



**UNIVERSITY OF NAIROBI**  
**COLLEGE OF HUMANITIES AND SOCIAL SCIENCES**  
**SCHOOL OF LAW**

**A CRITICAL EVALUATION OF THE RIGHT TO HOUSING IN KENYA**

**BY**

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**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT FOR THE  
AWARD OF THE DEGREE OF MASTER OF LAWS.**

**DECLARATION**

I, **DANIEL NGUGI KINUTHIA**, do hereby declare that this Thesis is my original work, which has been done in line with the requirements and regulations of the University of Nairobi for the degree of Master of Laws (LLM). This Thesis has not been submitted for a degree in any other university.

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Without the help of all these people, this study would have taken much longer period to complete.

## **DEDICATION**

This research project is dedicated to my wife Peace Wangui Gathongo, my mother Joyce Wairimu Kinuthia and my late father Fredrick Kinuthia Hadad.

## **TABLE OF KENYA LEGISLATION**

The Constitution of Kenya, 2010.

Judicature Act, CAP 8, Laws of Kenya.

Housing Act, Chapter 117 of the Laws of Kenya.

Constitution of Kenya, 1963 (Repealed).

Sectional Properties Act, No. 12 of 1987.

Kenya National Commission on Human Rights, Act No. 14 of 2011.

Land Laws (Amendments) Act, 2016.

The Prevention, Protection and Assistance to Internally Displaced Persons and Communities Act,  
No. 56 of 2012.

Children Act, Act No 8 of 2001.

## **TABLE OF SOUTH AFRICA LEGISLATION**

The Constitution of the republic of South Africa, 1996

Prevention of Illegal Squatting Act (PISA), Act No 52 of 1952 (Repealed)

Housing Act, 1997.

Social Housing Act, 2008.

Rental Housing Act, 1999.

Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998(PIE ACT).

## **TABLE OF SINGAPOREAN LEGISLATION**

Land Acquisition Act, 1966.

Housing and Development Act, 1960.

## **TABLE OF INTERNATIONAL DECLARATIONS, CONVENTIONS AND PRINCIPLES**

Declaration of Human Rights (Universal Declaration), 1948.

International Covenant on Economic, Social and Cultural Rights, 1966.

International Covenant on Civil and Political Rights, 1966.

International Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

The Istanbul Declaration and the Habitat Agenda, Second United Nation Conference on Human Settlements (Habitat II), Istanbul, 1996.

Vancouver Declaration on Human Settlements and the Vancouver Action Plan, 1994.

Vienna Declaration, 1993.

Maastricht Guidelines on Violation of Economic, Social and Cultural Rights, Maastricht, 1997.

Health Principles of Housing, World Health Organization, Geneva, 1989.

### **REGIONAL CHARTER**

African Charter on Human and People's Rights, 1981.

## **ABSTRACT**

The entrenchment of the right to housing in the Constitution of Kenya, 2010 (Article 43) was a new dawn to the majority of Kenyans, especially the low and medium earners. They had a hope of living in adequate and decent houses that secure their right to dignity. The right is also provided in the Universal Declaration of Human Rights; and the International Covenant on Economic, Social and Cultural Rights.

In spite of all these legal provisions on the right to adequate housing, the right remains a pipe dream. It is poorly implemented and widely violated. The number of people who are inadequately housed is increasing.

This study will carry out an evaluation of the right to housing with an aim of establishing how it can be well implemented and enforced. The study will look at: an analysis of the right to housing, its violation, challenges to its implementation and enforcement, and the role of State and individual citizens.

The study will advance an argument that there is poor understanding of the scope, nature and the content of the right to housing; the country has inadequate legal and policy framework to implement the right to housing; State has failed in its duty in realization of right to adequate housing; and that individual citizens and non-state actors have a role to play in actualization of the right to housing..

The study will analyze the existing laws, court cases and the existing literature on the right to housing to understand the nature of the right, inadequacy of the existing laws, violation of the right and how the right can be well implemented. The study will thereafter provide recommendations on how the right to housing can be actualized.

The study aims to provide the government of Kenya and its citizen with a practical solution to the housing problem. The housing problem is traced to British colonial history in Kenya and it is a major problem today.

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## LIST OF ABBREVIATIONS

ANC	African National Congress
CEDAW	Convention on Elimination of All Discrimination Against Women
CERAMIDE	Centre for Minority Rights and Development
CERD	International Convention on the Elimination of All Forms of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECHR	The European Commission of Human Rights
ECOSOC	Economic and Social Council
HDB	Housing Development Board
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICRPD	Convention on the Rights of Persons with Disabilities
KNCHR	Kenya National Commission of Human Rights
NHC	National Housing Corporation
NHSS	National Housing Subsidy Scheme
NGO	Non-Governmental Organization
OP	Optional Protocol
PISA	Prevention of Illegal Squatting Act
SDG	Sustainable Development Goals
SER	Social Economic Rights

SERAC	Social and Economic Rights Action Centre
UDHR	Universal Declaration of Human Rights
UN	United Nations

## CHAPTER ONE:

### INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.0 BACKGROUND

Housing is globally recognized as a human need and an essential requirement for the fulfillment of human life.<sup>1</sup> The need to guarantee everyone the access to adequate and affordable housing has gained recognition as a basic human right over time.<sup>2</sup> Like food, even those who cannot afford it need it perhaps more than those who can, because the latter could be in it for investments return.<sup>3</sup> Miloon Kothari has defined the right to adequate housing, as: “the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.”<sup>4</sup>

Enjoyment of right to housing requires the existence of other human rights.<sup>5</sup> Right to a shelter should, therefore, be defined to include such other rights as the right to adequate privacy, security, space, lighting and ventilation, and satisfactory location.<sup>6</sup> A narrow interpretation of the right will limit its enjoyment<sup>7</sup> because an adequate shelter is more than just a structure.<sup>8</sup> Other than a

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<sup>1</sup> Henry Onoria, ‘*Guaranteeing the Right to adequate Housing and shelter in Uganda: The case study of women and people with disability*’ (2007) Human Rights & Peace Centre 1, <[http://huripec.mak.ac.ug/pdfs/working\\_paper\\_6.pdf](http://huripec.mak.ac.ug/pdfs/working_paper_6.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Miloon Kothari, Sabrina Karmali & Shivani Chaudry ‘*The Human Right to Adequate Housing and Land*’ (2006) National Human Rights Commission 9.

<[file:///C:/Users/HP/Downloads/The\\_Human\\_Right\\_to\\_Adequate\\_Housing%20\(5\).pdf](file:///C:/Users/HP/Downloads/The_Human_Right_to_Adequate_Housing%20(5).pdf)> (Accessed on 8<sup>th</sup> August 2018).

<sup>5</sup> Ibid 16.

<sup>6</sup> United Nations General Assembly, The Global Shelter Strategy to the year 2000: Report of the Executive Director, UN Comm on Human Settlement, para 9 7< <http://www.un.org/documents/ga/res/43/a43r181.htm>> Accessed on 8 November, 2018.

<sup>7</sup> Committee on Economic, Social and Cultural Rights, General Comment No.4: The right to adequate housing (Article 11(1) of Economic, Social and Cultural Rights), < <http://www.refworld.org/docid/47a7079a1.html>> Accessed on 10<sup>th</sup> November, 2018.

<sup>8</sup> Christopher Golay and Melik Ozden, ‘*the right to housing*’ (1992)1, 4 <<https://www.cetim.ch/legacy/en/documents/bro7-log-A4-an.pdf>> (Accessed on 17th May 2018).

dwelling place, a house is a place where lives of members of a family are developed.<sup>9</sup>The Committee on Economic, Social and Cultural Rights (CESCR)<sup>10</sup> opined that the right to an adequate shelter should include the protection of the right holders from forced eviction, destruction of their homes, protection of their privacy, and the security of tenure.<sup>11</sup>The right holders should also not be discriminated in accessing adequate housing and making housing-related decisions.<sup>12</sup>

Kenya has an international obligation to provide adequate housing to her citizens. To begin with, Kenya has ratified various international treaties that have recognized housing as a right. First, the 1948 Declaration of Human Rights (Universal Declaration)<sup>13</sup> has recognized the right as being in line with the acceptable standard of living.<sup>14</sup> Secondly, International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>15</sup> instructs parties to take necessary actions so as to safeguard the rights to housing. It is the most fundamental international law principle in safeguarding the right to housing.<sup>16</sup> In addition, the covenant requires State parties to observe non-discrimination and to budget to the maximum of the available resources towards housing.<sup>17</sup>

Some rights may be regarded as ancillary to the right to housing. For instance, The International Covenant on Civil and Political Rights (ICCPR)<sup>18</sup> has safeguarded the protection of homes.<sup>19</sup> Article 5(e) (iii) of The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>20</sup> forbids discrimination with regards to the protection of the right to housing.

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<sup>9</sup> Laurence Juma, 'Nothing but a mass of Debris: Urban evictions and the right of access to adequate housing in Kenya' (2012)12 African Human Rights Law Journal 470.

<sup>10</sup> The Committee on Economic, Social and Cultural Rights was established in 28<sup>th</sup> May 1985 by United Nation Economic and Social Council. It is a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its state parties.

<sup>11</sup> General Comment no. 4 (n 7) para 9.

<sup>12</sup> Ibid.

<sup>13</sup> Ratified by Kenya on 31<sup>st</sup> July 1990, see [www.kenyalaw.org/treaties/treaties/164/universal-declaration-of-human-right](http://www.kenyalaw.org/treaties/treaties/164/universal-declaration-of-human-right) (accessed on January 3, 2018).

<sup>14</sup> Article 25 of UDHR, 1948.

<sup>15</sup> Article 11 (1) of ICESCR, 1966. Acceded to by Kenya on 1<sup>st</sup> May 1972.

<sup>16</sup> S Leckie, *The Right to Housing in A Eide et al (eds) Economic, Social and Cultural rights* (A textbook, 1995)111.

<sup>17</sup> Lawrence Juma (n 9) 470.

<sup>18</sup> International Covenant on Civil and Political Rights (ICCPR),

<[http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_200A\(XXI\)\\_civil.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_200A(XXI)_civil.pdf)> Accessed on 8 November 2018.

<sup>19</sup> Article 17(1) of ICCPR.

<sup>20</sup> CERD entered into force on 4<sup>th</sup> January 1969.

The African Charter on Human and People's Rights (African Charter)<sup>21</sup> has affirmed the necessity of shelter through interpretation of articles 4, 14, 16, 18(1), and 24 by The African Commission on Peoples and Human Rights (African Commission).<sup>22</sup> Kenya, being a signatory, is therefore bound by the African Charter to provide decent shelters to her citizens.

The Sustainable Development Goals (SDGs), goal number eleven (11) provides for sustainable cities and communities.<sup>23</sup> The goal recognizes the challenge caused by the shortage of adequate housing and congestions in urban areas and the limited land resource in the cities compounded by job seekers.<sup>24</sup> Although the urban slum population in the globe dropped from 28% to 23% between 2000 to 2014, more than half (56%) of urban dwellers in Sub-Saharan Africa are living in slums.<sup>25</sup> This may be understood to mean that the right to housing in Sub Saharan Africa has not gained importance as compared to other parts of the world.

Kenya's independence Constitution<sup>26</sup> did not clearly recognize housing as a right and only did so implicitly under section 75 on the protection of the right to property. Despite Kenya having ratified various international human rights instruments which have recognized housing rights, after independence, most of them were not domesticated.<sup>27</sup>

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<sup>21</sup> OAU Doc CAB/LEG/67/3 re 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union (2007)* 29 (adopted 27 June 1981).

<sup>22</sup> This view was ventilated by the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* Communication No. 155/96(African Commission Human and People's Rights 2001), para 60.

<sup>23</sup> Sustainable development goals, goal number 11,

<http://www.un.org/sustainabledevelopment/sustainable-development-goals/> Accessed on 12<sup>th</sup> January 2018.

The Sustainable Development Goals are a collection of 17 global goals set by United Nations which are interrelated though each has its own target to achieve. They cover a broad range of social and economic development issues which include poverty, hunger, health, education, and housing among others.

<sup>24</sup> Ibid.

<sup>25</sup> Sustainable Development Goals 2017 Progress report,

<https://unstats.un.org/sdgs/files/report/2017/TheSustainableDevelopmentGoalsReport2017.pdf> Accessed on 12th January 2018.

<sup>26</sup> Constitution of Kenya, 1963.

<sup>27</sup> Dan Juma, *Taking these rights seriously; Civil society organizations' parallel report to the initial state report of the republic of Kenya on the Implementation of the International Covenant on Economic, Social and Cultural Rights'* (2008)1,10,

[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT\\_CESCR\\_NGO\\_KEN\\_41\\_9386\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_NGO_KEN_41_9386_E.pdf) Accessed on 8<sup>th</sup> November, 2018.



Prior to the Constitution of Kenya 2010, international instruments ratified by Kenya had to be domesticated by an Act of Parliament before they could be recognized as laws domestically.<sup>28</sup> This was so because international law was not listed as a source of law under the Judicature Act.<sup>29</sup> General rules of international law have now been entrenched in the Constitution as sources of law.<sup>30</sup> Ratified treaties and conventions are now applicable in Kenya.<sup>31</sup>

Every Kenyan has been guaranteed access to adequate housing under Article 43(1) (b) of the Constitution of Kenya. It is incumbent upon the government of Kenya to observe the right, taking measures through legislation and policy to achieve the continuous realization of the right to shelter.<sup>32</sup> The Constitution has tasked the national government with the responsibility to develop housing policy and county governments with a responsibility to provide housing.<sup>33</sup>

It is the responsibility of the government to demonstrate that it lacks resources to put into action the economic rights.<sup>34</sup> While allocating resources, it must ensure the biggest possible population in the country enjoy the right and be mindful of vulnerable members in the society.<sup>35</sup> The court has been barred by the Constitution from interfering with the decision of the State made in accordance with this criteria.<sup>36</sup> The Constitution appears to have taken a reasonableness approach test which has been adopted by South African Courts,<sup>37</sup> thus providing the State with some latitude to exercise discretion.<sup>38</sup> This is different from the minimum core approach which leaves no room for discretion.<sup>39</sup>

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<sup>28</sup> Maurice Oduor, *'the Status of International Law in Kenya'* (2013) African Nazarene University law Journal 98. <<file:///C:/Users/HP/Downloads/Thestatusofintlawnkenya-published.pdf>> on 8<sup>th</sup> November, 2018.

<sup>29</sup> Section 3 of Judicature Act, CAP 8, Laws of Kenya.

<sup>30</sup> Article 2(5) of Constitution of Kenya, 2010.

<sup>31</sup> Article 2(6) of Constitution of Kenya, 2010.

<sup>32</sup> Article 21(3) Constitution of Kenya, 2010.

<sup>33</sup> Fourth Schedule to the Constitution of Kenya, 2010, provide for distribution of Function Between the National Government and the County Government.

<sup>34</sup> Article 20 (5) (a) of the Constitution of Kenya, 2010.

<sup>35</sup> Article 20 (5) (b) of the Constitution of Kenya, 2010.

<sup>36</sup> Article 20 (5) (c) of Constitution of Kenya, 2010.

<sup>37</sup> Lawrence Juma (n 9) 486.

<sup>38</sup> Nicholas Wasonga Orago, *'The Place of the Minimum Core Approach in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution'* (2015) 59 J Afr. L 244.

<<file:///C:/Users/HP/Downloads/NicholasWasongaOragoThePI.pdf>> Accessed on 14<sup>th</sup> November, 2018.

<sup>39</sup> Ibid.

Enforcement of economic rights in Kenya is a serious problem.<sup>40</sup> Indeed, the only Act of Parliament touching on housing is the Housing Act, 1953<sup>41</sup> whose objective was to provide public grants to local governments, companies, and individuals to enable them to procure land and or houses for dwelling purposes. This Act was promulgated in the year 1953 prior to Kenya attaining its independence. In furtherance of these objectives, the said Housing Act established a National Housing Corporation.<sup>42</sup> Besides that, the Act does not engender the housing right.

The effort by the government of Kenya to address housing problems can be traced in various housing policies. The first policy measure was in 1966 vide sessional paper no. 5 of 1966 which underscored the need for affordable housing in Kenya.<sup>43</sup> The policy recommended the establishment for National Housing Authority. Further, it recognized the already established National Housing Corporation under the Housing Act.<sup>44</sup> The sessional paper No. 3 of 2004 replaced the 1966 policy.<sup>45</sup> This policy guideline underscored the right to housing as a progressive right.<sup>46</sup> It also expressed the government's desire to arrest the deteriorating housing condition countrywide and raise the demand for houses in urban areas, rural areas, slum dwellings and in the public sector. Lastly, the 2004 Housing policy recognized the deficiency in the Housing Act and recommended the renaming of the Housing Act to the National Housing Corporation Act, enactment of an all-encompassing Housing Act, bringing down the cost of housing by utilizing the locally available construction materials, and popularization of the Sectional Properties Act<sup>47</sup> so as

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<sup>40</sup> International Commission of Jurist (ICJ), *Towards the Realization of Economic, Social and Cultural Rights in Kenya: Joint Civil Society Alternative Report to the 2<sup>nd</sup> – 5<sup>th</sup> State Report of the Republic of Kenya on the Implementation of the Covenant on Economic, Social and Cultural Rights* (2016) 7.

<[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT\\_CESCR\\_CSS\\_KEN\\_22959\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_CSS_KEN_22959_E.pdf)> Accessed on 8<sup>th</sup> November, 2018.

<sup>41</sup> Chapter 117 of the Laws of Kenya.

<sup>42</sup> Section 3 of Housing Act, 1953.

<sup>43</sup> Wafula Nabutola, *'Affordable Housing in Kenya: A Case Study of Informal Settlements'* (2004)1,11

<[https://www.fig.net/resources/proceedings/fig\\_proceedings/jakarta/papers/ts\\_01/ts\\_01\\_2\\_nabutola.pdf](https://www.fig.net/resources/proceedings/fig_proceedings/jakarta/papers/ts_01/ts_01_2_nabutola.pdf)> Accessed on 31<sup>st</sup> December, 2017.

<sup>44</sup> Section 3 of Housing Act, 1953.

<sup>45</sup> Economic and social Centre (Hakijamii), *'Assessment of the realization of the right to housing in Kenya 2011-2012'* (2012)1, 14-15 <<http://www.humanitarianlibrary.org/sites/default/files/2013/07/assessment.pdf>> Accessed on 31/12/2017.

<sup>46</sup> Sessional Paper No. 3 of 2004, on Housing Policy for Kenya,

<<file:///C:/Users/HP/Downloads/national%20housing%20policy%20for%20kenya.pdf>> Accessed on 28<sup>th</sup> July 2018.

<sup>47</sup> Act No. 12 of 1987.

to encourage people to seek shared ownership of property. Regrettably, no recommendation was ever implemented.

The Kenya Economic Recovery Plan of 2003-2007<sup>48</sup> focused on improving housing for among others, the poor, police and prison officers to boost their productivity; check on high-cost of building materials; enact appropriate land and housing legislation; and upgrading of slums and informal settlements.<sup>49</sup> The plan was not successful.

The National land policy was formulated vide sessional paper no. 3 of 2009 and recommended the promulgation of appropriate laws to regulate evictions in the country and infuse the virtues of good governance in the land management process.<sup>50</sup> Although the Land Laws (Amendment) Act, 2016 has provided procedure on evictions, the country continues to experience unlawful evictions. The Housing Act sadly has not been reviewed in alignment with the Constitution 2010.

A more elaborate dream on adequate housing is captured in The Kenya vision 2030<sup>51</sup> which provided a blueprint for a revolution in the housing sector. It predicted that Kenya will be a predominantly urban country by 2030. However, the medium-term goal 2012 that was for among others, to increase the production of housing from 35,000 annually to 200,000 and to enact a Housing Act was not achieved. There are also no signs of achieving its short-term vision (2020) that provided for sustainable decent housing among others. There is no strong legal and policy framework to steer the country toward vision 2030.

The government still appears determined to attain vision 2030. For instance, the government has undertaken to provide 40 Billion Kenya shilling incentives to meet 2030 housing target.<sup>52</sup> The private sector is intended to benefit from the fund to build 4.3 Million housing units required by

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<sup>48</sup> Kenya Economic Recovery Plan 2003-2007 <<http://siteresources.worldbank.org/KENYAEXTN/Resources/ERS.pdf>> Accessed on 12 January 2018.

<sup>49</sup> Ibid.

<sup>50</sup> Hakijamii (n 45) 14.

<sup>51</sup> The Kenya Vision 2030 is the country's new development blue print covering the period 2008 to 2030 that aims to transform Kenya into a newly industrialized "middle-income" country providing a high-quality life to all its citizens by the year 2030 <<http://www.vision2030.go.ke/>> Accessed on 12<sup>th</sup> January 2018.

<sup>52</sup> The Principal Secretary Ministry of Housing and Urban development, Ms. Aidah Munamo, made an announcement on 10<sup>th</sup> January 2018 of the government 40 billion initiatives to meet 2030 housing target, <<https://www.paxelnetwork.com/sh40b-govt-incentives-to-meet-2030-housing-target/>> Accessed on 12<sup>th</sup> January 2018.

2030.<sup>53</sup> More importantly, the government proposes to target the low-income urban household.<sup>54</sup> This proposal is great and should be appreciated. Be that as it may, there lacks a clear framework on how to implement this plan. On the other hand, there are fears that housing units, if the plan is realized, may never reach the most deserving population in the slums since the private commercial house providers are more concerned with urban upper middle as well as the high-income group for commercial purposes.

