AN INVESTIGATION INTO THE ROLE OF THE KENYAN JUDICIARY IN ENHANCING THE RIGHT TO HOUSING UNDER A TRANSFORMATIVE CONSTITUTION

BY

DERRICK WAWIRE

G62/67415/2013

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAWS (LLM) FOR THE UNIVERSITY OF NAIROBI

NAIROBI OCTOBER 2016

DECLARATION

I, The undersigned, declare that this Thesis is my original work and has not been presented to any other University or any other institute for academic credit.

Name: Derrick Omanyo Wawire

Signature:

Date:

This project has been submitted with my approval as the University of Nairobi Supervisor

Name: Justice (Rtd) Hon.Nancy Baraza

Signature:

Date:

DEDICATION

This work is dedicated to my beloved parents Edison Wawire and Truphena Wawire who worked so hard to bring me up and taught me good morals and financed most of my higher learning education.

And

My family for their profound support throughout this Masters of Law programme.

ACKNOWLEDGEMENT

First, I sincerely thank God for granting me continued health throughout the Course, caring parents, and the strength to see me through my education.

My sincere appreciation to my supervisor Justice (Rtd) Hon.Nancy Baraza and reader Mr.Rodney Okorth who took pain to proof read the work and offered suggestions and guidance. My regards to all those who touched my life at the University.

ABSTACT

The 27th of August, 2010 ushered in a new dawn: Kenya through its leadership promulgated the Constitution of Kenya, 2010, which has been hailed as a transformative Constitution. The foresaid event marked the beginning of a transformational journey in so far as the administrative, governance, social-economic, and cultural structures of Kenya are concerned. In this regard, the new dispensation guaranteed the protection of political, civil, social- economic and cultural liberties under the banner of the Bill of Rights.

Placing reliance on the text of Article 20(3) and 20(5) of the transformative Constitution, the obligation of enforcing fore mentioned rights is ultimately bestowed on the judiciary. My study keenly interrogates the progress made by the judiciary in enhancing the foresaid rights. It specifically concentrates on the right to housing as contemplated in Article 43 of the Constitution of Kenya, 2010.

In analytical form, the study employs the High Court of Kenya judicial precedents, in so doing; it brings out the difficulties faced by courts and in turn offers probable solution.

ABREVIATIONS

Butterworths Constitutional Law Reports (BCLR)

Committee on Social Economic Rights (CESCR)

Committee of Experts (C.O.E)

Commission of Inquiry on Post-Election Violence (CIPEV)

Criminal Procedure Code CAP 75 Laws of Kenya (CPC)

East Africa Law Reports (E.A)

International Commission of Jurists Kenya Chapter (ICJ Kenya)

Kenyatta International Conference Centre (KICC)

Kenya African National Union (KANU)

Kenya African Democratic Union (KADU)

Kenya Law Reports (eKLR)

Legislative Council (LEGCO)

Orange Democratic Union (ODM)

Supreme Court Cases (SCC)Urban Land Ceiling and Regulations Act, 1976(UCLRA)

Table of Contents

Declaration…….……..ii

Dedication…….…..iii

Acknowledgement…….……iv

Abstract…….…..v

Abbreviation……...vi

Table of Contents……..…….....vii-x

Bibliography…….....72

CHAPTER ONE: INTRODUCTION

1.0 Background…….....1

1.1 Statement of the Problem…….....6

1.2 Objectives of the Study……...9

1.3 Research Questions…….....9

1.4Research Hypothesis……...…….....9

1.5 Theoretical Framework……...…….....10

1.6 Literature Review……..…12

1.7 Research Methodology…….....16

1.8 Limitation and Scope of the Study…….……...16

1.9. Chapter Breakdown…….....18

CHAPTER TWO: THE BIRTH OF THE TRANSFORMATIVE CONSTITUTION

2.0 Introduction…….……..19

2.1 Pre-Independence Period (1920-1963)……..19

2.2Developments Leading to the Promulgation of the Independence Constitution……20

2.3 Period from 1963-1980…….....24

2.4 Period 1980-1992……..27

2.5Effects of the Constitutional Amendments) under the Period (1980-1992…….....27

2.6 Flaws of the Repealed Constitution…….….30

2.7 Period 1992-2002…….…….....31

2.8 Structure of the Review Process……...…….…...33

2.9 Gains under this period……..…….…….34

2.1.0 Post 2002-2007……..…….35

2.1.1 Post 2007 Period…….…….……..37

2.1.2 Transformative Features of the Constitution of Kenya, 2010…….……...40

2.1.3 Conclusion…….……..…42

CHAPTER THREE: JUDICIAL ENFORCMENT OF THE RIGHT TO HOUSING IN KENYA: GAINS AND DRAWBACKS

3.0 Introduction……..…….43

3.1 Approach of Courts……..…….44

3.2 Satrose Ayuma & 11 others-v-Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme……..…….....44

3.3 Ibrahim Sangor Osman-v-Minister for Provincial Administration & Internal Security for Provincial Administration & Internal Security & 3 others…….…….....47

3.4 Mitumba Case…….....48

3.5 Emerging Jurisprudence……..…….49

3.5.1 The Concept Meaningful Engagement …….51

3.5.2 Critique to the Meaningful Engagement Principle…….53

3.6 Contextualizing Difficulties Concerning the Right to Housing Jurisprudence…….....…….54

3.7 Conclusion……..…….....58

CHAPTER FOUR: A COMPARATIVE VIEW OF JUDICIAL ENFORCEMENT OF THE RIGHT TO HOUSING

4.0 Introduction…….....59

4.1 India…….…..59

4.3 Understanding the Jurisprudence to the Right to Housing…….....60

4.4 Conclusion…….....64

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction…….....65

5.1 Conclusions…….…….65

5.2 Recommendations…….....67

5.2.1 Balanced Approach…….....67

5.2.2 Training and Stakeholders Participation……..……..68

5.2.3 Legislation…….....69

5.3 Conclusion……..…….……..70

CHAPTER ONE

INTRODUCTION

1.0 Background

Bradley and K. Ewing[1] define a Constitution as a document possessing special legal sanctity in the sense that it sets out the framework and the principal functions of the arms of the government within a State and further prescribes the foresaid organs and principles mode of operation. In this context, the Constitution regulates the relationship between the State and its subjects.

World over Constitutions have been a reflection of social phenomena. The 1996 Constitution of Republic of South Africa (hereinafter connoted as the South African Constitution) [2]was preceded by the apartheid regime that breaded a society of extreme political imbalances and social inequalities. It has been argued that the 1994 dispensation embraced the notion of democracy, a culture of human rights founded on international norms and standards, and a strict adherence to the rule of law, [3]thus it created a Transformative Constitution. Fundamentally, the South African Constitution possesses a transformative text anchored on historic values, non-racialism, and non

---

[1] Bradley & K. Ewing, "Constitution and Administrative Law'',(14th edn Pearson/Longman,2007),Pg. 4
[2] The Constitution of the Republic of South Africa Act, 1996.
[3] M.Rapatsa, "transformative Constitutionalism in South Africa: 20 Years of Democracy", (MCSER Publishing), Rome-Italy, Vol 5, No.27, December, 2014.

sexism, all enshrined in a robust Bill of Rights. Thus, it peculiarly provides a platform for the justiciability of the socio-economic rights.[4]

Bearing in mind the configuration of the South African Constitution, Scholars led by Professor Karl Klare have formulated the notion of '*transformative constitutionalism'* that promotes a legal and governance system that is dictated by constitutional supremacy and the constitutional values. Klare explains the fore discussed principle to involve:

> *"……..*a long term project of constitution enactment, interpretation and enforcement committed (not in isolation, course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformation constitutionalism connotes an enterprise of inducing large-scale social change though non-violent political processes grounded in law.''[5]

Klare's progressive principle has found relevance in judicial remedial orders relating to the enforcement [6] of socio- economic rights under the South African Constitution (The right to housing under section 26; Right to healthcare, food, water, social and security under section 27; and right to education under section 29). An application of the foresaid principle was reflected in the case of *Grootbroom –v-Ostenberg Municipality*

---

[4]The South African Constitution provides: ''Right to Housing – section 26 and Right to Health Care-,food ,water and social security-section 27 of the Constitution of South Africa Act,1996.''

[5] K.Klare, "Legal Culture and Transformative Constitutionalism"14 South Africa Journal on Human Rights (1998)146151-156; expounded in S-V-Makwanyane 1995 (3) SA 391 (CC) 1995 (6) BCCR 665 (CC) Para 262.

[6] Section 172 (1) (a) provides: ''a court deciding a constitutional matter must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its consistency. The declaratory reliefs may be a declaration of invalidity or general declaratory orders.''

and Others 2000, [7]where a controversy related to the right to housing.[8] The Constitutional Court was called upon to give meaning to the above provision. The facts were: 510 Children and 390 adults were evicted from the land that had been placed aside for low cost housing. The foresaid adults sought redress from the Cape of Good Hope High Court. Consequently, the High Court ordered the government to provide the petitioners with shelter. Fundamentally, the Court defined the bare minimum necessities which the government must guarantee to include ‘’tents, portable latrines and a regular supply of water.’’

Aggrieved by the Court's decision the appellants moved to the Constitutional Court. At the Constitutional Court, the issue for determination crystallised as whether the right of housing contemplated in section 26 was justiciable. In determining, the question justice Jacob (presiding judge) was of the view that it did not matter whether these rights are justiciable or not, but how they can be enforced.[9] He opined that "section 26 places a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.'' With regard to section 26(2) the Court was of the opinion that there is a non-absolute and qualified positive obligation on the state to act.

---

[7] 2001 SA 46(CC),2000 11 bclr 1169 (CC).

[8] The Right to Housing under the South African Constitution is provided under section 26 as: "1) everyone has the right to have access to adequate housing. 2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. 3) No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit "

[9] Yacoob J, "The Housing Obligations Imposed on the State by the South African Constitution as defined by the Constitutional Court of South Africa", a speech elaborating the reasoning in Grootboom case given at a conference on Human Rights and Globalisation at Panchgani, India on December 30, 2000.

The Court arrived at a decision that effectively ruled took that the housing programme in place at Cape Metro was contrary to Section 26(2). In this respect, it made a declaratory order mandating the state to meet its positive obligation provided for by Section 26(2) of the Constitution. Thus the state is obligated to innovate, finance, execute and superintend measures that are geared towards providing relief to those in dire need.

In the above context, it is evident that the concept of transformative constitutionalism resonates well with the judicial enforcement of the socio-economic rights including the right to housing contemplated in the South African Constitution. Thus, it is rarely persuaded by the traditional notion of non-justiciability of socio-economic rights and strives to ensure that the establishment protects these rights.

Closer home, the Constitution of Kenya,2010 (hereinafter referred to as 'the Constitution')[10] has been described as progressive, historic and even revolutionary[11]; this is evident from the preamble which recognises the aspirations of the Kenyan people for essential values of human rights and the sovereign inalienable right to determine the form of governance of their country. It is also characterised by a comprehensive Bill

[10] Promulgated by Mwai Kibaki ,the President of Kenya on the 27th August ,2010.

[11] J. Biegon & G. Musila, "Socio-economic Rights as One Promise of a New Constitutional Era'' (eds) Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and opportunities for Kenya, Vol.10, (2012), Pg. 1.

of Rights (chapter four of the Constitution of Kenya,210) that encompasses socio - economic rights.[12]

In the above regard, the Constitution establishes the 'Bill of Rights as "a central plank in the framework for validating all interpretation by subjecting all governmental policies-economic, social and cultural-to it".[13]Under the socio-economic rights, the 'right to housing'[14] is given great prominence with regard to its normative content. It is embodied as not only limited exclusively to a physical structure of a house but in a much broader sense integrates housing, shelter and habitant environment as a whole.[15]

Evident from above, "like the South African Constitution, the Constitution differs from the traditional liberal model-which establishes a 'minimalist state' because it largely preoccupies itself with assigning and checking state power –to a transformative model which requires active state intervention to be used to advance equality ,human dignity and social Justice."[16]

From the foregoing, it can be stated that the Constitution is indeed a Transformative Constitution with a transformative design anchored on the doctrine *of 'transformative*

---

[12] Under Article 43(1) of the Constitution of Kenya, 2010 provides: ''for the state protection of socio-economic rights that include right to health care and the right to housing.''

[13]J. Biegon & G. Musila,"Socio-economic Rights as One Promise of a New Constitutional Era'' (eds*)* Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya, Vol. 10, (2012),Pg. 2.

