trustees of the Kenya Railways Retirement Benefits Scheme* (HCCP 65 of 2010, Nairobi)
- SERAC and Another Vs Nigeria*, (2001) AHRLR 60 (ACHPR 2001)

S.P. Gupta vs. President of India (AIR 1982 SC 1491) (transfer case)

Soobramoney v. Minister of Health (Kwazulu-Natal), (CCT32/97)[1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696)

Susan Waithera and others v. The Town Clerk, Nairobi City Council and two Others (2011] eKLR. Republic of Kenya

Wangari Maathai v. Kenya Times Media Trust Ltd, republic of Kenya in the High Court of Kenya at Nairobi Civil Case no 5403 of 1989.

CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 Introduction

This study explores the role played by public interest litigation (PIL) in the promotion and protection of the right to adequate housing in Kenya among the marginalized groups in Kenya. The research uses the Muthurwa High Court decision as a backdrop to explore how the community can ensure that the right to adequate housing as envisaged in the Constitution of 2010 is given effect.

Developing countries fail to protect, promote and fulfill socio-economic rights which usually lead to friction between the state and the citizens. For instance the marginalized agitate using violence as a means of achieving socio-economic rights. The Arab spring partly occurred due to massive unemployment and failure by governments to implement socio-economic and political reforms (Paciello, 2011). In the context of Muthurwa PIL becomes necessary when a society experiences systemic failure in safeguarding the right to socio-economic entitlements and the right to adequate housing in particular (Luseka, 2012: 5). This could be as a result of the authorities failing to comply with court orders arising from PIL perhaps because it touches on political and policy issues that invoke resistance. It could be because implementation is complex and may take a long time (KPTJ, 2014: 9). Court orders may at times not be the appropriate remedy in dealing with issues of widespread poverty. Besides, whereas courts can deal with legal matters they are most unsuitable in dealing with other causes of injustice and inequality having a social, economic and historical dimension that courts are least qualified to deal with as they would not be the appropriate forums (KPTJ, 2014: 9).

It is necessary to address questions related to enforcement of housing rights so as to ensure social stability. Invoking innovative mechanisms to enforce legal remedies, therefore, become necessary. Some options could include political means and advocacy. It is in this regard that PIL emerges as one of the best means to achieving socio-economic rights (Luseka, 2012: 5).

1.1.1 Public Interest Litigation

The term PIL has two component parts ‘public interest’ and ‘litigation’ which must be understood to unravel the concept of PIL. What constitutes public interest consists of two words that trace their origin in Latin. ‘Public’ (*publicus* in Latin) means having to do with the affairs of all people as opposed to a private group (Madhav, 2013). ‘Interest’ (*interessee* in Latin) refers to the people in general regardless of membership of any particular group. The term is used in reference to a right, title claim or some share in property. Therefore to say that an activity is done in public interest is an affirmation that the general welfare and rights of the public that are to be recognized, protected and advanced have been addressed. Public good or public interest is that which is for a larger community as opposed to individual. It is not sectarian. This may be for a large group of people e.g. ethnic or the entire national populace not just a small group.

Public interest litigation is the name given to efforts to provide legal representation to interests that historically have been unrepresented or under-represented in legal process to advance social justice (Aron 1989, 3). Black’s Law Dictionary defines public interest litigation as “legal practice that advances social justice or other causes for the public good, such as environmental protection. Although public interest litigation primarily encompasses private not for profit work, the term is sometimes used to include the work of government agencies” (Diego, 1350).

The defining characteristic of PIL is that, through cases focusing on either individuals or groups, it seeks to have a broader impact on the pressing, sometimes polarizing, contemporary social issues (KPTJ, 2014). PIL has certain distinguishing features that make it suitable for litigating issues of social justice: It is a strategy for redress, it is social action litigation, its objectives transcend the litigating parties and it is for public causes only (KPTJ, 2014).

1.1.2 Litigation

Litigation is the process of referring a dispute to the legal process or a lawsuit for the purposes of acquiring a legal settlement. Having looked at the two parts of PIL, for its proper definition we go back to jurisdictions that have practiced PIL for a longer time. In *Halicow Pictures PVT Ltd v. Prem Chandra Mishra and Others* AIR 2008 913, para. 19, the Indian Supreme Court defined PIL as “...The name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such groups efforts have been undertaken in the

recognition that ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such interests and groups include the proper environmentalists, consumers, racial and ethnic minorities and other.” Similarly in *People’s Union for Democratic Rights and Others v. Union of India and Others*, (1982) 3 SCC 235, PIL was viewed as “...cooperative or collaborative effort by the petitioner, the state of public utility and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges up on the poor, down trodden and vulnerable sections of society.”

These definitions shed light on PIL as referring to litigation that focuses on issues of importance to the public at large or a major section of the public and whose outcome is likely to not only concern the individual litigant but on a large section of the society (Maleche, 2014: 4). PIL refers to a shared community interest that has pecuniary or legal rights implications. It must however involve litigation for purposes of enforcement of the interests or interests whose final mandate is the protection of the poor, unrepresented and vulnerable members of the community. The action of PIL must go beyond court action. In the context of Muthurwa PIL became necessary when the society experienced systemic failure in the safeguarding of the entitlement to housing despite the state being duty-bound to protect the citizen’s socio-economic rights. The following is a brief background on the origins of PIL.

1.1.3 The Origin of PIL

The idea and origin of PIL is not clear, however in the US it is associated with the pioneering work of Louis Brandies, an American lawyer who later became a Supreme Court judge in the 1900s (KPTJ, 2014: 7). He urged lawyers to get involved in public interest matters to help in shaping society. Elements of PIL were also observed in England in the 1700s as a form of exposing the evil involved in slavery and slave trade (Harlow and Rawlings, 1992). Judges in England at the time urged lawyers to act for the poor (KPTJ, 2014: 7). What is clear is that PIL experienced phenomenal growth in the 1960s and 70s in the USA where lawyers got seriously involved in the civil rights movement, anti-war movement and other political and social issues like the abortion debate.

PIL is also part of the search for social justice and has at times taken on a violent streak. Some of the violent forms include the French revolution in 1789 and the American war of independence

in 1775. Efforts to abolish slave trade, racism and apartheid in the US and South Africa respectively, the collapse of the Soviet Union and the Arab spring formed part of that struggle (Paciello, 2011). Due to the tendency for movements to become violent, courts have consistently discouraged PIL. Courts have also argued that parties in a PIL suit were not directly involved and lack a sufficient enough interest. The past 3 decades has witnessed many jurisdictions such as India, South Africa and the USA relaxing their rules on standing by eliminating court fees, some reward PIL litigants as recognition that the action has positive impact on society. The more liberal ones have allowed actions through an informal way like writing of application letters by petitioners which opens a window for persons affected and civil society groups acting on behalf of others to begin the litigation process.

1.1.4 PIL in the USA

The land mark ruling in the case of *Brown v. Board of Education* (347 U.S. 483 [1954]), greatly influenced the practice of PIL in the USA. It was consolidated case of 5 anti-segregation suits that sought to focus society on the injustice of social segregation that was deeply embedded in the USA. The success of the case in the promotion of equality and non discrimination encouraged other American civil society groups to advance issues on gender equality, reproductive health, disability rights and immigration rights. PIL in the USA took on the form of class action suits where a petitioner would represent a group or class of persons affected by a violation. Class action suits are effective in enforcement of rights against private corporations and the government. In *Brown v. Plata* 131 S. Ct. 1910 (2011), the US Supreme Court upheld an injunction for the reduction of the population of prisoners in the California. Access to justice in class action suits has been made easier through: abolition of payment of costs with litigants being allowed to finance suits and recover costs from the suit when successful.

1.1.5 PIL in India

PIL has grown in India partly due to relaxed rules on standing and the growth of a well informed civil population (Narayana, 2007). Indian Courts have on the other hand initiated cases where there is failure by the state to act. Indian courts entertain cases that are initiated by way of a letter. In *People's Union for Democratic Rights v Union of India* (AIR 1982 1473), the rules of

standing were redefined to allow a 3rd party to bring a petition in a matter he/she was not directly affected. In *S.P. Gupta vs. President of India* (AIR 1982 SC 1491) (transfer case), ruled that 3rd parties could bring suits on behalf of persons who are unable to institute proceedings for he violation on their own.

1.1.6 PIL in South Africa

The gains made in the post-apartheid constitution are attributed to PIL mainly encouraged by progressive provisions in the Constitution (Dugard, 2006). This has been made possible by a number of factors, the ability by organizations and individuals to bring proceedings on behalf of others, the right to information and constitutional provisions on socio-economic rights. Some NGOs like Treatment Action Campaign and Legal Resources Centre have effectively used PIL in the advancement of human rights. For example in *Minister of Health vs. Treatment Action Campaign* (TAC) (2002[5] SA 703), the government was made to roll out the distribution of generic anti-retroviral drugs to prevent mother to child infection of HIV/AIDs. Other successes have been associated with abolition of the death penalty, protection of squatter from eviction before alternative shelter is found. The constitutional courts have also advanced rules for reduced costs in PIL for example in *Affordable Medicines Trust and Others v Minister of Health and Another*, [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC), stood for the proposition that any party in a PIL suit that loses to the government need not pay costs.

1.1.7 PIL in Kenya

The history of PIL in Kenya is a very short one. Before the promulgation of the Constitution of Kenya 2010, the state was by definition the embodiment of the public interest as a result law and politics were tightly controlled. The articulation of an alternative view or an NGO perspective of PIL pursued through legal means was nonexistent. Even if this was possible the courts lacked the independence to espouse or vindicate such a vision. PIL was hard if not impossible to sustain because of the rules on standing. For example in *Wangari Maathai v. Kenya Times Media Trust Ltd*. In this case Maathai sued the government of Kenya alleging breach of local government laws and brought a representative suit on behalf of the public. The court ruled that she did not

have the legal standing (*locus standi*) to bring a representative suit on behalf of the public. Under the then Constitution only the Attorney General could institute suits on behalf of the public. Similarly in *El-Busaidy v. Commissioner of Lands and 2 Others* (2002), 1KLR, the court maintained that in matters of PIL only the Attorney General can litigate up on them. The process of transforming the law, judicial culture and systems as hallmarks of dictatorial governance was partly fuelled by PIL.

The colonial government established a political and constitutional order to solely safeguard their interests through guaranteeing of fundamental rights and freedoms in the protection of the right to private property (Section 75). No attempt was made to address social injustices that were rampant during the colonial period. The focus of pre and post-independence administrations was legitimization of status quo by ignoring socio-economic rights. This remained the case even after the ratification of international human rights instruments that required the government to respect, protect and fulfill socio-economic and cultural rights (ICESCR, ICCPR, CEDAW, CRC and UDHR). Little effort was made to domesticate these instruments into domestic legislation.

Kenya's constitutional order since independence was based on the protection and entrenchment of fundamental rights and freedoms (Chapter 5, Constitution of Kenya, 1988 (repealed)). These rights were mainly civil and political rights and silent on socio-economic and cultural rights (Opiata, 2005: 155). This is partly because the Constitution making process at independence lacked popular participation of citizens as it was largely an arrangement between departing the colonial authority and leaders of the freedom movement. Courts before 2010 confined themselves to narrow interpretation of the law disregarding harm to evictees who deserved protection of due process. When it concerned private land, courts took even a much narrower and inflexible approach that the sanctity of title is absolute and squatters lacked *locus standi* to challenge registered land owners (Opiata, 2005: 155).

The legal foundation of PIL in Kenya is the Constitution which has brought a number of changes that have made it possible to use PIL as a way of vindicating the right to housing. More specifically in the area of *locus standi* and new rights that broadened the scope of application of PIL. First is the appointment of an independent judiciary (Article 160). Second, Article 258 of the Constitution allows any person to institute a suit relating to the contravention of the Constitution. Thirdly, the Bill of Rights has been broadened to give more focus to socio-

economic and cultural rights in Article 43 (1) (b) that envisages enforcement of socio-economic rights. Fourth, Article 2 (5) and (6) allows for the application of international treaties ratified by Kenya with specific reference to ICESCR. Fifth, Article 20 (1) which provides for interpretation of the Bill of Rights that favours enforcement of the Bill of Rights including right to housing. This is further concretized by Article 22, which makes it easy to file PIL by removing technicalities and fees. Further, Article 23 broadens the reliefs to be granted pursuant to violation of these rights to include compensation. It is within this background that the *Muthurwa* case was successfully articulated.

1.1.8 Social and Economic Rights

Social and economic rights are entitlements to material conditions for human welfare (Brand, 1998). They include the right to food, adequate housing, and health care, reasonable standards of sanitation, clean and safe drinking water, education and social security.