The experiences of the citizens of Kenya with regard to housing is worrying in spite of its entrenchment in the Constitution, international instruments and government plans.<sup>55</sup> The slum population has continued to increase, and in like manner, unlawful evictions continue to thrive.<sup>56</sup> Kibera slum, for instance, being the largest slum in sub-Saharan Africa<sup>57</sup> has most of its dwellers living in a deplorable state.<sup>58</sup>

Shortage of adequate housing is not just a Kenyan problem but a global one and despite its relevance in world legal system, more than a billion people are yet to be adequately housed.<sup>59</sup> This inadequate housing goes hand in hand with health-threatening conditions mainly due to overcrowding in the slums and poor sanitation.<sup>60</sup> In 2008, it was estimated that half of the world's population lived in poor slums in the cities that lacked necessary infrastructure and services.<sup>61</sup> Of the one Billion, more than 930 million are from the developing.<sup>62</sup> The gap between the developing and the developed countries with regard to housing appears to be growing larger.

To alleviate the deficit in decent housing, the legal and institutional obstacles should be removed. Besides, access to justice has been made more difficult due to the complexity of rules and procedures, geographical location of courts and tribunals, and the use of legalese and high court

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Emmanuel Mutisya and Masaru Yarime, *'Understanding the Grassroots Dynamic of Slums in Nairobi: The Dilemma of Kibera Informal Settlements'* (2013) International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies 197, < <http://www.tuengr.com/V02/197-213.pdf> > Accessed on 8 Nov 2018.

<sup>56</sup> Ibid 198.

<sup>57</sup> Yasmina Zaidman, *Knowledge necessary to meet poverty alleviation goals: Building enterprise to reach low-income market* (19LBJJ 2008)85

<sup>58</sup> Mutisya and Yarime (n 55) 206,207.

<sup>59</sup> UN Habitat, *The right to adequate housing* Fact Sheet No. 21, < [https://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf) > Accessed on 8<sup>th</sup> October 2018.

<sup>60</sup> Ibid 1.

<sup>61</sup> Ibid.

<sup>62</sup> Barrack Obaga, KPDA & Hassconsul: *'Housing shortage in Nairobi'* (2014)5.

fees.<sup>63</sup> In addition, a section of the public in Kenya lack trust in the judiciary and perceive courts as corrupt and do not expect justice from it.<sup>64</sup> Furthermore, the corruption in the various government institution, especially in the police service in Kenya has demotivated a good fraction of Kenyans especially when they participate in unlawful evictions. A strong institutional structure is, therefore, necessary which would ensure the effort by the State in the provision of houses reach the desirable groups and ensure that the State has accurate information of the population that has more urgent need of housing and thus give priority.

It is sad that in Kenya there is a population that has lived in caves for over 32 years<sup>65</sup> and nothing seems to be done about their wellbeing. This population is exposed to the danger of deadly parasites, animals, and hunger. Right to human dignity cannot be realized without adequate housing.<sup>66</sup> To put it briefly, to this population, the elaborate laws on right to adequate housing, exist in abstract and the few who may have little knowledge of the law, have very little access to justice due to many barriers, poverty being one of them. Education is one of the means of creating and spreading awareness to people on right to shelter.<sup>67</sup> Without this awareness, this vulnerable group cannot adequately fight for this fundamental right.<sup>68</sup>

It will not be appropriate to conclude this evaluation without looking into housing problem in Nairobi and its possible cause. As a big market, Nairobi has contributed to rural-urban migration as people migrate looking for job opportunities.<sup>69</sup> The large population has led to slums such as Kibera, Korokocho, Mathare, Sinai, and Mukuru Kwa Njenga among others.<sup>70</sup> To accommodate

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<sup>63</sup> Kariuki Muigua, 'Improving Access to Justice: Legislative and Administrative Reforms Under the Constitution' <<http://www.kmco.co.ke/attachments/article/110/A%20Paper%20on%20Improving%20Access%20to%20Justice%202.pdf>> Accessed on 12<sup>th</sup> May 2018.

<sup>64</sup> Jill Cottrell Ghai, 'Judicial Accountability in the New Constitution order' (2016) ICJ Kenya 34 <[http://www.icj-kenya.org/jdownloads/Publications/ICJ Judiciary Watch ed 12 final complete for web.pdf](http://www.icj-kenya.org/jdownloads/Publications/ICJ%20Judiciary%20Watch%20ed%2012%20final%20complete%20for%20web.pdf)> Accessed on 12<sup>th</sup> May 2018.

<sup>65</sup> KTN News Kenya, 'A Community that has lived in Caves for Over 32 Years' *Standard Digital* (16 March, 2014) <<https://www.youtube.com/watch?v=05oG3pBaqq>> Accessed on 12 January, 2018. A population of about 500 people have lived in a cave for over 32 years in Gilgil within Nakuru County. They have no alternative shelter and have strived for government intervention with no success.

<sup>66</sup> Miloon Kothari, Sabrina Karmali & Shivani Chaudhry (n 4) 11.

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> John O Oucho, Linda A Oucho, & Viola Ochieng', *Is Migration the Solution to Poverty Migration in Kenya?* (2014) 16, <<http://migratingoutofpoverty.dfid.gov.uk/files/file.php?name=wp21-oucho-oucho-ochieng-2014-is-migration-the-solution-to-poverty-in-kenya.pdf&site=354>> Accessed on 16 October 2018.

<sup>70</sup> *ibid.*

the poor migrants working in the city.<sup>71</sup> It can be seen that little has been done to house this migrant population from the rural areas.

It is apparent that corruption in the private and public sectors has made the development of affordable housing more costly.<sup>72</sup> Consequently, this has led to a rise in house prices preventing the majority of Kenyans from purchasing or renting.<sup>73</sup> Obtaining construction permits has been difficult due to social evils such as corruption while the housing demand continues to grow.<sup>74</sup> Nairobi is in need of over 20,000 units per year.<sup>75</sup> Increase in the cost of construction materials has also contributed to the shortage of houses.<sup>76</sup>

This research will evaluate the right as specified under the Constitution and various international legal instruments and further evaluate its content, nature, and scope. Critical analysis of the main causes of inadequate housing in Kenya will be evaluated together with the enforcement and implementation of the right, taking into consideration factors hindering the implementation. The role and duty of the citizens of Kenya in realizing the right to housing will be evaluated. The study will also endeavor to find out how this right has been enforced in other jurisdictions and see how Kenya can learn and better its situation. Recommendations will be made on the better actualization of the right to housing.

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<sup>71</sup> Ibid 16.

<sup>72</sup> ICJ (n 40) 14.

<sup>73</sup> Barrack Obaga (n 62) 3.

<sup>74</sup> *Doing Business Report* is a World Bank Group Flagship Report comparing business regulations for domestic firms in 190 economies.

<sup>75</sup> Barrack Obaga (62).

<sup>76</sup> H Gichunge, 'Factors that Contribute to the Cost of Provision of Low Cost Housing in Nairobi, Kenya' (International Conference on Spatial Information for Sustainable Development, Nairobi Kenya, 2-5 October 2001) 2,6, 10 < <https://www.fig.net/resources/proceedings/2001/nairobi/gichunge-CMTS1-2.pdf> > Accessed on 16 October 2018.

## 1.1 STATEMENT OF THE PROBLEM

Although the right to housing has been entrenched in the Constitution,<sup>77</sup> its implementation remains a big challenge in Kenya. In fact, the right has also been recognized by UDHR<sup>78</sup> and ICESCR.<sup>79</sup> Nevertheless, many Kenyans especially the low and middle-income earners are living in deteriorating if not already deteriorated buildings.<sup>80</sup> In fact, there are people living in caves for as they cannot afford houses.<sup>81</sup>

This study intends to carry out a critical evaluation of the right to housing with an aim of establishing factors that have contributed to non-achievement of the right to adequate housing in Kenya. The study will look at: an analysis of the right to housing; legal and policy framework on the right housing; a comparative analysis of the right to housing; violation of the right; duty of the State and individual citizens and non-state actors in actualizing the right to a shelter; and challenges to the implementation of the right. It will conclude by providing recommendations on the best way to realize the right to adequate housing.

## 1.2 JUSTIFICATION OF THE STUDY

The housing situation in Kenya is worrying.<sup>82</sup> Majority of Kenyans especially the low-income earners are living in deteriorating houses.<sup>83</sup> A good picture of this worrying house condition is evidenced in various slums in Kenya which portray poverty.<sup>84</sup> The housing conditions in these

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<sup>77</sup> Article 43(1) (b) and article 53(1) (c) of the Constitution of Kenya, 2010.

<sup>78</sup> UDHR (n 14).

<sup>79</sup> ICESCR (n 15).

<sup>80</sup> Nora Nthule Matindi, *'Affordable Houses for Low and Middle Income Earners in Nairobi- Kenya'*, 2.

<[http://www.hdm.lth.se/fileadmin/hdm/alumni/papers/SDD\\_2008\\_242b/Nora\\_Matindi\\_Kenya.pdf](http://www.hdm.lth.se/fileadmin/hdm/alumni/papers/SDD_2008_242b/Nora_Matindi_Kenya.pdf)> Accessed on 13 October 2018.

<sup>81</sup> KTN News Kenya (n 65).

<sup>82</sup> Ondola Otieno, *'Constraints in Housing Policy Towards Provision of low-cost Housing to the Urban Poor in Kisumu City, Kenya'* (International Journal of Humanities and Social science Invention, 2014) 31'

<[http://www.ijhssi.org/papers/v3\(1\)/Version-2/G03102031042.pdf](http://www.ijhssi.org/papers/v3(1)/Version-2/G03102031042.pdf)> Accessed on 16 October 2018.

<sup>83</sup> Norah Matindi (n 80) 2.

<sup>84</sup> Wafula Nabutola (n 43) 1-11.

slums are characterized by poor sanitation, poor infrastructure, and lack of water.<sup>85</sup> The situation continues notwithstanding that housing right has been entrenched in the Constitution of Kenya.<sup>86</sup> It has also been provided in various international laws.<sup>87</sup>

There exists a number of literature on the causes of poor housing. However, not much has been written on how to address those causes. It is therefore important to establish and examine the factors that hinder the realization of the right to housing in Kenya. Those problems should be addressed within the Kenyan context since the country faces unique problems which could be different from others countries. Put differently, although the housing shortage is a global problem probably with similar causes, Kenya will require specific measures which may be unique to her. For instance, inadequate housing in Kenya is traced from British colonial history.<sup>88</sup> It will be therefore important for Kenya to address some historical injustices created by the British so as to conclusively address the housing problem. A country that was never colonized will not have to address house injustices created by colonialists.

It is the expectation of the study that the recommendations made will be able to address the unique causes of the housing shortage in Kenya and give suitable measures. Some of the unique problems will include high population, corruption, attitude of the government and the citizens toward housing, illiteracy, inadequate resources, poor budgeting of financial resources, poverty, land grabbing, lack of clarity of roles of various roles of different government institutions and lack of legislation to implement the right to housing.

It is the hope of the study that if the government were to adopt the recommendations addressed to these unique problems, the country will manage to tackle most of the obstacles that hinder the actualization of the right to housing. There will also be proper utilization of available resources toward housing. With the said recommendations, suitable legislation addressing specific housing problems will become easier to enact which will have an impact of creating a strong legal

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<sup>85</sup> Kavinya Muindi, *'Air Pollution in Nairobi Slums: Sources, Levels and Lay Perceptions'* (Umea University) 1, <<https://www.diva-portal.org/smash/get/diva2:1133880/FULLTEXT01.pdf>> Accessed on 30 August 2018.

<sup>86</sup> Article 43 of the Constitution of Kenya, 2010.

<sup>87</sup> See ICESCR (n 15) and UDHR (n 14).

<sup>88</sup> Mores Mwirigi Njiru, *'Factors affecting growth of mortgage industries in Kenya; A case study of National Housing Corporation (2003) 1(7) International Journal of Social sciences and Entrepreneur 1,2'* <[http://www.ijssse.org/articles/ijje\\_vi\\_i7\\_26\\_35\\_pdf](http://www.ijssse.org/articles/ijje_vi_i7_26_35_pdf)> Accessed 2 December 2017.



framework towards housing policy. The recommendations will also inform of the possible areas in the Constitution that require amendments to fasten the realization of the right.

The study, therefore, aims at providing a cure for inadequate housing in Kenya by formulating a suitable recommendation for the implementation of the right that can engineer a social transformation in the housing sector.

### **1.3 STATEMENT OF OBJECTIVES**

- i. To analyze the nature, scope, and contents of the right to housing in Kenya.
- ii. To discuss and evaluate various violations of the right to housing in Kenya.
- iii. To evaluate and discuss how provisions that guarantee the right to adequate housing in the Constitution, international law and any other legal provisions in Kenya can be realized.
- iv. To evaluate, examine and identify the obstacles to the implementation and enforcement of the right to adequate housing in Kenya.
- v. To identify possible areas of reforms in laws, institutions, policies, and attitude in tackling the housing question in Kenya.

### **1.4 RESEARCH QUESTIONS**

The research aims to answer the following questions:

- i. What is the nature, scope, and contents of the right to housing?
- ii. How can provisions that guarantee the right to adequate housing in the Constitution, international laws and any other legal provisions be realized in Kenya?
- iii. What are the various violations of the right to housing in Kenya?
- iv. What are the challenges to the implementation and enforcement of the right to housing in Kenya?
- v. What are possible areas of reforms in laws, institutions, policies, and attitude in tackling the housing question in the country?

## 1.5 THEORETICAL FRAMEWORK

The study relies on natural law theory to advance the case for the right to adequate and affordable housing in Kenya. The theory is associated with philosophers such as Aristotle.<sup>89</sup> The proponents of natural law theory argue of the existence of a higher law that should guide human conduct. According to natural law, a true law is in agreement with nature and prohibits wrongdoing, should not change due to circumstances and should be of universal application.<sup>90</sup> Everyone is bound by its provision.<sup>91</sup> Time does not alter what is natural and it applies uniformly to different societies by use of reason.<sup>92</sup> Some proponents like Aquinas argue that positive laws which are just, are derived from natural law<sup>93</sup>.

The natural law theory has attracted criticism from Positivist for its assertion on the morality of law. The requirement by natural law theorist on the evaluation of moral merits of the legal system has been the boundary line between legal positivist and natural law theory. Positivists such as Hart who argues that law should be free from moral evaluations or moral commitments<sup>94</sup>. The same sentiments can be observed in Hans Kelsen's "Pure theory of law".<sup>95</sup>

The Constitution of Kenya provides for the right to adequate housing as a fundamental right. As observed above by Aquinas, positive law is derived from the natural law. It can, therefore, be concluded that the constitutional provision on right to adequate housing is a restatement of natural law as it is in agreement with nature. All humankind deserve a decent shelter making its application of universal application and will not differ in different societies in the world. The requirement of

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<sup>89</sup> Burns and Tony, "Aristotle and Natural Law: History of Political Thought" (1998) 19 Imprint Academic Ltd 142-166, < [www.jstor.org/stable/26217500](http://www.jstor.org/stable/26217500)> Accessed on 6 September 2018.

<sup>90</sup> Brian H. Bix, *Jurisprudence: Theory and Context* (Thomson Reuters, 7<sup>th</sup> edn, 2015) 70.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid 72.

<sup>94</sup> Ibid 43.

<sup>95</sup> Ibid 62.

a shelter by humans will continue unchanged being a moral requirement whose standard can only be measured by human reason. It is, therefore, an inalienable right to all human being.<sup>96</sup>

The universality of the natural right to housing is underscored in various provisions of international law instruments. It does not matter which part of the word one is based to be entitled to this right. The natural law, therefore, will go a long way in demonstrating the importance of housing to the human race.

The study has also relied on the realist theory. Esley Newcomb Hohfeld is one of the proponents of the theory.<sup>97</sup> The theory argues that law consists of certain types of rules regulating human conduct<sup>98</sup>. Hohfeld sought to elucidate the concept of a right.<sup>99</sup> More importantly to this paper, he demonstrated that every right has a composite duty. He clarified the relationship of right, duty, liberty, power, and immunity.<sup>100</sup>

Justice will be said to be served where every right obtains legal recognition.<sup>101</sup> Rights and duties are correlatives since every right must have a corresponding duty.<sup>102</sup> Deducing from this theory, it can be rightly stated that human rights are inherent in human beings and the purpose of government is to foster those rights and ensure maximum enjoyment. Hohfeld argues that the right has a correlative of a duty.<sup>103</sup> Law is seen to play a minimum role of preventing others from interfering with those rights.<sup>104</sup> The correlative duty of the State is the duty of restraint from interfering with those rights.

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<sup>96</sup> United Nations Office of High Commissioner for Human Rights, *Human Rights: A Basic Handbook for UN Staffs*, 2 <<https://www.ohchr.org/Documents/Publications/HRhandbooken.pdf>> Accessed on 8 November, 2018.

<sup>97</sup> Rosdorff, Leopold W. "Hohfeld's Theory of Fundamental Legal Concepts: A No-Revision." (1973) 16 Peeters Publishers 259. Accessed on <[www.jstor.org/stable/44083643](http://www.jstor.org/stable/44083643)> (On 6 November 2018).

<sup>98</sup> Nikolai Lazarev, 'Hohfeld's Analysis of Rights: Essentials Approach to a conceptual and Practical Understanding of the nature of Rights' (2005) Murdoch University Electronic Journal of law 1 <<http://classic.austlii.edu.au/au/journals/MurUEJL/2005/9.html>> Accessed on 5th April 2018.

<sup>99</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford publishers, 3<sup>rd</sup> Edn, 2012) 234.

<sup>100</sup> Ibid.

<sup>101</sup> Divya Chugh, Saumya Sharma, 'Hohfeld's Analysis of legal rights' Hidayatullah national law University, Abhanpur, New Raipur (India) 1 <<http://ijlls.in/wp-content/uploads/2014/10/article-Final-divya.pdf>> Accessed on 5th April 2018.

<sup>102</sup> Ibid.

<sup>103</sup> Raymond Wacks (99) 89.

<sup>104</sup> Ibid.

This theory of rights is criticized in the fact that not all rights have a corresponding duty.<sup>105</sup> This study disagrees and asserts all rights have corresponding duties. The duty may not be very clear however it exists.

The right to adequate housing as enshrined in article 43 (1) (b) of the Constitution of Kenya, it imposes a duty on the state to provide the houses to the citizens. The state has a duty to protect the right of citizens to housing and ensure no one is discriminated in its enjoyment.

## **1.6 RESEARCH METHODOLOGY**

The study will use doctrinal method of research. The data will be assembled from both primary and secondary sources. The primary sources shall include legislation and case laws from various jurisdictions. The secondary sources will include legal text, government reports, media report, policy documents and journal articles. These secondary materials shall be sourced mainly from Online databases such as LexisNexis UK, LexisNexis South Africa Hein-online and Jstor. The School of Law library will be relevant in accessing the both secondary and primary data.

Upon assembling of all relevant data, legal issues will be identified and analyzed. The analysis of the data will involve a comparative analysis of legal preposition and doctrine. The study will also link the new information to the study. Finally, a conclusion shall be drawn.

## **1.7 LITERATURE REVIEW**

A considerable amount of literature has been written on the right to housing both locally and internationally. There are those who have argued in support of social economic rights and those in opposition. The review will be considered in nine themes as follow:-

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<sup>105</sup> Ibid 235.

### 1.7.1 Origin of housing problems in Kenya.

There is no doubt that the lack of adequate houses has resulted in slums and informal settlement in Kenya. Lawrence Juma<sup>106</sup> attributes the emergence of slums and informal dwelling to Kenya's colonial history. He believed that land expropriation policies implemented by colonialist led to many indigenous communities losing their land to colonialists.<sup>107</sup> He explains that communities were pushed to colonial reserves and as population pressure increased in the reserves, informal settlements emerged.<sup>108</sup> The author has evaluated the history of housing in Kenya from the pre-colonial period to date in an attempt to unearth the housing problem.

The study by Juma, however, fails to address the positive attributes of colonialists on housing. For example, the British brought in a new technology in the housing which was unavailable in Kenya, which houses were later occupied by Kenyan after independence.<sup>109</sup> The houses were adequate and have informed some of the modern houses.<sup>110</sup> Juma has also not offered a solution to housing problem in Kenya. This study will be offering a solution to historical housing problem in Kenya.

Aggrey Maina<sup>111</sup> also traces the formal housing problems in Kenya in the colonial period where discriminatory policies led to skewed housing policies.<sup>112</sup> He also argues that the problem was compounded by the postcolonial government who operated long without an explicit policy on housing.<sup>113</sup> His paper has informed this study on the historical housing problem in Kenya and has enabled the author to make a well-informed recommendation on the right to housing based on history. The study will analyze the appropriate policies and legislation to address the historical housing problems in Kenya. Maina has not proposed a solution to housing problem. This study will be filling this gap.

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<sup>106</sup> Lawrence Juma (n 9) 470,486-490.

<sup>107</sup> *ibid* 487.

<sup>108</sup> *ibid*.

<sup>109</sup> Benjamin Opiyo, 'Out & About: Houses White Settlers Left Behind' *Daily Nation* (1<sup>st</sup> November 2018).

<<https://www.nation.co.ke/lifestyle/travel/The-houses-white-settlers-left-behind/1950822-4165160-001fns/index.html>> Accessed on 13 October, 2018.

<sup>110</sup> *ibid*.

<sup>111</sup> Aggrey Daniel Maina Thuo, 'An Archaeology of formal Urban Housing Problems in Kenya: Issues and Policies' (2013) 4 International journal of scientist & Engineering Research 534,

<[https://www.researchgate.net/profile/Aggrey\\_Thuo/publication/251237001\\_Archaeology\\_of\\_urban\\_housing\\_problems\\_in\\_Kenya\\_Issues\\_and\\_policies/links/5480054e0cf25b80dd703d29/Archaeology-of-urban-housing-problems-in-Kenya-Issues-and-policies.pdf?origin=publication\\_detail](https://www.researchgate.net/profile/Aggrey_Thuo/publication/251237001_Archaeology_of_urban_housing_problems_in_Kenya_Issues_and_policies/links/5480054e0cf25b80dd703d29/Archaeology-of-urban-housing-problems-in-Kenya-Issues-and-policies.pdf?origin=publication_detail)> accessed on 1 June, 2018.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid*.