[14] Article 43(1)(b) of the Constitution of Kenya.

[15] M. Kothari,S. Kamali & Chaudhry, "The Human Right to Adequate Housing and Land National Human Rights Commission'', India(2006)Pg.14.

[16] J.Biegon & G. Musila, "Socio-economic Rights as One Promise of a New Constitutional Era'' (eds) Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and opportunities for Kenya**,** Vol.10, (2012), Pg. 59.

constitutionalism'. In line with the foresaid concept, it obligates "the restructuring of the state, society, and the redistribution of power along egalitarian lines."[17]

Moreover, like the South African context, the above situation precipitates the Judiciary to play an active role in advancing the Bill of Rights and specifically socio-economic rights.[18]In playing its role, the Judiciary has faced difficulties. In analytical form, this paper will interrogate the jurisprudence from the Kenyan courts as regards to the application of the foresaid principle in the enforcement of the right to housing in our Transformative Kenyan Constitution. Additionally, it will offer an incisive critique to the said jurisprudence**.**

1.1 Statement of the Problem

The main aim of the study is to give a thoughtful examination into the Kenyan Courts ability to promote the doctrine of transformative constitutionalism specifically with respect to the right to housing. An overview of judicial precedents suggests that the Kenyan Courts have been faced with difficulties in so far as remedies to the right of housing are concerned.

In the case of *Satrose Ayuma& 11 others- v- Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 others*, High Court of Kenya at Nairobi, Petition No.65 of 2010(2011) eKLR, long term tenants and residents of Muthurwa estate were

---

[17] G. Albertyn and B. Goldbatt*, "*Facing the Challenges of Transformation: Difficulties in the Development of Indigenous Jurisprudence of Equality,"South African Journal on Human Rights (1998)pp. 248 -249.

[18] Article 20(3) of the Constitution of Kenya.

served with notices to vacate their home within 90 days. This was to enable the 1st respondent demolish the entire estate for its own use and purpose.

The petitioners (on their behalf and behalf of Muthurwa residents) lodged a Constitution petition arguing, inter alia, that indeed eviction violated their right to housing. In Its analysis, the court was cautious about a fundamental issue that arises once there is an inclusion of social -economic rights in any Constitution: the balancing of competing constitutional right to adequate housing against the other Constitution right to own private property and to do with it as one wills? In resolving the question, the honorable Court configured the interpretation of the Bill of Rights to the spirit of the Constitution. It observed that the mode of application of the Bill of Rights is expressly set out under Article 20(3) of the Constitution. It went on to examine the United Nations general basic principles and guidelines concerning the right to housing and was persuaded that although it is common ground that at some stage the tenants will have to vacate the premises but when that time comes, their eviction shall be carried out in a humane way.

The court held that in the instant case the petitioners had demonstrated that their fundamental rights had been violated. In sum, it granted a conservatory order which in my opinion seem to dictate the functioning of the executive arm of the government.

In a similar case of *Susan Waithera Kariuki & 4 others- v- the Town Clerk Nairobi City Council & 2 other,*[19] where by the petitioners had been granted notices to leave the respondents premises within 24 hrs. Consequently, their houses were demolished with the lapse of the 24 hrs notice. The petitioners put temporary shelters and remained *in situ and* sought legal action under Article 47(2) of the Constitution which grants the citizenry the right to a fair administrative action. The High Court was quick to note the arbitrary, capricious and high handed manner with which the 1st respondent handled the issue and that its act expressly contravened the Constitution in granting the orders sought.

From the foregoing scenario, it can be deduced that, there are issues concerning the practicability and enforceability of the right to housing orders issued by the Kenyan courts. The prevailing situation demands an alternative approach and thus there is need to inquire into whether there are other more pragmatic remedies at the courts' disposal. In a nutshell the orders granted in fore mentioned precedents are blanket in nature and times unenforceable hence the justification for my study.

[19] High Court of Kenya, Petition 66 of 2010(2011)eKLR.

1.2 Objectives of the Study

The study aims to achieve three main objectives:-

(i) To resolve the question as to whether the Kenyan courts have played an active role in promoting the right to housing under the new constitutional dispensation.

(ii) To unravel the challenges related to the enforcement of the said right, and,

(iii) To provide a case for reform.

1.3 Research Questions

The study, in discussing the concept of the right to housing under the Constitution, aims at resolving certain fundamental questions:

(1) Have the Kenyan courts acted progressively in promoting the right to housing as contemplated by the Constitution?

(2)What are the difficulties encountered by the Kenyan courts in enhancing the right to housing?

(3) What are the available remedies that may cure the foresaid difficulties?

1.4 Research Hypotheses

This discourse is premised on the view that the Constitution mandates courts to uphold the dignity of the citizens with regard to violations of socio-economic rights; right to housing. In enforcing these rights, the question of separation of power arises and thus the remedies granted have and may a wide scale impact: confronts the role of the

executive with regard to policy matters or has a potential impinge upon the authority of legislature.

In the above regard, it is my understanding that the situation can be remedied by courts developing a progressive and practical approach in granting remedies related to the right to housing.

1.5 Theoretical Framework

Numerous theories have been advanced with respect to rights based judicial review. These theories advance either in the negative or positive the foundation of the legal system capacity to enforce social economic rights.

Amongst these theories is the '*positivism'* theory.[20]The theory advances the thinking that "rights are simply those rules which the state has enacted for the protection of individuals and their property interest.'' It philophisically divorces the legal system from ethical and moral foundation of society and effect unable to motivate human beings for action or goods for future development.[21]In this regard, it has been able to justify obedience to iniquitous and immoral laws such as Nazi Nuremberg laws on racial purity. In his works, Dugard[22]chastises the legal positivism theory as the greatest impediment to realisation of social -economic rights. He asserts that the legal tradition

[20] H.L.A Hart, "The Concept of Law'' (2nd e.d,Oxford Calderon Press,1994)Pg.149.
[21] T.Edwin (1965), "The Morality of Law by L.Fuller,"Indiana Law Journal (1964) Vol.42/Issue no: 2, Article 5.
[22] J.Dugard, "Some Realism about the Judicial Process and Positivism a Reply", (1981)98 South African Law Journal Pg.372, and 374.

inherited from English law of positivism has a net result of failure on the part of judges to consciously promote human rights. He emphasizes that its ultimate aim is curb judicial discretion; "in positivity it is believed that the integrity of the law is maintained through a neutral and objective judiciary that is guided by subjective notions of right and wrong within written law." These notions does not promote judicial activism, thus in general prohibit progressiveness and promotes jurisprudential conservatism. He refers to it as the pathology of the judiciary.[23]

In opposite parity, there is the concept of transformative constitutionalism examined earlier. For emphasis purposes, the concept advocates for courts to issue orders aimed at the realisation of socio-economic rights. The end result would be to promote good governance and enhance the spirit of a Transformative Constitution. It encourages judges to issue orders that may be construed as infringing on the executive's role hence contradicting the salient principle of separation of powers.

It elicits the achievement of equality and in this respect "the project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other groups of inequality.''[24] Furthermore, it entails the development of opportunities which allow people to realise their full potential within positive social relationships.[25] I adopt this theory in my study on the basis that it roots

---

[23] Ibid.
[24] Supra Note 17-G Albertyn and B Goldbatt, "Facing the Challenges of Transformation: Difficulties in the Development of Indigenous Jurisprudence of Equality"(1998)14 South African Journal on Human Rights Pp.248-249.
[25] Ibid.

for justiciability of socio-economic rights and hence legal positivism has a limited bearing in my study.

1.6 Literature Review

The research is descriptive as well as analytical. In this sense, it aims at bringing out the challenges facing the Kenyan Courts with regards to the promotion and enforcement (through application of the concept of transformative constitutionalism) of the right to housing under the Constitution. There are various scholars who have given their commentaries on this study. This study has selected seven relevant works and additionally, it will identify the gaps in which it intends to remedy at its conclusion. In this respect, it has reviewed raging debates concerning the enforceability of socio-economic rights, Courts capacity to resolve dispute relating to socio-economic rights (which include right to housing), and the methodology to be used by the Courts in enforcing these rights.

With regard to justiciability of socio-economic rights, Yash Ghai[26]advances the historical and traditional argument that these rights are non-enforceable. He is of the thinking that these rights are just moral statements of a nation's ideal and hat there are no generally accepted levels in which to meet obligations. Moreover, he opines that policy decisions about these rights should be made politically. In opposite parity,

[26] Y. Ghai, "An Approach to the implementation of Economic and Social Rights;" a paper prepared for the interights at the Advisory Council Meeting, London 7-9 July 2000.

Dugard and Roux[27] are of the modern school of thought, they are of the view that these rights are justiciable and the establishment must ensure their full enjoyment of these rights. They are of the opinion that it makes no sense if there are constitutional safeguards to civil and political liberties and people are subjected to social exploitations propagated by the Capitalist governments.

In the above regard, they adopt the thinking advanced by the concept of transformative constitutionalism: the Court is justified to adjudicate claims of socio- economic rights and hence any classical reservations associated with the justiciability of socio-economic rights (policy and budgetary consideration that are best left to the executive) are unfounded. However, they posse reservations: the nature of social economic rights requires litigants to have a sophisticated understanding of them. Thus it is difficult for them to claim these rights unless they have substantial legal and other expert support.[28]

As to remedial question, they are of the view that Courts should come up with a new definition of separation of powers to fit within the doctrine of transformative constitutionalism. In this regard, the Court will be fully clothed with the authority to dialogue with the political branches of government and, in the process will assist in identifying precisely the content of social economic rights.

---

[27] J.Dugard and T Roux, **"**The Record of South African Court in Providing an Institutional Voice to the Poor: 1995-2004; in Gagarella**,"**et al; Pg.113.
[28] Ibid.

In parity with Dugard's view, Dixon[29] advances the concept of *'dialogue'* as a solution to the remedies granted by the Courts. Thus, he roots for a weak remedy on the account that the role of the judiciary is to counter blockages in the legislative process arising from blind spots and burdens of inertia including misapplication of laws and time constraints in legislative roles. He is of the strong view that a dialogic perspective prevents reverse burdens of inertia arising from strong forms of judicial review.

Tushnet [30]expresses concern with respect to a weak form type of review and opts for a robust approach that may lead to full enjoyment of these rights.[31] However, Musila fronts certain approaches that have been adopted in other jurisdiction before; minimum content obligation[32] and reasonableness.[33]He emphasises that the Constitution possesses a transformative text, and thus recognises that Courts may issue orders that have an impact on the allocation of resources and this regard makes it incumbent on Courts to approach these issues in a more co-operative and non-coercive manner allowing state organs flexibility in the implementation of rights.

---

[29] R.Dixon, "Creating Dialogue about Socio-economic Rights: Strong-Form versus Weak Judicial Review Revisited,'' *(*2007) Pg.5; International Journal of the Constitution law CON 391-418.

[30] M.Tushnet , "Alternative Forms of Judicial Review and the Persistence of Rights and Democracy Based Worries,**'**(2003b) 38 Wake Forest Law Review.Pgs. 813-838,815.

[31] M.Tushnet, *"*Alternative Forms of Judicial Review"**,** (2003a) 101 Michigan Law Review 2781-2784: Weak form review allows legislative majorities to displace judicial interpretations of the Constitution.

[32] G. van Bueren, "Alleviating Poverty through the Constitution Court" (1999)15 South African Journal on Human Rights 5; constitutes the essential elements of the rights without which the right may be rendered useless and basic survival threatened.

[33] See Supra Note 19-…. "the Court observed ……a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, whether public money could have been better spent. The question would be whether the measures that have been adopted reasonable, it is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these meet would meet the requirements of reasonableness."

As to the nature of the right to housing under the Constitution, Ndegwa [34]is of the view that it comprises two out of the seven grand elements replicated in the General Comment no.4.[35]Thus, she opines "adequate housing must be accessible to those entitled to it; disadvantaged groups must be accorded full and sustainable access to adequate housing resources."She further emphasizes that under the Constitution the disadvantaged include the Kenya widows who are HIV positive and therefore should not be evicted from their homes. In her view, the Constitution provides a variety of remedies which can be granted by the Court. However she acknowledges that some of the orders may not be implemented due to their impractical nature. She points a case in point in landmark case of G*rootboom*[36]where the judicial order concerning infringed fundamental rights was unenforceable. In this respect, she suggests the concept of '*meaningful engagement'* tried out by South Africa that encourages negotiations amongst the parties.