1.1.9 Right to Housing

One of the main areas where public interest litigation has been applied is on the right to housing. The right to adequate housing is one that has been heavily elaborated in international law discourse. The core content of the right to housing is according to the Special Rapporteur on adequate housing, “the human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity”. This definition is in line with that provided by the United Nations Committee on Economic, Social and Cultural Rights (the body in charge of monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights in the States which are party to it). According to the Committee, while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy (ESCR General Comment No. 4).

The right to housing is a basic need and in the hierarchy of needs is placed number 3 after food and clothing (Republic of Kenya, 2011: 2). For that reason, Article 25 of the Universal Declaration of Human Rights (UDHR) has recognized it as a key component of the right to adequate standard of living. Subsequent human right instruments ratified by Kenya have confirmed the centrality of the right to housing such as Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. The General Comment no 4 of 1991 on adequate housing by the UN Committee on Economic, Social and Cultural Rights provides an authoritative interpretation of the right to housing in legal terms under international law. Much more importantly, Article 43 (1) (b) of the Constitution of Kenya reiterates that the right to housing must be “accessible and adequate housing and reasonable standard of sanitation.”

Although the promulgation of the Constitution of Kenya in 2010 ushered in a regime of socio-economic rights, the right to housing still lacks an appropriate legislative framework to protect it (Opiata, 2005: 155). This has been made worse by a conservative judiciary that is inclined towards the protection of the right to private property. A number of non-governmental organizations (NGOs) viewed this as unacceptable and resorted to public interest litigation (PIL) as a way of filling the gap. This is necessary so as to overcome the obstacles in the legal framework by using administrative law principles to protect the right to housing. Kituo Cha Sheria has used judicial review in this endeavor. The argument by NGOs is that those threatening evictions act *ultra vires* and therefore without any legal consequences. Courts were however reluctant to issue stay orders before hearing merits of the cases of contemplated evictions. Such applications oftenly became ineffective. Courts generally agreed with complainants that squatters did not have any right to the land and therefore never deserved injunctive orders (Opiata, 2005: 155).

While that is the case, the right to housing which forms part of the larger right to human dignity, right to equality, social and economic rights, the basic provisions, which form the spirit of right to housing, are yet to be implemented in Kenya and remains elusive for a majority of Kenyans owing to a number of economic and legal factors (Rabar, 2012: 5). In the urban areas, housing has been privatized and therefore the majority of the urban poor dwellers cannot afford to pay mortgage. This is made worse by the lack of access to financing for affordable housing, financing is mainly accessible to Kenya’s upper middle-to-high income households which make housing remain a serious challenge to a majority of Kenyans (Rabar, 2012: 5). Therefore the

right to housing is one that is still prone to abuse due to the absence of a clear legal framework to regulate the exercise. Some of the reasons were the absence of an eviction legal framework.

Public interest litigation is invoked when the executive either fails to observe or enforce the laws (Dliwayo, 2013). The poor and marginalized are forcibly evicted from houses oftenly without compensation because they lack access to justice. In Muthurwa if the High Court through the medium of PIL had not issued an injunction to stop the Trustees from evicting the residents until the matter was finally determined, the story would be different. PIL is part of a wider strategy to empower affected communities. PIL also promotes an improved implementation of the law by pushing the boundaries of legal interpretation. PIL is not used alone but can complement other tools of empowerment and capacity building like legal literacy, legal clinics, research, advocacy campaigns and grassroots movements. However PIL has encountered a number of challenges that limit its effectiveness. They include: funding, reprisals especially from government agents through criminal prosecutions, lack of technical expertise among the lawyers on litigating socio-economic rights, reluctance by judges to deploy innovative remedies for fear of being labeled activists and the length of time in which court cases are determined in Kenya (Maleche, 2014).

1.2 Statement of the Problem

Kenya has taken steps to ratify most international and regional legal instruments that envisage the protection of the right to housing. Starting with Article 25 of the Universal Declaration of Human Rights (UDHR), that protects the right to housing and Article 11 (1) of the International Convention on Economic, Social and Cultural Rights (ICESCR). Pursuant to these provisions, the state made access to adequate and reasonable standard of housing and sanitation as a fundamental right in the Bill of Rights of Article 43 (1) (b) of the Constitution. One would think that the logic behind inclusion would be to promote, respect, protect and fulfill the thrust of the right to housing in line with its obligations under international and domestic law.

That notwithstanding, evictions continue to take place due to the absence of a legal and policy framework. The civil society has made efforts in the enforcement of the right to housing but has faced many challenges; PIL is not co-ordinated as it does not have legal regulation despite constitutional protection. Forceful eviction of slum dwellers either by the government or private developers in collaboration with the government is the clearest illustration of the violation of the

right to housing in Kenya. Eviction of the poor living in slums is done in order to accomplish certain objectives by the rich such as to grab the land (Amnesty International, 2007). Even when the evictions are pursuant to court orders that are illegally obtained, as in *John Samoei Kirwa and 9 Ors. V. Kenya Railways Corporation*. The High Court later intervened and granted a temporary injunction against eviction of residents in informal settlements on a railway line.

1.3 Broad Objective of the Research

The broad objective of the research is to explore the role of public interest litigation in the promotion and protection of the right to adequate housing in Kenya

1.3.1 Specific Objective

The specific objectives of the research are:

1. To assess the extent to which the use of PIL is employed to promote and protect socio-economic rights
2. To examine the scope of PIL as a tool to facilitate in the promotion and protection of the right to adequate housing
3. To investigate the challenges experienced in employing PIL as a tool in the promotion and protection of the right to housing
4. To examine the extent of the promotion and protection of the right to housing in Kenya

1.4 Research Questions

The research questions are:

1. How can PIL be used to promote the realization of the right to housing?
2. What are the challenges to be encountered in operationalization of PIL as a tool to realize public rights in Kenya?

1.5 Hypotheses

This study was premised on the hypotheses that:

1. The right to housing is hindered by lack of specialized legal and policy framework for the promotion and protection of the right to housing.
2. A structural PIL framework would lead to optimum engagement of the right to housing
3. Lack of clear structures of PIL as provided for in Article 22 (1) has a negative impact on the realisation of right to housing

1.6 Scope of the Study

This study is on the Muthurwa Estate residents who filed a case High Court No. 65 of 2010, Nairobi. This was the first case in Kenya after the 2010 Constitution to address the issue of the right to adequate housing. It was a representative suit where a few individuals with the assistance of civil society groups filed a land mark case that stopped the intended eviction of the residents. It will also show the challenges experienced by both the residents and civil society organizations in the process. Lastly best practices are used to show the experiences of other jurisdictions (India and South Africa) and how they addressed these challenges in enforcing social and economic rights. Also addressed are the lessons Kenya can learn in the implementation of constitutional provisions on social and economic rights (Article 43).

1.7 Limitations

One of the difficulties encountered during the research was in accessing information was that there was an air of hostility and suspicion between and among the respondents. It became clear during the research that two camps had sprung up, one was keen on pursuing the matter to its logical conclusion while the other group had apparently been compromised by the defendant corporation. The hostility between the two groups made it difficult to get all the information that was desired. Therefore to mitigate the negative effects the researcher had to hold separate focus groups

During the process of collecting data, the research team was conscious of the protection and security needs of some of the respondents who had been displaced and were fearful of making

their location known. In such situations interviews were conducted at safe locations far from the actual site. They were also briefed, prior to the study, on the possible challenges of keeping up with different expectations of the displaced and how to manage them. This proved useful in the field as researchers were able to explain the purpose of the study.

Another notable concern in the study was the prevailing fatigue among the respondents. Informants had participated in many interviews and therefore were reluctant to be interviewed again citing lack of tangible benefits arising from similar studies. Furthermore IDPs narrated about unfulfilled promises by the government and NGOs to find a lasting solution to their situation. However, an explanation by the researcher on the importance of this and other studies to inform future interventions for IDPs was reassuring.

1.8 Justification and Significance of the Study

The passage of the Constitution of Kenya was welcomed by the public with a lot of fan fare but little thought was given to how the implementation and enforcement of socio-economic rights were going to be undertaken. For residents of Muthurwa it turned out to be an opportunity that would eventually protect their right to adequate housing. This phenomenon especially the use of PIL has not been studied in Kenya. Therefore this project is a scholarly contribution first to the enforcement of the right to housing and secondly shows the gaps existing in the implementation of the Constitution. Ultimately it adds onto existing literature on the enforcement of socio-economic rights.

1.9 Theoretical and Conceptual Framework

1.9.1 Theoretical Framework

The study was guided by Roscoe Pound's theory of sociological jurisprudence. According to this school of thought, the law is deemed to be concerned with giving effect to social interests such as adequate housing rather than operating theoretically according to the texts (Cotterrell, 1989: 23). These social interests include security, health, trade, religion, the economy and others (Cotterrell, 1989: 23). Pound argued that law is a tool for social engineering and that it should be developed in relation to existing social needs.

Theoretically, public interest litigation rests on the assumption that many significant segments of society are not adequately represented in courts, parliament or administrative agencies. This is because they are either too poor or too diffuse to obtain legal representation in the marketplace” (Aron, 1989: 3). In the opinion of Roach, Public Interest Litigation (PIL) is a form of litigation that is intended to achieve benefits not only for litigants but also aim at reforming public institutions (Roach Report, 16). He argued that considering the huge expenses involved and limited capacity of those who engage in public interest litigation, the goal should be to get maximum benefit from litigation in terms of remedies sought. It also calls for a close working relationship with the community noting that his experience in public interest litigation for the aboriginal groups in Canada confirmed the importance of having in place a community or group that is properly informed on issues and litigation strategies.

The argument of sociological theory is that law is based on the needs of the society rather than on transcendent ideals such as those espoused by natural law and positivism theorists. They further propose that the origin of law should be seen as lying in sociological factors, human conduct and social conditions obtaining in the society such as religion, law culture, and education among others. Hence the law has a social background and each society must devise laws that best suit them with the objective of maintaining social control and order. Accepting that society is dynamic and hence what might be good for society today may not be good tomorrow, the law must adjust itself to the changing conditions of the society and therefore society has a duty to shape the law from time to time to reflect true changes or new conditions prevailing in the society at any one given time (Omony, 2004: 85-87). Consequently, the law would be a product of social forces in the society. To socialists law is validated by social criterion and that, that which is divorced from social realities and conditions is inadequate and incomplete and that what was important was the social consciousness of the people as a basis of law.

To the sociological school of thought, the validity of law will be charged on the basis and extent to which it assists in eliminating false consciousness hence the oppressed get to achieve their true consciousness. On the other hand, sociological jurisprudence also argues that law should serve a certain function in society and the main purpose of law is social control (Omony, 2004: 85-87). Social engineering as a doctrine was introduced by Roscoe Pound.

He propounded that the aim of social engineering is to build as efficient a structure of society as possible, which requires the satisfaction of the maximum wants with the minimum of friction and waste (Dias, 1976: 596). It involves maintaining equilibrium of competing social interests (Dias 1976, 596). These interests were defined as claims or wants or desires about which the law must do something if organized societies are to endure (Dias, 1976: 597). Roscoe observed that law is not based on absolute ideals but on the views and attitudes of a particular society.

1.9.2 Conceptual Framework

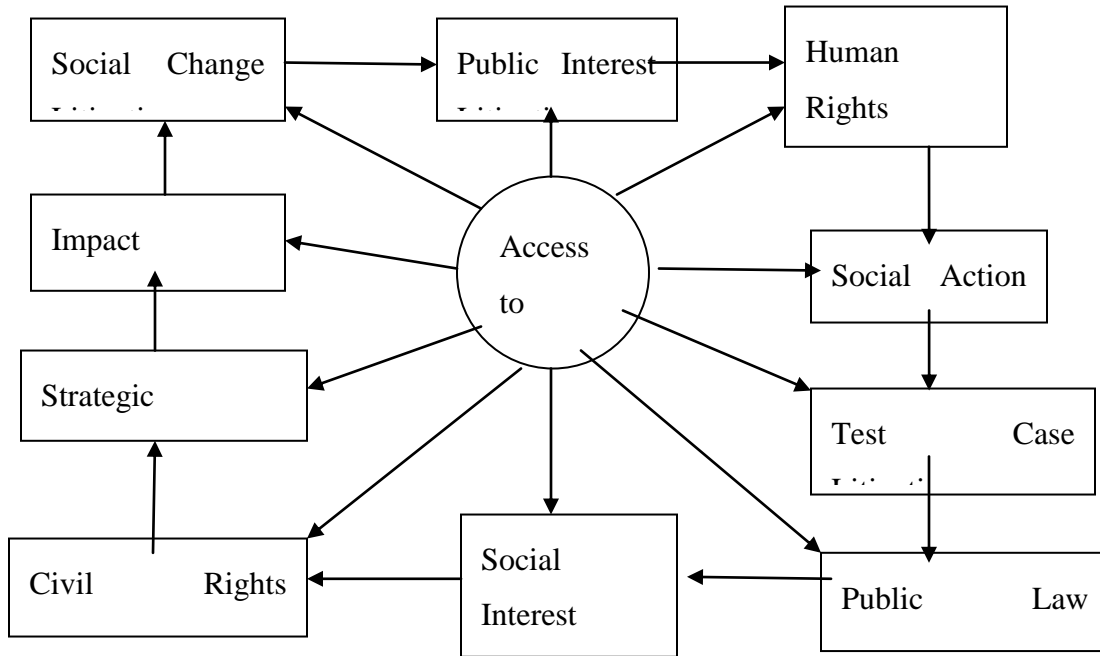
The concept of PIL connotes a shared community interest that involves legal action to protect the poor, unrepresented and the vulnerable. It is a mechanism through which social justice can be pursued. PIL is not limited to the parties in question but instead goes beyond the parties in the litigation process whose ultimate aim is the enforcement of social and economic rights.