The sessional paper No. 5 of 1966 gives some indications that housing problem pre-dates the independence of Kenya.<sup>114</sup> The policy recognized the formation of the National Housing Corporation provided under Housing Act.<sup>115</sup> It stressed on the necessity to improve an economic lot of rural population as a measure to curb rural-urban migration.<sup>116</sup> Around this period the minimum government standard then accepted by the government was a two bed-roomed house with a kitchen, toilet, and shower.<sup>117</sup> The policy remained a recommendation. It did not provide a framework of how it was going to be implemented. This study will be providing a guide on how to implement the right to housing.

### 1.7.2 Nature and scope of social economic rights

A number of authors have provided workable definitions to social economic rights. There is, however, no universal definition of these rights.<sup>118</sup> The first on the list is Khosa. Khosa has defined Social economic rights as those specific rights that give people access to certain basic needs (resources, opportunities, and services) necessary for the human to lead a dignified life.<sup>119</sup> Erasmus posits that they are human rights that secure the basic quality life of all member of a community that include housing.<sup>120</sup> Miloon Kothari has defined the human right to adequate housing, as: “The right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.”<sup>121</sup>

A wider definition to housing has been provided by Michelman who has defined the right to housing as a claim upon organized society, on behalf of each individual or household unit, to be assured of access to minimally adequate housing.<sup>122</sup> To add on Michelman definition, the European

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<sup>114</sup> Sessional Paper No 5 of 1966, < [http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Sessional-Paper-No-10-\(1965\).pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Sessional-Paper-No-10-(1965).pdf)> Accessed on 9<sup>th</sup> November, 2008.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Eygelaar, ‘Housing for the Lower Income Group’ (HRDU Seminar Nairobi, 9<sup>th</sup>, 10<sup>th</sup> May 1977).

<sup>118</sup> Dawood Ahmed and Elliot Bulmer, ‘Social and Economic Rights’ (2017) International IDEA 6.<<https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf>> Accessed on 9<sup>th</sup> November, 2018.

<sup>119</sup> S Khosa, *Social Economic Rights in South Africa* (2007)20.

<sup>120</sup> Gerhard Erasmus, ‘Social Economic Rights and Their Implementation: The Impact of Domestic and International Instruments’ (2004) 32 International Journal of Legal Education 243, 252.

<sup>121</sup> Miloon Kothari, ‘Adequate Housing, as a Component of Right to Adequate Standard of living’ (2006) 9, <[https://www.ishr.ch/sites/default/files/article/files/sr\\_housing.pdf](https://www.ishr.ch/sites/default/files/article/files/sr_housing.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>122</sup> Frank I. Michelman, *The Advent of the Right to Housing: A current appraisal* (5 HARV CIV RIGHTS-CIV LIB.L.REV 2007, 1990)207.

Court of Human Rights (ECtHR) in the case of *Moreno Gomez v Spain*<sup>123</sup> defined a home to include a place where private and family life develops.<sup>124</sup> The existence of many definitions shows how wide the right to housing is. An all-encompassing definition will have to include other rights without which right to housing cannot exist.<sup>125</sup> These rights will include the right to security, health, privacy, and information.<sup>126</sup>

The World Health organization has underscored the interrelationship of the human right to housing and land and health.<sup>127</sup> Similarly, CESCR General Comment No. 4<sup>128</sup> has expounded on the indivisibility of human right in relation to the right to housing.<sup>129</sup> It includes right to life, right to property, right to health, and the right to a healthy environment.<sup>130</sup> In *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*<sup>131</sup>, the African Commission on Human and Peoples' Rights (The Commission) interpreted the African Charter to find that it protected right to housing by implication. The right to housing was implied from the provisions on the right to life, right to health, and right to property.<sup>132</sup> It is however not easy to find this link. The study will endeavor to bring out this link of housing right to other human rights.

Tokyo report (2009) identified housing development as an essential element of social development.<sup>133</sup> The report also points out different perception of the concept of shelter and how it differs from one individual to another based on individual culture. This study aims at creating awareness of housing rights in Kenya. The study will take into consideration, different cultures that exist in Kenya. How a pastoralist will perceive adequate housing to be, will be different from a farmer in central Kenya.

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<sup>123</sup> App no 4143/02 (ECtHR, 16 November 2004), para 53.

<sup>124</sup> Ibid.

<sup>125</sup> Miloon Kothari (n 121) 9.

<sup>126</sup> Ibid.

<sup>127</sup> World Health Organization, Health principles of housing (1989), <<http://www.who.int/iris/handle/10665/39847>> Accessed on 9th November 2018.

<sup>128</sup> General Comment No. 4 (n 7).

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Communication No. 155/96(African Commission Human and People's Rights 2001), para 62.

<sup>132</sup> Ibid.

<sup>133</sup> Deepa.G.Nair, Bert Enserink, G.Gopikuttan, Phillip Vergragt, Alex Fraaij & Rene Dalmeijer, 'A conceptual Framework for Sustainable – Affordable Housing for the Rural Poor in Less Developed Economies' (The 2005 World sustainable Building Conference ,Tokyo 27-29 September 2005), <<file:///C:/Users/HP/Downloads/SB05TOKYO.pdf>> Accessed on 9 November,2018.

Chris Sidoti<sup>134</sup> has emphasized that housing is essential for human survival with dignity.<sup>135</sup> He dismissed those who do not believe in the existence of the right to housing as rubbish, arguing that if there were a right to housing, it would entitle every individual to demand a house and government resources would be totally inefficient to meet these demands.<sup>136</sup> He dismissed the argument as a narrow interpretation of human right which cannot be justified.<sup>137</sup> The study will evaluate the extent to which the State should provide housing directly to its citizens.

### **1.7.3 Challenges in the implementation and enforcement of the right to housing as a component of Socio-Economic Rights**

Implementation of socio-economic rights is a big problem for many countries especially developing countries.<sup>138</sup> Alston and Goodman<sup>139</sup> argue that resources are at the heart of the challenges to social economic rights.<sup>140</sup> The unique resource intensity of these rights gives them a fundamentally different character from Civil and Political Rights.<sup>141</sup> Secondly, the authors argue that poor countries' government cannot afford Economic Social Rights (ESR) due to the complexity of identifying who should be liable, especially financially for promoting their realization.<sup>142</sup> Thirdly, the authors contend that the size of the funding required makes Economic Social Rights inappropriate matters for judicial determination.<sup>143</sup> Lastly, the learned authors suggest that any proponent of Economic and Social rights must be able to provide coherent responses to these concerns and critiques by traditionalists.<sup>144</sup>

Although these arguments are crucial in pointing out financial difficulties in implementing the social-economic rights, the study rejects the view by the authors that there could be difficulties in

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<sup>134</sup>Chris Sidoti, 'Housing as a Human Right', (National conference on homelessness, Sydney, Australia 4<sup>th</sup> September 1996). < [https://www.humanrights.gov.au/sites/default/files/content/pdf/human\\_rights/housing.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf)> Accessed on 12 November 2018.

<sup>135</sup> Ibid 1.

<sup>136</sup> Ibid 3.

<sup>137</sup> Ibid.

<sup>138</sup> Dawood Ahmed and Elliot Bulmer (n 118) 6.

<sup>139</sup> Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press) 315.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.



identifying who should be liable for promoting the realization of social economic rights. Some developing countries like Kenya and South Africa have enacted constitutions that expressly place primary responsibilities on the state to meet ESR for the citizens.<sup>145</sup> The study agrees with the authors that limited finance could be a determinant in realizing social economic rights especially decent and affordable housing. The study will endeavor to give an insight that might be useful in developing criteria that developing countries should adopt in ensuring the SER are taken care in the annual financial budget.

Christopher in an introduction to his book on human rights<sup>146</sup> also expressed some of the difficulties encountered in implementing rights to Economic and Social Rights. He observed that these rights demand that States take positive action in support of the individuals.<sup>147</sup> He added that these rights are linked to the capacity of the State to make provision and that it is not uncommon to see such rights expressly limited to the economic capacity of the country.<sup>148</sup> While it is important for the State to provide for individuals, the author has not provided the level to which individual should be supported by the State since the obligation of the State should not be understood to mean that it has to take care of social economic needs of all citizens within borders. The study will evaluate the role of individual citizens in the provision of housing.

*Lain Currie* and *John De Waal* observed that Economic and Social rights are contentious because they are looked at as socialist manifesto crafted as a form of rights.<sup>149</sup> Lain continues to state that States should abstain from taking deliberately retrogressive measures that undermine the right to housing.<sup>150</sup> *Ralph Beddard* and *Dilys* similarly observed that these rights are also seen as societal goals rather than human rights.<sup>151</sup> The two authors have not given a deep consideration to the enforcement of social economic rights especially in the developing countries where there could be more pressing needs especially governance issues. Good governance is prerequisite to good

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<sup>145</sup> See Article 21 (1) of the Constitution of Kenya, 2010 and Section 7(2) of the Constitution of South Africa, 1996.

<sup>146</sup> Christopher Gane and Mark Mackarel, *Human Rights and the administration of Justice* (International bar Association, 1997)1.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Lain Currie and Joham de Waal, *The Bill of Rights Handbook*, (5<sup>th</sup> Edn, 2006)568-569.

<sup>150</sup> *Ibid* 572.

<sup>151</sup> Ralph Beddard and Dilys M Hill (Eds), *Economic, Social and Cultural Rights Progress and Achievements (ST. Martins Press, New York, 1992)*6.

implementation of the right to housing.<sup>152</sup> The study will consider some acts by the State that may be considered retrogressive to the right to housing.

To add on contentious nature of social-economic rights, Danie Brand also points out that during the drafting of UDHR, some States were opposed to the incorporation of the economic and social rights in the document because they viewed them as mere aspirations not deserving the status of Human Right.<sup>153</sup> The argument could possibly explain why UDHR is not binding but declaratory in nature.<sup>154</sup> Awasthi and Katoria however, appear to respond to Danie Brand by advancing an argument that SERs are human rights which should be guaranteed in any organized society.<sup>155</sup> The author should, however, give a picture of various understanding of socio-economic rights by various people in the world. Kenya has different cultures where people would understand adequate housing in many ways as their numbers.<sup>156</sup> The enforcement and implementation will, therefore, be determined by the culture. The study will attempt to find out whether the right to housing should be mere aspiration or binding in nature.

Conway has argued that housing subject is complicated because it concerns economic and financial matter.<sup>157</sup> He further argues that housing, if not well addressed can be a root cause of harsh outcomes such as diseases and poor-quality of human labor.<sup>158</sup> The author has however not discussed how the financial complication can be addressed to prevent diseases and poor quality of labor. He has also not drawn the relationship between housing and health. This study will be demonstrating how other human rights including rights to health are important to the enjoyment of the right to housing.

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<sup>152</sup> Dawood Ahmed and Elliot Bulmer (n 118) 23.

<sup>153</sup> Danie Brand and Christof Heyns (eds), *Societal-Economic Rights in South Africa* (Pretoria University Law press, 2005) 3.

<sup>154</sup> Hurst Hannum, 'The UDHR in National and International Law' (1998) 2 Health and Human Rights 144-158, <<https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/04/16-Hannum.pdf>> Accessed on 9 November, 2018.

<sup>155</sup> S. K Awasthi and P. P. Katoria, *Law Relating to protection of Human Rights* (2<sup>nd</sup> edn, Orient Publishing Co, 2008) 62.

<sup>156</sup> Dorothy Achieng' Obonyo, 'Cultural Aspects of Housing: A case of Luo in Kisumu Town, Kenya' (XXXIII IAHS World Congress on Housing, Pretoria, South Africa, 26th to 30th September 2005), <<https://repository.up.ac.za/bitstream/handle/2263/10298/Cultural%20aspects%20of%20housing%20in%20Kenya.pdf;jsessionid=64E5C9E7825EB27E5DC4308C8DF043E3?sequence=1>> Accessed on 9<sup>th</sup> November, 2018).

<sup>157</sup> Jean Conway, *Housing Policy* (The Gildredge Press, United Kingdom, 2000) 2.

<sup>158</sup> Ibid.

The difficulty in enforcement of social economic rights has further been underscored by *Bankie*, *Manias*, and *Namiseb* who argue that the administration of the right to adequate housing, as part of Economic and social rights is difficult resulting in its marginalization.<sup>159</sup> *Akumah* adds a voice to this and argues that while Economic and Social Rights under Africa Charter and Peoples' Rights are justiciable, they are hard to exercise.<sup>160</sup> The study will be providing reasons for the importance of the right to housing and that it should not be marginalized.

The cost argument has been criticized by *Teymur*.<sup>161</sup> *Teymur* disagrees with the argument that the cost of housing is too high stating that such an argument is equivalent to one saying that the aim of realizing the right to a shelter is not worth achieving.<sup>162</sup> The cost implication of the right to housing cannot be wished away. It is worth consideration because without finance it would be difficult to construct housing for the people.<sup>163</sup> The study will find out the appropriate measures that can lower the cost of housing.

For a successful implementation of the right to housing, identification of the beneficiary is important. *Mashood* and *McCorquodale*<sup>164</sup> have discussed the identity of the beneficiary in the provision of social assistance. More importantly, the authors emphasize that the neediest must enjoy the protection.<sup>165</sup> The authors go ahead to explain that because the identity of the beneficiary is key in the provision of social assistance, directions of expenditure to the most in need is key and must be considered alongside the level of expenditure by a state.<sup>166</sup> The process of identifying the neediest member of the society has however not been provided by the learned authors. If the identity of those in dire need of housing is not properly done, the houses may end up with the rich who may then let them to the poor compounding the housing problem further. It is a delicate

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<sup>159</sup> B F Bankie, C Manias, and J T Namiseb, *The Southern African Human Rights Reader Towards Creating a Sustainable Culture of Human Rights* (UNESCO, 1998) P vii.

<sup>160</sup> Everlyn A Akumah, *The African Commission on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 1996) 183.

<sup>161</sup> Necdet Teymur, Thomas A Markus and Tom Wooley (EDS), *Rehumanizing Housing* (Butterworths, London, Busto, 1998) 37.

<sup>162</sup> Ibid.

<sup>163</sup> Christopher E. Herbert, Eric S. Belsky and William C. Apgar, *Critical Housing Finance Challenges for Policymakers* (2012) Joint Centre for Housing Studies of Harvard University 3, <[http://www.jchs.harvard.edu/sites/default/files/w12-2\\_herbert\\_belsky\\_apgar.pdf](http://www.jchs.harvard.edu/sites/default/files/w12-2_herbert_belsky_apgar.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>164</sup> Mashood A. Baderin and Robert McCorquodale, *Economic, Social and Cultural Rights in Action* (Oxford university press, 2009) 357.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

exercise considering the rich, especially the political class enjoy massive political power which they can use to acquire the houses meant for the poor.<sup>167</sup> The study will be providing recommendations that would ensure the neediest citizens of Kenya benefit from public housing.

#### 1.7.4 State obligation on socio-economic rights

At the international level, a number of legal instruments have been adopted creating an obligation on Kenya to provide shelter to her citizens. The first on the list is the 1948 Declaration of Human Rights.<sup>168</sup> Sadly, the declaration is not binding on Kenya.<sup>169</sup> The second on the list is article 11(1) of International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>170</sup> ICESCR has placed the obligation on the government of Kenya to provide housing to every citizen without discrimination. Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR)<sup>171</sup> on protection to privacy and homes; article 5(e) (iii) of (ICERD),<sup>172</sup> which forbids discrimination with regards to the protection of the right to housing; further reinforce the importance of the housing. The CESCR General Comment 7 provides that a State should use all necessary means to promote the right to adequate housing.<sup>173</sup> Sustainable development Goals (SDGs)<sup>174</sup> by the United Nations underscores the importance of the right to housing. Goal No. 11 emphasizes the need for good affordable public housing and upgrade of slum settlements. The study recognizes the need to create affordable houses in the whole country for all residents irrespective of their status. The sustainable goals are not binding on Kenya.<sup>175</sup> These instruments suffer from a lack of enforcement.<sup>176</sup> The study will address the enforceability of the right to housing at a local level.

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<sup>167</sup> Bruce R. Scott, *'The Political Economy of Capitalism'* (2006)13, <<https://www.hbs.edu/faculty/Publication%20Files/07-037.pdf>> Accessed on 9<sup>th</sup> November, 2018.

<sup>168</sup> See Article 25 of Universal Declaration of Human Rights.

<sup>169</sup> Hurst Hannum (n155) 144.

<sup>170</sup> Acceded to by Kenya on 1<sup>st</sup> May 1972

<sup>171</sup> ICCPR (n 18).

<sup>172</sup> ICERD (n 20).

<sup>173</sup> CESCR General Comment 7: The Right to Adequate housing (Art.11.1) forced evictions, <<http://www.refworld.org/docid/47a70799d.html>> Accessed on 9<sup>th</sup> November, 2018.

<sup>174</sup> Sustainable development goals (n 23).

<sup>175</sup> Svatava, *'Global SDGs Assessment: Helping or Confusing Indicators'* (2018) MDPI 1, <<file:///C:/Users/HP/Downloads/sustainability-10-01540.pdf>> Accessed on 9<sup>th</sup> November, 2018.

<sup>176</sup> Ibid.

At the regional level, the obligation is created by the African Charter, 1981. The African Charter provisions on right to life, property, health, and family has also been interpreted to protect the right to adequate shelter.<sup>177</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)<sup>178</sup> has guaranteed women the right to equal access to housing in a habitable environment.<sup>179</sup> There are no adequate mechanisms to enforce the obligation under the Charter.<sup>180</sup> At the national level, the main law creating the obligation is the Constitution of Kenya.<sup>181</sup> The study will evaluate the causes of poor implementation under the Constitution.

### **1.7.5 Obligation of non-state actors in housing**

The Istanbul Declaration and Habitat Agenda, 1996<sup>182</sup> has fortified the responsibilities of the non-state actors to the provision of adequate housing.<sup>183</sup> The declaration stated that it requires a joint effort by the government, individual citizens, communities and various local organizations.<sup>184</sup> While holding an argument that these organizations are under no legal duty to provide housing, to achieve the rights, a joint effort will be required. The declaration is however not legally enforceable and non-state actor cannot be held liable for the breach.<sup>185</sup> The declaration has however not addressed how the effort of individual citizens would be harnessed in the provision of adequate housing. The study will be advancing an argument that individual citizens should respect enjoyment of the right to housing by other citizens.

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<sup>177</sup> African Commission (n 131) para 62.

<sup>178</sup> African Women's Protocol was signed by Kenya on December 17, 2003.

<sup>179</sup> Article 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

<sup>180</sup> Kayitesi Zainabo Sylvie, *'Delivering Better: Strategic Plan 2015-2019'* (2015) 7,

<[http://www.achpr.org/files/pages/about/strategic-plan/achpr\\_strategic\\_plan\\_2015\\_19.pdf](http://www.achpr.org/files/pages/about/strategic-plan/achpr_strategic_plan_2015_19.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>181</sup> Article 43 of the Constitution of Kenya.

<sup>182</sup> The Istanbul Declaration and the Habitat Agenda, 1996 < <https://unhabitat.org/wp-content/uploads/2014/07/The-Habitat-Agenda-Istanbul-Declaration-on-Human-Settlements-2006.pdf>> Accessed on 9<sup>th</sup> November, 2018.

<sup>183</sup> Ibid 12.

<sup>184</sup> Ibid.

<sup>185</sup> Hurst Hannum (n154) 144.

### 1.7.6 Violation of right to housing

Violation of right to housing occurs when the State has failed in its national, regional and international obligations with regard to housing.<sup>186</sup> It will also occur in the instances of horizontal violation of the right to housing. The housing problems should, however, be understood as a worldwide problem.<sup>187</sup> More than 100 million people are estimated to be homeless while more than one billion are inadequately housed, with the developing countries most affected<sup>188</sup>. Put differently, the right to housing to over one billion people in the world have been violated.<sup>189</sup>

The report found developing countries to have unique reasons for the poor state of housing, ranging from social, economic and political factor. Criminals will prefer slums to undertake criminal activities.<sup>190</sup> Some slum dwellers have been suspected of letting out their decent houses provided by the government and thereafter return to the slums.<sup>191</sup> The political class turns a blind eye to the growth of slums and informal settlements for own selfish gain.<sup>192</sup> The need for decent housing is then used for political campaign tool.<sup>193</sup>

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<sup>186</sup> United Nations, Office of High Commissioner for Human Rights, Economic Social and Cultural Rights: Handbook for National Human Rights Institutions (2005) 9-15,

<<https://www.ohchr.org/Documents/Publications/training12en.pdf>> Accessed on 9<sup>th</sup> November, 2018.

<sup>187</sup>United Nation Centre for Human Settlement (Habitat), *Global Report on Human Settlement 2001: Cities in Globalizing World* (Earth Scan Publication Ltd, 2001) VI,

<[http://www.un.org/en/events/pastevents/pdfs/Cities\\_in\\_a\\_globalizing\\_world\\_2001.pdf](http://www.un.org/en/events/pastevents/pdfs/Cities_in_a_globalizing_world_2001.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>188</sup> Graham Tipple and Suzanne Speak, 'Definition of Homelessness in Developing Countries' (2003) Elsevier Ltd 336, <<file:///C:/Users/HP/Downloads/definitionsofhomelessness.pdf>> Accessed on 9<sup>th</sup> November, 2018.

<sup>189</sup> Ibid.

<sup>190</sup> UN-HABITAT, State of the World's Cities, (2006) 119 < <http://wcr.unhabitat.org/>> Accessed on 9<sup>th</sup> November, 2018.