From, the foregoing scholarly contributions, it is evidently clear, certain uncertainties arise from this area of the study. Firstly, there is no general consensus on the issue of absolute justiciability of socio- economic rights and specifically right to housing. Thus there are questions as to the Courts legitimacy to issue orders that compel the authorities to do certain positive actions to enforce these rights. Secondly, there is no clarity as to what is the ideal regime of remedial orders that the Court should adopt in

---

[34] I.Ndegwa: "A roof over Wanjikus Head: Judicial Enforcement of Right to Housing under the Constitution *of* Kenya",(eds);in Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya**,** Vol.10, (2012)pg. 157.
[35] General Comment No.4,UN DOC E/C.12/1997/4.
[36] Supra Note 7.

violations of the above nature: should they adopt dialogical or reasonablessness method. My study strives to remedy the foresaid questions; in so doing the study limit itself to the right to the housing.

1.7 Research Methodology

The study will explore the qualitative method of research as opposed to the quantitative in the sense that the area of study is accustomed and has desired tentative results. In addition am also of the view that my study may be impended by time constraints (short time lines for its completion).

In the above context, the methods of data collection will include secondary and tertiary sources of data. Secondary sources include textbooks, articles in periodic journals paper presentations in conferences and speeches of authoritative figures in this area. Tertiary sources include mainly judicial precedents.

1.8 Limitation and Scope of the Study

The study intends to interrogate the doctrine of transformative constitutionalism within the context of the enforcement of the right to housing. However, the Constitution promotes multiple aspects of this doctrine. They include the principles of devolution and Public finance which are key to the realisation of foresaid doctrine. I am of the opinion that my approach would be disadvantageous to the reader as it will deny him or her holistic understanding of this doctrine.

The Bill of Rights consists of civil - political rights and other socio-economic rights which Courts are obligated to remedy their violations. In this respect am of the view

that in focussing my discussion to the right of housing, the study will be devoid of the integral aspect of comprehensive enforcement of the Bill of Rights within the context of the foresaid doctrine. In my view, this approach may be a minus to the reader.

1.9 Chapter Breakdown

The study consists of five chapters. Chapter one is introductory and contains the background to the study. It highlights the problems in this area. The Chapter includes problem statement, Justification of the Study, objective of the study, the research questions, hypothesis, theoretical framework, literature review, methodology, limitation and scope of the study.

In Chapter two, the study interrogates in length the history of the Kenyan Constitution and how it has evolved to be of a transformative nature. In its analysis, the discourse highlights the circumstances that necessitated the clamour for a new Constitution and sequences of events that led to the enactment of the Constitution. It brings out the specific aspects that make the Constitution to be of a transformative nature. In so doing, the study lays emphasis on the right to housing.

In Chapter three, the study concentrates on analysing the prevailing situation in Kenya with respect to the judicial application of the doctrine of transformative constitutionalism in enforcing the right to housing. In interrogating the foresaid situation the discourse offers constructive critique.

In Chapter four, the study gives a comparative view of the doctrine. It restricts itself on the enforcement of the foresaid right in India.

Chapter five concludes the study and offers recommendations aimed at curing the defects that arise from the application of the above doctrine with respect to the right to housing.

CHAPTER TWO

THE BIRTH OF THE TRANSFORMATIVE CONSTITUTION

2.0 Introduction

This chapter seeks to provide an insight on the constitutional developments in Kenya since independence to date. Thus it will interrogate the process of constitution making resulting in the promulgation of the Constitution. In so doing, the study will highlight the challenges experienced during this journey. In addition, it will discuss the transformative aspects of the Constitution with specific reference to the right to housing

The study intends to canvass the developments in key phases of constitutional history namely: pre-independence period; period 1963-1980; period 1981-1992; period 1992 - 2002; period ranging from 2002-2007; and post 2007 period.

2.1 Pre-Independence Period (1920-1963)

Pre-colonial Kenya was characterised by informal judicial and administrative authority. Thus judicial powers were exercised by informal tribunals that were binding only within specific communities.[37]The situation necessitated the formalisation of the country's governance structure and eventually the creation of a colony.[38]In effect; this meant that the governance mechanism previously held by British protectorate was put

[37] Prof J.B Ojwang, "The Constitutional Development in Kenya: Institutional Adaptation and Social Change*", (*Acts Press*)*1990, Pg. 30.
[38] Kenya was transformed into a colony in 1920.

under the direct control of her majesty's government (British Empire) through the governor. However, the coastal strip was still maintained as a protectorate.

2.2 Developments leading to the Promulgation of the Independence Constitution

The colonial government re-structured the executive council and legislative Council (LEGCO) [39]with a view of bringing uniformity and order in the country's organisational structure; indeed the LEGCO was empowered to make ordinances with the governor as the speaker.[40] In his capacity, the governor made all the necessary regulations and standing orders to guide to the operation of the LEGCO. In addition, the executive council was established to advice the governor on matters of administration. The foresaid situation introduced the concept of collective participation and administration and "given the elist and sectarian orientation of the settlers platform and their powerful influence with colonial authorities, there was no surprise that the laws passed and executed were rationally discriminatory."[41]

The year 1944 marked the beginning of constitutional reforms as Eliud Mathu was nominated to the LEGCO as the first African representative. Further reforms were witnessed in 1954; the adoption of *Lytelleton* Constitution. The Lytelleton Constitution introduced policy measures whose objective was to give Africans a limited degree of

---

[39] Established in 1907.
[40] Prof J.B Ojwang, "The Constitutional Development in Kenya: Institutional Adaptation and Social Change", (Acts Press),1990,Pg. 31.
[41] Ibid.

participation in constitutional machinery.[42]It further involved a limited franchise of Africans to elect eight members to the LEGCO.[43]The ministers were required to exercise responsibility for decisions on government policy under the banner of collective responsibility.[44]However, the form of collective responsibility was limited since most ministers formed the larger executive arm of the government. The situation was further worsened by banning of political activities. In effect, the colonial government proscribed the only political party Kenya African union (KAU) and the liberation group Mau-Mau movement. In response, the Mau-Mau movement swung into action employing guerrilla tactics resulting into mass killings and displacement of both the foreign and local population.

In an attempt to address the foresaid problem, the colonial government adopted the Lennox Boyd Constitution.[45]The Lennox Boyd Constitution abolished the executive council and replaced it with a council of ministers; it also increased the number of African members in the LEGCO to 14.It further provided for specially elected members who were to be elected by the LEGCO sitting as an electoral college, interesting the Constitution increased the membership of the council of ministers to 16 with half of the membership being appointed from elected members of the LEGCO. Lastly, it established a council of state comprising of 10 members and a chairman.

---

[42] Prof J.B Ojwang, "The Constitutional Development in Kenya: Institutional Adaptation and Social Change", (Acts Press), 1990, Pg. 32.
[43] K.Stifting, "History of Constitutional making in Kenya", (Media Development Association), 2012, Pg. 8.
[44] Ibid.
[45] Adopted in 1958.

The aforementioned reforms were not satisfactory to the African leaders; they were of the view that no consultation had been made at the conception and formation stages of both the Lytelleton and Lennox Boyd Constitutions.[46]

With the growing resistance of the Lennox Boyd Constitution, a different approach was sought by the colonial government, with firm foundation on inclusiveness. This scenario precipitated the staging of the first Lancaster House Conference.[47]At the conference African leaders were determined to pressurise the colonial government to: release all political prisoners and open up the democratic process to the Africans by negotiating for commanding positions in executive government and LEGCO based on the principle of majority rule. Further negotiations were carried by other minority groups present at the conference; however no comprehensive agreement was reached.

The outcome of the Lancaster Conference necessitated the secretary of state for colonies, Sir Ian Macleod to promulgate a new Constitution popularly known as 'Macleod Constitution'. The Macleod Constitution increased the members to the Legislative Council to 65 of which 53 were to be elected by the Electoral College. The franchise requirements for voters were liberalised. Consequently, twenty seats were reserved for Europeans, Asians and Arabs. The Constitution also provided for a justiciable Bill of Rights that legitimized various rights: ''the right to personal liberty, right to private property, the right to life, the freedom of conscience, freedom of

[46] Prof J.B Ojwang,"The Constitutional Development in Kenya: Institutional Adaptation and Social Change" (Acts Press, 1990), Pg. 34.
[47] Held from January to February 1960.

expression and freedom of assembly.''[48]The Constitution was implemented in April 1961 by then there was an overwhelming desire for constitutional reform.

Elections were held late in the year 1961 under the Macleod Constitution pitting two indigenous African parties; Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). KANU emerged victorious (meaning it had majority seats in parliament.) However, KANU declined to form the government for the sole argument that some of its leaders had been detained by the colonial government. However, KADU agreed to form a government which was dominated by colonial officials with the governor exercising real powers. The government was characterised by mistrust among members of the council of ministers. This in turn led to discord in operations resulting in challenges with regard to decision making.[49]

The above situation led to the staging of the Second Lancaster Conference.[50]The main objective of the conference was to strike consensus between KADU and KANU over the governance system, the major difference was the *Majimbo* (federal system of government) which had been fronted by KADU but vividly opposed by KANU. The conference resulted into the formation of the internal self-government Constitution. The Constitution provided that the governor acting on his discretion was responsible for defence, including naval, military and air force, external affairs and internal security. The executive powers of the state were still vested in law and not the Prime Minister.

---

[48] Supra Note 43 above.
[49] Supra Note 43 above.
[50] Convened in 1962.

The Constitution ensured that a politically organised government supported by a popularly elected legislature; the ensuing elections saw KANU victorious with the party leader Jomo Kenyatta becoming Kenya's first Prime Minister. The Independence Constitution was settled based on compromise between various communities living in Kenya. It sought to capture the agreement thrashed out at the Lancaster House Conferences.[51]In this regard, it served as a tool for enactment of noble values such as the salient concept of constitutionalism.[52]The most prominent feature of the Independence Constitution was that it "secured the rights of minorities through the Bill of Rights modelled on the '*European Convention on Human Rights.*'[53]It also consisted of the two chamber parliament comprising of the House of Representatives and the Senate. The Senate was mainly mandated to safeguard regionalism or '*Majimboisim*'.

2.3 Period from 1963-1980

The Independence Constitution provided an elaborate mechanism of amendment: a proposed amendment for the entrenched provision required at least a 90% vote in the Senate for and 75% for ordinary clauses and this was in addition to 75% in the House of Representatives. From the foregoing the Independence Constitution was rigid and inflexible.

---

[51] G.Muigai,"The structure and values of the Independence Constitution Report of the Constitution of Kenya Review Commission", Vol .5, Pg. 270, approved for issue on 10th April, 2003.
[52] Ibid.
[53] The convention on Human Rights was the first treaty based and binding human rights instrument in the world and was adopted by the Council of Europe and operation in 1953.

Between 1963 and 1982, the Independence Constitution was amended many times that it could no longer be classified as rigid.[54]The amendment was exclusively carried out by parliament; with undue regard to other stakeholders view. The first major amendment was the seventh amendment: mergered the Senate and the House of Representatives into unicameral legislature.[55]As a consequence the Senate was abolished, the life of Parliament was extended by two years and 41 new constituencies were created. Furthermore the intended dissolution of first Parliament in 1968 was postponed to 1970. The said amendment has been observed as retrogressive simply because it dealt a death blow to regionalism.[56]It further confirmed the establishment of a strong centralised government.

The tenth amendment to the Constitution took place in 1968. The amendment prescribed for a 'direct' Presidential election. Equally it dictated that the Members of Parliament should be nominated by a political party.[57]It further provided for 12 specially elected MPs and empowered the President to nominate 12 MPs from his party.

The aforementioned amendments[58] were consolidated and published in the Revised Constitution.[59] The Revised Constitution incorporated other amendments such as the alteration of the membership of the Electoral Commission, whose members including the chairman were to be appointed by the President. Thus, the position of the Speaker

---

[54] G,Muigai, "Amending the Constitution: lessons from History", the Advocate,Vol,No.3,February 1993.
[55] Constitution Amendment Act no.40 of 1966.
[56] K.Stifting, "History of Constitution Making",(Media Development Association), 2012, Pg. 19.
[57] Constitution of Kenya (Amendment) Act No.45 of 1968.
[58] Ibid.
[59] Published in the year 1969.

of the National Assembly as the chairman of the Electoral Commission was technically annulled .