PIL comprises three independent terminologies namely ‘public’ ‘interest’ and ‘litigation’. Public interest refers to a matter that is of concern to the public and is in need of protection or recognition (Black’s Law Dictionary, 9th ed. at 1350). Litigation on the other hand is the process of filing a law suit (Ibid. 1017).

PIL in other jurisdictions is known as public law litigation, strategic litigation, test case litigation, impact litigation, social action litigation, social change litigation, civil rights litigation and human rights litigation. PIL can also be defined by its potential to impact social change and “court ordered results that impact social change that looks for an impact beyond the individual plaintiffs or groups that initiated the litigation” (Goldston and Adjami, 2008: 7). This study has however adopted the USA definition that:

“Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services to significant sections of the population and to significant interests. Such groups and interests include environmentalists, consumers, racial and ethnic minorities and others.” (Ford Foundation, 1976).

Diagram 1: Conceptual Framework



In the light of the above background, chapter two is a review of the literature written in the area of PIL and the enforcement of social and economic rights. Chapter three comprises the research methodology which explains and shows the justification for various methods used in the study. Chapter four is the research design and methodology. It is divided into three parts. Part one is the data analysis, part two is the case of Muthurwa Estate and part three is a comparative analysis of India and South Africa. Chapter five is the conclusion, summary and recommendations that have been arrived at in view of the lessons learned from other jurisdictions that have practiced PIL for a longer period.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

A country may have the best written bill of rights in the world, but if the state organs and institutions, and leaders at all levels, and every individual in the country are not committed and do not pay attention to them, then the human rights so guaranteed are not worth the paper(s) they are written on (Arwa, 2012).

Whereas there is a lot of literature on the enforcement of civil and political rights at the international level, there is a dearth of information on the role of PIL in promoting and protecting the right to adequate housing in Kenya. Perhaps this is because many scholars still view the state as the custodian of human rights. This research has a different view in the sense that non state actors are seen to have a role in the protection of human rights. The issue of enforcing socio-economic rights and the right to housing in particular and whether to use PIL for that purpose has been a controversial one.

Opinion is divided on whether or not these rights should get legal enforcement. Opposition to enforcement has been made on the ground that socio-economic rights in general are not legal rights but moral rights. Beside, the debate has been infiltrated by politics of universality and cultural relativism or Western concept of rights and Eastern concepts of right. Moreover, the public is more ambivalent towards violation of socio-economic rights as compared to civil and political rights. A discussion of these issues will help in making a case for the enforcement of socio-economic rights not as moral right but rights that are at par with civil and political rights. Enforcement of these rights will strengthen the realization of civil and political rights. This chapter is divided into two parts: part one evaluates the impediments to the promotion and protection of socio-economic rights, while the second part examines the role of PIL.

The passage of a new Constitution in 2010 with a lot of fanfare was followed by a lot of expectation in terms of the enforcement of socio-economic rights. For the first time in the history of the country, it seemed that socio-economic rights and civil and political rights were equal as far as enforcement was concerned. Little was it appreciated that unlike civil and political rights, constitutionalizing socio-economic rights was just the first step, but translating them from mere aspirational into full-fledged rights was attendant with a lot of challenges (Arwa, 2012: 6).

Whether or not to enforce socio-economic rights has created debates between two opposing sides that are either in support or against enforcement. The argument for enforcement is grounded on the premise that socio-economic rights are rights just like the civil and political rights and therefore should be enforced. The school of thought in opposition to justifiability argue that courts are not the legitimate forums as they lack the institutional and professional competence to adjudicate on matters of socio-economic rights (Arwa, 2012: 6). This chapter discusses some of these arguments in the context of the role of PIL in the promotion and protection of the right to adequate housing.

2.2 Core Content of the Right to Housing in International Law

The core content of the Right to Housing in International Law is provided for in Article 25 of the UDHR and Article 11(1) of ICESCR: “the state parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing-housing and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.” The Committee on Economic, Social and Cultural Rights which monitors the implementation status of nations is clear that the right to adequate housing: “...should not be interpreted in a narrow or restricted sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity” (General Comment No. 4).

The right to housing should also correspond to certain minimum standards under international law. These are enumerated as: legal security of tenure, including protection against forced eviction, availability of services, materials, facilities and infrastructure, including access to safe drinking water and sanitation, affordability, including for the poorest, through housing subsidies, protection against unreasonable rent levels or rent increases, habitability, including protection from cold, damp, heat, rain, wind and disease vectors, accessibility for disadvantaged groups, including to the elderly, children, the physically disabled, the terminally ill and victims of natural disasters, location, far from polluted sites or pollution sources but near to health-care services, schools, child-care centers and other social facilities (General Comment No. 4).

The Committee has further prohibited forced eviction which it defines as:

The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” For the Committee, forced evictions are prima facie incompatible with the obligations of the International Covenant on Economic, Social and Cultural Rights and “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. (General Comment No. 4).

According to the United Nations Special Rapporteur on the Right to Adequate Housing, “the human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity” (Report of the Special Rapporteur 2001). The Rapporteur emphasizes that the right to housing is inter-linked with the realization of other basic rights without which it would not be complete. This includes: the right to life, the right to protection of one’s private life, of one’s family and one’s home, the right not to be subjected to inhuman or degrading treatment, the right to land, the right to food, the right to water and the right to health. It is also tied to respect of the fundamental principles of non-discrimination and gender equality (UN Habitat 2001). On the part of the U. N. Commission on Human Settlements (UN-Habitat) and the Global Strategy for Shelter, ‘shelter for all’ means affordable shelter for all groups in all types of settlements, meeting the basic requirements of affordability, security of tenure, structural stability and infrastructural support, with convenient access to employment and community services and facilities” (UN Habitat 2001) .

2.3 Promotion of the Right to Adequate Housing through Regional Legal Instruments

State Responsibility is provided for at the regional level, Article 1 of African Charter on Human and Peoples’ Rights (ACHPR) provides that: “Member States of the Organization of African Unity party to the present Charter shall recognize the rights, duties and freedoms and shall undertake to adopt legislative or other measures to give effect to them.” Further, Article 25, mandates state parties ‘to promote the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.’ In *SERAC Vs Nigeria*, the government of Nigeria had the responsibility to protect by offering effective remedies, promote (facilitate enjoyment), respect (refrain from interfering) and fulfill (provide basic services-in the case of ECOSOC rights). An important thing to note is that the Charter has no reservation clause, but rights may be limited specifically through claw back clauses or via the omnibus provisions of Article 27(2).

2.4 Adjudicating Socio-economic Rights Using PIL in Kenya

The history of Kenya has shown that lawyers and civil society organizations have used PIL as part of the broader struggle of drawing attention to inequality and injustice (KPTJ, 2014: 5). Through it, the marginalized have been able to share concerns on issues of a socio-economic nature. Opportunities created through PIL have enabled civil society groups influence governments, policy formulation, encouraged dialogue as well as enabling civil society to be more pro-active. Through it gaps in public service have been exposed while additionally helping poor people to claim their rights.

This is a far cry from the period before 2010, when Kenya courts relied on English interpretation of standing that determined who could sue. English courts generally banned private individuals from litigating matters of public rights. In an English case: *Gouriet vs Union of Post Office Workers and Others* ([1977] 3 All ER 70), the court argued that:

“It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but, that public rights can only be asserted by the Attorney- General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney- General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has a right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.”

Disregarding this position, some judges deviated from this position by relaxing the rules on *locus standi*. This allowed suing without showing sufficient enough interest in the matter. In *Albert Ruturi, J. K. Wanywela & Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya* ([2001] 1 EA. 253 Nairobi High Court Misc. Civil Application No.908 of 2001), the High Court established that public interest suit could be instituted so long as one established a ‘minimum enough interest’.

The current Constitution has settled matters of standing in Articles 22 and 258 to the effect that “every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention”. PIL on the basis of individual standing in the 2 articles allows bringing of suits against perpetrators of human rights violations. In using individual standing one must be prepared to show personal interest in the matter. However the

scope of personal is not clearly defined in the Constitution, but those relying on it must show why it so qualifies. *Musyoka v Attorney-General* (Constitutional Petition 305 of 2012) is for the authority that once a matter is found to be of public interest in a court of law, it cannot be withdrawn due to its public interest nature.

The major impediment in the promotion and protection of the socio-economic rights had been the failure by the Chief Justice to establish rules of procedure. However in June 2013, the Chief Justice gazetted the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. The rules were meant to facilitate aggrieved Kenyans to file proceedings any time their rights under the Bill of Rights were violated. The essence of the rules is to limit formalities and free courts from procedural restrictions while expanding access to justice as envisaged in Article 48. Among other things the rules clarify the admissibility of evidence, *amicus curie* (friends of court), when to settle matters out of court and alternative dispute resolution (ADR).

2.4.1 State Obligation to Respect, Protect and Fulfill

The framework of international human rights and the fundamental rights and freedoms in the Bill of Rights of the Constitution, required the state to respect, protect and fulfil all human rights without discrimination. The differences in the 2 sets of rights relate to the degree and not principle and for that reason, CPR and ESCR should be treated as binding in all respects (Arambalo, 1999, 114-120).

According to Shue (1980, 7), basic human rights have a minimum content of moral rights which the state must respect, fulfil, promote and respect. Basic rights can be divided into security rights that relate to an individual's 'physical security' and substantive rights which relate to 'basic rights to minimum economic security' such as right to health care, food, shelter and water (Shue, 1980: 23). Security and substantive rights are essential for the enjoyment of the more extensive rights (CPR).

2.4.2 Forced Evictions in Nairobi

Forceful eviction of slum dwellers either by the government or private developers in collaboration with the government is the clearest illustration of the violation of the right to housing in Kenya. Eviction of the poor living in slums is done in order to accomplish certain objectives by the rich such as to grab the land (Amnesty International, 2007). Even when the evictions are pursuant to a court order, in most cases the orders are illegally obtained, for example in the case of *John Samoei Kirwa and 9 Ors. v. Kenya Railways Corporation*, the High Court in granting a temporary injunction against eviction of residents in informal settlements on a railway line said that:

Plaintiffs [residents] are likely to establish that the notice was issued unprocedurally and unlawfully. They are also likely to establish at the hearing of suit that the notice was arbitrary and unreasonably inadequate....It should be noted that human compassion must soften the rough edges of justice in all situations. The eviction of squatters not only means their removal from their houses but the destruction of the houses themselves. The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. I am of the view that [if] squatters ... [have] settled and have been in existence for a long time, say for twenty years or more, and ... have improved and developed the land on which they stand [and that land] is required for a public purpose, ... alternative site or accommodation should be considered...[I]t is clear that plaintiffs are likely to suffer irreparable loss. No one can quantify the amount of loss when children miss the benefit of free primary education or when their homes are demolished and their parents are evicted from the only known home.... The applicants have shown in their averments that they have ploughed their farms and have even planted crops on it. They have also shown that they have been in occupation of the railway land reserve for over 30 years and the owner has not disturbed them.

2.4.3 Judicial Response

In *Susan Waithera and others v. The Town Clerk, Nairobi City Council and two Others* (2011] eKLR. Republic of Kenya. in the High Court of Kenya) the judge bemoaned the absence of a comprehensive guideline on evictions and proceeded to state that:

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

Efforts to amend the Housing Act to make it compliant with the Constitution have not been fruitful (Rabar, 2012: 5). The Eviction and Resettlement Procedure Bill that would have regulated eviction of squatters is yet to be passed into law. As a consequence squatters continue to be evicted in a dehumanizing manner as illustrated by the massive displacement of persons following the post election violence of 2008 where over 600,000 were rendered homeless (Report of Special Rapporteur on Housing, 2010: 6).