<sup>191</sup> Augustine Oduor, 'Kibera Residents Rent out Houses, Move to Slums' Standard Daily (12<sup>th</sup> May 2011) <<https://www.standardmedia.co.ke/business/article/2000034968/kibera-residents-rent-out-houses-move-to-slum>> Accessed on 9<sup>th</sup> November, 2018. The Housing PS was quoted admitting that the Government was facing challenges of tenants continued breaching tenancy agreement and let out the houses allocated to them to make money.

<sup>192</sup> Joy Wanja Muraya, 'Greed and Bad Politics Encourage Urban Slums' *Daily Nation* (21 September, 2011), <<https://www.nation.co.ke/lifestyle/dn2/Greed-and-bad-politics-encourage-urban-slums/957860-1240320-ry2uo7z/index.html>> Accessed on 9<sup>th</sup> September, 2018. The former PS for information and technology, Dr Ndemo was quoted saying that selfishness exhibited by politicians is to blame for the growth of slums.

<sup>193</sup> Ibid.

The violation of human right to housing has further been buttressed by *Evadne Grant* who estimates half of the world population of the world to be living in the informal settlements.<sup>194</sup> He identifies housing as a basic need which poorest people lack.<sup>195</sup>

One of the causes of inadequate housing is the migration of people from the rural to the city. *Lawrence Juma* has identified the rural-urban migration as one of the causes of population pressure in the urban areas.<sup>196</sup> Their right to housing is violated when these migrants are not provided with decent houses.<sup>197</sup> It is important to point out that the government of Kenya had formulated the rural development as a policy to stem rural-urban migration and to reduce pressure upon urban infrastructure in Kenya due to its population trend.<sup>198</sup> The policy identified the lack of security of land tenure as a contributing factor to poor housing as groups of squatters feared their homes could be demolished without notice.<sup>199</sup> These are some of the measures the study will be recommending to curb house shortage in the cities.

*Wafula Nabutola*<sup>200</sup> outlined a clear picture of how slums portray poverty in the developing world. He identifies tenure of insecurity compounded by harassment from authorities as a major cause of slums and informal settlement.<sup>201</sup> Unsatisfactory tenure of the majority of slum dwellers as a major cause of poor housing.<sup>202</sup> The slum dwellers are afraid of putting up a permanent structure as they

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<sup>194</sup> Evadne Grant, 'Enforcing Social and Economic Rights: The Adequate Housing in South Africa' (2007) 15 African Journal of International and Comparative Law 2.

<file:///C:/Users/HP/Downloads/EvadneGrantEnforcingSocia%20(1).pdf > Accessed on 9<sup>th</sup> November, 2018.

<sup>195</sup> Ibid.

<sup>196</sup> Lawrence Juma (n 9) 470,486-490.

<sup>197</sup> Ibid.

<sup>198</sup> Gabriel N. Kirori, 'Rural Development Policies in Kenya: a descriptive Analysis over 1970 -2001 periods'(European Journal of Business, Economics and accountancy, VoL.3, No. 1, 2015)

<<http://www.idpublications.org/wp-content/uploads/2015/01/RURAL-DEVELOPMENT-POLICIES-IN-KENYA-A-DESCRIPTIVE-ANALYSIS-OVER-1970-2001-PERIOD.pdf>> Accessed on 14th May 2018.

Rural decentralization policy was adopted soon after independence for rural development. The thrust of the policy was the achievement in the rural balance development as well as improvement of sustenance of livelihood of the rural household.

<sup>199</sup> Denis Kabagambe and Moughtin, 'Housing the poor: A case study: Nairobi' (1983) 5 (3) Third world planning Review 241, <<https://online.liverpooluniversitypress.co.uk/doi/pdf/10.3828/twpr.5.3.1024w75311536r23>> Accessed on 9<sup>th</sup> November, 2018.

<sup>200</sup> Wafula Nabutola (n 43) 11.

<sup>201</sup> Ibid

<sup>202</sup> Kabagambe (n 199) 241.

fear the authorities could demolish them without a satisfactory notice.<sup>203</sup> The study will fill this gap by proposing a solution to land tenure.

*Henry Onoria* has discussed how housing and shelter rights are neglected or marginalized in the measures of eradication of poverty or in the development policies.<sup>204</sup> The subject of his study is the realization of the right to housing in Uganda especially for the vulnerable groups, being women and persons with disabilities.<sup>205</sup> His study examines policy and legal framework on the right to housing.<sup>206</sup> The situation is not any different in Kenya since vulnerable groups like children and women have been marginalized.<sup>207</sup> Poverty is also a factor in attaining affordable housing in Kenya.<sup>208</sup> The author will evaluate the legal and policy framework in Kenya and whether they are strong enough for the actualization of the right to housing.

Forced evictions are one of the main cause of slums and informal settlements. In a report by *Hakijamii*,<sup>209</sup> forced evictions and access to housing finance were identified as some of the causes of homelessness and inadequate housing.<sup>210</sup> The report underscored the need for the vulnerable groups such as elderly and children to be given special consideration, frowning upon discrimination in fulfillment of the right to adequate housing.<sup>211</sup> The study will attempt to offer a solution to the problem of unlawful eviction.

### **1.7.7 Best practices on the right to housing**

The study, in an attempt to look for a solution to the housing problem, the author has reviewed the Constitution of South Africa.<sup>212</sup> South Africa has taken the right to a house a level higher. Section 26 (2) of the Constitution of South Africa provides that the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of the right to housing. There is a number enabling legislation that include Housing Act No. 107 of 1997 and Housing Consumers Protection Measures Act No. 95 of 1998 as contemplated by section 26(2) of

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<sup>203</sup> Ibid.

<sup>204</sup> Henry Onoria (n 1) 22 – 24.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> ICJ (n 40) 14, 17.

<sup>208</sup> Norah Nthule Matindi (n 80).

<sup>209</sup> *Hakijamii, Assessment of the realization of the right to housing in Kenya (2011-2012)* 10, 26, <<https://www.humanitarianlibrary.org/sites/default/files/2013/07/assessment.pdf>> Accessed on 12 November, 2018.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> The Constitution of South Africa was enacted in 1996.



the Constitution of South Africa to actualize the Right to housing. Michael Clark<sup>213</sup> was of the view that the right to housing is the most contested and frequently litigated in South Africa.<sup>214</sup> He, however, pointed that government has been unwilling to implement the progressive decision by the courts.<sup>215</sup> South Africa has also formulated emergency programmes for providing temporary housing relief when the need arises.<sup>216</sup> South Africa government has also developed a policy to provide a social grant to help combat poverty in the country in an attempt to fulfill the provisions of its domestic laws and policies.<sup>217</sup>

One of the landmark cases on the right to adequate housing in South Africa is *Government of the Republic of South Africa v Grootboom (Grootboom case)*.<sup>218</sup> The court ruled that the right to housing means more than brick and mortar holding that land social amenities such as water and sewage disposal are parts of the right. Considering Kenya constitution borrowed heavily from the constitution of South Africa, the same principle can be applied in Kenya. The study will carry out a comparative analysis of the right to housing in South Africa and Kenya so as to find out the necessary lessons the country can learn to improve in the provision of houses in Kenya. It will find out how the progressive court decisions on housing have impacted on the implementation of the right.

Singapore has managed to house 90% of its population.<sup>219</sup> The study will evaluate the measures taken by Singapore with a view of finding out if the same measure can be applied in Kenya. Some of the measures taken by Singapore were granting the State massive powers to take individual

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<sup>213</sup>Michael Clark, 'Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of the Jurisprudence and Implication for the Local Government' (SERI 2016) 3. <[http://www.seri-sa.org/images/Jurisprudence\\_Revised\\_2016\\_Final\\_to\\_print.pdf](http://www.seri-sa.org/images/Jurisprudence_Revised_2016_Final_to_print.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Tissington K, Munshi N, Mirugi-Mukundi G and Durojaye E, *Jumping the Queue, Waiting Lists and Myths: Perceptions and Practice around housing Demand and allocation in South Africa* (, Foundation for Human Rights, 2013)7.

<sup>217</sup> Jackie Dugard and Kate Tissington, *Targeting the Poor? An analysis of Free Basic Services (FBS) and municipal Indigent Policies in South Africa*, (SERI 2013) 6. <[file:///C:/Users/HP/Downloads/Targeting\\_the\\_Poor\\_Nov13.pdf](file:///C:/Users/HP/Downloads/Targeting_the_Poor_Nov13.pdf)> Accessed on 9<sup>th</sup> November, 2018.

<sup>218</sup> 2000(11) BCLR 1169.

<sup>219</sup>Sock – Yong Phang and Mathias Helble 'Housing Policies in Singapore' (2016) ADBI Working Paper series 9, <[ibidhttps://www.adb.org/sites/default/files/publication/181599/adbi-wp559.pdf](https://www.adb.org/sites/default/files/publication/181599/adbi-wp559.pdf)> Accessed on 17<sup>th</sup> August 2018.

lands and compelling the families to reduce the number of children per household.<sup>220</sup> The measures will be evaluated against the right of the citizens of Kenya to own land and to have a family.

## **1.8 LIMITATION**

A key limitation of this study will be time and financial constraint. The author will not manage to do a field study to get the first-hand information on various experiences on right to housing.

## **1.9 HYPOTHESIS**

The government of Kenya has failed to adopt adequate measures to realize the right to housing as enshrined in the Constitution of Kenya and as universally recognized in the international legal instruments through its failure to enact legislation aimed at promoting the right to housing.

## **1.10 CHAPTER BREAKDOWN**

Chapter one is a general introduction to the study. Chapter two will look at the legal framework and an analysis of the right to housing. Chapter three will look at: the obligation of the government of Kenya in the realization of the right to housing; violation of the right to housing; relationship of culture and housing; implementation and enforcement of the right to housing; and the role of citizens and other non-state actors in the realization of the right to housing. Chapter four will discuss comparative analysis on right to housing in Kenya and other jurisdictions. Chapter five will contain the summary of the findings, conclusion, and recommendations.

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<sup>220</sup> Ayer Gruber, *'Public Housing in Singapore: The Use of Ends – Based Reasoning in Quest for Workable System'* (1997) 38 Harvard International Law Journal 259 <<file:///C:/Users/HP/Downloads/AyaGruberPublicHousinginS.pdf>> Accessed on 16<sup>th</sup> August 2018.

## CHAPTER TWO

### LEGAL FRAMEWORK AND AN ANALYSIS OF THE RIGHT TO HOUSING

#### 2.0 INTRODUCTION

Without an adequate understanding of the contents of the right to a shelter, it would be hard to enjoy the right. This chapter will discuss the legal framework and an analysis of the right to housing. It will analyze the right as provided in international, regional and national legal instruments. The chapter will explain how binding these instruments are.<sup>1</sup> The constituents of the right to an adequate housing such as availability, location, accessibility, affordability, and cultural acceptability will be discussed.

#### 2.1 International law

The right to housing was first brought into existence with the adoption of the Universal Declaration of Human Rights<sup>2</sup> (UDHR) in 1948.<sup>3</sup> It was the first global instrument to explain and safeguard Social Economic Rights in the context of human rights.<sup>4</sup> Article 25(1) offered the initial codification of worldwide right to a shelter.<sup>5</sup> The right is now guaranteed to every person and his entire family.<sup>6</sup> Although the declaration is not a legally binding document<sup>7</sup>, it has provided the foundation and guideline principles in the formation of a series of other international agreements<sup>8</sup>,

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<sup>1</sup> Scott Leckie, *the Right to Housing* (20 Newsletter 19 1987) 15.

<sup>2</sup> UDHR was adopted on 10<sup>th</sup> December 1948 by General Assembly resolution 217(III). It was ratified by Kenya on 31<sup>st</sup> July 1990.

<sup>3</sup> Scott Leckie (n 1) 16.

<sup>4</sup> Ibid.

<sup>5</sup> Mignon Senders, *Women and the Right to Adequate Housing* (16 Neth Q Rts 1998) 175.

<sup>6</sup> Article 25 of UDHR, 1948.

<sup>7</sup> Hurst Hannum, *'The UDHR in National and International Law'* (1998) 2 Health and Human Rights 144-158, <<https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/04/16-Hannum.pdf>> Accessed on 9 November, 2018.

<sup>8</sup> U.S Department of State, *'Celebrating 60 years of Human Rights'* (2008) 13 eJournal USA 3, <[https://kr.usembassy.gov/wp-content/uploads/sites/75/2017/04/the\\_universal\\_declaration\\_of\\_human\\_rights.pdf](https://kr.usembassy.gov/wp-content/uploads/sites/75/2017/04/the_universal_declaration_of_human_rights.pdf) >Accessed on 24th July, 2018.

at both the global and regional level. It has also inspired the drafting of national legislation and constitutions.<sup>9</sup> Further, many provisions of UDHR are also now parts of the international customary law.<sup>10</sup>

The non-binding nature of the UDHR leaves room for State parties to abuse human rights since a breach of its provisions cannot be challenged in any human rights bodies.<sup>11</sup> Such a State can only be condemned for the violation.<sup>12</sup> Its application will depend on the goodwill of the state parties leaving the individual citizens exposed to violations.<sup>13</sup>

However, the UDHR inspired<sup>14</sup> the formation of ICESCR in 1966 which has guaranteed right to adequate housing.<sup>15</sup> Luckily, Kenya is a signatory to the convention<sup>16</sup> which is said to be the most crucial codification of the housing right.<sup>17</sup> It was the first global effort to transform Social Economic Rights (SER) in UDHR into legally binding provisions.<sup>18</sup> States are obligated to commit the maximum of the resource available to the continuous achievement of the rights.<sup>19</sup> The enactment of legislation directed to the improvement of the living conditions is one of the required measures.<sup>20</sup> The State parties are further enjoined to guarantee these rights without discrimination of any kind.<sup>21</sup>

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<sup>9</sup> William A. Schabas OC Mria, *The Universal Declaration of Human Rights*, vol 1 (Cambridge University Press, 1947) CXii.

<sup>10</sup> Gordon Brown, *The Universal Declaration of Human Rights in 21<sup>st</sup> Century: A living Document in a Changing World*, (Open Book Publishers, 2016)34.

<sup>11</sup> United Nations Office of High Commissioner for Human Rights, *Human Rights Violations and Abuses in the Context of Protest in Nicaragua* (2018) 10, <

[https://www.ohchr.org/Documents/Countries/NI/HumanRightsViolationsNicaraguaApr\\_Aug2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/NI/HumanRightsViolationsNicaraguaApr_Aug2018_EN.pdf)>

Accessed on 15 November, 2018.

<sup>12</sup> Ibid 15.

<sup>13</sup> Ibid 7.

<sup>14</sup> Hurst Hannum (n 7) 146.

<sup>15</sup> Article 11(1) of ICESCR.

<sup>16</sup> Acceded to by Kenya on 1<sup>st</sup> May 1972

<sup>17</sup> Mignon Senders (n 5).

<sup>18</sup> Two UN Covenants on Human Rights International Law Essay (Law Teacher. net, July 2018) 1 Accessed on <

<https://www.lawteacher.net/free-law-essays/international-law/the-two-un-covenants-on-human-rights-international-law-essay.php>> (28<sup>th</sup> July 2018)

See United Nations, Educational, Scientific and Cultural Organization < <http://www.unesco.org/new/en/social-and-human-sciences/themes/advancement/networks/larno/economic-social-and-cultural-rights/>> Accessed on 28<sup>th</sup> July 2018.

<sup>19</sup> Article 2(1) of ICESCR, 1966. The Covenant entered into force on 3<sup>rd</sup> of January 1976.

<sup>20</sup> Ibid.

<sup>21</sup> Article 2(2) of ICESCR

In spite of Kenya being a signatory of ICESCR, the realization of the right to housing is far from being achieved.<sup>22</sup> First, the covenant has a weak enforcement mechanism.<sup>23</sup> The state reporting mechanism may not give a true picture of how the country is implementing the right to housing. It is also worth pointing out that adoption of Optional Protocol to ICESCR (OP-ICESCR) opened the first door to individual complaint mechanism.<sup>24</sup> Ordinary Kenyan citizens may not be aware of this individual complaint mechanism. The State has also failed on its part to create the awareness to the citizens to file individual complaints.<sup>25</sup>

Individual complaint mechanism is further made difficult by the procedure involved. One has to exhaust the local judicial mechanism before approaching the Committee on Economic, Social and Cultural Rights (CESCR).<sup>26</sup> The Committee will have to deal with admissibility procedure before it can admit such a complaint.<sup>27</sup> The process becomes expensive for an ordinary Kenya citizen and requires legal expertise.<sup>28</sup> The process, therefore, reduces access to justice as many Kenyans may choose to give up. Without meaningful enforcement, it will only be just a right on a paper.

The Committee on Economic and Social and Cultural Rights (CESCR),<sup>29</sup> is mandated to protect and promote SER.<sup>30</sup> Had it diligently exercised its mandate, there would be little ignorance on the right. The body has thus failed in its mandate to promote the rights due to the prevalence of the ignorance of the rights. After receiving the state reports, it checks on the veracity of the report

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<sup>22</sup> Joyce Miguda Majiwa, 'Challenges Towards the Realization of the Right to Development in Kenya' (LL.M thesis, University of Nairobi, 2013).

<sup>23</sup> V.Y Dhupdale, 'Enforcement of Human Rights at International and National Level (2014)1, <<file:///C:/Users/HP/Downloads/PaperonEnfocrmentofHumanRightsPDFFile.pdf>> Accessed on 15 November, 2018.

<sup>24</sup> Optional Protocol to ICESCR was adopted in December 2008 and came to force in 2013

<sup>25</sup> Silvia Randazzo, 'Human Rights and Deprivation of Liberty in Kenya: An Analysis of Human Rights' Situation and Guidelines for internal Monitoring System" (2016) IJJO 69.

<[https://www.oijj.org/sites/default/files/human\\_rights\\_and\\_deprivation\\_of\\_liberty\\_in\\_kenya-report.pdf](https://www.oijj.org/sites/default/files/human_rights_and_deprivation_of_liberty_in_kenya-report.pdf)> Accessed on 10<sup>th</sup> November, 2018.

<sup>26</sup> Article 3 of the Optional Protocol to ICESCR.

<sup>27</sup> United Nations Office of the High Commissioner for Human Rights, Individual Complaint Procedure Under United Nations Human Rights Treaties: Fact Sheet No.7/Rev 2, <

<https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>> Accessed on 15 November, 2018.

<sup>28</sup> Ibid 5-13.

<sup>29</sup> The Committee was established under ECOSOC resolution 1985/85 of 28 May 1985

<sup>30</sup> Committee on Economic Social and Cultural Rights: Monitoring Economic, Social and Cultural Rights, <<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>> Accessed on 10<sup>th</sup> November, 2018.

though it cannot demand enforcement.<sup>31</sup> The system is therefore weak and unreliable and cannot be seen to serve any useful purpose in the actualization of decent homes.<sup>32</sup>

International Convention on Civil and Political Rights (ICCPR) is a binding legal instrument guaranteeing protection to privacy and homes<sup>33</sup> for the enjoyment and fulfillment of the right to housing. Again, the problem here is enforcement. Probably due to the sovereignty of state parties, the enforcement body is not quick to condemn non-adherence to the covenant leaving the right holders in a state of helplessness.<sup>34</sup>

Article 14 (2) of Convention on Elimination of all Discrimination against Women (CEDAW) require States to take appropriate measures to secure housing for women living in rural areas.<sup>35</sup> Although the convention emphasized on women in rural areas, women in urban areas are also experiencing similar housing problems if not worse. There is no law in Kenya guaranteeing adequate housing to Kenyan women in rural areas. Kenya is therefore in breach of this provision and there seems to be no attempt to comply.

The preamble to the International Convention on the Rights of the Child (CRC), recognizes that children should be afforded the necessary protection and assistance and should grow up with dignity.<sup>36</sup> Article 16(1) of CRC emphasizes the preservation of the dignity of the child with regard to housing. The home and privacy of the child are protected under the convention.<sup>37</sup> The state has an obligation to assist parents or the guardians to a child with a house in the case of need.<sup>38</sup> The increasing number of street children in various towns in Kenya is a clear demonstration of non-observance of the covenant.<sup>39</sup> Allowing children to sleep outside in the cold takes away the very dignity of the child that defines their human identity.

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<sup>31</sup> Fact sheet no. 7 (n 27) 12.

<sup>32</sup> Ibid.

<sup>33</sup> Article 17(1) of ICCPR, 1966.

<sup>34</sup> UN Office of High Commissioner for Human Rights (n 11) 15.

<sup>35</sup> CEDAW entered into force in 3<sup>rd</sup> September 1981, ratified by Kenya on 9<sup>th</sup> March 1984.

<sup>36</sup> The Convention on Right of the Child entered into force in 2<sup>nd</sup> September 1990. It was ratified by Kenya on 30<sup>th</sup> July 1990.

<sup>37</sup> Article 16(1) of CRC, 1989.

<sup>38</sup> Article 27(1) of the Convention on the Rights of a Child, 1989.

<sup>39</sup> Benard Sorre and Peter Oino, *'Family Based Factors Leading to Street children Phenomenon in Kenya'* (2013) 2(3) IJSR 148, < <file:///C:/Users/HP/Downloads/StreetChildren-FamilyBasedfactors-IJSRON2013543.pdf>> Accessed on 15 November, 2018.

Article 5(e) (iii) of Convention on Elimination of All Forms of Racial Discrimination (ICERD) requires the state to eradicate and ban discrimination in the enjoyment of the right to housing.<sup>40</sup> Racial discrimination in housing in Kenya is more cultural rather than design.<sup>41</sup> For example, most Indians have traditionally lived in *Ngara* estate while Arabs live in the coastal region.<sup>42</sup> Majority of Muslims lives in Eastleigh estate.<sup>43</sup> There is a need to create a social integration to prevent this racial segregation. Article 9 and 28 of The Convention on the Rights of Persons with Disabilities (ICRPD)<sup>44</sup> requires the state parties to put in measures to eliminate obstacles that would prevent disabled persons from enjoying the right to Housing. Article 28 recognizes the right of disabled persons to adequate living conditions including housing and steady improvement of the living conditions.<sup>45</sup> There is no legislation in Kenya addressing the right to housing for the disabled person. The houses in the estates are designed for normal persons.<sup>46</sup> The disabled have to struggle to climb stairs. The height of the door locks, toilets, kitchens is designed for normal persons.<sup>47</sup> All these have to be considered if the covenant is to be strictly observed.