The Fifth Amendment extended the power of the mercy exercisable by the President pursuant to section 27 of the Revised Constitution to persons found guilty of an election by an election Court.[60] The amendment was crafted with Hon. Paul Ngei in mind(Ngei was a former armed struggle detainee and a great friend of the President Jomo Kenyatta at Kapenguria, however he had breached election rules and was on the verge of disqualification from elective politics). Interesting, the Bill leading relating to the foresaid amendment was enacted into law in less than twenty four hours and granted a retrospective application effective from the 1st January 1975.

The judiciary was also affected by the sixteenth amendment established the Court of Appeal.[61]In effect, the Chief Justice became both a judge of the Court of Appeal and the High Court. In turn there were administrative challenges relating to the operationalisation of the Office of the Chief Justice in the sense that he or she could potentially constitute a bench hearing an appeal on a matter he or she had determined as a High Court judge.

The Independence Constitution brought forth the noble doctrine of democracy to the society that was in conflict with the colonial system of governance that the natives were subjected to. Its objective was to harmonise and fuse the operations of a democratic

---

[60] Constitution of Kenya (Amendment) Act No.14 of 1975.
[61] Constitution of Kenya (Amendment) Act No.13 of 1977.

Constitution. However, the various amendments witnessed under this period did everything to promote a dictatorial presidency.[62]In addition, the undemocratic authoritarian and administrative structure created a retrogressive society where the democratic principles were undermined and the quality and legitimacy of the Independence Constitution.[63]

2.4 Period 1980-1992

In 1978, the first president of the Republic of Kenya Jomo Kenyatta passed on; his vice President Hon. Daniel Moi assumed the helm of leadership. During his reign, there were further amendments to the Revised Constitution. The amendments were fewer than those witnessed earlier but they completely altered the constitutional architecture of Kenya and severely undermined the enforceability of the Bill of Rights.

2.5 Effects of the Constitutional Amendments under this Period (1980-1992)

The nineteenth amendment[64] turned out to be the most controversial amendment. It introduced Section 2A to the Constitution. The said provision transformed Kenya into a *de jure* one party state and in practice it barricaded all forms of political opposition enforced the ruling party KANU to be the only voice. It was thought that the amendment was "engineered by leaked information that Hon. George Anyona and Hon.

---

[62] Andreassen,B.A, "Oranges and Bananas: The 2005 Kenya Referendum on the Constitution", CMT,Working paper,2006,Pg.1.

[63] G.Muigai ,"Amending the Constitution: Lessons from History," the Advocate Vol.2,No.3,February 1993.

[64] Constitution of Kenya (Amendment) Act No. 7 of 1982.

Oginga Odinga had an intention of forming a new political party.''[65]The amendment was an affront to democracy and was a Constitutional *detat*; the ruling party simply legislated itself into power and in effect of rewrote the Bill of Rights in unorthodox way.[66]

The aforementioned amendment engineered the 1982 attempted coup that was mostly orchestrated by junior officers of the Kenya Air force. Subsequently, repression followed; with a massive crackdown on lecturers and politicians who were viewed as sympathetic to the opposition movement.

The twenty first amendment repealed Section 89 of the revised Constitution which provided for acquisition of citizenship to any person born in Kenya after 11th December, 1963.Only persons who had a mother or father of Kenyan citizenship by virtue of being born in Kenya after 11th December 1963 were entitled to citizenship.[67]

The twentieth third amendment to the Constitution can be linked to the legislature's desire to curtail the judiciary's power in enforcing the fundamental rights and freedoms. The underlying issue was a product of the decision in *Republic-v- Margaret Ngui*, [68] the case related to the rights of an accused person with respect to bail as contemplated in section 123(1) of the Criminal Procedure Act (CPC) and Section 79 of the Revised Constitution. An amendment to Section 123(1) (proscribed bail for treason, murder and

---

[65] K.Stifting, "History of Constitution Making", (Media Development Association), 2012, Pg. 25.
[65] Held from January to February 1960.
[66] Supra Note 61.
[67] Constitution of Kenya(Amendment)Act No. 6 of 1985.
[68] High Court Criminal Application No.4 of 1985 unreported.

robbery violence suspects) was in conflict with section 79 of the Revised Constitution. In the Ngui case, the applicant contended that the said amendment was in contravention of her rights under the Constitution. The Court observed that Parliament's action in amending the CPC was *ultra-vires* and in effect a nullity. The ruling paved way for a constitutional amendment that legitimised the capital offences of murder, robbery with violence and treason as non-bailable. In relation to this, there was a constitutional amendment; the twentieth fourth amendment which prescribed that suspects in police custody shall be arraigned in Court within 24hrs of their arrest, this was amended to 14 days for capital offences and 24hrs for the other crimes.

The amendments carried out between 1982 -1990 were desired at establishing powerful executive thus undermining the proper functioning of other arms of the government and independent offices resulting into entrenched authoritarian governance system.[69] The systems of checks and balances contemplated in the independence Constitution were watered down; most notably the creation of a one party *de jur*e state suppressed any democratic space.

The aforementioned scenario engineered the agitation for reforms with the main objective being the introduction of a multi- party state. The agitation was boosted by a group of politicians who had been excluded from the main stream politics through expulsion from the only political party KANU and losers from the infamous queue

[69] K.Stifting, "History of Constitution Making,"(Media Development Association), 2012, Pg. 30.

voting elections in 1988.[70] In support of the foresaid clamour for reforms, the international community threatened and eventually cancelled the aid packages and budgetary support to the government. As result of the external pressure, Parliament made the twentieth seventh amendment[71] which repealed Section 2A of the Constitution paving way for multi-party politics together with a limitation for the presidency's term. The key milestones of the said amendment was repealing of the provision that made Kenya a *de jure* one party state. The said section had severely limited political choices of Kenyans[72] and had rewrote the Bills of Rights. In addition, there was removal of security of tenure of fundamental public offices: judges of the High Court and Court of Appeal, the Attorney General, the Controller, and Auditor General.[73]

2.6 Flaws of the Repealed Constitution

Placing reliance on the foregoing Constitutional developments, there is an allusion that in a bid to re-concentrate power, the post-colonial governments (governing regimes from the year 1963-1992) expanded the existing coercive powers of state. Thus the successive governments ensured that there was an extensive continuance derogation of the Bill of Rights.[74] The amendments included the fifth, seventh tenth, sixteenth and nineteenth amendment which respectively related to: establishment of a unitary state,

---

[70] P Wanyande, "Electoral Politics and Election Outcomes in Kenya", African Development, Vol.XXXI No.3, 2006, pp.62-80.
[71] Constitution of Kenya (Amendment) Act No. 12 of 1991.
[72] Supra Note 67 (above).
[73] Facilitated by the passage of the Constitution of Kenya Amendment Act No.4 1998.
[74] H.W.O Okorth-Ogendo; **"**Constitutions without Constitutionalism: Reflections on Africa Politics Paradox" *(*American Council of Learned Societies) (1968) Pg33.

enactment of new electoral laws, re-organisation of the judicial operations and establishment of one party state.

The fore discussed amendments paved way for a flawed constitutional order where human rights provisions were severely watered down. In this respect there was an emergence of a dangerously powerful presidency characterized by dictatorial tendencies. Its effects were manifested in a trail of human rights abuses such as detention without trial, police torture, inhuman prison conditions, severe curtailment of freedoms of association,assembly,expression and restricted right to political participation.

Equally, the amendments set the stage for bad governance and lack of accountability. The regime was marred by large scale corruptions that included collapse of public institutions and major scams such as the Goldenberg. In addition; it resulted in the withdrawal of donor funding leading to economic restructuring and adjustments such as retrenchment of public servants**.**

2.7 Period 1992-2002

As pointed out earlier, Parliament's repeal of section 2A of the Constitution[75]was aimed at facilitating the subsequent 1992 general elections. Furthermore, it posed certain progressive measures: the President was required to receive a majority of total votes cast, a minimum of 25% votes of the valid votes cast in 5 provinces, and that the

[75] Amendment was to effected on December 4, 1991.

President shall not hold office for more than two terms. The elections were to be overseen by the electrical commission of Kenya as opposed to the provincial Administration. However, in the ensuing elections KANU won the election with a clear majority. [76] The said scenario precipitated the reform movement coalescended around opposition parties and civil society, to retrieve to the drawing board with an intention of coming up with comprehensive reforms.

To begin with, the reform movement embarked on a journey of a draft Constitution and the convening of a National Constitution Convention.[77] "Among the proposals in the model Constitution was that persons without high school education were not eligible to vie for the Office of the President and those persons over the age of 70 years were not eligible to vie for presidency."[78]

Further attempts were made by the opposition parties and 1997 saw a negotiated minimum reform package through the Inter Parties Parliamentary Group (IPPG).[79] The agreement provided for inclusive Electoral Commission of Kenya; it further provided for a right of appeal for losers of election petitions from the High Court to the Court of Appeal. Non-progressive statutes such as those curtailing certain civil and political rights were repealed. For instance, those dealing with the offences of sedition, laws inhibiting freedom of association and expression. The IPPG enabled the enactment of

[76] Constitution of Kenya (Amendment) Act No.6 of 1991.
[77] The Proposed Constitution dubbed ''Kenya Tuitakayo''was sponsored by the ICJ Kenya and LSK.
[78] Prof Macharia Munene; "The manipulation of the Constitution of Kenya 1963-1996"; a Reflective Essay.
[79] Amendments were effected through the Constitution of Kenya (Amendment Act number 9 of 1997.

the Constitution of Kenya Review Act of 1997(the Act). However, the government was anxious to assume control of the process and minimize people participation.[80]

Between 1999-2000, the Act was revised with a model that provided for an independent Commission whose mandate was to consult and collect views on the draft Constitution. However, the civil society commenced a parallel review (popularly known as the 'Ufungamano initiative') under the stewardship of main religious groups. They contended that the government led process was non-inclusive. Negotiations for a merger between the two parties begun in the year 2000 and subsequently there was a merger between the independent commission and the Ufungamano initiative. The merger had the objective of giving out a people driven process accommodating the diversity of all Kenyans.

2.8 Structure of the Review Process

The Constitution of Kenya Review Act established the organs that were intended to oversee the reform process. The organs were: the Constitution of Kenya Review Commission, National Constitutional Conference, the National Assembly and the Referendum.

The Constitution Review Commission comprised of commissioners appointed by the President on approval by Parliament. It was tasked with providing civic education to the public on constitutional issues and also seeks Kenyan's views on reforms. The National

[80] Jill Cottrell & Yash Ghai; "The Role of Constitution Building process in Democratization: a Case Study in Kenya,"(IDEA)2004.

Constitutional Conference comprised of all MPs, each district was granted 3 delegates, all the political parties were allowed 42 representatives, and finally the religious groups were granted 125 representatives. Its major aim was to reflect public concerns and act as the primary negotiating forum in the review process. It was characterised by a myriad of challenges including disagreements on contentious issues namely: the structure of the executive arm of the government and devolution. Subsequently, the Consensus Committee Report was rejected by delegates.[81] The National Assembly was to enact changes to the Constitution by making formal amendments through the Parliamentary Select Committee. However, the said committee was characterised by leadership wrangles. The Referendum was a device for solving differences among delegates of the conference. The conference and parliament were the critical decision making organs in the process. The conference had to adopt the draft Constitution by voting for it through a threshold of two-thirds majority of all members**.**

2.9 Gains under this Period

The inaugural meeting of the conference was convened on 2nd December 2002, the National Assembly was dissolved soon thereafter effectively suspending the process until April 2003.The main reason was to pave way for the 2002 general election. The enactment of sections 45A and 45B effected the independence of the Office of the Clerk and the Parliamentary Service Commission. This was by empowering the Commission to offer employment and independent management of its own budget. The amendment

[81] Ibid.

restored parliamentary independence. Since then, Parliament has been more effective carrying out its legislative watchdog and representation.

2.1.0 Post 2002-2007

The 2002 elections ushered in a new regime. The new government was elected on the backbone of reform agenda, but since its inception, the government lost its reformist zeal; [82]it tendered to maintain the status quo. For instance it retained Provincial administration with the objective of ensuring a top-down control of the population and forming one of the cornerstones of its survival.

The National Constitutional Conference ("the Conference') was convened in April 2003 and its high participatory process led to the expansion of the agenda, as communities and marginalized groups were included in the Constitution making history. A draft Constitution emanated from this forum; it advocated for participatory democracy, self-government and accountability. Subsequently, the MPs threatened to amend the proposals advanced at the conference when the draft Constitution eventually gets to be debated in Parliament on account that some of the clauses were unfavourable to them.[83]

March 2004 marked the last day of the Conference and on this occasion, Ministers, led by the Vice President walked out before the final voting in protest over the consensus reached by the parties (the agreed structure on the executive had been dishonoured). The foresaid event did not prevent the Chairman of Constitution of Kenya Review

[82] K.Stifting, "History of Constitution Making", (Media Development Association), 2012, Pg. 371.
[83] Ibid.