Jurisprudence coming from the courts is not harmonized and at best negates the right to housing. In *Engineer Charo wa Yaa versus Jama Abdi Noor, Trade Plus International Ltd, Municipal Council of Mombasa, County of Mombasa, and Attorney General* (HC Misc. App. No. 8 of 2011, Mombasa), the High Court in Mombasa was petitioned by a group that had been evicted from the private land they had occupied following a court order. The petitioners argued that their eviction was a violation of their constitutional right to housing as well as other constitutionally guaranteed rights. They also asked the court to allow those evicted and living in makeshift structures on the property “to obtain humanitarian support to construct temporary tents, portable bathrooms and toilets on the property so as to safeguard their right to accessible and adequate housing and to reasonable standards of sanitation until the hearing and determination of the (main case) herein.” The Court rejected the application and the judge ruled that the provision of Article 21(2) of the constitution stating that: “The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43” meant that the “right to housing as provided for in Article 21(2) of the constitution is not a final product for direct dispensation, but is an *aspirational right*, which the state is to endeavor to render progressively”.

However, in *Satrose Ayuma and others v. The Registered Trustees of the Kenya Railways Retirement Benefits Scheme* (HCCP 65 of 2010, Nairobi) the High Court for the first time protected the right of the poor and marginalized to adequate housing. This was partly possible through the efforts of PIL spearheaded by Kituo Cha Sheria among other organizations. The High Court granted an injunction stopping the Trustees from evicting the residents until the matter was finally determined.

Therefore the right to housing is one that is still prone to abuse due to the absence of a clear legal framework to regulate the exercise. Some of the reasons were the absence of an eviction legal

framework in *Susan Waithera and others v. The Town Clerk, Nairobi City Council and two Others* 2011 and lack of harmonized judicial response in *Engineer Charo wa Yaa versus Jama Abdi Noor, Trade Plus International Ltd, Municipal Council of Mombasa, County of Mombasa, and Attorney General*.

According to Justice Singh, “PILs are like alarm clocks. They tell the government: don’t sleep, please get up.” The use of PIL to remedy issues of social injustice is informed by a number of objectives. PIL promotes dialogue between the government, courts and other non-state actors on the mechanisms of shaping social policy and solve long standing injustices (KPTJ, 2014: 2). This is usually accomplished through challenging government action and decisions that do not comply with the law. This is particularly important for regulatory laws, standards that are designed to improve policies and legal protections that relate to issues of human and consumer rights.

Secondly, PIL assists the public in understanding and enhancing public interest issues and even where the action is unsuccessful, it generates public conversation on contemporary issues. Courts benefit as well by being informed of alternative interpretation of domestic and international law in a manner that facilitates the realization of socio-economic rights. Third and very important, PIL seeks to provide no cost legal services to the poor and vulnerable individuals or groups of people in support of their struggles that challenge powerful economic, political and government interests (KPTJ, 2014: 3). For that reason, PIL is viewed as *pro bono* despite the fact that some of the legal issues dealt with are complex legal and policy matters that take a lengthy period of time to be concluded. This does not bar PIL from its mandate because it aims at the expansion of social services or enhance standards of living of the poor. This arises from the realization that victims of injustices are oftenly unable to confront political action directly due to high cost involved and the danger to the individual actors. This makes PIL a safe haven for solving social injustice as courts are viewed as being neutral and authoritative decision makers that can be trusted.

When authorities are threatened with court action, they may wish to settle matters out of court and thus provide a platform for voicing social rights concerns and generate debate and political momentum. Social mobilization on the streets or winning cases in the streets has the effect of making judges rule in favour of PIL and the litigation process. Even where it is not successful, it provides political momentum that acts to aid the broader cause (Gloppen, 2005: 22).

In summary the objectives of PIL can be summarized as follows: to achieve individual redress for clients, set legal precedent and standards, enforce existing legal protections, implement new rights or safeguards, precipitate policy and statutory changes, promote access to justice, foster government accountability, document historical injustices, correct historical injustices, raise community consciousness on the issues/civic education, protect the environment and finally strengthen the Judiciary (Kilonzo, 2013).

2.5 Promoting Socio-Economic Rights in Kenya as Central Theme of PIL

After the promulgation of the new constitution the reach of public interest litigation has been expanded. In *Amoni Thomas Amfry and Another v. Minister for Lands and the Attorney General*, the issue for consideration was whether the court should issue an order directed at the President to Gazette the Chairperson and Members of the National Land Commission established under Article 67 of the Constitution in accordance with the provisions of the National Land Commission Act, 2012 (Act No. 5 of 2012) (“the Act”). The court directed the President to comply with the provisions of paragraph 8 of the First Schedule to the National Land Commission Act and officially appoint the Chairperson and Members of the National Land Commission within seven (7) days. The president complied and appointed members of the commission.

The import of Articles 19(2) and 20(3) (4) of the Constitution is that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human being.

2.6 Central Themes in Public Interest Litigation

2.6.1 The Necessity of PIL

The promulgation of the new Constitution has given impetus to PIL. Article 22(1) and 258 of the Constitution of Kenya has finally dispensed with the difficult requirements of *locus standi* encountered in the previous Constitution. It provides that: “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” This is by far the clearest indication that individuals hitherto denied access to social justice could finally do so without any impediment

through PIL. As a result courts have become important arenas for the interpretation of the Constitution and exceedingly as the forum to guide the constitutional implementation process (Kituo cha Sheria and Katiba Institute, 2011: 6). According to Ghai, this helps the public to participate in the implementation process by safeguarding constitutionality throughout the process. In the eyes of the public, PIL contributes to “citizens’ demands for their rights and holding public officers accountable” (Kituo cha Sheria and Katiba Institute, 2011: 7). In addition it helps to educate people on their socio-economic rights enshrined in the Constitution.

PIL becomes an important tool for human rights promotion because government departments have too much power over the affairs and rights of the community. PIL becomes an instrument of socially checking on administrative excesses especially when public protests are not listened to. States have also been slow in responding to the promotion and protection of socio-economic rights through constitutions and legislation. This difficulty has been created by the nature and financial implications involved in implementation of these rights (Luseka, 2012: 4). Besides socio-economic rights have found it difficult to gain global acceptance, despite the fact that the ICESCR has gained global ratification. Older democracies in particular have contested the inclusion of these rights in constitutions due to their positive nature (Luseka, 2012: 4).

There has also been a movement towards an adversarial mechanism of raising challenges to socio-economic rights. Public interest litigation has traditionally been used for an individual to advance public and not personal rights. However PIL envisages individuals going to court in support of communal rights. This is partly because the community is largely ignorant of their rights and how to pursue their remedies in the courts of law (Roger, 2004: 58). Even if they are aware of the rights the possibility of taking up action against a powerful defendant such as the government is normally very minimal (Cappelletti 1979, 519-520).

Many government agencies implement public policy and therefore there is a high demand for judicial review through PIL (Roger, 2004: 58). In poor countries like Kenya, where access to justice is inadequate owing to cost, distance and structure of presentation, only public minded individuals can go to court. The inability of a claimant to access courts, independent of the nature of the right for which judicial protection is sought (Francioni, 2007: 32), is justification enough for PIL. This could again be due to high cost of legal costs/fees or inadequate judicial

infrastructure. This is in addition to PIL being used as a tool to empower the disadvantaged members of the society to access their rights (Ghai, 2012: 8).

2.6.2 Relevance of Public Action in Realizing Socio-Economic Rights

Promotion of socio-economic rights is essential for reducing poverty and enhancing human development. Action by the Kituo Cha Sheria and other Civil Society groups underscores the importance of a strong and effective public action within a democratic state to end human poverty (Kumar 2011, 105).

Promotion of these rights envisages the forging of partnerships and multiple stakeholder consensus. This would include creating pre-legislation policies for public awareness which would use the evidence and deconstruct misconceptions to provide options while stimulating of public discourse as a necessary starting point in formulation of policy and legislation (Kumar, 2011: 105). Socio-economic rights have a common ally in human development because they both seek to secure human freedom and the dignity of people (UNDP, 2000)). Human rights have been defined as increasing personal capabilities, wider choices and expanding freedoms. Human beings are enabled “to do what they want to do and be what to be” (Sen, 1999). The response of the state is to assure universal rights (Fukuda-Parr and Shiva, 2009).

2.7 Limitations of Using PIL to Enhance Human Rights

Whereas PIL holds great promise in the promotion of the rule of law, protection of socio-economic rights and a catalyst for social transmission, it faces certain limitations and challenges that those who seek to rely on it must be alive to. This will allow them to make informed decisions. Some of the challenges inherent in public interest litigation include the possibility of contributing to the backlog of cases and hence delayed justice. Other challenges could emanate from the state where the government could use public interest litigation to make concessions (order by consent) with a section of a broader group of litigants leading to intergroup conflicts. Besides there have been reports of lack of consent, transparency and the need to make declaration to all interested groups. Moreover, there are few litigants doing public interest litigation and there is need to include more lawyers.

2.7.1 Weaknesses in the Justice System

PIL in Kenya is limited by the existing systemic weaknesses of the justice system. Some of the weaknesses include failure in the enforcement of court orders, arising from PIL actions. This is due to the fact that PIL have an effect on the politics of the day as well as policy issues. The implementation of orders that arise from PIL could sometimes be complex and may even take a long time to be completed. This is besides the fact that court orders may not be the right remedy for changes needed to reverse widespread poverty. In addition litigation can only address issues related to access to justice and failure to respect the law, other issues like injustice, inequality, socio-economic and historical injustices cannot be addressed through PIL (KPTJ, 2014: 9).

Litigation is still a challenging process in a country like Kenya as cases take a long time to be concluded and use large amounts of resources. Where quicker resolution is desirable, alternatives to litigation become an option but hardly resorted to.

2.7.2 Role of the Courts in PIL

The role of courts in PIL have also been questioned because where it concentrates on individuals, it tends to promote inequality and individual privilege over the broader issues of public interest. The effect is to make some individuals move forward (Gauri and Brinks, 2008: 142). In *Soobramoney v. Minister of Health (Kwazulu-Natal)*, (CCT32/97)[1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696), the plaintiff who suffered from renal failure sort judicial intervention to enable him in accessing free dialysis. The South African Constitutional Court ruled that the applicants' rights had not been violated since the allocation of resources was based on a reasonable criteria that did not include dialysis. That government provide resources within the limits of constitutional guarantees.

Governments have used this as a defence against accusations of failure to protect and enforce socio-economic rights. Article 20 (5)(a) of the Constitution recognizes this. The understanding is that socio-economic rights would be progressively realized pursuant to Article 21 (2). In the process the government must have regard to factors like vulnerability of the individuals as provided for in Article 20 (5)(b).

PIL can be used to encourage judicial intervention in questions of social policy that has implications for the allocation of resources (Gauri and Brinks, 2008: 142). Examples from South

Africa, India, Brazil and Indonesia show that courts have moved away from specific social measures preferring policy solutions (Steiner, 2008: 330). In South Africa, the Constitutional Court resorted to granting ‘supervisory jurisdiction’ where social policy commitments against constitutionally entrenched social rights standards (Langford, 2008: 34). The flexibility of supervisory rulings moves governments towards ‘progressive steps’ in identifying social injustice in encouraging policy to reshape unjust social policy. Supervisory orders enhance transparency and accountability in social policy planning.

2.7.3 Judicial Intervention in Social Policy

Critics of PIL have argued that courts do not have the technical competence to handle matters of social policy. What is often forgotten is that courts have intervened in areas of taxation and commerce with far reaching implications on social and economic effects (Steiner et al, 2008: 315). However judges need to undergo training to enable them acquire the necessary competences.

2.7.4 Integrating PIL with Advocacy Approaches and Lack of Political Will

The above analysis illustrates that PIL should not just be addressed in court as a legal issue. For it to be more effective, PIL need to be combined with advocacy skills of mobilization and outreach to increase chances of success in litigation (Davis, 2008: 710). This would allow it to be aligned to broader national level campaigns in using other tools like protests, petitioning of political leaders, better use of the media as well as making technical contributions to policy and law making processes. PIL needs to adopt strategies of collaborating with organizations that would infuse it with complementary skills for better results (Davis, 2008: 710).

The implementation of judgments depends on social movements that help in the monitoring and follow up on compliance (Gloppen, 2005: 22). Court judgments do not enforce themselves, they depend on other branches of government for execution and implementation. For litigation to be effective, it must be complied with and therefore needs political action for implementation. This is further influenced by other political players in the political chain, such as the authority of the judgments for example those relying on mandatory and supervisory orders, their independence, legitimacy and the skills in the balancing of political forces (Swart, 2005).