Other international legal and binding instruments ratified by Kenya providing for the Right to housing include the 1951 Convention Relating to the Status of Refugees (art. 21)<sup>48</sup>, article 49 of the Geneva Convention relative to the Protection of Civilian Person in Time of War, article 43(1) (d) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43 (1) (d)).<sup>49</sup> The refugees in Kakuma are living in deplorable houses yet Kenya has ratified Convention on the Status of Refugees.<sup>50</sup> As far as they are human

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<sup>40</sup> ICERD was acceded by Kenya on 13<sup>th</sup> September 2001.

<sup>41</sup> Winnie Mitullah, 'The Case of Nairobi, Kenya' 3, < [https://www.ucl.ac.uk/dpu-projects/Global\\_Report/pdfs/Nairobi.pdf](https://www.ucl.ac.uk/dpu-projects/Global_Report/pdfs/Nairobi.pdf) > Accessed on 14<sup>th</sup> November, 2018.

<sup>42</sup> Ibid 3.

<sup>43</sup> Ibid.

<sup>44</sup> The Convention on the Rights of Person with Disabilities was adopted on 13<sup>th</sup> December 2006 and entered into force on 3<sup>rd</sup> May 2008. It was ratified by Kenya on 18<sup>th</sup> May 2008.

<sup>45</sup> Ibid.

<sup>46</sup> Emily Cooper, Lauren Knott, Gina Schaak, Lisa Sloane, Andrew Zovistoski, '*Housing Crisis for People with Disabilities*' (2015) Technical Assistance Collaborative 22, < <http://www.tacinc.org/media/52012/Priced%20Out%20in%202014.pdf> > Accessed on 14 November, 2018.

<sup>47</sup> Capability Scotland, House Conference Report (2011) < [http://www.capability-scotland.org.uk/media/88925/the\\_future\\_of\\_housing\\_for\\_disabled\\_people\\_capability\\_scotland\\_conference\\_report\\_april\\_2011.pdf](http://www.capability-scotland.org.uk/media/88925/the_future_of_housing_for_disabled_people_capability_scotland_conference_report_april_2011.pdf) > Accessed on 14 November, 2018.

<sup>48</sup> Acceded by Kenya on 16<sup>th</sup> May 1966.

<sup>49</sup> Ratified by Kenya in July 2003

<sup>50</sup> Unite for Sight, '*Module 3: Food, Water, Sanitation, and housing in Refugee camps*'- Accessed on < <http://www.uniteforsight.org/refugee-health/module3> > (on 30 August 2018)

beings living within the boundaries of Kenya, refugees ought to be treated with a dignity that includes adequate housing.

For an individual to access the complaint mechanism under ICCPR, CEDAW, UNCPRD, CRC, and ICERD, Kenya must have signed the respective optional protocol.<sup>51</sup> Just like the ICESCR, an individual has to be taken through the tedious process of admissibility. The process is cumbersome and expensive. Although the Conventions and their protocols are easily available on the internet, the high level of illiteracy in Kenya makes them inaccessible to the majority of Kenyans.<sup>52</sup> The respective committees under the conventions have no powers to enforce the above specific provisions. This could explain why the right to housing has been neglected for such a long time. Although the conventions are binding, without a proper enforcement mechanism, they are just inspirational.

The right to a decent shelter has equally been incorporated in a number of plans of actions, declarations, agendas, several instruments of UN organs and bodies and specialized agencies which are not binding in nature.<sup>53</sup> Opening the list is the Vancouver Declaration on Human Settlements and the Vancouver Action Plan, 1976,<sup>54</sup> which underscore shelter as basic human right and that all obstacles hindering its attainment should be eliminated by governments.<sup>55</sup> The General Comments by the committee charged with enforcement of SER are also not binding but assists in expounding on the right to a house.<sup>56</sup> Maastricht Guidelines on the violations of Economic, Social and Cultural Rights, 1997<sup>57</sup> are also not binding however they inform the state parties to various

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<sup>51</sup> United Nations Human Rights, Office of the High Commissioner, *Individual Human Rights Procedures under United Nations Human Rights Treaties: Fact sheet no 7/Rev 2'* (2013) 13-22

<<https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>> Accessed on 10<sup>th</sup> November, 2018.

<sup>52</sup> Grace W. Bunyi, 'Real Options for Literacy Policy and Practice in Kenya' (2006) United Nations Educational, Scientific and Cultural Organization 4, <<http://unesdoc.unesco.org/images/0014/001459/145956e.pdf>> Accessed on 15 November, 2018.

<sup>53</sup> Mignon Senders (n 5) 176.

<sup>54</sup> Vancouver Declaration on Human Settlements, 1976, 7

<[http://mirror.unhabitat.org/downloads/docs/The\\_Vancouver\\_Declaration.pdf](http://mirror.unhabitat.org/downloads/docs/The_Vancouver_Declaration.pdf)> Accessed on 10 November, 2018.

<sup>55</sup> S. Leckie, *The UN Committee on Economic, Social and Cultural Rights and the Rights to Adequate Housing: Towards an appropriate Approach'*, (1989) 11 Human Rights Quarterly 523.

<sup>56</sup> See CESCR General comment No. 4 and General Comment No. 7.

<sup>57</sup> Maastricht Guidelines on Violation of Economic, Social and Cultural Rights, 1997, <[http://hrlibrary.umn.edu/instreet/Maastrichtguidelines\\_.html](http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html)> Accessed on 28<sup>th</sup> July, 2018.



conventions on their obligation to protect, respect, and to fulfill.<sup>58</sup> The guidelines state that failure to observe any of these obligations constitute a violation of the rights. These non-binding instruments commonly referred to as soft laws are of important persuasive values especially to courts.<sup>59</sup> Due to the non-binding nature of these instruments, a State may decide to ignore them. Kenya can be said to have ignored these guidelines and the clarification offered by the General comments since very little is being implemented.

## 2.2 Regional

The operating legal framework at the regional level is African Charter on Human and Peoples' Right (African Charter).<sup>60</sup> The Charter does not expressly provide for the right to housing, however, through interpretation it has led to the protection of the right to housing.<sup>61</sup> The African Commission for Human Rights in the case of *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* interpreted article 4, 14, 16,18(1) and 24 on right to life, property, health, family, development and satisfactory environment to have a combined effect of affirming the right to a shelter.<sup>62</sup>

Vulnerable members in the society have their right to shelter guaranteed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).<sup>63</sup> Women are guaranteed right to equal access to housing in a habitable environment.<sup>64</sup>

Due to the competing political interest in Kenya, the enforcement of the provision of the African Charter on housing has become exceedingly difficult.<sup>65</sup> The right holders are intimidated by the

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<sup>58</sup> Victor Dankwa, Cees Flinterman and Scottie Leckie, 'Commentary on the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights' (2013) 14, < <http://www.icescr-pakistan.org/wp-content/uploads/2013/11/20-02.pdf>> Accessed on 10<sup>th</sup> November, 2018.

<sup>59</sup> F Viljoen, *International Human Rights law in Africa* (2012) 30.

<sup>60</sup> African Charter, 1981, was ratified by Kenya on 23 January 1992.

<sup>61</sup> Lawrence Juma, 'Nothing but a Mass of Debris: Urban Eviction and the Right of access to Adequate Housing in Kenya' (2012) 12 Afr Hum Rts 479.

<sup>62</sup> Communication No. 155/96 (African Commission Human and People's Rights 2001), para 62.

<sup>63</sup> Signed by Kenya on December 17, 2003

<sup>64</sup> Article 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

<sup>65</sup> International Commission of Jurist (ICJ), *Towards the Realization of Economic, Social and Cultural Rights in Kenya: Joint Civil Society Alternative Report to the 2<sup>nd</sup> – 5<sup>th</sup> State Report of the Republic of Kenya on the Implementation of the Covenant on Economic, Social and Cultural Rights* (2016) 7, 14.

<[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT\\_CESCR\\_CSS\\_KEN\\_22959\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_CSS_KEN_22959_E.pdf)> Accessed on 8<sup>th</sup> November, 2018.

State as they demand their rights.<sup>66</sup> The Ogiek community successfully demonstrated to the commission of their ineffectiveness of local remedies as required by the optional protocol to the charter.<sup>67</sup> The Government of Kenya has the capacity to withdraw its consent allowing the individual from approaching the commission.<sup>68</sup> This leaves the right holder at the mercy of the State.<sup>69</sup> It would be better if a right holder were to approach the Commission or Africa Court of Human and People Rights without having to go through the rigorous exercise of admissibility. The procedure is not user-friendly. Most of the people whose right to housing is disregarded are poor and illiterate and may not understand the law on admissibility. The Commission and the court should also adjust to sitting in a country where a complaint has been filed to minimize on the travel and upkeep cost.

## **2.3 National law**

### **2.3.1 The Constitution of Kenya, 2010.**

The only law that expressly safeguards the right to housing, is the Constitution. Kenya has an impressive constitutional text that guarantees social and economic rights. The Constitution of Kenya, 2010 repealed the 1969 one which had no provision on economic and social rights. The right to housing is guaranteed under Article 43(1) (b) as an economic and social right under the Bill of Rights. Every citizen has been guaranteed the right to accessible and adequate housing. The State is obligated to take deliberate action to actualize the right.<sup>70</sup> The Bill of Rights is so special because it is supposed to inform government policies.<sup>71</sup>

The State has a duty to enact laws to discharge its constitutional obligation to respect human rights which includes legislation on housing.<sup>72</sup> The aim is to protect the dignity of all Kenyans.<sup>73</sup> It is

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<sup>66</sup> African Commission on Human and People's Rights v Kenya Application No. 006/2012 para 170.

<sup>67</sup> Ibid, para 94

<sup>68</sup> In the Matter of Ingabire Victoire Umuhoza v Republic of Rwanda, Application 003/2014, the African Court of Human and Peoples' Rights ruled that a state can withdraw its consent allowing individual to file complaint.

<sup>69</sup> Ibid para 58.

<sup>70</sup> Article 21(2) of the Constitution of Kenya, 2010.

<sup>71</sup> Article 19(1) of the Constitution of Kenya, 2010.

<sup>72</sup> Article 21(4) of the Constitution of Kenya, 2010

<sup>73</sup> Article 28 of the Constitution of Kenya, 2010.

worth noting that all provisions in the constitution are equal<sup>74</sup>and none should override the other.<sup>75</sup> The right to housing is therefore as important as the right to life.<sup>76</sup>

Right to adequate housing for the vulnerable member of the society such as the elderly<sup>77</sup>, disabled, marginalized communities and the children<sup>78</sup>have been constitutionalized in order to preserve their dignity and respect.<sup>79</sup> General rules of international law, as well as any ratified treaty and convention, can now be applied in Kenya.<sup>80</sup>

The citizens of Kenya therefore, have the constitutional backing to claim their right to housing as guaranteed in various treaties ratified by Kenya. In *William Musembi & 13 others v Moi Education Centre Co Ltd & 3 others*<sup>81</sup>, the High Court of Kenya invoked Article 2(5) of the Constitution and made reference to the general rules of international law and upheld the right to housing people who had been unlawfully evicted from their homes. This was a progressive decision on the progressive realization of social economic rights which was regrettably set aside on appeal.<sup>82</sup> The matter is, however, waiting for final a determination by the Supreme Court.<sup>83</sup>

Where the State alleges insufficiency of resources to implement the social-economic rights, Article 20(5) (a) imposes a responsibility on the state to show that the resources are not available. The Constitution, therefore, imposes a rebuttable presumption that State possesses enough resources to implement economic rights unless it proves otherwise. In doing so, the state must ensure the largest number of Kenyans enjoy the right not forgetting the vulnerable members in the community.<sup>84</sup>

The above constitutional provisions have been litigated in Kenyan courts as will be discussed in the next chapter. The right for children, disabled, youth, women and the poor to housing have not

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<sup>74</sup> Article 25 of the Constitution of Kenya, 2010.

<sup>75</sup> See *Airport Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR para 136.

<sup>76</sup> Morton Emmanuel Winston, 'Indivisibility and Interdependence of Human Rights' (1999) University of Nebraska 23, < [file:///C:/Users/HP/Downloads/Indivisibility\\_and\\_Interdependence\\_of\\_Human\\_Rights.pdf](file:///C:/Users/HP/Downloads/Indivisibility_and_Interdependence_of_Human_Rights.pdf)> Accessed on 15 November,2018.

<sup>77</sup> Article 57(c) of the Constitution of Kenya, 2010.

<sup>78</sup> Article 53(1) (c) of the Constitution of Kenya, 2010.

<sup>79</sup> Article 21(c) of the Constitution of Kenya, 2010.

<sup>80</sup> Article 2(5) and (6) of the Constitution of Kenya,2010,

<sup>81</sup> [2014] eKLR Para 53.

<sup>82</sup> See *Moi Education Centre Co Ltd v William Musembi & 16 others* [2017] eKLR.

<sup>83</sup> Supreme Petition No. 2 of 2018.

<sup>84</sup> Article 20 (5) (a) & (b) & (c) of the Constitution of Kenya, 2010.

been properly observed in spite of clear provision above.<sup>85</sup> The Kenyan courts have not been of much help in realizing the right to housing due to their retrogressive interpretation of the articles above. There has been no adequate legislative effort to actualize the right to housing. All the above constitutional provisions call for a comprehensive legislation that will provide for the substantive and procedural law to promote and protect the right to the adequate living conditions. The legislation should cover all the elements of the right to adequate housing so that people of Kenya can benefit from the constitutional protection of the right to housing. For a long time, there has not been political goodwill to enforce above constitutional provision on the right to housing. However, the president of Kenya, Uhuru Kenyatta has made some promises to have the State provide affordable housing to Kenyans.<sup>86</sup> This a wait and see.

### **2.3.2 Legislative Framework**

The principal Act on housing in Kenya is the Housing Act which was promulgated in the year 1953 prior to Kenya attaining its independence. The objective of the Act was to provide public grants to local governments, companies, and individuals to enable them to procure land and or houses for dwelling purposes. In furtherance of these objectives, the said Housing Act established a National Housing Corporation. The Act, however, does not engender the housing right and its usefulness has since dissipated. The Act has not been aligned with the Constitution of Kenya to make clearer the right to housing as guaranteed.

Forced and unlawful evictions constitute a violation of the right to housing. As a response to the violation, the Parliament has put in place a statutory legal framework, the Land Laws (Amendment) Act, 2016 which provides for the manner and procedure that should be followed in evicting persons in unlawful occupation of private, community or public land. As discussed in the next chapter, the unlawful evictions have increased despite the Act. The State has participated in these illegal evictions creating a state of impunity.<sup>87</sup>

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<sup>85</sup> Kanyua, Focus on the Most Vulnerable Groups, 11<[http://mirror.unhabitat.org/downloads/docs/5647\\_23903\\_2472\\_alteedit.pdf](http://mirror.unhabitat.org/downloads/docs/5647_23903_2472_alteedit.pdf)> Accessed on 15 November, 2018.

<sup>86</sup> Policy Monitor, 'Realizing the Big Four Agenda Through Energy as Enabler'. < <http://kippra.or.ke/wp-content/uploads/2018/04/KIPPRA-Policy-Monitor-Issue-9-No.-3.pdf> >Accessed on 30 August 2018.

<sup>87</sup> William Musembi (n 82) para 85.

The Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act<sup>88</sup> comes close to addressing housing problems to the internally displaced persons. The Act defines an internally displaced person as a person forced to flee or leave their home or habitual residences as a result of, inter alia, large-scale development projects. Protection of homes to the internally displaced persons will go a long way in the fulfillment of the right to adequate housing. Other than this definition, the Act has not assisted in promoting the right to housing. The number of the internally displaced person who are inadequately housed still persist.

Finally, the Children Act<sup>89</sup> imposes an obligation on the government as well as the child's family to take action to ensure the survival of the child as well as its development.<sup>90</sup> To safeguard the dignity of the child, a decent housing ought to be provided for by those responsible for the child, and in the event, the parents of the child cannot afford, the State should provide. If this Act was to be strictly followed, Kenya would not be having a high number of street children.<sup>91</sup> They sleep in the cold where they are exposed to various dangers not limited to sickness and physical attacks.<sup>92</sup>

The country will, therefore, require a comprehensive legislation on housing rather than piecemeal amendments that do not adequately address the right to housing. The existing legislation are lacking in many ways. For example, they fail to give the contents and scope of the right to housing. They also fail to provide a remedy for the violations. The legislative measures to ensure the right to housing is realized has therefore not been met.

### **2.3.3 Government Policies**

In 1966 the government came up with sessional paper no. 5 of 1966 which recommended the establishment of the National Housing Authority and National Housing Corporation.<sup>93</sup> The policy only achieved the establishment of National Housing Corporation under the Housing Act. The second was the sessional paper No. 3 of 2004<sup>94</sup> that recognized among others, the right to housing

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<sup>88</sup> Act No. 56 of 2012.

<sup>89</sup> Act No. 8 of 2001.

<sup>90</sup> Section 4(1) of the Children Act, 2001.

<sup>91</sup> African Network on Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) 'Urban Poverty Research and Policy Evaluation on Street Children and Their Families, (1991) 10 <<https://www.streetchildren.org/wp-content/uploads/2013/08/research-street-children-kenya.pdf>> Accessed on 23<sup>rd</sup> October 2018.

<sup>92</sup> Ibid 7.

<sup>93</sup> National Housing Corporation is established under Section 3 of Housing Act, 1953.

<sup>94</sup> Sessional Paper No. 3 of 2004, on Housing Policy for Kenya, <<file:///C:/Users/HP/Downloads/national%20housing%20policy%20for%20kenya.pdf>> Accessed on 28<sup>th</sup> July 2018)

as a progressive right and enactment of an all-encompassing Housing Act,<sup>95</sup> and popularization of the Sectional Properties Act<sup>96</sup> so as to encourage people to seek shared ownership of property. None of the recommendations was achieved. An all-encompassing Act providing for the scope, content, and remedy for the violation of the right to housing would have gone a long way in providing a legal framework for the realization of the rights.

The sessional paper no. 3 of 2009 was more ambitious. It provided for setting aside of land for development of houses for the poor to be offered to them at an affordable rate.<sup>97</sup> The policy was a total failure. Finally, in 2013 the government developed the National Slums Upgrading and Prevention Policy.<sup>98</sup> It looked at issues in slums and the current and previous government initiatives on slum upgrading.<sup>99</sup> With all these ambitious policies on housing, many Kenyans continue to live in deteriorating housing conditions.<sup>100</sup> What is needed now is for the government of Kenya to take action and execute those policies.

## **2.4 ANALYSIS OF THE RIGHT TO HOUSING IN KENYA**

There is no legislation in Kenya that provides for the nature, scope, and contents of the right to housing. However, a number of authors and scholars have attempted to define economic and social rights. Khosa has defined Social economic rights as those specific rights that give people access to certain basic needs (resources, opportunities, and services) necessary for a human to lead a dignified life.<sup>101</sup> These needs are so vital that they ensure human beings are able to keep a minimum standard of living that secure their human dignity.<sup>102</sup> Erasmus has defined these basic needs to include housing.<sup>103</sup> Miloon Kothari has defined the human right to adequate housing, as: “The right of every woman, man, youth and child to gain and sustain a safe and secure home and

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<sup>95</sup> Ibid 30.

<sup>96</sup> Act no 12 of 1987.

<sup>97</sup> Sessional paper no. 3 of 2009 on National land policy, <<http://www1.uneca.org/Portals/lpi/CrossArticle/1/Land%20Policy%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf>> Accessed on 28<sup>th</sup> July, 2018.

<sup>98</sup> The Ministry of Housing, ‘National Slums Upgrading and Protection Policy,’ <[http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/kenya\\_slum\\_upgradeprevent\\_policy\\_may\\_2013.pdf](http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/kenya_slum_upgradeprevent_policy_may_2013.pdf)> Accessed on 30 August 2018.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> S Khosa, *Social Economic Rights in South Africa* (2007)20.

<sup>102</sup> Ibid.

<sup>103</sup> G Erasmus, ‘*Social Economic Rights and Their Implementation: The Impact of Domestic and International Instruments*’ (2004) 32 *International Journal of Legal Education* 243, 252.

community in which to live in peace and dignity.”<sup>104</sup> Michelman defines the right to housing as a claim upon organized society, on behalf of each individual or household unit, to be assured of access to minimally adequate housing.<sup>105</sup> The European Court of Human Rights (ECHR) in the case of *Moreno Gomez v Spain*<sup>106</sup> defined a home to include a place where private and family life develops.<sup>107</sup>

The nature and scope of the right to housing has also been elaborated in various legal instruments such as ICESCR. The Committee on Economic, Social and Cultural Rights (CESCR), elaborates seven criteria to clarify what right to housing means.<sup>108</sup> These criteria are the legal security of tenure; affordability; habitability, availability of services, location; material facilities and infrastructure; accessibility; and cultural acceptability.<sup>109</sup>

Legal tenure may be in form of rent, informal settlements, and emergency occupation of land.<sup>110</sup> A good security of tenure should protect citizens against arbitrary evictions and threats of evictions.<sup>111</sup> When people are being evicted from their homes due to high rent or failure to pay a high purchase price of a house, the tenure is said to be compromised.<sup>112</sup>

The scarcity of water especially in Kenyan slums, inaccessibility of houses due to poor infrastructure, lack of social facilities like schools and health centers; polluted environment;<sup>113</sup> lack of participation in decision making,<sup>114</sup> are all incompatible with adequate housing.<sup>115</sup>

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<sup>104</sup> Miloon Kothari, *The Human Rights to Adequate Housing and Land* (2006) Rajika Press Service Pvt. Ltd 9, <[file:///C:/Users/HP/Downloads/The\\_Human\\_Right\\_to\\_Adequate\\_Housing%20\(7\).pdf](file:///C:/Users/HP/Downloads/The_Human_Right_to_Adequate_Housing%20(7).pdf)> Accessed on 10<sup>th</sup> November, 2010.