Commission from presenting the draft (popularly known as the 'Bomas draft') to the Attorney General. On May 5, 2005, the Parliamentary Select Committee received views from stakeholders (civil society, political parties and religious groups) and considered the inclusion of the Naivasha Accord[84] in the draft. The Bomas draft was revised using in the reviews collected and the product was dubbed the 'Kilifi' Draft.' Parliament deliberated and endorsed the draft paving way for the Attorney General to draft the proposed new Constitution as required by the Act.

The parliamentary debate on the Kilifi draft did not resolve the contentious issues and the process was characterised by a contest between political leaders affronting different models of the executive.[85]The aforementioned struggle divided the political class into two groups; those for and against the proposed new Constitution. During the referendum held on the day on the 21st November the 'no group' carried the day. It later emerged that the contentious issues were the major reason for the rejection of the Proposed Constitution.

Upon the outright rejection of the Kilifi draft, the government then headed by President Mwai Kibaki sacked all the cabinet ministers including those allied to the 'yes' campaign. The 'no' group former Ministers proceeded to form their own party known as the Orange Democratic Movement (ODM). ODM was speared by the Hon. Raila Odinga. Subsequently, the country went on to the 2007 general elections under the

---

[84] Agreement reached in Naivasha in the year 2005 between the two warring political camps over contentious issues.
[85] Supra Note 60(above) Pg. 3.

Revised Constitution. The elections were highly disputed; with the looser Raila Odinga and his ODM party rejecting the results and eventually resulting into eruption of Post-election violence.

2.1.1 Post 2007 Period

The Post-election crisis in late 2007 and early 2008 was a result of the outright rejection of the judiciary as an arbiter between the warring parties. The judiciary as a Constitutional body was regarded in highly inept and the ODM flatly rejected calls to go to the Courts owing to their structures, composition and lethargic process. Thus it could not be trusted to deliver a fair and sound judgement.

Efforts for fact findings were made through bodies such as the Kriegler Commission[86]and Waki Commission,[87] their principal recommendation was that there was need for both constitutional and legal reforms. Thus, the prevailing situation at the time called for a constitutional change. The end result was a power sharing agreement between the warring parties and subsequent establishment of the Kenya National Dialogue and Reconciliation process (KNDRC).

The implementation of KNDRC saw parliament enact two significant legislations; the Constitution of Kenya Review Act[88]and Constitution of Kenya (Amendment) Act

---

[86] Independent Review Commission on elections held in Kenya on 27 Dec 2007.
[87] The Commission of Inquiry on Post -Election Violence(CIPEV) established by the Government of Kenya in February 2008 following the disputed Kenya Presidential election of 2007;it handed over the report to the President Mwai Kibaki and Prime Minister Raila Odinga on the 15th October 2008.
[88] Act No. 9 of 2008.

(2008).[89]The former made provisions geared at facilitating the review process. It gave effect to the decision in *Rev Timothy Njoya-v-AG*[90] that held that a new Constitution could not be adopted without a referendum or proper constitutional convention.[91]In this regard, it established the Committee of Experts (COE) and the timelines for completion of its work; 12 months from the date of the commencement of the Act. The latter introduced section 47A in the existing constitution, this set out the procedure for the replacement of the constitution; through a referendum. The COE mandate was to come up with a harmonised draft. It was consisted of eleven voting members who included foreigners. The inclusion of foreigners was aimed at ensuring that the process of constitutional formation will not to be associated with pre-existing ethnic or political factions.[92]

The 'Harmonised Draft' was first published in November 2009 paving way for a 30 day period for public scrutiny of the draft and onward transmission of proposals for amendments by the MPs. As anticipated, the revised draft was presented to the Parliamentary Select Committee and later returned to the COE, who published the Proposed Constitution on 23rd February 2010.The 4th August 2010 enabled Kenyans to exercise their sovereign right through a referendum and effectively culminating into the adoption of the Constitution. Indeed, the adoption of the Constitution signified an end to the long pervious wait for a new constitutional order.

---

[89] Act No. 10 of 2008.
[90] Misc. Civil Application No.82 of 2004.
[91]The Preamble of the Constitution of Kenya Review Act.
[92] "Kenya Struggle to a draft new Constitution nears and end" *(*Public Law, October 2009), pp843-844.

2.1.2 Transformative Features of the Constitution of Kenya, 2010

The Constitution has fundamentally altered the defectively perceived governance structure in Kenya and essentially transformed the Kenyan society. The most critical reforms relate to: devolution, human rights and governance. Furthermore it has underpinned the concepts of transparent, accountable and democratic governance.[93]

The Constitution gives special recognition to the concept of Devolution.[94]In this regard, it has configured, distributed and limited the use of state power along multiple lines and thus seeks to redress historical injustices: regional inequality, unemployment and low growth by devolving political, and financial responsibility to counties. It also introduces a well coordinated accountability system that is aimed at keeping the executive in position. Moreover, it creates a two chamber parliament comprises of a national assembly and a senate. Pursuant to Article 96 of the Constitution of Kenya, 2010, the senate is limited to acting as a check-and balance on legislation developed by the national assembly. In contrast to the old order, the foresaid position is an imperative improvement. As Yash Pal Ghai explains:[95]

---

[93] Preamble and Article 10 of the Constitution of Kenya, 2010.
[94] Chapter 11 of the Constitution of Kenya,2010.
[95] Yash Pal Ghai, "Devolution: Restructuring the Kenyan state", Vol. No. 2, Journal of Eastern African Studies, Routledge Publishers (originally a lecture at the African Research and Resource Forum, Kenyatta International Conference Centre (KICC), Nairobi, 23 November, 2007).

> "There was wide scale perception, which statistics support, that the centralized state has, for the last 50 years, singularly failed to promote economic and political development, and that only a few areas and a small elite had benefited from the policies of the government.''

The restructuring of the governance framework ensures a just distribution of state power in parity with the Kenyans aspirations ventilated in the objectives of the Constitution.

In addition, the Constitution embraces the principles of substantive justice and affirmative action; this is through its recognition of popular sovereignty as a way of achieving participatory democracy.[96]Intertwined to this are national principles and values contained under Article 10 which guide the interpretation of the Constitution and any ordinary Legislation. They also dictate the orderly subsistence of society; in this context, Article 10(1) prescribes that all state organs, state officers, public officers, actors and persons who apply or interpret this Constitution or any law are bound by these values. This Article should guide the making and implementation of public policy by government agencies. Thus all legislations, regulations and executive measures must conform to these values and principles.

The Constitution recognises the promotion of social justice through the recognition and protection of human rights and fundamental freedoms within the arm bit of the Bill of Rights.[97]The rights underneath belong to each individual and should be guaranteed by

---

[96] G.Muzila, "Realizing the Transformative Promise of the 2010 New Electoral Law's", Judicial Hand Book on Election Petition, 2013, Pg.3.
[97] Article 19(2) of the Constitution of Kenya, 2010.

the state. Thus these rights are not conferred by the state and can only be limited as when certain conditions contemplated by the Constitution are met.

The progressive Bill of Rights incorporates Social-economic rights[98]that create privileges to material implication for human happiness. The situation is a great departure from the Independence Constitution and is driven by a certain ideology: the rationale behind was the moral pre-commitment demonstrated by Kenyans in recognising these rights as players in eradicating the socio-economic vulnerabilities and inequalities to which large sections of Kenyan people had been subjected to.[99]

The right to housing is accorded recognition within the realm of Social-economic rights.[100] The right is of great significance, simply because there is a bundle of justiciable rights coupled to it. The right encompasses: accessible housing, adequate housing, and right to reasonable standards of sanitation. These rights are not merely aspiration or guiding principles for state policy, hence the state is obligated to actively intervene in the society in favour of the most vulnerable members. In this context, the state has to ensure progressive realisation of these rights; through taking policy and legislative measures to archive their enjoyment as contemplated in article 43.[101]Equally,

---

[98] Article 43 of the Constitution of Kenya,2010, these rights include right to: "the highest attainable standard of health; accessible and adequate housing;, to reasonable standards of sanitation,; freedom from hunger; to have adequate food of acceptable quality; clean and safe water in adequate quantities; social security and social security."

[99] Constitution of Kenya Review Commission report dated 21st October, 2004.

[100] Supra note 6.Chapter one.

[101] Article 20 and 21(2) of the Constitution of Kenya, 2010; it provides the legal framework, thus application of the principle of progressive realization of Social-economic rights.

courts are mandated to make determination on these rights as envisaged under Article 23 of the Constitution**.**

2.1.3 Conclusion

This chapter has canvassed in the length the history of constitutionalism in Kenya; it has highlighted the process of making the Independence Constitution and the aftermath of its promulgation. In addition, it has discussed the events preceding the making of the Constitution. Finally, it has highlighted the saline aspects that make the Constitution to be of a transformative nature. Amongst the highlighted aspects is the right to housing. In the next chapter, the discourse will interrogate the judicial enforceability of this right.

CHAPTER THREE

JUDICIAL ENFORCEMENT OF THE RIGHT TO HOUSING IN KENYA: GAINS AND DRAWBACKS

3.0 Introduction

The primary responsibility of interpreting and enforcing the Constitution is bestowed upon the judiciary. Moreover, it is common ground that the courts have the final say on the validity of all laws. This chapter seeks to interrogate the emerging jurisprudence from our Kenyan Courts in enhancing certain transformative aspects of the Constitution and in particular the right to housing as contemplated in Article 43(1) (b) of the Constitution. The discourse will critically analyse the Courts' approach in giving meaning to the said Article. Furthermore, it will offer meaningful critique to the foresaid jurisprudence.

In so doing, the study will mainly concentrate on the case laws which mainly constitute of eviction cases. They include: *Satrose Ayuma* case*;Ibrahim Sangor Osman-v-Minister for Provincial Administration & Internal Security & 3 Others;*[102] and *Mitu –Bell Welfare Society –v-the Attorney General, Kenya Airports Authority and Commissioner of Lands (*popularly known as the *'Mitumba case').*[103]In so doing, the study intends to illustrate the gains and losses flowing from the Court decisions.

---

[102] High Court of Kenya at Embu, Petition No.2 of 2011.
[103] High Court Petition No.164 of 2011.

3.1 Approach of Courts

As aforementioned, eviction cases constitute the largest category of cases of violation of the right to housing. The cases vary from a variety of situations: the evictor may be a state agency or a private proprietor, the basis on which the evictees' occupied land varies (from one possessing an absolute title to acquiescence or adverse situation), the reason may include whether the right procedure was followed under the Constitution or ordinary legislation.

Suffice to say that they seem to be a broad consensus by the High Court Judges as to what constitutes to the right to housing under the Constitution. In this regard, the High Court has read into the law and brought legal certainty in respect of the principles contemplated in Article 43. In effect, it has harangued the cruelty of the government or private parties meted to individuals in the violation of this right.[104]

3.2 Satrose Ayuma & 11 others-v- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme

In the *Satrose Ayuma* case' the learned Judges Musinga J (adjudicated the matter at the interim level) and Lenaola J (heard the matter at the latter stage) went to great lengths in analysing the purposes, procedures and consequences of evictions. In my view, it is paramount to enumerate the Court's analysis simply because it enables one to ascertain

[104]Prof Y.Ghai "The Public Interest," (Katiba Institute's Public Interest Litigation) issue No.1 May 2014). Pg.6.

the right to housing as contemplated in Article 43 of the Constitution and as aspired by the Kenyan people.

In the foresaid case, the Court was guided by the Constitution[105] to draw relevant inference from international law. In this respect it conceptualised the right to housing as 'not merely meaning having a roof over's one's head or having shelter as a commodity' or that everyone must inhabit a luxurious mansion.'' The Court opined that the right entails certain minimum core obligations that the state must ensure. They include: security of tenure,[106] affordability and habitability,[107] accessibility,[108] availability of services and infrastructure,[109] and culture adequacy.[110]In addition, the Court considered the guidelines established by the "United Nations Office of the High Commissioner for Human Rights in relating to the right to adequate housing'',[111] which provides that**:**

> "Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of rights recognized in both the international covenant on human rights. The committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b)

---

[105] Article 2 (5) of the Constitution.