Courts are usually constrained and unable to influence policy on their own and depend on factors outside of the legal system for compliance with transformational judgments (Rosenberg, 1991: 35). Implementation is also undermined by political and economic factors related to government capacity to enforce rulings and political will. For example it depends on the political context or the existence of dominant political forces that can ignore court decisions or the existence of protective players that would make failure to comply very costly (Widener, 1999). The political culture influences cost of obeying court orders, for example a tradition of legalism would mean more legitimacy for courts in society and therefore seen as socially relevant.

Political elites have a higher propensity for disobeying court orders especially if they differ with government ideology and policy (Widener, 1999). Those that are in line with government ideology and policy harness political will in granting priority to social rights issues. Whereas political will is crucial in the implementation of court orders, they also depend on the ability of state's to harness financial and administrative resources to facilitate the implementation process.

2.7.4 Relator Action

The argument is simple, that is, if the rights asserted by the private individuals are public rights, it is the job of Attorney General who is the guardian and protector of public rights to represent public interest. The Attorney General may initiate actions either at his own volition or at the instance of a member of public by way of a relator action. It follows that if public interest litigation actions can only be initiated with the prior consent of the Attorney General, it is unlikely that consent will ever be given in politically sensitive cases (Widener, 1999).

2.7.5 Executive Control of the Judiciary

The political control of the judiciary by the executive also constitutes a serious non-legal impediment to public interest litigation. It is subtle, and lethal. A judge who owes allegiance not to the constitution but to his political master can quite easily shut the doors of the courts to public interest litigants on various grounds, particularly on the issue of legal standing. This control is exercised in matters relating to the appointment, promotion and removal of judges.

Success in the courtroom for PIL does not always translate into legislative and social policy changes. In seeking answers to PIL, focus needs to go beyond success in the courtroom. What happens in court is just one aspect; the actual compliance with the court decision depends on

broader issues of political and social factors. Largely it depends on mobilization out of court on the judgment and public debate. Its success depends on voicing claims as well as providing impetus for social mobilization that creates tools that are helpful in advocacy and training (COHRE, 2003).

2.8 Conclusion

PIL is an important tool in the struggle by the poor to promote and protect socio-economic rights and the right to adequate housing in particular. From its humble origins in the USA, PIL has spread throughout the world as the option of choice where violations of socio-economic rights are rampant. In jurisdictions such as South Africa, India, Brazil and Indonesia, PIL has been used to effect social change, alleviate poverty and enable the participation of marginalized people in policy formulation. The growth in PIL is motivated by the inability of poor people to compel governments implement international obligation to progressively realization of socio-economic rights. The passage of a new Constitution in Kenya gave impetus to PIL as it expanded the scope of locus standi that finally gave groups such as Kituo Cha Sheria and Katiba Institute the standing to demand the enforcement of the right to adequate housing among other issues.

PIL is however not without critics who view the systemic weaknesses of Kenya's judicial system as working against it through backlog of cases, non-enforcement of court orders and corruption as limiting the effect of PIL. PIL has not contented with the politics of the day especially where court orders are seen as interfering with vested interests in matters touching on politics and policy formulation. Besides where PIL is concerned with the advancement of individual interest, it is seen as creating further inequality. Courts lack the competence to balance social, economic, and political and policy issues, to acquire it they may need to collaborate with other agencies such as civil society groups and adopt other measures other than judicial ones to alert involve the public. These weaknesses limit the effectiveness of PIL, however it remains the only weapon at the disposal of marginalized members of society in addressing matters related to the violation of socio-economic rights.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

The research methodology used in this study is qualitative in nature as it seeks to describe and analyze how PIL has been used in vindicating the right to adequate housing in Kenya. This is done by using a case study of the natural setting of Muthurwa Estate in Nairobi County. The research strategy used comprises interview and focus group. The latter is particularly important for two reasons. First, according to Orotho and Kombo, (2002) it is flexible and interactive and therefore lends itself to getting the insights and feelings of the respondents in Muthurwa community. Secondly, majority of the residents of the estate are semi-illiterate and could easily be reached through focus groups.

3.2 Research Design

The design of the research is based on descriptive and case study format. The purpose of using descriptive design is to describe the state of affairs in Muthurwa and why PIL was necessary in the protection of the right to adequate housing. Descriptive design is not just a collection of findings but it involves the analysis, comparison and interpretation of data. The researcher uses descriptive survey as a data collection method that involving administering interview guides to a sample of respondents (Orotho, 2003). It was found useful in determining the respondents' attitudes, opinions and habits towards PIL. However, after the findings were reported, conclusions were made and solutions to some of the problems suggested.

3.3.1 Case Study

A case study was chosen so as to study the area in question more closely. The definitive advantages of the case study is that it allows for more detail in addition to providing context in a more holistic manner. It made it possible for a thorough understanding and background as to why PIL became a very effective method in understanding the problems faced by the residents of Muthurwa. Muthurwa was chosen because it represents the first case where PIL was used successfully in the protection of the right to adequate housing in Kenya.

3.3.2 Research Site

The research site chosen was Muthurwa estate in Nairobi. The choice was informed by it being more accessible to the researcher as well as representing the attributes i was looking for such as a poor marginalized estate that is threatened with eviction. The residents of Muthurwa as the plaintiffs in the case gave insights into the problems they have so far encountered in protecting their right to adequate housing. The researcher was able to visit the Muthurwa community and held discussions with the community leaders together with the plaintiffs in the case.

3.3.3 Population

The population of Muthurwa is cosmopolitan with one unifying factor: the residents are poor, marginalized community held together by the desire to protect their right to adequate housing. It is from this group that the highest sample is taken. The population is largely diverse and comprises individuals who have been associated in one way or another with the Kenya railways either as former employees or their descendants. The houses in effect belonged to the railways authority. The diversity of population in terms of gender and ethnicity allows for more reliability of the data collection.

3.3.4 Sampling Techniques

The study used both probability and non-probability sampling. First a random sample was carried out to get information on whether all residents of Muthurwa supported the protection of their right to adequate housing. It involved dividing the population into homogenous sub-groups after which a simple random sample of each group was taken.

Non probability sampling was also used since the researcher' interest was the representatives of the concept. It was aimed at a theoretical representation of study population by maximizing the scope of the study. In more specific terms it set to find out how a small group of representative of the whole was able to illustrate the impact PIL in protecting the right to adequate housing.

Purposive sampling was then used to target individuals that were considered reliable for purposes of the study. For that reason organizations and institutions that were involved in PIL were selected, the plaintiffs in the case, Judges who handled the case and advocates who represented the community together with the para-legal staff who linked the community to the civil society groups for purposes of litigation. The researcher considered the organizations and

institutions to be information rich since they were directly involved in the case and the central issues under study. In purposive sampling, snow ball sampling was used by asking people in the community about what they knew about PIL. Beginning with a few people we were able to get a critical number that increased the sample size as new contacts were mentioned from the initial sample. It came out that a majority of the original residents had moved to other estates such as Kibera and those remaining had rented out the premises. Out of this finding a decision was made on the right type of people to interview for the purposes of the study.

3.3.5 Target Population

Four types of respondents were selected as a vital part of achieving the objectives of the study. They included: Judges, advocates, the Muthurwa community, Civil Society organizations and the County government. It was felt that the five groups would enable reliable conclusions to be made.

3.3.6 Research Instruments

The research used interviews as the instrument to collect data. An interview guide was designed for purposes of collecting data. Five interview guides were used representing each of the target population. There are two reasons why the guided interview was used instead of a self guided questionnaire: first the study sought to test the aptitude of which only the interview could highlight. Secondly, some of the respondents were illiterate and could not read or write.

3.4 Dependant and independent variable

3.4.1 Dependant variable

The dependent variable for this research is the promotion and protection of housing rights. This is the outcome the study attempts to investigate and predict. It is dependable because any outcome on its implementation depends on other factors mainly the efforts of PIL and not the government or any other extraneous variables.

3.4.2 Independent variable

The independent variable in this research is the PIL. This is because it basically explains the variation or outcome in the dependent variable. It is said to be the cause of the dependent variable. PIL among other things creates awareness of human rights, educates the public,

advocates for enforcement of the same through litigation, represents interests of the public in matters pertaining to state violation of socio-economic rights. Consequently together with an activist judiciary fills the gap in the legislative and constitution enforcement of housing rights.

CHAPTER FOUR

DATA, COLLECTION AND ANALYSIS

4.1 Introduction

Chapter four is divided into three parts. Part one is the data analysis, part two is the case study of Muthurwa and part four is a comparative analysis of India and South Africa. The choice of the case study is informed by the successful litigation using PIL in the enforcement of the right to adequate housing in Kenya despite the numerous challenges. Case study also gave the researcher the adequate opportunity to make an in-depth study of the community. The comparative analysis on the other hand demonstrates an appreciation of how PIL has had a tremendous impact on the promotion and enforcement of socio-economic rights and especially the right to adequate housing in India and South Africa.

4.2 Data collection

Two sets of data were collected for this study: secondary data and primary data. Secondary data played an important part in the introductory part of the project by laying out the theoretical foundation. Primary data is used to solidify and validate the outcome of secondary data.

4.2.1 Secondary sources

The study began by making extensive use of secondary data found in the various libraries. This information was found in text books, online databases, decided cases, conference papers and reports, journal articles, Acts of Parliament, unpublished theses and international legal instruments such as the UDHR, ICCPR, ICESCR and CEDAW. It will be supplemented by a comparative analysis of the cases, legislations and constitutions from the various jurisdictions as part of the desk top review meant to inform the researcher about the existence of formal systems tasked with the promotion of the right to housing. However the level of detail is insufficient for the assessment of the phenomena.

4.2.2 Primary data

Primary data was collected through a structured interview which will involve the development of an interview guide whose sole purpose is to get detailed and unique insights into peoples' experiences and perceptions about the subject matter. This will help the researcher get to areas

that were not previously considered as being important. In total 55 respondents will be interviewed. The spread will include 5 judges, 10 magistrates, 10 advocates, 10 members of the public, 10 members of civil society and 10 other members from Muthurwa to represent the victims who instituted a suit for redress of right to housing.

4.2.3 Data analysis

The data collected will be analyzed to test the variables, hypothesis and assumptions in reference to the research questions, objectives and literature review. The basis of this analysis is to bring out the relationships between the different attributes. The key findings will be summarized and interpreted with a view of determining the areas of intervention.

4.2.4 Study of the Muthurwa Estate Case

Muthurwa Estate is located within the larger Kamukunji Constituency, along Haile Selassie and Landhies road in land No 209/6502, in Nairobi City, Kenya. It sits on a 72 acreage area was constructed in around 1911-14 for the workers of the then East African Railways and Harbors Company (EARHC). In 1978 (EARHC) was placed under the Kenya Railways Cooperation, which had a workforce of about 22,000 workers, part of this group were residing in the 1786 housing units in Muthurwa. For several years the estate has been neglected and dilapidated, each house measuring about 10 by 10 feet designed in rows of 24 houses each. Since 2010, the estate has been embroiled in dispute between the residents and the Kenya Railways Corporation as to whether or not they should be evicted.

4.3 Ayuma and Others v. A G and Others (Muthurwa case)

4.3.1 The Issues in the case

The case presented a number of governance issues that relate to the promotion of social economic, foremost among them being whether the court could enforce the right to housing as part of the broader socio-economic rights provided in Article 43. Secondly, whether Kenya takes its international obligations seriously relating to the protection of the right to adequate housing? This is important because the government has ratified major human right treaties that protect the right to housing namely: Article 25 of the Universal Declaration of Human Rights (UDHR), Article 11 of the International Covenant of Economic Social and Cultural Rights (ICESCR), Article 27 of the International Convention of the Rights of the Child (CRC) and Article 26 of the

Convention on the Rights of Persons with Disabilities. Thirdly, whether the forced evictions carried out violated the rights of the tenants not following the UN guidelines on forced evictions.”

4.3.2 The Facts

In October 2010 the Trustees of the Kenya Railways Staff Retirement Benefits Scheme had taken over the management of the estate sent in bulldozers before sunrise to destroy the homes of its tenants: a mixture of Railways' pensioners, and former employees, and statutory tenants. The Trustees had already announced their plans to sell the land ('the estate') transferred to it to ensure payment of pensions to former employees entitled to retirement benefits, to developers.