<sup>105</sup> Frank I. Michelman, *The Advent of the Right to Housing: A current appraisal* (5 HARV .CIV. RIGHTS-CIV. LIB.L.REV. 2007, 1990)207.

<sup>106</sup> App no 4143/02 (ECtHR, 16 November 2004), para 53.

<sup>107</sup> Ibid.

<sup>108</sup> CESCR General Comment No. 4, (1991) para 8, <<http://www.refworld.org/docid/47a7079a1.html>> Accessed on 10<sup>th</sup> November, 2018.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> South African Human Rights Commission, *3<sup>rd</sup> Economic and Social Rights Report* (2001) (Chapter Six) 250, <[https://www.gov.za/sites/default/files/3rd\\_esr\\_0.pdf](https://www.gov.za/sites/default/files/3rd_esr_0.pdf)> Accessed on 10<sup>th</sup> November, 2018.

<sup>112</sup> Ibid.

<sup>113</sup> Kavinya Muindi, *Air Pollution in Nairobi Slums: Sources, Levels and Lay Perceptions* (2017) Umea University 8, <<https://www.diva-portal.org/smash/get/diva2:1133880/FULLTEXT01.pdf>> Accessed on 30 August 2018.

<sup>114</sup> General Comment No 4(n 108) para 9.

<sup>115</sup> Kavinya Muindi, (n 113).

Commercialization of housing has largely affected participation in decision making in Kenya.<sup>116</sup> All these elements of the right to an adequate housing illustrate that the realization of the right to housing, require other rights to be present<sup>117</sup>because all human rights are interlinked.<sup>118</sup> For instance, the right to housing cannot be separated from that of health,<sup>119</sup> education, privacy, and social security.<sup>120</sup> The government of Kenya has to observe all these rights if the right to housing will have to be attained.

There are various misconceptions about the right to adequate housing. First, the right does not require the State to build a house for every citizen in Kenya.<sup>121</sup> It only requires the state to undertake measures such as policy and legislative measures that would enable people to be adequately housed,<sup>122</sup> and protect against action that may inhibit the enjoyment of the right to housing.<sup>123</sup>

Secondly, the right to adequate housing is not a goal to be attained in the long term but States “must make every possible effort, within their available resources, to realize the right to adequate housing and to take steps in that direction without delay”.<sup>124</sup> Thirdly, the right is distinguishable from the right to property.<sup>125</sup> The right to adequate housing is broader than the right to property for as it encompasses other rights such as the right to live with dignity, peace, and right to health.<sup>126</sup>

Fourthly, the right to adequate housing does not go against development projects which could result in the displacement of locals.<sup>127</sup> The right only imposes conditions including procedures on

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<sup>116</sup> Marie Huchzermeyer, ‘*Slum Upgrading in Nairobi Within the Housing and Basic Market*’(2008) *Journal of Asian and African Studies* 19 Accessed on

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.7870&rep=rep1&type=pdf> > (on 30 August 2018)

<sup>117</sup> Asbjorn Aide, *Economic, Social and Cultural Rights* (Springer, 2001)123.

<sup>118</sup> Vienna Declaration, 1993, 14-25, <

[http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.157\\_24.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.157_24.pdf)> Accessed on 10<sup>th</sup> November 2018.

<sup>119</sup> Lilian Chenwi, ‘*Implementation of Housing Rights in South Africa: Approaches and Strategies*’ (2015) *24 Journal of Law and Social Policy* 71.

<sup>120</sup> OCHHR & UN – Habitat ‘The right to adequate housing fact sheet No. 21/Rev.1, 9<

[file:///C:/Users/HP/Downloads/Right%20to%20adequate%20housing%20\(1\).pdf](file:///C:/Users/HP/Downloads/Right%20to%20adequate%20housing%20(1).pdf)> accessed on 10<sup>th</sup> November, 2018.

<sup>121</sup> Ibid 6.

<sup>122</sup> Ibid.

<sup>123</sup> Lawrence Juma (n 61) 479.

<sup>124</sup> Fact sheet Number 21 (n 120) 7.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.



how such displacement should be carried out.<sup>128</sup> There should be adequate consultation with those evicted to develop solutions and to minimize the scale of the eviction. Finally, the right to adequate housing should not be understood to mean the right to the land.<sup>129</sup> However, right to land can be an essential aspect of the achievement of the right to adequate shelter.<sup>130</sup> The inadequate housing can result from people being denied access to land.<sup>131</sup>

## **2.5 Conclusion**

The right to adequate housing is provided in various international, regional and national legal instruments. The soft laws have also helped to elaborate on the right. The right to housing requires the existence of other rights in its enjoyment and should apply to everyone without any discrimination. The children, elderly, disabled, the poor, the marginalized and the rich should enjoy the right to housing. The progressive realization of the right to housing should not be perceived to mean that other rights should be given priority because without the enjoyment of the right to housing other rights may not be fully enjoyed. The duty imposed on the State to provide housing should be properly understood. The State should create the capability to the citizens such that they can afford to house themselves. Necessary housing laws and policies should be enacted and the State should desist from acts that violate the right to the housing such as unlawful evictions.

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<sup>128</sup> Ibid.

<sup>129</sup> Miloon Kothari (n 104) 14.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

## CHAPTER THREE

### REALIZATION OF RIGHT TO HOUSING IN KENYA

#### 3.0 INTRODUCTION

This chapter will discuss the duty of the State in respecting, protecting, promoting and fulfilling the right to housing. It will further analyze the nature of the violation of the right to housing in Kenya. The relationship between culture and housing will be discussed so as to demonstrate how culture affects the right to adequate housing. Implementation and enforcement of the right will be evaluated with an aim of establishing the main challenges in the actualization of the right to housing. Finally, the chapter will discuss the roles of the citizens of Kenya and non-state actor in the realization of the right.

#### 3.1 Obligation of the government of Kenya in the realization of the right to housing

The State is the main guarantor of the rights to Kenyans because it controls the basic structure of the Kenyan policy, legal system, and the governance structure.<sup>1</sup> The State has inherent responsibility over the legal system; exercise control over some institutions that human rights impose limitations over their action; have greater power of enforcement of human rights than any other body, and poor use of its power can be a major threat of the right to human rights.<sup>2</sup> This is seen when the Kenyan Government allows the use of the police force to supervise illegal evictions.<sup>3</sup> The Africa Commission on Human and People's Rights in *SERAC V NIGERIA* observed that all rights, place four duties on the state, namely the duty respect, protect, promote and fulfill.<sup>4</sup> Maastricht guidelines on violations of Economic, Social and Cultural Rights point out

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<sup>1</sup> Gordon Brown, *The Universal Declaration of Human Rights in 21<sup>st</sup> Century: A living Document in a Changing World*, (Open Book Publishers, 2016)72.

<sup>2</sup> *ibid*

<sup>3</sup> See *William Musembi & 13 others v Moi Education Centre Co Ltd & 3 others* [2014] eKLR, where police were deployed to evict villagers from a private property.

<sup>4</sup> *The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*, Communication No. 155/96, (ACmHPR, 15, October, 2001) para 44.

the obligation to respect, protect and fulfill.<sup>5</sup> The Constitution of Kenya has also recognized the four duties on the state.<sup>6</sup> Article 11 of ICESCR has also mentioned the same measures which can be termed as indicative in the sense that it does not cover all the measures which are to be taken by the State parties.<sup>7</sup> The guiding principle is providing everyone with a situation whereby he can enjoy an adequate standard of living.<sup>8</sup> The specific circumstances in Kenya determine those situations. The level of illiteracy, poverty, and politics will have a role to play.<sup>9</sup>

The obligation to respect requires the State not to interfere with the enjoyment by the citizens of their right to a shelter. Oxford English dictionary defines respect to mean ‘due regard for the feelings or rights of others’. It is thus a negative obligation on the state. Kenya has an obligation to respect the efforts and the achievements of individuals themselves which includes respect for their homes and land where they have erected shelters.<sup>10</sup>

When the government conducts an arbitrarily forced eviction, the act constitutes a breach of the duty to respect the right to housing. The evictions of residents of *City Cotton* and *Upendo Villages*<sup>11</sup> in Nairobi by the government of Kenya was, therefore, a breach of duty to respect. As will be seen herein below, it is more pronounced when the State fails to respect the houses available to those who are able by their own means to produce their own food, because it deprives them existing resource base. The eviction of residents of City Cotton and Upendo villages prevented them from taking care of their own needs by use of their own assets.<sup>12</sup> The demolition of ‘illegal’ structure in Kibera slums for purposes of road construction<sup>13</sup> has contributed to the dispossession of the weaker groups in order to promote what the dominant groups consider to be overarching

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<sup>5</sup> Maastricht Guidelines on Violation of Economic, Social and Cultural Rights, 1997, Para 6, <[http://hrlibrary.umn.edu/instate/Maastrichtguidelines\\_.html](http://hrlibrary.umn.edu/instate/Maastrichtguidelines_.html)> Accessed on 28<sup>th</sup> July 2018.

<sup>6</sup> Article 21 (1) of the Constitution of Kenya, 2010.

<sup>7</sup> Article 1 of ICESCR, 1966.

<sup>8</sup> Asbjorn Eide, *Economic, Social and Cultural Rights* Supra, (Springer, 2001) 136.

<sup>9</sup> Grace W. Bunyi, ‘Real Options for Literacy Policy and Practice in Kenya’ (2006) United Nations Educational, Scientific and Cultural Organization 4, <<http://unesdoc.unesco.org/images/0014/001459/145956e.pdf>> Accessed on 15 November, 2018.

<sup>10</sup> Ibid.

<sup>11</sup> See Nairobi High Court Petition No. 264 of 2013 consolidated with petition 274 of 2013.

<sup>12</sup> Asbjorn Eide (n 8) 136.

<sup>13</sup> Fredrick Obura, ‘Over 20,000 Families Left Homeless in Kibera Demolition’ *Standard Digital* (Nairobi, 23 July, 2018) <<https://www.standardmedia.co.ke/business/article/2001289172/houses-flattened-in-kibera-nairobi>> Accessed on 30 August, 2018.

national goals.<sup>14</sup> More than 20,000 families were left homeless.<sup>15</sup> Many have been evicted so as to preserve forests and to build roads without an alternative shelter provided to them.<sup>16</sup> The most affected are children, women and the elderly.<sup>17</sup> The State, therefore, must restrain from interfering with the rights of the citizens and where the evictions are for good cause, there must be adequate consultation, adequate notice, and an alternative shelter.

The evictions should also be done in a humane manner to avoid destruction of property and injuries to the evictees. For instance, the demolition in *Kibera* was carried without consultation and with less than two weeks' notice with no alternative accommodation provided.<sup>18</sup> The government, therefore, should refrain from engaging in acts that violate the integrity of individuals.<sup>19</sup> It should also not infringe on the right of citizens to use resources available to them in enjoying their right.<sup>20</sup>

The obligation to protect requires the State to take measures that ensure the citizens enjoy their rights including prevention of violations of the right to housing by third parties.<sup>21</sup> For example, the government of Kenya must protect its citizens from private developers who may demolish their houses for commercial purposes. The protection of housing may take the form of legislation that protects land grabbing.

The protection extends to the rental houses. The cases filed at Rent Tribunal<sup>22</sup> by tenants indicate violations of their right to housing especially through unlawful eviction by their landlords which violation comes with the destruction of their property. Sometimes raw human waste and sewerage have been used to force tenants out of the premises.<sup>23</sup> Getting the remedies from the tribunal is sometimes difficult due to procedure and costs. The remedies ought to be accessible, affordable,

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<sup>14</sup> Asbjorn Eide (n 8) 137.

<sup>15</sup> Fredrick Obura n 13.

<sup>16</sup> Vitalis Kimutai, 'MP says Rift Leaders set to Meet Uhuru over Mau evictions', *Daily Nation* (Nairobi, 31 July 2018) <<https://www.nation.co.ke/counties/narok/Rift-MPs-date-with-Uhuru-over-Mau-evictions/1183318-4690060-dk5vjg/index.htm>> Accessed on 7 August, 2018.

<sup>17</sup> Ibid.

<sup>18</sup> Chrispinus Juma, 'Kibera Slum: Notice of Massive Demolition Issued in this Area, Nairobi' (Pulse Live, 4 July 2018) <<https://www.pulselive.co.ke/news/local/state-issues-demolition-notice-in-kibera-for-road-construction-id8576541.html>> Accessed on 30 August, 2018.

<sup>19</sup> *Serac v Nigeria* (n 4) para 61.

<sup>20</sup> Ibid

<sup>21</sup> Maastricht guidelines (n 5) para 9.

<sup>22</sup> Rent Tribunal established under Section 4 of Rent Restriction Act, 1959, CAP 296 of laws of Kenya.

<sup>23</sup> Fred Juma, 'How landlord in Nairobi are Stealing are frustrating tenants' (Soko Directory, 6 March 2018) <<https://sokodirectory.com/2018/03/landlords-nairobi-stealing-frustrating-tenants/>> Accessed on 8<sup>th</sup> August, 2018.

timely, and effective. As discussed below, the tenants are sometimes evicted at night and the cash deposit for rent is retained. It is thus the obligation of the State to protect the tenants from such unscrupulous landlords.

Kenya has not created adequate and necessary infrastructures/framework to enhance the protection of the right housing from interference by the third parties and threats emanating from natural and human-made risks <sup>24</sup>contrary to article 1 and 2 of ICESCR.<sup>25</sup> For instance, more than 48 people were killed in May 2018 when a private dam (Solai dam tragedy) <sup>26</sup>raptured. The residents were never provided with new houses after their houses were carried by water. The State has an obligation to protect the people from such man-made risk.

The obligation to facilitate requires the government of Kenya to periodically assess the current situation in the whole country,<sup>27</sup> identify people who have been denied the right to shelter, and take appropriate steps to remedy the situation.<sup>28</sup> There is no evidence of Kenya having carried out a periodic assessment of the standard of living in the country. Periodic assessments are required to find out whether measures adopted have improved the situation for the groups previously identified and to determine whether the groups not previously identified have difficulties in enjoying an adequate standard of living.<sup>29</sup> Kenya, having not carried out the periodic assessments, can therefore not know the true state of living conditions especially in the rural areas as the emphasis is mostly laid on the urban areas. This could possibly explain why there is a population in Nakuru County that has lived in caves for 32 years without any help from the State.<sup>30</sup> Failure to assist the victims of *Solai* tragedy is a breach of state's duty to facilitate. The assessment should not only focus on

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<sup>24</sup> Peter Warutumo, 'Flood Waters Wash Away Vehicles Leave a Trail of Destructions' *Daily Nation* (25 May 2018), <<https://www.nation.co.ke/counties/Flood-waters-leave-trail-of-destruction/1107872-4578502-xm6rnfz/index.htm>> Accessed on 9<sup>th</sup> August 2018.

<sup>25</sup> UN Human Right Committee, General Comment No. 31 < <http://www.refworld.org/docid/478b26ae2.html>> Accessed on 11 November, 2018.

<sup>26</sup> Julius Chepkwony, '48 People Killed in Patel Dam Tragedy, Solai, Nakuru' *Standard Digital* (10 May 2018) <<https://www.standardmedia.co.ke/article/2001279876/48-people-killed-in-patel-dam-tragedy-solai-nakuru>> Accessed on 30 August, 2018.

<sup>27</sup> Asbjorn Eide (n 8) 138.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> KTN News Kenya, 'A Community that has lived in Caves for Over 32 Years' *Standard Digital* (16 March, 2014) <[https://www.youtube.com/watch?v=\\_05oG3pBagg](https://www.youtube.com/watch?v=_05oG3pBagg)> Accessed on 12 January, 2018. A population of about 500 people have lived in a cave for over 32 years in Gilgil within Nakuru County. They have no alternative shelter and have strived for government intervention with no success.

the urban areas because the population in the rural areas are experiencing worse housing problems which are further compounded by poverty.

The obligation does not necessarily mean that the state should provide direct material support, but the state should get rid of the obstacles that make it difficult for Kenyans to enjoy the right to adequate housing. Factors such as poverty, the high cost of building materials, unscrupulous landlords, and land grabbing should be properly dealt with by the state as they negatively affect the right to housing. The cost of building materials is unbearable in Kenya.<sup>31</sup> The land is also expensive. There is no legislation to cap the amount one can sell his land. It is a case of willing buyer and willing seller which alienate a certain population from living in certain areas as they cannot afford. The State should, therefore, assist by developing a proper pricing policy.

The obligation to fulfill/facilitate require the government to put in place necessary political, economic, social and administrative measures to ensure the right to housing is enjoyed in full. Housing should be provided to those who cannot afford to provide for themselves whenever there are circumstances outside their control so as to preserve their dignity. For example, special measures must be taken to provide adequate housing to children as they are helpless and cannot be blamed for their choice of parents. Temporary housing should be provided in instances of natural disasters such as fire and floods like in *Solai* Tragedy. There is no legal framework and policy in Kenya on how to assist victims from natural calamities forcing them to spend nights in the cold before they can get help.<sup>32</sup>

The obligation to promote would require the Kenya government to enhance the capacity of the citizens to enforce their rights. This can be done through education, awareness raising, training, and advocacy. The African Charter has recognized the obligation to promote human rights through teaching, education, and publication.<sup>33</sup> The high level of illiteracy in Kenya makes it harder for citizens to learn that the right to housing is a legal entitlement. Majority of Kenyans lack adequate knowledge of the right to shelter and the obligation of Kenya in relation to the right. Kenyans have

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<sup>31</sup> H Gichunge, 'Factors that Contribute to the Cost of Provision of Low Cost Housing in Nairobi, Kenya' (International Conference on Spatial Information for Sustainable Development, Nairobi Kenya, 2-5 October 2001) 2,6, 10 < <https://www.fig.net/resources/proceedings/2001/nairobi/gichunge-CMTS1-2.pdf> > Accessed on 16 October 2018.

<sup>32</sup> *Solai* Tragedy (n 26).

<sup>33</sup> Article 25 of the African Charter, 1981.

not been adequately enlightened on the available mechanisms and procedure for the enforcement and vindication of the right to housing in instances of violations. The obligation would also require the government to provide an enabling environment for human rights institutions and civil society organizations to work freely in human rights advocacy and to further follow up on State's implementation of human rights. Sadly, the state has through state agencies frustrated these human rights institutions and civil societies making hard for them to advocate for human rights protection and promotion.<sup>34</sup>

### 3.2 Violation of right to housing

When the State fails in its obligation to protect, respect, promote and to fulfill the rights of its citizen to housing, it is in violation. There is a horizontal obligation under article 20 of the Constitution on the private citizens to respect bill of rights<sup>35</sup> thus determining the regulation of relations between private individuals.<sup>36</sup> Under the same provision, companies and non-governmental actors can be liable for human rights violations.<sup>37</sup>

Failure by the state to provide slum dwellers with decent housing is a violation of their right to housing. For instance, more than 34% of the entire population of Kenya are urban dwellers<sup>38</sup> with 71% of the urban population living in slums.<sup>39</sup> Sadly, 60% of the population in Nairobi lives in slum areas.<sup>40</sup> This is a failure of the state on its obligation to provide, protect and promote the rights to housing. The housing problems in slums are complicated by insufficient water supply,

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<sup>34</sup> Kenya Human Rights Commission, 'Statement on Attacks by the NGO board against the KHRC' (12 January, 2017) <<https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/573-statement-on-the-attacks-by-the-ngo-board-against-the-khrc.html>> Accessed on 9<sup>th</sup> August 2018.

<sup>35</sup> Doris Matu, 'Improving Access to Justice in Kenya Through Horizontal Application of Access to justice and Judicial Review' (2017) Strathmore Law review 1, 2 <[http://www.press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1\\_Article\\_4.pdf](http://www.press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_4.pdf)> Accessed on 9<sup>th</sup> August 2018.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Republic of Kenya Ministry of Housing 'Background Document: the National Slum Upgrading and Prevention Policy' (2013) <[http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/kenya\\_slum\\_upgradeprevent\\_policy\\_may\\_2013.pdf](http://healthycities.berkeley.edu/uploads/1/2/6/1/12619988/kenya_slum_upgradeprevent_policy_may_2013.pdf)> Accessed on 26 July 2018.

<sup>39</sup> Ibid 5.

<sup>40</sup> The National Slum Upgrading policy (n 38) 4.

and where it is accessible there is a problem of contamination due to lack of refuse collection.<sup>41</sup> These have the effects of causing diseases to the slum dwellers.<sup>42</sup>

Forced evictions by the State is a failure on its duty to respect the right to housing and it is a major violation of the right to housing.<sup>43</sup> It also occurs when the state offers protection to the private entity to carry out illegal evictions. Eviction would be illegal when it is carried out without a court order or in disobedience of the court order. Many times the court order stopping the evictions have been disobeyed by the state. For instance, in *William Musembi & 13 others v Moi Education Centres Co Ltd & 3 others* [2014]eKLR,<sup>44</sup> over 326 residents of two villages known as city cotton and Upendo villages were forcefully evicted by a gang of youth who were guarded by police officers. Their houses and business structures were violently destroyed rendering them homeless. The High Court found that the demolition of the petitioners' houses and forced eviction without a provision of an alternative shelter was a violation of their indispensable right to their inalienable human dignity and adequate housing. *Moi Education Centre Limited*, a private entity, was found to have a horizontal obligation and ordered it together with the state to pay damages to the petitioners. Sadly, the Court of Appeal set aside the judgment<sup>45</sup> of the High court and the matter is now at Supreme Court.<sup>46</sup>

The above is a clear demonstration of how the State and private entity have violated the right to housing. The government which is supposed to defend the rights of its citizens is violating the same rights. It does not matter whether the evictees are occupying the land illegally, the obligations still remain. The State ought to provide alternative shelters once it is found that the occupants are illegally on the land. The Kenyan Courts are sometimes a setback on the right to housing especially the appeal courts as seen above and the cases below.