[106] CESCR, General Comment No.4 (1991), Para 8**: ….. '**Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.

[107] CESCR, General comment No.4(1991),Para 8(c**): '**availability of services, materials, facilities and infrastructure – sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services." providing the inhabitants**.'**

[108] Supra**: – '**discern able governmental obligations need to be developed aiding to substantiate the right of all to a secure place to live in peace and dignity, including access to land and entitlement**.'**

[109] Supra**: – '**discern able governmental obligations need to be developed aiding to substantiate the right of all to a secure place to live in peace and dignity, including access to land and entitlement.'

[110] Supra

[111] CESCR comment 7 :(General Comments).

> adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be is available with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors**."**

In granting the sought orders, the Court fundamentally observed that:

> "Legal Construction of the Constitution socio-economic rights cases in our new constitution dispensation must be anchored on the aforesaid principles in order to give effect to the fundamental rights stipulated in our Bill of Rights."

In nutshell, the learned justice Lenaola granted the following orders: (i) The respondents had violated the petitioners right to housing and sanitation ;(ii) The Government should amend the Water Act, 2002, to align it with article 43(1) (d) of the Constitution;(iii) In 90 days the state lodge an affidavit exhibiting planned state policies and legal framework concerning forced evictions and demolitions which should adhere to International Legal order ;(iv)The State should file an affidavit in court within 90 days detailing measures and policies implemented by the State to realise the right to adequate and accessible housing;(v)The petitioners and the respondents should meet in 21 days to formulate a programme of eviction of the petitioners from the suit premises, taking into account all factors, including the need to respect international human rights law on the right to housing and the constitutional imperative in Article 43(1) (b) of the

Constitution; and (vi)The agreed programme to be filed within 60 days from the date of judgment.

3.3 Ibrahim Sangor Osman-v-Minister for Provincial Administration & Internal Security & 3 others

Similarly, in the case of *Ibrahim Sangor Osman,* the petitioners petitioned the Court for both restraining interim and mandatory orders against the four respondents who had evicted them from their shelters. The Court went on to analyse the recommendations by the Committee on International Covenant on Economic and Social Cultural Rights (hereinafter referred to as "the Committee").The relevant excerpt explains:

> "Nothwistanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment or other threats. State parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons."

Based on the foregone Committee's recommendation, the Court observed that:

> "Evictions must be justified; they must be carried out in the most exceptional circumstances after all feasible alternatives to eviction and explored in consultation with the affected community after due process protections are afforded to the individual, group or community*."*

The Justice Muchelule allowed the Petition and granted all injunctions prayed for ex parte.

3.4 The Mitumba case

In this case, the village(Mitumba) was near Wilson airport, in 1992 the occupants had been moved from the vicinity of Mombasa Road by the Ministry of Roads and taken to

their present site by the government(Airport authority).Consequently, the government tried to demolish their structures but they obtained a court order stopping the demolition. Despite the Court order, the government proceeded to do the demolition. Subsequently, the occupants filed contempt proceedings.

The Court found the authority to have violated a court order. In her analysis, Justice Mumbi Ngugi relied on international rules regarding eviction, which require the issuance of an adequate notice, especially if the community has resided for long period. In granting the orders prayed for, she emphasised even if the evictees did not own the land, they were citizens of Kenyans and hence were not depleted of their rights eviction process. She rejected the argument of the government's submission that socio--economic rights were not actionable and further held the villagers were entitled to compensation from the government villagers for the loss of property. Just like the *Ayuma,and Ibrahim cases*, in the *Mitumba case* the Court endorsed the application of international rules governing eviction.[112]It deplored the lack of consultation with the community and failure to give them reasons for eviction.[113]

3.5 Emerging Jurisprudence

The fore discussed judicial precedents have been hailed as landmark cases in the Kenya's jurisprudential arena in regard to the enforcement of the right to housing. Certain thinkers are of the opinion that these decisions have consciously or sub-

[112] Prof Y.Ghai ,"The Public Interest" (Katiba Institute Public Interest Litigation issue 1May 2014) Pg.7.
[113] Supra.

consciously kicked open the conversation regarding the justiciability of the right to housing under the Constitution.[114]Thus, the Courts have construed the Constitution in a purposive manner in consonance with Article 259 of the Constitution[115] and further invoked the United Nations guidelines and principles in giving meaning to this right. In this regard, the Courts have strongly evolved from the old dispensation where in cases like *Peter Anyang Nyong'o & Others- v- Attorney General and Rono-v- Rono;*[116] International law was regarded as non-persuasive until it had been domesticated.

It is worth noting that the Courts have constructively construed the interplay between international law (general comments by the committee on economic and social rights) and Articles 19(2), 20 and 43 of the Constitution. As dictated by the *ground norm* they have adopted an interpretation that favours the enforcement fundamental right and freedom coupled with "values that underlie an open and democratic society based on human dignity, equality; and freedom; and guarantees relating to the" right to housing.

Evident from the *Satrose Ayuma* case, the judiciary has integrated and expounded the application of the well-established test governing injunctions popularly known as the *test* in *the Giella-v-Cassman Brown'*.[117]It has opined that in circumstances as the instant matter, the Constitution obligates the Court to consider the well laid down principles of

---

[114] I.Ndegwa: **"**A roof over Wanjikus Head: Judicial Enforcement of Right to Housing under the Constitution of Kenya',(eds);in Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya**,** Vol.10, (2012Pg. 167.

[115] Stipulates that: "this Constitution shall be interpreted in a manner that-(a)promotes its purposes, values and principles;(b)advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;(c)permits the development of the law; and (d)contributes to good governance.''

[116] 2010 eKLR,CA No.66/02;respectively.

[117] (1973)EA 358.

injunction in tandem with the Constitution.[118]Thus: it has observed that whereas it is mandatory for the applicant to show that he or she has a prima facie case with a like hood of success; it is paramount for a court to consider as to whether the grant or denial of the conservatory relief will enhance the constitutional values and objects.

Another interesting feature of these rulings is that the courts have been willing to invite individuals or organisations known to posse some expertise in the area of social economic rights in the capacity of *amicus curiae* to give their contribution. The expertise so given, has greatly aided the court in arriving at its ruling. The *amicus* who have so far participated include the great professor of constitutional law Yash Pal Ghai and reputable human rights organisations such Kituo cha Sheria.

The Courts have largely adopted the fore discussed methodology of the reasonableness review with a combined influence of the minimum core approach. Thus in cases like *Satrose Ayuma* and *Mitumba*, the Court has evaluated state policies and actions visa-vis the guarantees under the Bill of Rights. Equally, they have also amalgamated remedies that recommended policy review on enforcement of a right with ones ameliorating the circumstances of the individual Petitioner.

[118]I. Ndegwa: **"**A roof over Wanjikus Head: Judicial Enforcement of Right to Housing under the Constitution of Kenya'',(eds);in Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya**,** Vol.10, (2012)Pg. 166.

3.5.1 The Concept of Meaningful engagement

Undoubtedly, from the foregoing decisions, it appears that the judiciary is seizing the opportunity provided under Article 43 to enforce this transformative Constitution. Moreover, the Courts have been able to adopt the aforementioned principle of meaningful engagement predominantly employed by the South African Courts.

The foresaid principle was famously applied in the case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Other*[119], where the City of Johannesburg through the National Buildings Regulations and Standards Act, 103 OF 1977,enacted a policy of demolition of unsafe buildings. Consequently, the Occupants (who included Olivia) filed a suit at the High Court under section 26.

The High Court ruled in favour of the residents: "it directed the government to develop and implement a comprehensive and coordinated programme to deal with the housing problem." To the contrary, the Supreme Court of Appeal revised the decision. Its decision was pegged on the fact that there was an enabling law sanctioning the government's action. On appeal to the Constitutional Court, the Court found the action illegal. In addition, it issued an interim order compelling the parties to engage in meaningful engagement: essentially anchored and reinforced the High Court's position and directed the government to hold talks with the community before coming up with any programme.

---

[119] 2008 5 BCLR 475 (CC).

Olivia Road decision is hailed as ground breaking in so far the implementation of the right to housing is concerned. In this regard, it is held to have expounded the principles laid down in the *Grootboom* decision. As opined by *Chenwi* and *Tissington*[120]the case of Olivia Road connoted meaningful engagement to be deemed to have prevailed when "communities and government talk and listen to each other, and try to understand each other's perspectives so that they can achieve a certain goal." Thus, meaningful engagement has the following ingredients: structured and comprehensive talks; mindful of the communities' preferences; and equality of the respective parties. Moreover, the state must engage with the communities at all stages of the strategy: decision making, planning implementation and evaluation.[121]

It is quite intriguing that the South African Constitution does not expressly provide for this concept; however in the instant case, the Court was able to interpret the interplay between several constitutional provisions to give meaning to the foresaid concept. In addition, it made reference to International law. The relevant provisions include: the preamble of the Republic of South Africa Constitution[122]; sections 152, [123]7(2),[124]26(2),and [125]26(3)[126]of Republic of South Africa Constitution ;United Nations

[120] L.Chenwi & K.Tissington; "Engaging meaningfully with government on socio-economic rights: A focus to housing" (Community Law Centre (1999-2010) Pg.9.
[121] Supra Note above.
[122] The preamble prescribes that "the government has a duty to improve the quality of life of all citizens and free the potential of each person."
[123] "Local government must encourage social and economic development."
[124] Places a duty on the state to" respect, protect, promote and fulfill rights in the Bill of Rights."
[125]"The state must act reasonably to make sure the right of access to housing is realized."
[126] It provides that" no one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances"

Basic Principles and Guidelines on Evictions and Displacement(2007) ; [127]and respective General comments relating to evictions.[128]

It is worth noting that the foresaid principle has entirely been employed by the Kenyan Courts, in this regard, honourable mention is accorded to the learned judges in the cases of *Satrose Ayuma and Mitumba.*

3.5.2 Critique to the Meaningful Engagement Principle

One of the arguments emanating from the Grootbooom and *Olivia* decision relates to the Institutional Competency of the Constitutional Court: the Court lacks the capacity to attain and assess the extensive information and problematic aspects of a court's potential remedies.[129]According to certain commentators, [130]Courts are and will be typically faced with specific controversies relating to a situation or one individual of violations of socio- economic rights. In this regard, such situations warrant the presiding judge to craft a remedy limited to the instant violation. Thus granting such orders, Courts tend to negate the universal principles of that dictate that parties must be bound by pleadings and must be an end to litigation.

The scholars espouse that the remedies granted in the aforementioned cases are inadequate. The reasoning is pegged on the fact that there is insufficient information

---

[127] Provides that "all groups and persons who might be affected have the right to relevant information and full consultation throughout the entire eviction process."
[128] They include: General Comment no.4 on the right to adequate housing (1991) paras 8 and 21, General comment 7 on the Right to housing in the context of forced evictions (1997) paras 13 and 15.
[129] Eric C. Christiansen ,"Adjudicating Non-Justiciable Rights: Socio Economic Rights and the South African Constitutional" (Columbia Human Rights Law Review),2007Pg.349.
[130] Supra Note above.

presented to the honourable Court to make a just and informed remedy. However, there is a rebuttal to the above assertions: the South African Constitution has an enabling law that provides for a post –trial stage therein expert reports are admissible, the said admissibility enables judges to make informed decisions.

3.6 Contextualizing Difficulties Concerning the Right to Housing Jurisprudence in Kenya

Imperatively, the Judiciary has been central to the realisation of the Constitution's transformative objectives: promotion of social justice, equality and human dignity. Commentators have argued that the Courts approach goes a long way in insulating the general citizenry from violations of socio-economic rights. Thus, they effectively reduce the social injustices that existed between the Old and the new order.[131]However, as it will be demonstrated in the course of this chapter, it is common ground that the emanating jurisprudence has been met with certain challenges.

Notwithstanding the aforementioned progressive judgements, suffice to say certain decisions tend to suggest that some judges might be tempted to negate the gains attained under the Constitution. A case in point is in the case of *Charo wa Yaa v Juma Abdi Noor & others;* [132]where the petitioners' homes had been demolished without notice and, having nowhere to go, they sought the Court's nod to erect temporary structures on

---

[131] G. Musila, "Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution", in Japheth Biegon and Musila (eds): Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya, Vol. 10 (2011), Pg. 66.

[132] High Court of Kenya at Mombasa Miscellaneous Civil Appeal No.8 of 2011(unreported).

the same property. The Court delivered judgment in favor of the state and stated that "the remedy to the right to housing as contained in Article 21(3) is not a final product for dispensation but is an inspirational right, which the state is to endeavour to render progressively."