Some of the residents of Muthurwa numbering 10 led by Ayuma as 1st respondent together with a consortium of institutions among them NGO's like Open Society Justice Initiative and Kituo Cha Sheria, went to court and successfully stopped the sale of community land, houses and forced evictions. They sued the government represented by the City Council of Nairobi and the Attorney General. In 2005, KRC established a retirement scheme for the staff of KRC known as the Kenya Railways Staff Retirement Benefits Scheme and a trust. The function of the scheme was provided for in the Trust Deed. During this period, the rent was increased from Ksh. 800 to 2,500 to be backdated to the time the scheme too over the assets of KRC. The effect of this was that the residents of Muthurwa were to begin paying rent to a new body established under the new Act.

This changed in 2010 when residents of Muthurwa were informed that the account had been closed and therefore the bank was no longer accepting rent on behalf of the scheme. The applicants could therefore not remit rent, which was followed by the disconnection of social amenities such as water and electricity. Through an advertisement in the Standard of 15 July 2010 titled 'Prime Opportunity for Development in the CBD Courtesy of the Kenya Railways Staff', the scheme advertised for the sale of the property in question. This was followed shortly afterwards by the scheme giving notice to all residents of Muthurwa to vacate the premises in 90 days. Before the expiry of the notice, demolitions began in an attempt to force the applicants out of the suit property.

4.3.3 The Decision

Justice Lenaola concluded that the trustees had to a certain extent violated the petitioners' rights to accessible and adequate housing contrary to Article 43 of the Constitution. But, he argued that the violation was only limited to the manner in which the forced evictions from the estate were conducted on July 12, 2010:

“It does not matter that the petitioners do not hold title to the suit premises and even if they had been occupying shanties, the 1st respondent was duty bound to respect their right to adequate housing as well as their right to dignity. Wherever and whenever evictions occur, they are extremely traumatic. They cause physical, psychological and emotional distress and they entail losses of means of economic sustenance and increase impoverishment.”

Justice Masinga in his ruling delivered on 17th Day of February 2011 observed that the government of Kenya had obligations to offer its citizens access affordable housing. The court also directed that the status quo to remain and residents requested to continue paying their monthly rent.

4.4 Comparative Review of PIL

According to (Olowu 2011, 1), the inability in most jurisdictions to protect housing rights is because of the narrow interpretation of human rights into justiciable and non justiciable rights. Justiciable rights or first generation rights constitute the civil and political rights while non justiciable of second and third generation rights include social, economic and cultural rights are considered for progressive implementation. This explains why public interest litigation has grown to fill up the gap in the implementation of social and economic rights. This becomes necessary for what he calls non justiciable aspect of these rights in most contemporary jurisdictions which are not designed to bring about social, economic and political justice. However, developing jurisprudence in India and South Africa shows that this need not be the case and have established mechanisms that ensure the enforcement of socio-economic rights. A few cases have been selected in India and South Africa to show case the direction Kenya's law in the protection of the right to adequate housing should take.

4.4.1 PIL in Promotion of Socio-Economic Rights in India

PIL cannot be successive without an activist judiciary the Indian Supreme Court has taken an expansive and proactive approach towards fundamental rights. It has on several occasions

affirmed that socio-economic rights are nonnegotiable and meet requirements for direct implementation.

In the case of *Maneka Ghandi v. Union of India*, where the applicant's passport had been seized by the authorities pursuant to the Emergency Orders of that period, and thus, she had been denied the opportunity to travel abroad. The court emphasized that any procedure that affects human rights must not be arbitrary, fanciful or oppressive (Ghandi, 1978). While this case was not specifically concerned with socio-economic rights, it has arisen as a class action in defense of broader human rights protection such as in education, legal aid, pollution free environment, livelihood and human dignity. The approach by the Indian judiciary on matters involving social justice, human development, labour rights and human dignity illustrates its commitment to creative interpretation that views fundamental rights to "mean merely animal existence when it is bereft of human dignity."

In the case of *Olga Tellis v. Bombay Mun. Corporation* (Tellis, A.I.R. 1986 S.C. 180), where the plaintiffs were slum dwellers filed a suit opposing forcible eviction by the defendant corporation in violation of Article 21 of the Constitution on the right to life. The Supreme Court agreed with the complainant that indeed the eviction violated the right to livelihood granted by Article 21 on the right to life. The court consequently ordered cessation of evictions so as to mitigate on the hardships that would ensue. In justifying this finding, the court said that:

The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law...An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life (Tellis, A.I.R. 1986 S.C. 180).

Odowu (2011) considers judicial restraint and judicial activism that is accompanied by political insensitivity and carelessness as the biggest danger to the protection of social and economic

rights (Peretti, 1999: 188). Commenting on this Indian approach, a jurist from Zimbabwe has said that:

India has many more problems of poverty, ignorance and illiteracy that we have in...Africa. Yet it is in India that judicial activism has changed the face of justice...The question of delivery of justice to the disadvantaged was paramount in the minds of Supreme Court judges. They reformed its procedures and jurisdictional rules relating to constitutional and legal rights of the poor classes who could not approach the court for redress of their grievances...This was judicial activism at its best (Dumbutshena, 1998: 191).

4.4.2 Promotion of the Right to Housing using PIL in South Africa

The approach to the right to adequate housing in other jurisdictions has been more forward looking than Kenya's position. In South Africa where apartheid discriminated against black citizens, the housing situation is not any better. In *The Government of the Republic of SA v. Irene Grootboom Yacoob* (*Grootboom case*) case involving the protection of the right to housing, the Constitutional Court stated that:

The issues here remind us of the intolerable conditions under which many of our people are still living are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may resort to taking the law into their hands in orders to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be compelled by intolerable living conditions to resort to land invasions. Self help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage...

According to the court's reasoning, the right to housing was not expressly provided for in Article 26 of the South African Constitution, what was therein was a negative obligation upon the state and other agencies to frustrate citizens in their quest to access the right to housing. The same sentiments were expressed in support of public interest litigation in the protection of socio-economic rights by the South African Constitutional Court in *Soobramoney v. Minister of Health, Kwa Zulu Natal*, the Court stated:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our

society into one in which there will be human dignity, freedom and equality, lies at the heart of our new Constitutional order. For as long as this conditions continue to exist that aspiration will have a hollow ring.

4.4.3 Lessons for Kenya

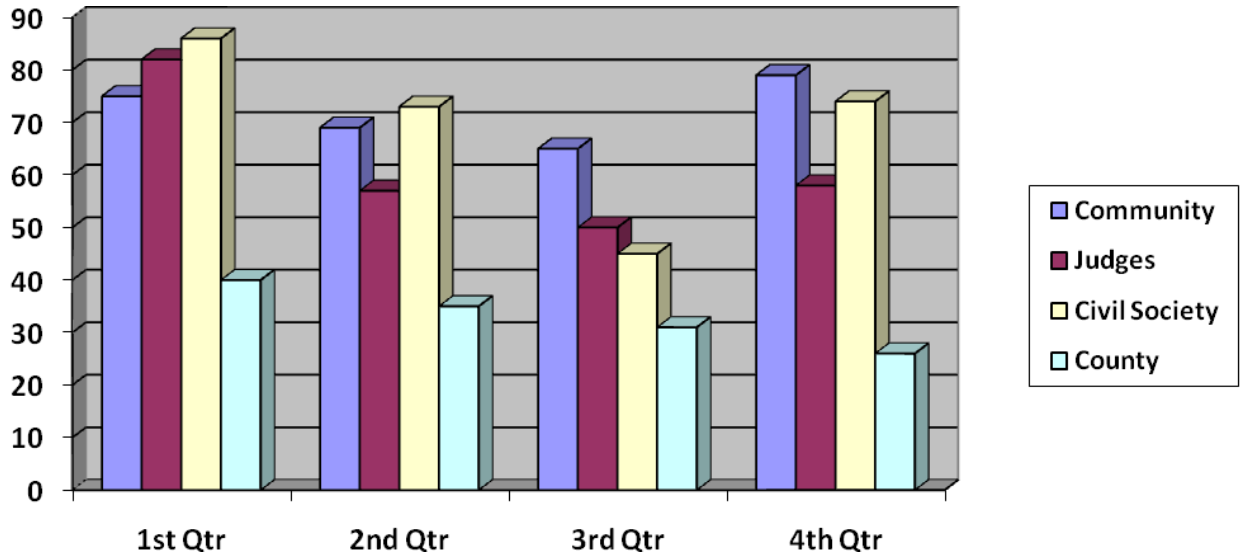
Some lessons are apparent in the theoretical discussions on using law to institute social change. The comparative analysis is a demonstration that indeed PIL can be used in changing society but for it to be effective in Kenya a number of things would have to change. The starting point is that constitutionalizing socio-economic rights is just the beginning. It is a recognition that the debate needs to shift from whether socio-economic rights are justiciable to how best to enforce socio-economic rights. Further the evolution of PIL in India and South Africa shows that PIL needs to be broadened and not seen as being the exclusive preserve of individual judicial officers in court. The move by the Chief Justice of Kenya in establishing rules for execution of PIL for purposes of enforcing socio-economic rights is a step in the right direction. The two examples show that vigilance by the public is critical as it prevents the watering down of the protection of rights that were previously protected in the name of development. Without vigilance the protection of socio-economic rights would collapse.

4.5 Findings

The study interviewed 63 respondents divided into 30 members of the Muthurwa community, 9 advocates, 8 magistrates, 3 judges, 4 staff of the County of Nairobi housing department, 6 from other institutions (Katiba Institute, Kituo cha Sheria, the Kenya National Commission on Human Rights (KNCHR) and the Kenya Human Rights Commission (KHRC). Other institutions that were also interviewed included staff members at the Attorney General's (AG) and 3 University lecturers, 2 from the University of Nairobi and 1 from Catholic University of Eastern Africa (CUEA). The findings are analyzed using spread sheet and the tabulations represented in 2 charts. The first chart represents answers from targeted members of the Muthurwa community. While the second chart is representative of answers from the other groups comprising judges, magistrates, advocates, County Government of Nairobi and Commissioners.

Chart 1:

4.6.1. Role of PIL in Protection of the Right to Adequate Housing



1ST Qtr.-State protection of the right to adequate housing

2 Qtr.-Role of civil society in PIL

3rd Qtr.-Adequacy of PIL

4th Qtr.-Court Enforcement of the right to housing

4.6.2 State Protection of the Right to Adequate Housing

Different groups of respondents had varying views on the role of PIL in the protection of the right to adequate housing. When asked whether the state had an obligation in protecting the right to adequate housing 86% of members of the civil society and 82% of the Judges who responded answered in the affirmative as against 40% of the county housing department and 86% of the community. This demonstrated the level of awareness of the import of socio-economic rights to the different respondents. They explained that after the promulgation of the Constitution of Kenya 2010 with an expanded Bill of Rights, the state had a duty in the protection of socio-economic rights and the right to adequate housing in particular. Therefore the high awareness levels among judges, advocates and civil society demonstrates that reality.

4.6.3 PIL in the Protection of the Right to Adequate Housing

73% of respondents in the civil society believed that PIL plays a very important role in the protection of the right to housing as against 69% of community respondents, 57% judges and advocates and 35% of county housing department. Community members were categorical that although PIL managed to stop their eviction they are not sure for how long the injunction will hold since they are so poor to continue pursuing the matter. Those supporting the important role played by PIL illustrate the *Muthurwa* case as a classic example of the positive role played by PIL in the promotion and protection of the right to housing. However members of the community cited the inability of the court to supervise and follow up on the orders issued relating to restoration of water and sanitation that has been ignored by the defendant's in spite of an existing court order. They have come to believe that since house ownership belongs to rich people who have the habit of disobeying court orders when they are issued, which follows a familiar pattern. Those who argued that PIL plays a minimal role for this was the belief that since the victims of eviction are normally very poor people and anytime the legal process is invoked it often comes very late when they have already been evicted. This issue was properly interrogated when the respondents were asked whether PIL was adequate in helping to vindicate the right to housing.

4.6.4 Adequacy of Using PIL

Despite the fact that majority of respondents said that PIL has a role in protecting the right to housing, the percentages came down when they were asked whether it was adequate. Out of 75% of community respondents who supported PIL, only 65% said that PIL on its own is not an adequate intervention in the protection of the right to housing and needs to be complemented by other mechanisms. Out of the 82% of judges, advocates and commissioners, only 50% of them viewed litigation as the starting point and not the end result of protecting victims of eviction. In the opinion of civil society respondents, 45% believe PIL would be an effective measure if it is backed by sufficient political will to enforce court orders. 30% of the county housing department support PIL viewing it as a violation of the rights of property owners. To the county officials the victims of eviction do not have title to the property they encroach on and therefore have no right to claim what they do not have.