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<sup>41</sup> M Hunczermeyer 'Slum upgrading in Nairobi within the housing and basic services market – housing rights concern' (2008) 43 *Journal of Asia and African Studies* 19 20.  
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.7870&rep=rep1&type=pdf>> Accessed on 11 November 2018.

<sup>42</sup> Ibid.

<sup>43</sup> CESCR General Comment 7: The Right to Adequate housing (Art.11.1) forced evictions, <<http://www.refworld.org/docid/47a70799d.html>> Accessed on 9<sup>th</sup> November, 2018.

<sup>44</sup> Nairobi High Court Petition No. 264 of 2013 consolidated with petition 274 of 2013.

<sup>45</sup> See *Moi Education Centre Co Ltd v William Musembi & 16 others* [2017] eKLR.

<sup>46</sup> Supreme Court Petition No. 2 of 2018.



Similarly, in *Mitu-Bell welfare Society v Attorney General & 2 others*,<sup>47</sup> the residents of Mitumba village in Nairobi were violently evicted by Kenya Airport Authority with assistance from police. The demolition was against an express court order that had restrained the respondent from carrying out the eviction. This is a blatant disobedience of the Constitution.<sup>48</sup> Although the land did not belong to the petitioners, this was the place they knew as home for many years and it was unreasonable to give them seven days' notice to vacate without providing them with alternative land. To assert the obligation of a private entity to observe human rights, the High Court found the Kenya Airport Authority and the State to have violated the rights to housing and other Social Economic Rights. The respondents were further ordered to provide within 60 days, policies and programmes to ensure provisions of houses to marginalized groups such as the residents of *Mitumba* village. Again, the Court of Appeal delivered a very retrogressive judgment<sup>49</sup> setting aside the judgment of the High Court. The matter is currently in the Supreme Court. The demolition of houses violated the rights of innocent children and the elderly to their right to housing and dignity. The mode and manner of eviction were so demeaning to their dignity taking away the very essence of humanity. Before eviction, it is important for the state to adequately consult the people concerned and provide an alternative shelter and the eviction to be carried in a humane manner.

In the case of *Satrose Ayuma & 11 others v Registered Trustees of Kenya Railways Staff Retirement Benefits Schemes & 3 others*,<sup>50</sup> the residents of *Muthurwa*, within Nairobi were violently evicted by Registered Trustee of Kenya Railways Staff Retirement Benefits scheme to pave way for the commercial building. The residents had the bank account where they were depositing their rent closed, water supply and other the amenities disconnected, the property was advertised for development and notice to vacate issued within 90 days. Before even the expiry of 90 days, demolition began where water was disconnected, toilets and bathrooms destroyed. The High Court found there was an infringement of the right to housing, sanitation and human dignity of the residents as well the right to the protection of the law for the children.

The facts of this case are heart-wrenching. Destroying housing, water connection and sanitation goes against the core elements of the right to housing. There were no government officials during

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<sup>47</sup> (2013) eKLR.

<sup>48</sup> Article 2(2) of the Constitution of Kenya, 2010.

<sup>49</sup> See the judgment in *Kenya Airport Authority v Mitu –Bell Welfare Society & 2 others* [2016] eKLR.

<sup>50</sup> High Court Petition No 65 of 2010.

the evictions or neutral observers to ensure international standards of evictions were followed. It was very degrading.

Due to Kenya's failure in its obligation to observe the right to housing, some disputes have found their way to the African Commission on Human and People's Rights (The Commission). In *Centre for Minority Rights and Development (CERAMIDE) and Minority Group Rights International on behalf of Endorois Welfare Council v Kenya(Endorois case)*<sup>51</sup>, there were allegations of violations among others, the displacement of Endorois community from their ancestral land. The government of Kenya had evicted them from their ancestral land in name of preserving the Game reserve. As a result, the community could not access Lake Bogoria which was one of the sources of their livelihood and a source of their food.<sup>52</sup> The local court could not offer any effective remedy.<sup>53</sup> The African Commission found that forced displacement by the government of Kenya violated the right to housing of Endorois community.<sup>54</sup>

When such forced displacement occurs without an alternative provision of the shelter, the community the community lose their access to food. Any alternative shelter must be situated in an area where the evictees should access water, food, roads, and shopping centers among other facilities. For the Endorois community, none of the above was provided including compensation.

Similarly, in the case of *African Commission on Human and People's Rights v Republic of Kenya(Ogiek case)*,<sup>55</sup> the commission filed the application pursuant to Article 5(1) of the protocol to the African Charter on the establishment of African Court of Human and People's Rights. The case concerned the eviction notice issued by Kenya Forest Service in 2009 requiring the Ogiek Community and other inhabitants to leave Mau Forest within 30 days.<sup>56</sup> The Court found that the Kenya Government was in violation of article 22 of the Charter.<sup>57</sup> The court found that the Ogiek had been continuously evicted from Mau forest by the government of Kenya without being effectively consulted.<sup>58</sup> It further found that they had not been actively engaged in developing

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<sup>51</sup> Communication 276/2003 (ACmHPR, 25 November 2009).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Application No. 006/2012(ACtHPR, 26 May 2017).

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid Para 210.

housing, health and other social-economic arrangements concerning them.<sup>59</sup> The community had tried all the local remedies which were unavailable and ineffective. It is disappointing for Kenya to be sued in the African Court for failure to protect the right to housing to its citizens notwithstanding the provision of the right to housing in Article 43 of the Constitution. This is lack of constitutionalism as the government should live the constitution and embrace all the values of democratic society by respecting the rights of its citizens.

All forms of violations of the right to housing must be addressed by the State. Individual violators of the right to housing must also be stopped by the state and be made to pay damages for their actions. The court should also be progressive in interpreting the constitution so as to stop the violation of the rights by private entities and the state.

When the landlords charge exorbitant rent, keep the houses in inhabitable condition, fail to allow the tenants to have peaceful enjoyment of rental houses, they are in violation of the right to housing. Landlords have horizontal obligation to observe the right to housing. Discrimination in places of residence has been created by financial strength. If the landlords can charge reasonable rent, the issue can be mitigated.

Failure by the government to provide a law to control the cost of building material is a violation of the right to housing. Property developers have decried high costs of construction materials.<sup>60</sup> The high cost of these materials has contributed to the high cost of houses. Without incentives from the government, the cost may not change.

It will be difficult to enjoy the right to housing without proper land tenure. Failure by the state to ensure proper land tenure where decent houses can be constructed is a violation of the right to housing. The country has had houses being demolished as a result of land disputes pegged on ownership. For instance, in *Zakayo K. Bargoiyet v Charity Gathoni & 2 Others*,<sup>61</sup> the court ordered the demolition of the defendant's house. The issue of ownership was at play. The state ought to protect the land buyers to ensure they obtain clean titles to construct houses.

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<sup>59</sup> Ibid.

<sup>60</sup> Peter Lugaria 'Pain as VAT Pushes cost of Construction Materials' (CK Digital News Magazine, 4 April, 2014) <<https://www.constructionkenya.com/2776/vat-hikes-cost-of-construction/>> Accessed on 31 August 2018.

<sup>61</sup> [2016] eKLR.

A habitable environment where the houses are built should be the responsibility of the State. It should protect citizens from issues such as air pollution from third parties. Slums dwellers in Kenya in places like *Kibera*, *Mukuru Kwa Njenga* are living in the air polluted environment.<sup>62</sup> The level of insecurity in the slums<sup>63</sup> and other areas in the country is also very high. Without security, the right to housing cannot be fully realized. Private Citizens and the state have an obligation to ensure security. Violation of the right to housing will be deemed to exist in those estates where there is insecurity.

Kenya vision 2030 may not be realized if the violation to the human rights to housing will continue to be violated by State. The government will also need to look at all the housing policies since the independent and allocate enough resources to implement them.

### 3.3 Culture and housing

Kenya has more than 42 tribes each with its own distinct culture.<sup>64</sup> Some of the cultures are expressed in the type of their housing.<sup>65</sup> They give the community an identity.<sup>66</sup> Nomadic communities will construct temporary houses as they will need to move from one place to another in search of pastures.<sup>67</sup>

The question then is how to ensure adequate houses to these communities without interfering with their culture. The government need not construct stone houses for the pastoralists. All it is required to do is to ensure all other elements that constitute adequate housing are present. For example, there should clean water for drinking, adequate sanitation, security, food, health, and adequate

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<sup>62</sup> Olang Sana and Okoth Okombo, *Taking Stock of Socio -Economic challenges in Nairobi slums in Kenya* ( Elite PrePress Ltd, 2012)3,9, 11.

<sup>63</sup> Ibid.

<sup>64</sup> Minorities Rights Group International, '*Kenya, Minorities, Indigenous Peoples and Ethnic Diversity*' (2005) 9 <<https://minorityrights.org/wp-content/uploads/old-site-downloads/download-147-Kenya-Minorities-Indigenous-Peoples-and-Ethnic-Diversity.pdf> > Accessed on 23 October 2018.

<sup>65</sup> Ashild Lappégard Hauge, 'Housing and Identity' (PhD Thesis, Norwegian University of Science and Technology 2009). 35 < <https://core.ac.uk/download/pdf/52097170.pdf> > Accessed on 15 November, 2018.

<sup>66</sup> Mary Gauvain, Irwin Altman, '*A cross –Cultural Analysis of Homes*' (1982) Georgi Publishing Company 29, <<https://lasur.epfl.ch/wp-content/uploads/2018/05/GAUVAINandALTMAN.pdf> > Accessed on 18<sup>th</sup> October 2018.

<sup>67</sup> Allison Marie Kotowicz, 'Maasai Identity in 21<sup>st</sup> Century' (LLM thesis, University of Wisconsin- Milwaukee, 2013)118, < <https://dc.uwm.edu/cgi/viewcontent.cgi?article=1720&context=etd> > Accessed on 11 November, 2018.

infrastructure. They should be able to access those social facilities wherever they relocate. By doing so, the communities will be psychologically satisfied.

The housing structures should not expose the communities to rains, wild animals and parasite. The materials to construct the houses should also be made available. The communities should also not be evicted from the places they call home. For example, Ogiek communities who have had an attachment to Mau forest as a source of their food should not be removed from the forest.<sup>68</sup> It is not for the government to determine their culture but themselves.<sup>69</sup> Measures should be taken to ensure they are able to access various social services in their habitat.

Maasai communities in Kenya have Manyata as their traditional houses.<sup>70</sup> The State should ensure that they are secure in those Manyata and are able to access water, health and other social amenities. They should also have pit latrines for health reasons.

The unique cultures in Kenya provide different ways of dealing with housing problems in Kenya. The state will need to understand those cultures so as to address them while respecting their uniqueness.

### **3.4 Implementation and enforcement of the right to housing in Kenya**

Human rights treaty bodies, international courts and tribunals, civil society organizations, local courts, authorities, commissions, and human rights education are some of the forms of implementing the right to housing.<sup>71</sup> For Kenyan government to get a clearer path for implementation of the right to housing, the State should focus on the disparity between Kenya as it is today and Kenya it is hoped to be in the year 2030 as the country works toward achieving vision 2030. Housing rights are far from being realized today.

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<sup>68</sup> African Commission on Human and People's Rights (n 55) para 170.

<sup>69</sup> Ibid para 172.

<sup>70</sup> Allison Marie Kotowicz (n 67) 25.

<sup>71</sup> Gordon Brown (n 1)81.

The only State institution<sup>72</sup> with a constitutional mandate to implement and enforce Human rights in Kenya is Kenya National Commission on Human Rights (KNCHR).<sup>73</sup> KNCHR has a wide mandate that include promotion, monitoring, investigation, reporting of violation, and securing appropriate redress whenever there is a violation.<sup>74</sup> It is the principal state organ in ensuring compliance with State obligation on human rights as provided in international and regional treaties and conventions.<sup>75</sup> With the above functions of KNCHR, all that is required is a practical means of implementation.<sup>76</sup>

The KNCHR appears, however, to have concentrated on civil and political rights. Its mandate is so wide that it covers all obligation on the State on economic rights at global, regional and national level.<sup>77</sup> When individual citizens are ventilating their grievances in court for a declaration of their right to housing, it has not applied to be joined as an interested party to help those parties ventilate their grievances. In *Satrose Ayuma*<sup>78</sup>, *Mitu-bell*<sup>79</sup>, *Endorois*<sup>80</sup>, *Ogiek*<sup>81</sup>, and *William Musembi*<sup>82</sup>, the KNCHR would have been expected to offer a hand in investigating and moving the court for a declaration of the right to housing. With all the above constitutional mandate they never joined the suit. It also not known to promote the right to economic rights through education yet it has the mandate to do so. It is the principal organ in ensuring ICESCR is complied with, however, there is no evidence on its work. More importantly, it need not be moved to investigate the abuse and violation of the right to housing. The violation of the right to housing is so blatant but it has rarely taken definite steps to ensure compliance.

The whole blame, however, should not be laid on KNCHR. It would be proper to consider factors that may hinder their performance. First, the majority of the commissioners are politically

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<sup>72</sup> Kenya National Human Rights and Equality Commission established under article 59(1) of the Constitution of Kenya, 2010.

<sup>73</sup> Established under section 3 of Kenya National Commission on Human Rights Act, Act No. 14 of 2011 pursuant to Article 59(4) of the Constitution.

<sup>74</sup> Section 8 of Kenya National Commission on Human Right Act, Act no. 14 of 2011.

<sup>75</sup> Ibid.

<sup>76</sup> Gordon Brown (n 1) 81.

<sup>77</sup> KNCHR Act (n 74).

<sup>78</sup> *Satrose Ayuma* (n 50).

<sup>79</sup> *(Mitu-Bell)* (n 47).

<sup>80</sup> *Endorois* (n 51).

<sup>81</sup> *Ogiek* (n 55).

<sup>82</sup> *William Musembi* (n 44).

appointed.<sup>83</sup> It is the president who nominates the chairperson. Most of the other commissioners are nominated by government ministries and state agencies.<sup>84</sup> This might bring political interference with their mandate especially in areas where the state has an interest. Secondly, the commission is financed by the State and probably it has to please the political class to get adequate finance.<sup>85</sup>

The judiciary has a pivotal role to play in upholding human rights to housing. However, only an independent judiciary can render impartial justice. Whenever there is an impending violation of the right to housing, individuals will seek refuge in the court of law for orders of injunctions. In many instances, it is the poor who are faced with the demolition of their houses by the state in the name of construction of infrastructures or by very rich individuals. Kenyan courts have been accused of corruption.<sup>86</sup> With a corrupt judiciary, the rich will obtain a court order to evict the poor from their houses or the poor will lose the suits in court. The tenants will also lose their suit in rent tribunal and in the court.

An independent Judiciary will interpret the constitution properly and enforce the right to housing. There are, however have had instances where the courts have upheld the right to housing without fear. For instance, in *Mitu-bell*<sup>87</sup> and *William Musembi case*<sup>88</sup>, Mumbi J correctly interpreted article 43 of the Constitution and found the state liable of violation. The judge was courageous enough to order the parties to return to court for the court to supervise the implementation of its order on the right to housing.<sup>89</sup> Although the judgment was reversed by the Court of Appeal, the judgment is a living proof of an independent judiciary in the enforcement of the economic right. Court of Appeal, however, delivered a retrogressive judgment which does not promote the right to adequate housing by holding that court lacks the power to supervise its judgment.<sup>90</sup>

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<sup>83</sup> Section 11 of Kenya National Commission of Human Rights Act, Act No. 14 of 2011.

<sup>84</sup> Ibid.

<sup>85</sup> Section 45 of Kenya National Human Right Commission Act, Act No. 14 of 2011.

<sup>86</sup> Ethic and Anti-corruption Commission, '*A Study on Corruption and Ethics in the Judicial Sector*' (2014) Research and Transformation Department Ethic and Anti-Corruption Commission 41, <<http://www.eacc.go.ke/docs/Judicial%20study%20-%20Full.pdf>> Accessed on 11<sup>th</sup> August 2018.

<sup>87</sup> *Mitu – Bell* (n 47) para 73.

<sup>88</sup> *William Musembi* (n 44) para 85.

<sup>89</sup> *Mitu – Bell* (n 47) para 79.

<sup>90</sup> See *Kenya Airport Authority v Mitu-Bell Welfare Authority & 2 others* [2016] eKLR.

Kenya police service is another State agency that can help implement and enforce the right to housing. Conversely, the police service has been accused of participating in violation of the right to housing.<sup>91</sup> In *William Musembi case*, the police were found liable for giving protection to rowdy who demolished the houses of the poor villagers. The police who are supposed to enforce the court orders in preventing the unlawful demolition of houses have been found liable of disobeying the court order. With this blatant disregard of rule of law, it will be difficult to realize full realization of the right to housing.

Kenya being a signatory to ICESCR<sup>92</sup>, it has an obligation to file a report to CESCR on measures it has taken in ensuring the realization of social economic rights.<sup>93</sup> The last report by Kenya through the KNHRC, it gave very little on the realization of economic rights. The report did not address the right to housing.<sup>94</sup>

The government of Kenya has argued that the implementation of economic rights will be determined by the availability of resources and that it should be realized progressively.<sup>95</sup> Available resources those resources within the country and those made available through assistance from international community.<sup>96</sup> The Kenyan courts have progressively pronounced itself on progressive realization of economic rights. The provision of adequate to housing should not wait until the government of Kenya feels it is ready.<sup>97</sup> The government should, therefore, allocate enough resources to build houses for Kenyans.

### **3.5 The role of Citizens and other bodies in the realization of the right to housing.**

According to Hohfeld, legal rights have correlative of legal duty.<sup>98</sup> The citizens of Kenya are the right bearers and thus have the duty on the realization of the right to housing. Although the state is the principal duty bearer in fulfilling the right to housing, the citizens and other bodies have a

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<sup>91</sup> See *Mitu-Bell* (n 47) and *William Musembi* (n 44).

<sup>92</sup> Kenya acceded to ICESCR on 1<sup>st</sup> May 1972.

<sup>93</sup> Article 16 (1) of ICESCR.

<sup>94</sup> UN Economic and Social Council (ECOSOC), *Compilation of information from national human rights institutions*, 27 January 2017, <<http://www.refworld.org/docid/58a18abb4.html>> [accessed 11 August 2018]

<sup>95</sup> *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others* [2013] eKLR, para 11.

<sup>96</sup> *Limburg Principles on implementation of International Covenant on Economic Social and Cultural Rights*, 26 <[http://www.concernedhistorians.org/content\\_files/file/to/142.pdf](http://www.concernedhistorians.org/content_files/file/to/142.pdf)> Accessed on 11 November, 2018.

<sup>97</sup> *Mitu-Bell v Kenya Airport Authority* (n 47) Para 53.

<sup>98</sup> Nikolai Lazarev, '*Hohfeld's Analysis of Rights: Essentials Approach to a conceptual and Practical Understanding of the nature of Rights*' (2005) *Murdoch University Electronic Journal of law* 69 <<http://classic.austlii.edu.au/au/journals/MurUEJL/2005/9.html>> Accessed on 5th April 2018.



role to play since the realization of the rights requires a joint effort of the state and the citizens. The state should only supplement the personal efforts of achieving the right adequate housing where necessary.<sup>99</sup> For instance, the Convention on the Rights of Child (CRC) requires the states parties to come to the assistance of the parents in providing housing to a child only in the case of need.<sup>100</sup> The parents will, therefore, take the effort to provide housing for the children and the state will supplement their effort.

The responsibility of Kenyan citizens requires them to recognize that the fulfillment of some rights to housing is costly which may render rights not immediately achievable.<sup>101</sup> There is, therefore, need for the government of Kenya to have a democratic dialogue with the citizens on how to fulfill the right to housing.<sup>102</sup> The citizen should be educated on the role of the government and their roles in their achievement of the achievement of adequate housing as the recognition of dialogue will assist in advancing its fulfillment.<sup>103</sup> It is everyone's responsibility to respect and look out for each other's rights.<sup>104</sup>

The slum dwellers in *Kibera, Mathare Korogocho* among others, should not just sit and wait for the state to provide houses to them. They need to work toward the achievements of the rights by looking for individual resources. The State should add to their individual measures. However the State has to create the capability to enable them to provide houses for themselves as proposed by Amartya Sen.<sup>105</sup> As rightly held by Courts in South African, other agents within society, including individuals citizens, must be given capacity through legislation and other government policies to gain the capacity to provide housing.<sup>106</sup> It is this enabling that will create the capacity among Kenyans to provide housing for themselves.

Civil society organizations and non-governmental organizations (NGO) dedicated to human rights should play a frontline role in highlighting the importance of the rights to housing, by naming and shaming government and private entity whenever they are guilty of violations of the right to

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<sup>99</sup> Asbjorn Eide (n 8) 138.

<sup>100</sup> Article 27(3) of the Convention on the Right of the Child, 1989.

<sup>101</sup> Gordon Brown (n 1) 77.

<sup>102</sup> *ibid*

<sup>103</sup> *ibid*

<sup>104</sup> *ibid* 76.

<sup>105</sup> Debra Satz, Amartya Sen's '*the Idea of Justice: What Approach, Which Capabilities*', (43 Rutgers L.J. 2012) 286.

<sup>106</sup> Government of the Republic of South Africa and others v Grootboom and others, 2000(11) BCLR 1169, 41.

housing. Kenya government should, however, make a good environment for NGO to enable them to promote, protect, and investigate violations of human rights to housing.