The analysis in the *Charo case* has been said to be a manifestation of the Courts' inability to appreciate the importance of the entrenchment of socio- economic rights in the Constitution.[133]Thus, the subject to progressive realisation is no longer aspirational. It can be said that the jurisprudence resonates with the aspirations of the Repealed Constitution .Moreover, placing reliance on the fact that the *Charo* decision still stands as good law; certain judges may be inclined to apply it.

Equally, the Court's reasoning seems to be in parity with De Wet understanding of the nature and status of social economic rights.[134]The scholar opines that justiciability of these rights is likely to occur in scenarios where the law guarantees them as individual 'subjective rights,' in other words only having the right to housing means that an individual can go to court and receive an order awarding him a house. Contextualizing De wet's critique; it is improper for the courts to grant remedies such as the one witnessed in the *Mitumba and Satrose Ayuma case.*

---

[133] M.Nderitu; "Case Digest on Enforcement of Economic and Social Rights" *(*International Kenya Section of the International Commission of Jurists*)* 2014, Pg. 57.

[134] De Wet, "Constitutional Enforceability of Economic and Social Rights: the meaning of the German Constitutional model for South Africa."33 (1996).

Additionally, there is a perception that in enhancing these rights, the judiciary is arrogating itself the role of Constitutional implementation. This act may be termed as an overlap of its key role of Constitutional interpretation.[135]In this regard, judicial remedies of the above nature go a long way in being supplementary to both the administrative and legislative process. The proponents of the aforementioned school of thought, are great admires of the concept of parliamentary sovereignty: Parliament has unlimited legislative competence in exercising that political sovereignty when positively legislating, and therefore cannot be bound by the courts or the executive.[136]

The concept of Parliamentary Sovereignty is provided for by Article 1(3) (a) of the Constitution as:

> "Sovereign power under this Constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution
>
> Parliament and the legislative assemblies in the county government
>
> …….
>
> (c) the judiciary and independent tribunals
>
> ……..''

Further expounded by Article 94 as:

> "(1) the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament

[135] Prof Ben Sihanya: "Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects" *(FES* Occasional Paper No.5) Pg. 36.
[136]Austin, *"*The province of Jurisprudence Determined"*,* Wilfred E .Rumble(ed), 1995.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority."

From the above extracts, it is argued that the Constitution has re-aligned the relationships between the three arms of the government and in effect affirmed the renowned principles of Constitutional Supremacy, Parliamentary sovereignty and judicial independence.[137] However, the legislature is still deemed as the sole custodian of both political legitimacy and institutional capacity to weigh and accommodate the demands of the general citizenry. Therefore, it is quite improper for 'unelected judiciary' to exercise any role of policy or administrative traditionally associated with the executive or parliament. In doing so, as exhibited in the in the current situation, they would be attempting to overrule the will of the people.

Lastly, it is said that the form of socio- economic rights is undefined and the Courts lack the competency and expertise to do this.[138] This view is grounded on the fact that social economic circumstances of the day constantly determine new state priorities therefore such a situation cannot be resolved by judicial remedies as it may generate unreasonable expectations on part of the poor.

---

[137] Prof. C Roschmann,P Wendoh & Mr. S. Ogolla , "Human Rights, Separation of Powers and Devolution in the Kenyan Constitution,2010,Comparison and Lessons for EAC Member States", Pg. *5.*
[138] Supra Note 24.

3.7 Conclusion

From the foregoing unfolding, it can be deduced that although there is a great relief that the Constitution has empowered judges to coach remedies whose net effect keeps both the legislature and executive in check;[139] it is suffice to say that the empowerment has a negative effect. In this regard, it has established a perception that the Courts' are asserting their view on policy making and legislation; an arena ordinarily and respectively deemed to be a preserve of the executive and parliament.

[139] Supra Note 22.

CHAPTER FOUR

A COMPARATIVE VIEW OF JUDICIAL ENFORCEMENT OF THE RIGHT TO HOUSING

4.0 Introduction

As canvassed in this discourse, the theory of transformative constitutionalism is dictated by the strive to ensure equality, restitution and redistribution of social-economic rights within the society. The concept has found a deep resonance in certain Nations' Constitution and in turn in the jurisprudence of their respective courts.

This chapter will give a comparative view of certain jurisdictions that have applied this concept in their judicial and governance system in so far as the promotion of the right to housing is concerned. In this regard, the chapter will concentrate on the Indian jurisdiction.

4.1 India

The Republic of Indian has an estimated population of 1.25 billion and is governed by a Constitution (hereinafter referred to as 'the Indian Constitution') that was promulgated on the 26th January; 1950.Arguably, the Indian Constitution represents the world's largest democracy and is a truly remarkable in the sense that it has 448 Articles. In this respect, it can be hailed for setting a framework that creates key political principles that clearly demarcates the roles and duties of government institutions. In this regard, it is

revered as '"one of the longest written Constitution of any sovereign Country in the world."[140] The Supreme Court of India and State High Courts are empowered to enforce Fundamental Rights. The Supreme Court is regarded as the ultimate guardian and protector of fundamental rights.[141]

4.2 Understanding the Jurisprudence relating to the Right to Housing

The right to housing is not expressly provided for by the Indian Constitution but Indian Supreme Courts has effected it through Article 21.[142] Article 21 guarantees that "No one shall be deprived of their right to life or personal liberty except according to procedure established by law.*"*

As aforementioned the Indian Constitution has arrogated the Supreme Court the power to enforce the fundamental rights and freedom. This discourse will concentrate on the case law that has given meaning to Article 21.The cases include: *Olga Tellis v Bombay Municipal Corporation(*1985)3SCC545);*Shantistar Builders v Narayan K Totame(*1990) 1 SCC 520).;and *Chameli Singh v State of UP(*1996) 2 SCC 549).

---

[140] Kishore (2010): "Fundamental Rights of India," http://kish.in/fundamental_rights_of_india/ accessed on 23.10.2011.

[141] See Article 32(1) of the Indian Constitution which provides: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."

The *Olga Tellis* matter was within the realm of public interest and involved the pavement dwellers of the Bombay city. The claimants submitted that they could not be evicted from what they called home without being offered alternative shelter. To the contrary, the Bombay Municipal Corporation argued that pursuant to the Bombay Municipal Corporation Act, it was empowered to evict them. The Court held that the right to live hood and shelter was a significant competent of the Right to Life. Hence the corporation was mandated to offer the dwellers alternative settlement.

The *Olga Tellis* case is considered to be a landmark decision in so far as the right to housing is concerned. In this respect, it contextualized the Right to life as protected under the Indian Constitution. Thus, it introduced a remedy that cured violations of social-economic rights[143] and ultimately obligated the state not to curtail the quite enjoyment of the right to life. The foresaid principles played a critical role in the judges 'reasoning in the fore discussed South African precedent of *Grootbroom.*

The *Shantistar Builders case* is a clear demonstration of the application of the principles established in the Olga Tellis decision; the controversy concerned the grant of about 1500 housing units for members of weaker caste. The Government of Maharashtra pursuant to Sections 20 and 21 of the *Urban Land Ceiling and Regulation Act, 1976*, (ULCRA) the government was to set create land with the objective of for th constructing a housing unit for the lower sections of the society and on conditions.

[143] Kothari; "Right of Housing: Constitutional Perspective on India and South Africa Lawyers Collective" (June, 2011), Pg.3.

The respondents (lower caste members), petitioned the High Court contending that the builder had violated its scope of work. Subsequently, the Court dismissed the petition. However the Supreme Court ruled in favour of the respondents and directed the builders to strictly adhere to the stipulated contract. At page 527 of the judgement, the Supreme Court fundamentally observed:

> "The right to life…would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. For the animal, it is the bare protection of the body; for a human being it has to be a suitable accommodation, which would allow him to grow in every aspect _ physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly, can even be mud-built thatched house or a mud-built fire-proof accommodation."

In *Chameli Singh v State of UP*, the main issue concerned the state's compulsorily acquisition of land. The court held that the land acquisition by the State was proper in so far as it is meant for a public purpose under a special Scheme evolved to provide housing accommodation exclusively for the Scheduled Castes.[144]

Following the holding in the *Olga Tellis* and *Shantistar*, the right to life and shelter was construed to be part and parcel of the Right to Life; the court has held that such acquisition was in accordance with procedure and compulsory for the public purpose of the State under the obligations of the Fundamental Rights and the Directive Principles. It is argued that in the judgement, the honourable Court has reconciled the obligations of the State under the Right to Life, the Right to Residence and Settlement under Article

---

[144] Kothari, "Right of Housing: Constitutional Perspective on India and South Africa Lawyers Collective" (June, 2011), Pg.7.

19(1)(e) and the international obligations, and made a very progressive interpretation to the Directive Principles and held (at paragraph 8)that:[145]

> "The Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. As is enjoined in the Directive Principles, the State should be deemed to be under an obligation to secure for its citizens, of course subject to its economic budgeting."

The foresaid judgements can be said to be quite progressive; however it is suffice to say that there are certain cases where the Supreme Court has inclined to reverse the gains made. Most notable of this is authorities is the *case of Narmada Bachao Andolan v Union of India (1997) 11 SCC 121*.The legal question in this matter concerned was the construction of the 'Sardar Sarovar Project dam' and its subsequent impact on the environment and the people of the Narmada valley (who have been displaced with inadequate resettlement and rehabilitation plans).

As Kothari Opines,[146] the most interesting jurisprudence emanating from this case was that despite the Court's knowledge of the inability of the establishment to give account of the situation (determine the total number of people to be displaced and those resettled), the Supreme Court held:

> "…….displacement of the tribal's and other persons would not per se result in the violation of their fundamental or other rights….. "

In sum, it held in favour of the Authorities. The judgment seems to have gone against the established principles relating to the Right to Housing by the Indian Supreme Court.

---

[145] Supra Note above.
[146] Supra.

4.3 Conclusion

In the instant chapter, the discourse has extensively reviewed the enforcement of the right to housing in the Indian jurisdiction. From the conversation, it is evident that both jurisdictions tend to apply the two main principles (Minimum core and meaningful engagement) in enforcing this right.

In addition, the Supreme Court of India and tends to seek guidelines from international obligations premised on International law. However, it is worth noting that the Indian Supreme Court randomly employs the use of international law. In this respect its decisions tend to vary and more often than not result into contradictory remedial orders.

From the foregoing, it is evident that the situation in India is quite similar with the one in Kenya: there is lack of uniformity and uncertainty in respect of the remedial orders relating to the enforcement of the right to housing. Drawing inferences from these experiences, my next chapter will give solutions aimed at curing the prevailing defects in the Kenyan situation (discussed in the preceding chapter)

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

In its inception the study set out to interrogate the judicial enforcement of the right to housing contemplated in Article 43 of the Constitution.Additionally, it laid out its objectives: resolving the issues as to whether the Kenyan courts have played an active role in promoting the right to housing under the new constitutional dispensation; unraveling the challenges related to the enforcement of the said right; and providing a case for reform. Equally important, it centrally assumed that with the current constitutional dispensation courts were bound to make orders that Interfered with ordinary functioning of the executive. In this respect, it provided a tentative solution that was geared to ensuring that the courts develop a progressive and practical approach in so far as the grant of remedies related to the right to housing is concerned.

The study in this chapter, seeks to make conclusions in parity with the laid down hypothesis and gaps established in the literature review. In turn it makes recommendations aimed at curing the defect.

5.1 Conclusions

The study has concluded that the socio-economic rights are enforceable in Kenya and hence the traditional notion of non-justiciability of socio-economic rights has no bearing under the transformative Constitution. Placing reliance on article 43 the right to housing is guaranteed by the state and protected by the courts.

Furthermore, it has satisfied the fore mentioned hypothesis in the sense that it has examined (Chapter three of the study) the judicial precedents so far handed down by the Kenyan Courts has relived two emerging critical issues: criticism relating to the enforceability of the remedies granted by Courts and Inconstancies of the emerging principles in those judgments. In this regard, an examination of precedents like *Ibrahim Sangor Osman Mitumba,Satrose Ayuma,*the court seemed to have adhered to the dictates of Article 20(5) of the Constitution. However as evident from the discussion in Chapter three, this approach has been critiqued by scholars such as Musila, Tushnet and Prof.Y.Ghai. The scholars are of the view the above approach interferes with the executive's core mandate and broadly impedes the noble principle of separation of powers. As an alternative, the scholars respectively front for the minimum and reasonableness approach.