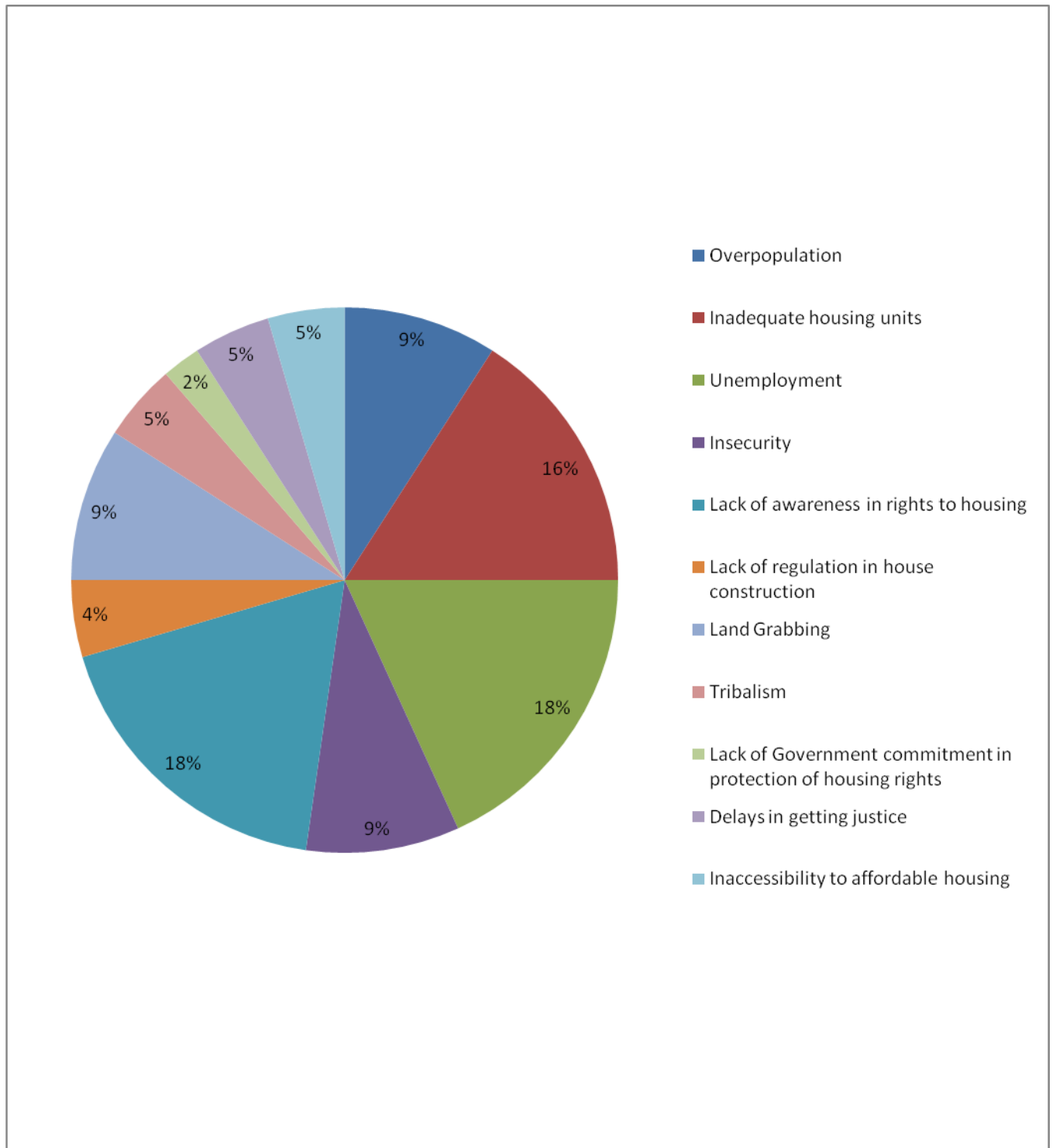
4.6.5 Enforcement of the Right to Adequate Housing

When the respondents were asked whether courts should enforce the right to adequate housing, 79% of the community respondents, 58% of judges, advocates and commissioner's respondents, 74% of civil society respondents and 31% of county staff respondents answered in the affirmative. Other than viewing it as a constitutional obligation in Article 43, the reason given by the respondents was that at the point of going to court, the plaintiffs are desperate and see it as the only option. Those who disagree argued that courts are not the right forum to balance social, economic and political issues. Adding that, the executive branch of government is well placed to implement policies of a social nature being within its mandate and in line with the doctrine of the separation of powers. The other argument was that the government may not have enough resources to roll out adequate housing for all Kenyans and therefore to purport to do so would be opening up a flood gate of litigation.

4.7 Challenges in Accessing the Right to Adequate Housing for Members of Muthurwa Community

Although members of the Muthurwa community acknowledge the important role played by PIL in protecting the right to adequate housing, they consider certain challenges that have had a negative impact on the promotion of the right to housing. According to community respondents, the greatest impediments to the alleviation of the right to housing in descending order are: land grabbing and lack of government commitment to the protection of the right to adequate housing with 18%, inadequate housing units with 16%, overpopulation, unemployment, insecurity, lack of awareness of rights and delays in getting justice with 9%. Other factors include tribalism and lack of regulation in housing construction.

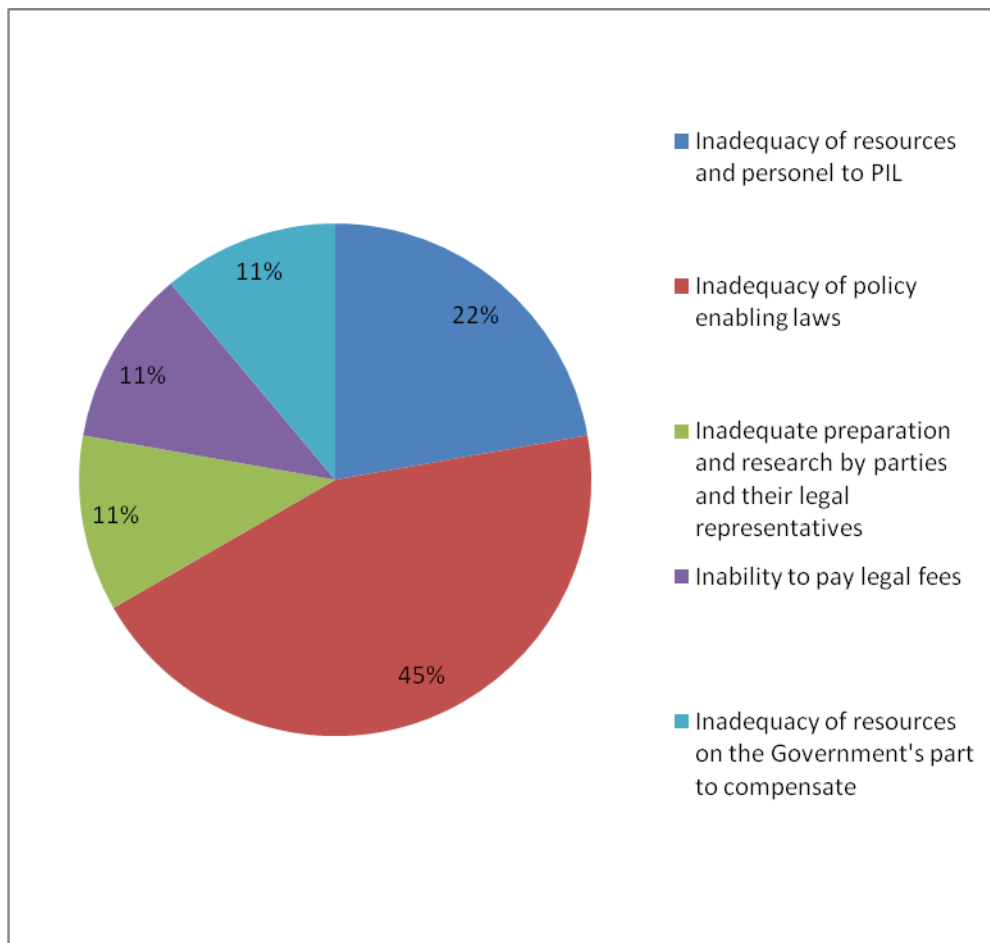
Chart 2: Challenges in Accessing the Right to Housing



4.8 Challenges of using PIL to enforce right to housing

The respondents were categorical that the challenges experienced in the effective application of PIL as a method of bringing about social change included: inadequacy of resources and personnel, policy and enabling laws, preparation and research and resources by the government. This is in addition to the high cost of litigation for purposes of PIL.

Chart 3: Challenges of using PIL to enforce right to housing



4.8.1 Absence of policy and enabling laws

A total of 45% of the respondents view the absence of policies and laws to protect the right to adequate housing and PIL in general as one of the biggest challenges to an effective PIL framework. This is despite the fact that the right to adequate housing is protected in international law (UDHR, UNCRC and ICSECR) and even domesticated by Article 2 (5) (6) of the Constitution of Kenya, 2010. However, the domestication process has not been done as laws to protect illegal evictions for example have not been enacted. It is however recognized that an Eviction Bill has been published and not much has been heard of it. Consequently illegal evictions still occur in Kenya in contravention of international law. Court orders are routinely not obeyed thus leaving poor residents without legal protection. Although PIL is now a constitutional right in Article 48 and 258 of the Constitution, legislation has not also been passed to operationalize it. This explains why there is a lot of reluctance in the enforcement of awards that arise from PIL. This is particularly common where such action relates to vested political interests or policy matters.

4.8.2 Inadequate Resources and Personnel

22% of the respondents answered that PIL has not been very effective because of inadequacy in resources and personnel. Although PIL is seen by the poor and marginalized as being a free service, it is not and is in fact paid for by local or foreign donors. PIL is just a litigation process like any other and maybe even more rigorous as it requires enormous human and financial resources that come at a very high cost. Public interest lawyers may find that they need to meet the subsistence costs of some clients and/or hire the services of policy experts. These factors require adequate funding, which is not always easily mobilized. PIL is not particularly well paying and there are few monetary incentives to attract the large majority of experienced lawyers to take PIL cases. This particular factor may have an adverse impact on the long-term strategy of PIL cases, as circumstances may at times compel public interest lawyers to drop out of cases midway (KPTJ, 2015: 32).

PIL is a fairly new process in litigation in Kenya, the preparation stage is usually the most difficult, it involves research in factual and legal research are intertwined and ongoing processes, preparation of the pleadings, picking the right parties, maintaining dialogue with the clients,

post-litigation strategy and how to enforce a settlement or judicial decision. This involves how the outcome maybe publicized and leveraged upon (KPTJ, 2015: 13).

4.8.3 Poor Preparation and research

PIL also suffers as a result of inadequate preparation and research by parties and their legal representatives. Sound research as part of the preparations for PIL can help clarify the issues at hand and the options available to address them. The quality of research also has a direct impact on how courts eventually rule. This point that is related to inadequate personnel was cited by 11% of the respondents. The effectiveness of a PIL process is won and lost during the preparation stage. This is because PIL calls for very innovative ways of litigation that involves framing issues such as reliefs in unconventional manner. For example public interest lawyers ought to prepare and present their cases in court in a manner that demonstrates the public interest dimension of their cases, and appeal to the court to consider declining to award costs in the event that they lose their cases (KPTJ, 2015: 21).

Kenyan courts have tended not to award costs when they have determined that a matter was in the public interest. However, it must be clear that in Kenya there is no rule that insulates litigants from having costs awarded against them by the court. Therefore, PIL practitioners should ensure that their actions are not deemed frivolous in nature, since this could trigger award of costs. In order to limit exposure to costs, public interest lawyers should ensure that the issues they pick up are realistic, and work efficiently and effectively during the litigation process. Diligence in litigation is often a mitigating factor against the award of costs. If costs are assessed by the court some may be disallowed as unnecessary. In some jurisdictions such as the UK and Canada, courts have issued costs to compensate the litigants (KPTJ, 2015: 23)

4.3 Conclusion

In conclusion it is clear that PIL plays a very important role in the promotion and protection of the right to adequate housing and recognized by members of the Muthurwa community, civil society organizations, judges and advocates. PIL has particularly grown due to the expansion of *locus standi* by Constitution. However, PIL still faces many challenges that have impacted on its capacity to be an effective tool in the litigation of socio-economic rights and especially the right to housing. These challenges include the systemic weaknesses of the Kenyan judiciary like backlog of cases, failure by the executive to obey court orders. Other than the absence of policy

and enabling laws to regulate evictions, inadequate resources and personnel, poor preparation and research has diluted the effect of PIL and made it less effective tool in the promotion and protection of the right to adequate housing.

The Muthurwa case demonstrates that the people who suffer most when the socio-economic rights are violated are the poor and marginalized. At the same time it shows how PIL can be successfully used to promote and protect the right to adequate housing. Barring other challenges PIL is shown to be the answer to the progressive realization of socio-economic rights since the government is not in a hurry to implement them. But for it to be effective it would need to learn lessons from jurisdictions that have used PIL for a long time and succeeded at it. The biggest lesson is that providing for socio-economic rights in domestic law is just the first step. In so doing it would be made clear that PIL needs to be expanded and applied across the courts and not just specific courts and judges. Lastly, PIL works best alongside the mobilization of the community to fight for a common goal.