With regard, to inconstancies, the study through the decision of *Charo* (canvassed at chapter three) has demonstrated that there are some judges who still possess the conservative view and may pose difficulties in the enforceability of the right to housing. The view has further been propelled by a comparative analysis in the like-minded Indian jurisdiction (canvassed at chapter four *Narmanda* decision contravened the progressive principles set out in *Olga tellis* decision) where there has been different principles employed to the enforcement of these rights.

In sum, the study has established that the current constitutional set up has and is likely to bring forth challenges in so far as the judicial enforcing the right to housing. In this context, the study has demonstrated that the tested principles of meaningful

engagement, reasonableness or conservative approach may not remedy the situation. Hence the prevailing situation demands Kenyan Courts to adopt a progressive and pragmatic approach.

5.2 RECOMMENDATIONS

5.2.1 Balanced Approach

In tandem with my hypothesis, I would recommend that Kenyan Courts in enforcing Article 43 should adopt a '*balanced approach'* (duplicity approach) that tends to fuse the concept of meaningful engagement (discussed in chapter three) and strict approach contemplated in Articles 20(3) and 20(5).In this regard, Courts should first issue structured interim orders and then issue final orders pursuant to the compliance of the interim orders. This solution is informed by non-receptiveness of fore discussed jurisprudence engraved in the decisions of Mitumba and *Satrose Ayuma*. As noted, in this case the judicial officers employed the concept of meaningful engagement; however, this has been widely critiqued as contravening the noble principle of separation of powers.[147] Furthermore, in the fore discussed case of *Ibrahim Sangor*, the Court applied the strict approach, however the decision is said to have failed to meet the threshold of distributive justice.

The *balanced approach* would not only ensure that the remedies so granted are non-coercive in nature to either of the parties but more imperatively inclined towards

[147] Supra Note 16.Chapter Four.

ensuring there will be non-deprivation of the fundamental rights and freedom. Thus in situations where there is an eminent eviction, the temporary injunction will be tailor made to ensure that there is a status quo while parties engage in dialogue within the existing legal framework. With regard to the final orders, the Courts may grant orders which are characterized by a short term progressive effect.

On the contrary, in situations where evictions have already taken place, the temporary injunction should inhibit the continuance of the harm. In respect to the final orders, the court should adopt a structured dialogue similar to the situation in the preceding paragraph. The foresaid approach is different from the current approach which is characterized by compelling orders directed respectively towards the executive and parliament regarding the compulsory compensation of the petitioners and amendment of the existing laws[148].Although the said orders may be justified but might also propel the judiciary as an oversight body of the other arms of the government.

5.2.2 Training and Stakeholders Participation

In furtherance of capacity building, there should be training of judicial officers on this particular aspect of law (the right to housing). The training is necessary because the theory (transformative constitutionalism) guiding the enforcement of this right is quite alien in our jurisdiction: firstly, it was never provided for in the Revised Constitution and secondly, as interrogated in the preceding chapters there is an ongoing conservation regarding the remedial orders available to the judicial officers.

[148] Views propounded in both the Satrose Ayuma and Mitumba case.

In the above regard, there is a dire need for judicial officers to be acquainted with this aspect of the law. The training can be conducted by judicial offers or revered thinkers from jurisdictions in which the foresaid concept has been successfully employed namely India and South Africa.

Capacity building can also be enhanced through consultative meeting between various stakeholders who include other arms of the government such as the executive, parliament, civil society and the general public. The foresaid sessions are fundamental because these institutions may be called upon to execute the said orders and it is also in line with the public participation and accountability enshrined in Article 10 of the Constitution.

5.2.3 Legislation

In line with the dictates of the Constitution specifically Article 43, I propose that there should be various legislative enactments. In this regard, I associate myself with sentiments of Justice Lenaola in S*atrose Ayuma* case: there should an amendment of Water Act 2002 to be in line with Article 43 of the Constitution. It is my view that section 20[149] and 21(2)[150] should be amended to be in line with the classical principle of distributive justice enshrined in the said Article. Furthermore, it is my opinion that the said statutory provisions should incorporate the principles right of the right to a fair

[149] Section 20 of the Water Act, 2002 provides: 'state scheme shall take precedence overall other schemes for-use of water or drainage of land; a community project shall take precedence over any other schemes for use of-water or the drainage of land except a state scheme'.
[150] Section 21(2) of the Water Act, 2002 provides: a State scheme acquisition should be provided by law.

administrative provided under Article 47[151] of the Constitution. Finally, I take notice that there is a Fair and Administrative of Justice Bill, 2014 pending before the National Assembly. In this context, it is my proposal that the said Bill should be expedited into Law

5.3 Conclusion

This chapter has made certain key conclusions and outlined concrete recommendations key to curing the defects discussed in chapter three. In this regard, it has taken a huge step in the above direction by drawing three clear breakthroughs. First, it has demonstrated that a *balanced approach* by the courts would not only ensure that there is mutual understanding, cohesiveness and respect between the various arms of the government but the Courts in adherence to the edicts of Articles 20(3) and 20(5) of the Constitution are steadfast in safeguarding the rights of the general citizenry. Secondly, it has shown that the training of judicial officers and staff on this area will enable them acquire the required expertise in this area. Thirdly, it has provided for a robust

---

[151] Article 47 of the Constitution provides :("(1) Every person has the right to administrative action that is Expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is

likely to be adversely affected by administrative action, the person has

the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or,

if appropriate, an independent and impartial tribunal; and

(b) Promote efficient administration."

legislation. The said legislation will guide courts in arriving at a remedy that is balanced in nature.

In sum, am of the view and convinced that the said proposals will be sufficient in curing the current lacuna currently in the judicial remedial orders.

Bibliography

Books/Journals/Articles

A Bradley & K Ewing, Constitution and Administrative Law, (14th edn Pearson/Longman, 2007).

Andreassen, B.A, Oranges and Bananas: The 2005 Kenya Referendum on the Constitution, CMT, Working, paper, 2006.

Biegon & G Musila, Socio-economic Rights as One Promise of a New Constitutional Era (eds) Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and opportunities for Kenya Vol.10. (2012*).*

Chenwi & K.Tissington; Engaging meaningfully with government Socio-economic rights: A focus to housing (Community Law Center (1999-2010).

Constitution of Kenya Review Commission report dated 21st October, 2004.

De Wet, Constitutional Enforceability of Economic and Social Rights: the meaning of the German Constitutional model for South Africa.33 (1996).

G Albertyn and B Goldbatt, Facing the Challenges of Transformation: Difficulties in the Development of Indigenous Jurisprudence of Equality (1998)14 South African Journal on Human Rights.

G.Muzila, Realizing the Transformative Promise of the 2010 New Electoral Law's,Judicial Hand Book on Election Petition.

G,Muigai, Amending the Constitution: lessons from History, the Advocate,Vol,No.3,February 1993.

G.Mungai, The structure and values of the Independence Constitution Report of the Constitution of Kenya Review Commission, Vol .5, Pg. 270, approved for issue on 10th April, 2003.

H.W.O Okorth-Ogendo; Constitutions without Constitutionalism: Reflections on Africa Politics Paradox *(*American Council of Learned Societies) (1968).

H.L.A Hart, The Concept of Law (2nd e.d,Oxford Calderon Press),1994.

I. Ndegwa: *A* roof over Wanjikus Head: Judicial Enforcement of Right to Housing under the Constitution of Kenya,(eds);in Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya**,** Vol.10, (2012).

J.Austin, The province of Jurisprudence Determined, Wilfred E .Rumble(ed), 1995.

J Dugard, Some Realism about the Judicial Process and Positivism a Reply, (1981)98 South African Law Journal.

J Dugard and T Roux, The Record of South African Court in Providing an Institutional Voice to the Poor: 1995-2004.

Jill Cottrell & Yash Ghai; The Role of Constitution Building process in Democratisation: Case Study in Kenya, 2004.

K.Klare Legal Culture and Transformative Constitutionalism 14 South Africa Journal on Human Rights Godfrey Musila, Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution in Japheth Biegon and Musila (eds): *J*udicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya, Vol. 10 (2011).

Kothari, Right of Housing: Constitutional Perspective on India and South Africa Lawyers Collective. **(**June, 2011).

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

M.Nderitu; Case Digest on Enforcement of Economic and Social Rights *(*International Kenya Section of the International Commission of Jurists*) 2014*

Prof J.B Ojwang, The Constitutional Development in Kenya: Institutional Adaptation and Social Change,*(*Acts Press*)*1990.

Prof Macharia Munene; The manipulation of the Constitution of Kenya 1963-1996*; a* Reflective Essay1997.

Prof Ben Sihanya: Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects *(FES* Occasional Paper No.5).

Prof. C Roschmann,P Wendoh & Mr. S. Ogolla , Human Rights, Separation of Powers and Devolution in the Kenyan Constitution,2010,Comparison and Lessons for EAC Member States

Prof Macharia Munene; The manipulation of the Constitution of Kenya 1963-1996*; a* Reflective Essay1997.

Prof J.B Ojwang, The Constitutional Development in Kenya: Institutional Adaptation and Social Change, *(*Acts Press*)* 1990.

Prof Y.Ghai, the Public Interest, (Katiba Institute's Public Interest Litigation issue 1) May 2014.. Prof Macharia Munene; The manipulation of the Constitution of Kenya 1963-1996*; a* Reflective Essay1997.

P Wanyande, Electoral Politics and Election Outcomes in Kenya, African Development, Vol.XXXI No.3, 2006

T Edwin (1965), The Morality of Law by L.Fuller, Indiana Law Journal, (1964). Vol.42/Issue no: 2, Article 5.

Yash Pal Ghai, Devolution: Restructuring the Kenyan state**,** Vol. No. 2, Journal of Eastern African Studies, Routledge Publishers (originally a lecture at the African Research and Resource Forum, Kenyatta International Conference Centre (KICC), Nairobi, 23 November, 2007).

Yacoob J, The Housing Obligations Imposed on the State by the South African Constitution as defined by the Constitutional Court of South Africa, a speech

elaborating the reasoning in Grootboom case given at a conference on Human Rights and Globalisation at Panchgani, India on December 30, 2000.

Constitutions/Statutes

Constitution of Kenya, 2010.

Constitution of the Republic of South Africa Act, 1996.

Independence Constitution of Kenya, 1963.

Indian Constitution.

Revised Constitution of Kenya, 1969.

Criminal Procedure Act, Cap 75, Laws of Kenya.

Urban Land Ceiling and Regulation Act, (India) 1976.

Cases

Charo wa Yaa-v-Juma Abdi Noor & Others (High Court of Kenya at Mombasa Miscellaneous Civil Appeal No.8 of 2011(unreported).

Chemeli Singh v State of UP (1996)2SCC 549.

Giella-v-Cassman Brown (1973) E.A 358.

Grootboom-v-Ostenberg Municipality & Others 2000, 2001 SA 46(CC), 2000II 69.

Ibrahim Sangor Osman-v-Minister for Provincial Administration & International Security & 3 Others (High Court of Kenya at Embu, Petition No.2 of 2011.

Mitu-Bell Welfare-v- Attorney General,Kenya,Kenya Airports Authority and Commissioner of Land(High Court Petition No.169 of 2011)

Namanda Bachao Andolan –v-Union of India (1997)11SCC 121

Occupiers of 51 Olivia Road & Others-v-City of Johannesburg & Other (2008 5 BCR 475(CC)

Olga Tellis-v- Bombay Municipal Corporation (1985)3 SCC 545.

Peter Anyang Nyong'o & Others-v-Attorney General (2010) eKLR.

Republic-v- Margarett Ngui(High Court Criminal Application No.4 of 1985)unreported.

Rono-v-Rono, CA, No.66/02

Satrose Ayuma & 11 Others-v-Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 2 others (High Court Petition No.65 of 2010(2011) eKLR.

Shantistar Builders –v-Narayan K Totame(1990) 1SCC 520.

Waithera Kariuki & 4 Others –v-The Town Clerk of Nairobi City Council & 2 others (High Court of Kenya, Petition 66 of 2010(2011) eKLR

International Law Reports

Office of the United Nations High Commissioner for Human Rights Adequate Housing Fact sheet No.21/Rev.1 Printed at United Nations, Geneva

ISSN 1014-5567GE.09-14883–November 2009–9,245 Reprinted at United Nations, GenevaGE.14-80125–May 2014.