CHAPTER FIVE

CONCLUSIONS, FINDINGS AND RECOMMENDATION

5.1 Introduction

Kenya has ratified international and regional legal instruments that protect the right to adequate housing. In addition, Article 43 of the Constitution has domesticated the right to housing as a fundamental right in the Bill of Rights. Despite all this evictions continue to take place due to the absence of a policy and legal framework on the right to housing. The study set out to analyze the role played by PIL in the promotion and protection of the right to adequate housing. The study used administered interview guide to the respondents for purposes of collecting data. The study found out that PIL plays a key role in the promotion and protection of the right to housing.

It is clear in this study that although the Constitution of Kenya has provided for the right to adequate housing, the enforcement of this right is only done on paper as the practical aspects are non-existent and those who desire to enjoy the right are not able to do so. This is because of the novelty of enforcing socio-economic rights whose implementation depends on litigation as governments are not prepared to do so for various reasons. Those who stay in the marginal areas of the city are poor and therefore not able to go to court to demand for these rights due high cost of litigation, the logistics of gathering evidence, the longtime taken in concluding the cases and the general systemic weaknesses of Kenya's in accessing justice.

Before the promulgation of the Constitution of Kenya, 2010, PIL was unheard of in Kenya's judicial system. This was due to the fact the legal position held by the Attorney General as the custodian of public interest. Since the AG was a state employee appointed exclusively by the President he hardly brought up matters of interest to the public. Thus the question of *locus standi* was the single biggest stumbling block in the realization of public rights through PIL. This was made worse by a Constitution that put exclusively put emphasis on civil and political rights to the exclusion of socio-economic rights.

The new Constitution enacted in 2010 brought renewed hope for the implementation of the right to adequate housing and the use of PIL in vindicating socio-economic rights. The question of locus standing was solved by Article 258 of the Constitution which allows any person convinced that the Constitution is being violated to raise the matter in a court of law. This is in addition to

Article 48 which makes it easy for any person to access justice with minimum technicalities. With regard to the right to adequate housing, Article 2 (5) (6), allows the application of international legal instruments that are ratified by Kenya. Consequently the UDHR, ICSECR, Commentary 4 and 7 and other instruments that protect the right to adequate housing are therefore directly applicable in Kenyan courts. Therefore PIL does not only become an important tool for the protection of the right to adequate housing in international law but is protected in Kenya's Constitution. This has given way for the expansion of litigation in the protection of the right to housing.

The objectives of PIL are laid out to include allowing the poor and the marginalized access justice. PIL brings awareness to the issues related to the violation of socio-economic rights and in the process becomes an important instrument of social change and transformation. PIL has been credited for promoting dialogue by reminding the government the government of some of its responsibilities towards its citizens. This helps in shaping policy and general compliance with existing law.

In this project the right to adequate housing has been illustrated by way of a case study and comparative analysis of other jurisdictions. Muthurwa case represents the viability of using PIL to vindicate the right to adequate housing. Muthurwa is a poor estate whose residences are marginalized, however they took advantage of the Constitution helped by civil society groups to take the matter to court. The public awareness campaigns generated around the issue contributed to the success of the case. The courts turned socio-economic rights into justiciable rights in the enforcement of the right to adequate housing in international and domestic law. However, although the court granted the prayers of the plaintiffs, the enforcement of this right still poses challenges for the residence of Muthurwa. For example in spite of the court order that water and sanitation be restored, this has not been done to date.

This is an illustration of the systemic weaknesses faced in the enforcement of court orders especially pursuant to a PIL process in Kenya. It shows lethargy in the enforcement of court orders especially those touching on sensitive political issues and policy matters as well as the absence of eviction laws. There is also a perception that socio-economic rights come under the executive arm of government therefore the judiciary lacks capacity and competence to deliberate on such matters. The argument is that it violates the separation of powers which is an important

constitutional principle. The adversarial nature of the legal system puts the residence at a disadvantage as they are compelled to use scarce resources to continue with the process which takes a lengthy period of time.

The comparative study of South Africa and India shows the lessons Kenya can learn from these two jurisdictions in the enforcement of the right to adequate housing. The two jurisdictions experienced similar challenges but overcame them by issuing supervisory orders. What comes out is that PIL and the courts are important tools for the implementation of the right to housing as they act as instruments of social change and transformation.

5.2 Conclusion

In conclusion when all is said and done PIL remains relevant in the implementation of the right to adequate housing. It has been shown through the Muthurwa case that the passage of paper rights is not enough, the real test is in their implementation. Therefore such passage should be followed by a mechanism of implementation and where this is absent and the government is either unwilling or unable to do so, PIL remains a viable option. This is particularly important when the victims of violations are poor and marginalized. Although success in PIL helps in bringing about awareness, monitoring and the implementation of socio-economic rights, it is often not an end in itself. It would be made more effective if complemented by other measures that would bring more public awareness to its critical role in enforcing the right to adequate housing in Kenya.

5.3 Recommendation

A number of recommendations have been made that would help in the promotion and protection of the right to adequate housing using PIL. This includes the full implementation of the Constitution, statutory reforms, raising awareness and measures to complement PIL.

5.3.1 Legal Reforms

There is need to enact laws on the right to housing, law to regulate eviction in line with international best practices. This law would provide for budget lines for people who are moved to be given alternative accommodation. Laws on access to justice would remove legal technicalities in line with Article 48 and 258 of the Constitution. There is the need to make steps create a legal system that would be more facilitative of PIL as an option for the enforcement of

the right to adequate housing. This is because one of the biggest handicaps of PIL in Kenya is poor legal framework. For example there are laws that restrict the registration and supervision of civil society groups that play an important role in PIL. There are also no specific laws on access to justice, PIL and especially *locus standi*. This will be an elaboration of the constitutional provisions that have broadened *locus standi*, PIL and access to justice. Laws that regulate eviction need to be created for example the passage of the Eviction Bill.

5.3.2 Raising of Awareness

National human rights institutions need to carry out civic education to create awareness on the use of PIL for promotion and protection of human rights more so the right housing. This is because PIL is not properly understood and the public suffers from the absence of awareness. As a result the enormous opportunities available in PIL are not taken advantage of in advancing socio-economic rights. Therefore measures need to be taken to improve the functioning of national human rights institutions such as the KNCHR and the institution of the Ombudsman as agents of raising awareness in PIL. Currently the role of the commission is reactive rather than pro-active. Further, the approach to PIL needs to be looked at broadly due to its implications for social change and transformation.

5.3.3 Full Implementation of the Constitution

The state must take steps to fully implement the right to housing in Article 43. In addition to Article 258 which provides for PIL. The Constitution of Kenya 2010 has elaborate provisions on the enforcement of socio-economic rights and PIL. However the implementation of these rights is a problem because due to systemic weaknesses of Kenya's judicial system, backlog of cases, non-enforcement of court orders, lack of political good will and novel nature of socio-economic rights. There is the need to fully implement constitutional provisions touching on socio-economic rights in particular the right to adequate housing. This is because the implementation of the right to adequate housing will be accompanied by other rights such as the right to water and sanitation that are critical the health of the people and national development.

5.3.4 Complement PIL

It is recommended that PIL needs to be complemented with other mechanisms that work for the success of PIL such as advocacy, protests and general public awareness campaigns. Litigation is

just one of the efforts that the civil society use to bring awareness to socio-economic rights but it needs to be complemented. This is because PIL on its own is not sufficient to solve the issues of the right to adequate housing. PIL works best in collaboration with other measures meant to bring more awareness. Some of these measures include advocacy, protests and general public awareness campaigns. Therefore PIL should be looked at as a cure for all but rather as just one of the mechanisms. Besides, courts are bound to award remedies if sufficient public awareness has been made around the public interest issue in question.

5.3.5 Harmonized Judicial Decisions

It is recommended that judges need to undergo training to acquire necessary competences in the application of international instruments in the enforcement of the right to housing. This arises from court judgments that are diverse and lacking understanding of international legal instruments.

5.3.6 Supervisory Orders

It is recommended that Judges need to be sensitized and be consistent in the use of supervisory orders in ensuring the enforcement of the right to housing. This is because although the state has an obligation in the promotion and protection of socio-economic right, the obligation is more often unmet due to the failure by the courts to use instruments at their disposal such as supervisory orders to make the state and non state actors accountable as way of enforcing the right to housing.

5.3.7 Harnessing Political Will

It is recommended that Members of Parliament be sensitized on the necessity of passing laws that implement socio-economic rights and especially the right to housing and the Eviction Bill. Political will has been identified as a major challenge in the enforcement of the right to adequate housing in Kenya because it is pegged on the successful implementation of the new Constitution. There is no doubt that the enforcement of this right requires sufficient political will which is defined as a sufficient set of political actors with a common understanding of a particular problem on the public agenda genuinely intends to support a commonly perceived potentially effective solution (Lori. 2011). For political will to be effective, it must have the following components, a sufficient set of political actors with a common understanding of a particular

problem on the public agenda, genuine intention to support and a commonly perceived potentially effective policy solution. Any failure in any one of the components will detract from the effective implementation of the Constitution that pertains to socio-economic rights and this seems to be the scenario presently existing in the country.

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Appendix A

INTERVIEW GUIDES

Interview Guide for Judges, Magistrates and Advocates

Introduction: I am Justus Munyithya, MA Human Rights student at University of Nairobi. I am undertaking a study on “The Role of Public Interest Litigation in the Promotion and Protection of the Right to Housing in Kenya: The Case of Muthurwa Estate”. The purpose of this interview is twofold: first is to get information on awareness of judges, magistrates and advocates on the right to adequate housing and the remedies that could be given for victims of violation of the right to adequate housing in particular. Second to assess the effectiveness of public interest litigation in protecting this right.

Questions

1. What is the right to adequate housing?
2. In your view do you think PIL has a role to play in promoting and protecting the right to housing?
3. Do you think courts are legitimate avenues to litigate cases in relation the right to adequate housing in particular?
4. Can the Constitution of Kenya be applied in court litigations in matters related to violations of the right to adequate housing?
5. What remedies are available for the violation of right to housing?

Appendix B

Interview Guide for Commissioners at the Kenya National Commission on Human (KNCHR), Kenya Human Rights Commission (KHRC), Kituo Cha Sheria and Katiba Institute

Introduction: I am Justus Munyithya, MA Human Rights student at University of Nairobi. I am undertaking a study on “The Role of Public Interest Litigation in the Promotion and Protection of the Right to Housing in Kenya: The Case of Muthurwa Estate”. The purpose of this interview is twofold: first is to get information on awareness of judges, magistrates and advocates on the right to adequate housing and the remedies that could be given for victims of violation of the right to adequate housing in particular. Secondly, to assess the effectiveness of public interest litigation in protecting this right.

Questions

1. What is the right to adequate standard of living and how is it related with the right to adequate housing?
2. What is the role of the Commission in the realization of the above rights?
3. Does the Commission have mandate to investigate and handle cases of violation of the right to adequate housing?

Appendix C

Interview Guide for Member of the public/community/Nairobi Informal Settlements Coordination Committee

Introduction: I am Justus Munyithya, MA Human Rights student at University of Nairobi. I am undertaking a study on “The Role of Public Interest Litigation in the Promotion and Protection of the Right to Housing in Kenya: The Case of Muthurwa Estate”. The purpose of this interview is twofold: first is to get information on awareness of judges, magistrates and advocates on the right to adequate housing and the remedies that could be given for victims of violation of the right to adequate housing in particular. Secondly to assess the effectiveness of public interest litigation in protecting this right.

Questions

1. What is the right to adequate housing?
2. Does the state/government have a duty in protecting the right to housing?
3. What is the role of the civil society in protecting the right to housing?
4. Which aspect of the right to adequate housing is often claimed?
5. In your view what are the procedures to be followed in considering and investigating cases related with the right to adequate housing?
6. What kind of decision should be given by the court? And how is its enforceability evaluated?
7. What is the level of enforcement mechanism available for this right?

Appendix D:

Interview Guide for Nairobi County Housing Department

1. What is your name? (optional)
2. What is the county policy on the right to adequate housing?
3. To what extent is the policy adequate?
4. What is the role of PIL in promoting and protecting the right to adequate housing?
5. Has this intervention been sufficient and in which way?
6. What remedies are available for the violation of right to housing and are they sufficient?
7. Did you encounter any challenges in enforcing the right to adequate housing?
8. What else would you want to add?