The private employers have a role in ensuring their employees are living in decent housing. They should give housing allowances that would enable them to afford a decent housing. The financial institutions should give housing loans at reasonable loans to enable many people house themselves. The multinational corporation operating in Kenya have a duty to develop a culture that respects the right to housing. They should not engage in businesses that will negatively affect the citizens' right to housing such as contamination of their living environment.

### **3.6 Conclusion**

The Kenyan government has the primary role in safeguarding the right to housing. When the government observes its obligations to respect, protect, promote and fulfill the right to housing, it will have discharged its duty as there will be no violation attributable to it. The horizontal application to observe the right to housing also apply to individual citizens and companies and can be held liable for the violation. The right to housing, however, does not mean that the State should provide housing to everybody. The State should create capacity among the citizens to provide housing for themselves and only come in when the citizens are unable to house themselves for reasons beyond their control. This capability should include legislative and policy measures, for example, an enactment of a comprehensive Housing Act and workable housing policy.

The State, due to the power it yields, should ensure its officers and agents do not violate the right to housing and on the forefront in respecting the right to housing. It should also allocate adequate resource for the provision of housing. The citizens, the judiciary, NGOs, corporations have a role to play in the realization of the right to housing.

## CHAPTER FOUR

### COMPARATIVE STUDY OF THE RIGHT TO HOUSING

#### 4.0 INTRODUCTION

Inadequate housing is not just a Kenyan problem but a global problem. Research has revealed that over 600 million people living in urban areas and another one billion living in rural areas live in poor quality houses which are overcrowded with inadequate adequate water, poor sanitation, and poor garbage collection.<sup>1</sup> In spite of the widespread housing problem, some countries have made great strides in upholding the right to housing. This chapter will look at the experiences of the right to housing in Singapore and South Africa and compare them to Kenya. It will conclude by analyzing the measures that Kenya can learn from the two countries in upholding the right to housing.

#### 4.1 Right to housing in South Africa

The litigation of the constitutional right to housing in South Africa, makes the country stand out.<sup>2</sup> South Africa can trace its housing problems from the Apartheid regime that extended racial discrimination to the housing.<sup>3</sup> Occupation of land on basis of race was established long before apartheid in 1948.<sup>4</sup> However, before 1948, the South Africa colonial government appeared a little mindful of the natives with regard to housing.<sup>5</sup> For instance, in 1920, the government passed a housing Act that vested the local authority with the responsibility of providing better housing to the poor community who included white and native population.<sup>6</sup> The Act came into force in 1923

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<sup>1</sup> Millon Kothari, *'Privatizing Human Rights: The Impact of Globalisation on Adequate, Housing, Water and Sanitation'* (2012) 1, <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN010131.pdf>> Accessed on 13<sup>th</sup> August 2018.

<sup>2</sup> Jackie Dugard, Michael Clerk, Kate Tissington & Stuart Wilson, *The Right to Housing in South Africa*, (Foundation for Human Rights, 2016) 2.

<sup>3</sup> Lucy A. Williams, *'The Right to Housing in South Africa: An Evolving Jurisprudence'* (2014) *Columbian Human Rights Law Review* 817, <<file:///C:/Users/HP/Downloads/SSRN-id2440718.pdf>> Accessed on 11 November 2018.

<sup>4</sup> Ibid 819.

<sup>5</sup> Housing, *'State Assisted Housing in South Africa'*, (1927) 25 *Monthly Lab Rev* 73 <<file:///C:/Users/HP/Downloads/HousingStateAssistedHousi.pdf>> Accessed on 17 August 2018.

<sup>6</sup> Ibid.

when the government gave loans to the local government to construct houses.<sup>7</sup> The plan, however, could not stay for long and with the apartheid, segregation in housing was politically entrenched.

Many Apartheid laws and policies were enacted contributing to among other things, unequal racial approach to housing and displacement of natives to areas that were racially defined.<sup>8</sup> Such laws included the Prevention of Illegal Squatting Act (PISA) that subjected the “unlawful occupiers” to criminal prosecution and summary eviction.<sup>9</sup>

Soon after independence, 1994, The African National Congress party (ANC), adopted as a White Paper that set out housing policy for South Africa<sup>10</sup> provided a framework for building one million government-funded houses within first five years of ANC in office.<sup>11</sup> In the policy, the National Housing Subsidy Scheme (NHSS) made capital subsidies available for housing to those who qualified.<sup>12</sup> The private construction companies constructed the housing for the government.<sup>13</sup>

The Government of South Africa in 1996, was quick to adopt, a constitution that included in its Bill of Rights, housing as a social and economic right.<sup>14</sup> The Constitution explicitly mandates the government to "promote and fulfill" SER.<sup>15</sup> Courts are also obligated when interpreting the constitution, to promote values that promote an open and democratic society.<sup>16</sup>

The right to adequate housing is provided for under Section 26(1) of the South African Constitution. At section 26(3), the constitution prohibits evictions and demolition without a court order. A court of must also take into account all the relevant factors before ordering an eviction.<sup>17</sup>

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<sup>7</sup> ibid

<sup>8</sup> Lilian Chenwi, 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (J.L. & Soc. Pol'y 2015)68

<sup>9</sup> Lucy William, (n 3) 824.

<sup>10</sup> Robina Goodlad, 'The Housing Challenge in South Africa' (Sage Publications Ltd, 1996)16, 36.

<sup>11</sup> Kate Tissington, *A resource Guide to Housing in South Africa 1994 -2010: Legislation Policy, Programme and Practices* (SERI, 2011) 8-12 < [https://housingfinanceafrica.org/app/uploads/SERI\\_A-Resource-Guide-to-Housing-in-South-Africa\\_Feb11.pdf](https://housingfinanceafrica.org/app/uploads/SERI_A-Resource-Guide-to-Housing-in-South-Africa_Feb11.pdf)> Accessed on 2 September 2018.

<sup>12</sup> Ibid 74.

<sup>13</sup> Ibid 80.

<sup>14</sup> Lucy A. Williams (n 3) 817.

<sup>15</sup> Section 7(2) of the Constitution of South Africa, 1996.

<sup>16</sup> Section 39(1) (a) of the Constitution of South Africa, 1996.

<sup>17</sup> Kate Tissington (n 11) 12.

The South Africa Constitution also recognizes housing rights in relation to children and detained persons under section 28(1) (c) and 35(2)(e).<sup>18</sup> It is important to point out that the right of children to a home is not limited by access, progressive realization or available resources.<sup>19</sup>

The Primary legislation in South Africa providing for the right to Housing is the Housing Act, 1997<sup>20</sup> that entrenched the policy principles outlined in 1994 white paper.<sup>21</sup>The National Standard (2007) was introduced under section 3(2) of Housing Act to provide the minimum technical specification for dwelling houses, <sup>22</sup>for example, two-bedroom house with a separate bathroom and a toilet.<sup>23</sup> Social Housing Act (2008) was enacted for purposes of establishing and promoting a sustainable social housing environment among other functions.<sup>24</sup> Other legislation relevant to housing enacted in South Africa government are PIE Act (1998) and Rental Housing Act (1999) which will be discussed later on this chapter.

The courts of law in South Africa have developed housing rights more than any other social and economic right in the Constitution.<sup>25</sup> The evictions and forced removal during apartheid can partly explain the focus of the constitutional court on the right to housing.<sup>26</sup> One of the landmark case on the right to adequate housing is *Government of the Republic of South Africa v Grootboom (Grootboom case)*.<sup>27</sup>The court ruled that the right to housing means more than brick and mortar holding that land social amenities such as water and sewage disposal are parts of the right. The court further added that individual must be enabled by the state to provide housing for themselves.<sup>28</sup> This was a progressive interpretation of the right to housing. The Grootboom case developed a reasonableness as a yardstick to measure the policy, legislative and other measures

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<sup>18</sup> Lilian Chenwi (n 8) 73.

<sup>19</sup> Ibid.

<sup>20</sup> Kate Tisssington (n 11) 14.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 19.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 20

<sup>25</sup> Lucy Williams (n 3) 819.

<sup>26</sup> Ibid.

<sup>27</sup> 2000(11) BCLR 1169.

<sup>28</sup> Ibid para 41.

adopted by the government to achieve progressive realization of the right to housing.<sup>29</sup> The court developed a base to require an explanation from the state on the measure it has taken to realize the right to housing.<sup>30</sup> Finally, the court elaborated on the duties to respect the right to housing by stating that the State should desist from interfering with enjoyment of rights of others.<sup>31</sup> The Court declared that different levels of government to provide housing to those in desperate need.<sup>32</sup>

The *Grootboom* case impacted positively on housing rights in South Africa even though Ms. Grootboom died before she could receive a permanent house from the government.<sup>33</sup> For instance, the judgment led to the development of the 2003 Housing Assistance in Emergency Situations and establishment of a program for emergency housing and upgrading of informal settlements.<sup>34</sup>

South African courts have also employed a concept known as the meaningful engagement while court is seized with social economic matters.<sup>35</sup> The concept was employed *Occupiers of 51 Olivia Road v. City of Johannesburg, (Olivia road case)*<sup>36</sup> where over four hundred occupiers of two buildings contested an order that authorized their eviction as the building was allegedly insecure.<sup>37</sup> Court ordered to meaningfully engage with an aim to resolve the differences and that the engagement be based on constitutional values.<sup>38</sup> The court underscored on the vulnerability of people in need of houses.<sup>39</sup>

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<sup>29</sup> Lucy A Williams (n 3) 821.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 823.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Kate Tissington (n 11) 94. Grootboom thus gave rise to a right to emergency housing and a means for its enforcement, at least through the application of the Emergency Housing Programme.

<sup>35</sup> Lucy A Williams (n 3) 828.

<sup>36</sup> 2008 (3) SA 208 (CC) (S. Afr.).

<sup>37</sup> Ibid 1. These evictions were pursuant to the National Building Regulations and Building Standards Act 103 of 1977 and section 20 of the Health Act 63 of 1977.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

Meaningful engagement was further employed in *Olivia road case*, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,<sup>40</sup> the Court required respondents<sup>41</sup> to engage meaningfully with a huge informal community that was to be evicted to pave way for construction of formal housing.<sup>42</sup> The court emphasized on respect for dignity during the negotiation which included provision of alternative accommodation.<sup>43</sup>

Other than Housing Act, South Africa has enacted two important legislation that has enhanced promotion of right to housing. The two legislations are the Rental Housing Act<sup>44</sup> and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).<sup>45</sup> The Rental Housing Act has created a mechanism to balance the rights of tenants and the landlord and prevention of unfair practices and exploitation.<sup>46</sup>

During the apartheid-era *Prevention of Illegal Squatting Act (PISA)* subjected “unlawful occupiers” to summary eviction and criminal prosecution.<sup>47</sup> The experiences of the PISA led to enactment of the PIE Act which gave effect to Section 26(3) of the Constitution<sup>48</sup> It further repealed PISA and decriminalized squatting. The Act further sought to protect the dignity of evictees by providing procedural requirement on eviction.<sup>49</sup> One of the requirement is for municipality to consider whether available land where the occupier has occupied the land for more than 6 months.<sup>50</sup>

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<sup>40</sup> 2010 (3) SA 454 (CC) (S. Afr.).

<sup>41</sup> The eviction was not sought by the City of Cape Town, which owned the property, but rather by Thubelisha Homes Ltd., a public company established by the government to undertake housing development. *Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) at 497 para. 126 (S. Afr.).

<sup>42</sup> Lucy A Williams (n 3) 831.

<sup>43</sup> *Joe Slovo v Olivia Road Slovo* (n 40) 529-30 para 238.

<sup>44</sup> Rental Housing Act, 1999, Act No 50 of 1999.

<sup>45</sup> Lucy A Williams (n 3) 824.

<sup>46</sup> Rental Housing Act 50 of 1999, Preamble (S.Afr.).

<sup>47</sup> Lucy A Williams (n 3) 824.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Section 4 of PIE Act, 1998.

According to section 6 of PIE Act, duration of occupation, circumstances in which occupiers came to the disputed land, and the availability an alternative shelter have to be taken into account before eviction.<sup>51</sup>

The principles of white paper 1994 were revised in 2004, through the adoption Breaking New Ground (BNG) 2004 outlining strategies to fulfill the right to housing.<sup>52</sup> This underscored the consistency in the government of South Africa to progressively attain the right to adequate housing. Although South Africa has not achieved full realization of right to housing, it has made great stride in promotion of the right. As of June 2013, it was in need of 2.1 million units.<sup>53</sup>

#### **4.2 Right to Housing in Singapore**

Singapore is a city-state estimated to be of 700 square kilometers with a growing population.<sup>54</sup> The initial population in 1819 at the British founding was 150.<sup>55</sup> The population has grown through immigration mainly from Malaysia and surrounding countries.<sup>56</sup> Its population stood at 4.8 million as at 2008<sup>57</sup> where 90% of this 4.8 million lived in High-rise housing which was seen by the government as a key strategy for providing high-quality living to its growing population.<sup>58</sup> Land scarcity and high population density provided justification for the government interference in land ownership and house sector.<sup>59</sup>

The housing problems in Singapore can be traced to British colonial period in 1819.<sup>60</sup> The British in Singapore did not consider housing as part of the responsibilities of the Government.<sup>61</sup>

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<sup>51</sup> Ibid.

<sup>52</sup> Kate Tissington (n 11) 21.

<sup>53</sup> Lilian Chenwi (n 8) 69.

<sup>54</sup> Belinda Yuen, 'Reinventing Highrise Housing in Singapore' (2009) US Department of Housing and Urban Development 3, < <https://www.jstor.org/stable/20868687>> Accessed on 11 November 2018.

<sup>55</sup> Ibid.

<sup>56</sup> Aya Gruber, 'Public Housing in Singapore: The Use of Ends – Based Reasoning in Quest for Workable System' (1997) 38 Harvard International Law Journal 236.  
<<file:///C:/Users/HP/Downloads/AyaGruberPublicHousinginS.pdf>>Accessed on 16<sup>th</sup> August 2018.

<sup>57</sup> Belinda Yuen (n 54) 3.

<sup>58</sup> Ibid

<sup>59</sup> Sock – Yong Phang and Mathias Helble 'Housing Policies in Singapore' (2016) ADBI Working Paper series 3, <[ibidhttps://www.adb.org/sites/default/files/publication/181599/adbi-wp559.pdf](https://www.adb.org/sites/default/files/publication/181599/adbi-wp559.pdf)> Accessed on 17<sup>th</sup> August 2018.

<sup>60</sup> Aya Gruber (n 56) 236.

<sup>61</sup> Ibid.



However, the manner in which Singapore government handled the post-colonialism era has largely determined its current status of housing.<sup>62</sup>

To fully appreciate the effort made in Singapore in housing, it would be prudent to plunge in the history of Singapore. After World War II, 84% of Singapore was a very poor country whose shelters were defined by overcrowding and general lack of essential services.<sup>63</sup>

After World War II, the government of Singapore made public housing a top political priority and a major plan to rejuvenate its economy.<sup>64</sup> The People's Action Party who assumed power in 1959, were determined to have lasting success on housing.<sup>65</sup> In 1967, the Government adopted a Concept Plan known as ring plan for rapid expansion of the urban center and the creation of high-density residential areas surrounding the urban center.<sup>66</sup> The plan called for among others, the construction of residential structures to accommodate a population of 3.7 million by the year 2030.<sup>67</sup>

The Singapore's initial steps in implementing its housing program was to enact legislation, the Land Acquisition Act and the Housing and Development Act, granting the government powers and control over the use of private property.<sup>68</sup> The Housing and Development Act severely restricted private ownership of property.<sup>69</sup>

Singapore government not only secured the land for construction of houses but ensured the construction was well financed.<sup>70</sup> The Housing and Development Board (HDB) financed the housing system through a combination of low-rate government loans, government subsidies, and revenues raised from HDB operations.<sup>71</sup> The HDB financed its budgeted capital expenditure

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid 239.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid 240.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid

<sup>70</sup> Aya Gruber (n 56) 245.

<sup>71</sup> Ibid.

through the housing development and mortgage financing whose interest were 7.75% and 6% respectively.<sup>72</sup> There were also direct subsidies from the government.<sup>73</sup>

The government Singapore acquired sufficient land, cleared squatters and owner-occupiers from the land by relocating them to temporary residences during the construction of the housing units.<sup>74</sup> There were no arbitrary eviction.<sup>75</sup> The government provided reasonable compensation for to those who were ousted from their homes.<sup>76</sup> The HDB cleared enough land and embarked upon its ambitious program such that by 1995, about 721,881 units had been constructed.<sup>77</sup>

The Singapore government went to an extent of establishing the Home Ownership Scheme established in 1964, where Singaporeans could use their compulsory savings in the Central Provident Fund to help repay loans obtained from the HDB for the purchase of homes.<sup>78</sup>

The HDB provided housing at subsidized costs.<sup>79</sup> Housing prices were lower than market prices and construction costs, resulting in a deficit from the operating costs of the sale of flats.<sup>80</sup> HDB further provided rental flats at subsidized rates, thus creating rental deficits.<sup>81</sup> The rates were kept low to enable the residents to use their savings to repay their mortgage.<sup>82</sup>

The population of Singapore was growing fast and therefore it had to put in measures to put in measures curb population growth.<sup>83</sup> For instance, in 1965, the government implemented the Family Planning Program, to discourage large families.<sup>84</sup> A family three children or more were forced to wait longer for public housing.<sup>85</sup>

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 249.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 251.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 246.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 259.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

Despite the growing population, Singapore has managed to house its citizens. For instance, the population in 1997,<sup>86</sup> stood at 2.93 million, in 2008<sup>87</sup> it stood at 4.8 million, while in 2015 it was 5.54 million.<sup>88</sup> In 1997, 86% of Singapore's 2.93 million people resided in Housing and Development Board (HDB) flats.<sup>89</sup> 81% of HDB residents owned their flats, leaving only five percent as renters.<sup>90</sup>

The government of Singapore has continued to adjust its housing policy as it respond to various housing challenges.<sup>91</sup>The table below the nature of house ownership in Singapore. The homeownership has increased over time with only a small percentage left.<sup>92</sup>

*Table 1: Housing Stock, Housing Supply, and Homeownership Rate, 1970–2015*

Year	Population '000'	Total housing stock	HBD Housing	Private Housing	Person per dwelling unit	HBD Dwellings as proportion of Housing stock	Resident Home – Ownership rate
1970	2,075	305,833	120,138	185,695	6.8	39%	29.4%
1980	2,414	467,142	337,198	129,944	5.2	72%	58.8%
1990	3,047	690,561	574,443	116,118	4.4	83%	87.5%
2000	4,017	1,039,677	846,649	193,028	3.9	81%	92.0%
2010	5,076	1,156,732	898,532	258,200	4.4	78%	87.2%
2015	5,535	1,296,304	968,856	327,448	4.3	75%	90.3%

Sources: Data from Singapore government publications and websites<sup>93</sup>

<sup>86</sup> Aya Gruber (n 56) 236.

<sup>87</sup> Belinda Yuen (54) 3.

<sup>88</sup>Pang and Helble (n 59) 3.

<sup>89</sup> Aya Gruber (n 56) 236.

<sup>90</sup> Ibid.

<sup>91</sup> Pang and Helble (n 59) 5.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

The houses constructed by HDB were one-room to five-room units containing a kitchen and a bathroom.<sup>94</sup> Social, recreational, and transportation amenities are also provided.<sup>95</sup>

The government of Singapore restricted the free operation of Singapore's housing markets.<sup>96</sup> HDB owners and renters had their ownership and transfer restricted.<sup>97</sup> Flat owners could only sell to private citizens before expiry of at least two years and had to wait for at least thirty months after the sale before applying for a new house from government.<sup>98</sup> To restrict more commercial housing, Singapore government imposed a levy on the private sale of public housing units.<sup>99</sup> The concept can help in controlling the house beneficiaries.

Singapore government promoted the right to housing through massive campaign of racial integration.<sup>100</sup> It also ensured contentment with public housing, by educating its constituents about socialized living.<sup>101</sup> The government further introduced into all schools a moral education program based on both Confucian ethics and government policy goals to promote the awareness and the practice of moral and traditional values among its citizens.<sup>102</sup>

To house its citizens, Singapore has had no regard to the right to land. Instead, Singapore government employed ends-based reasoning to justify its housing program.<sup>103</sup> The government had massive powers to take private land. Though Singapore has not respected the rights to private property, it has eradicated slums and homelessness and has put spotless high rises where there once was squalor.<sup>104</sup>

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<sup>94</sup> Ayer Gruber (n 56) 252.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid 255.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid 256.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 257.

<sup>101</sup> Ibid 258.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid

### 4.3 Lessons from the comparative study

The first lesson the government of Kenya can learn from this comparative study is addressing historical problems related to housing. The same way the housing problem in South Africa and Singapore<sup>105</sup> is traced from British colonial period, housing problem in Kenya is also traced from the British colonial period.<sup>106</sup> There is need to address the land issue without which it would be difficult to achieve full realization of the right to housing.

Land in Kenya was the most important instrumental weapon that led to independence in 1963.<sup>107</sup> However, the independence did not translate into the land reverting to Kenyans.<sup>108</sup> The land also ended in the hands of the rich few.<sup>109</sup> Legislations that can grant the State the control of private property would help the government to get sufficient land for constructions of houses. Singapore government successfully adopted such measures.<sup>110</sup>

The second lesson the country can learn is controlling its population. Singapore gave housing priority to family with few members so as to encourage the people to plan their families.<sup>111</sup> At independence in 1960, Kenya had a population of 8.1 million people.<sup>112</sup> In 2017, the population had grown to 46 million people.<sup>113</sup> With a manageable population, it will be easier for the government to plan on how to house its citizens.

The third lesson is enacting legislation designed to implement right to housing. The lesson can be learned from South Africa which enacted Housing Act, Social Housing Act, Rental Housing Act, PIE Act, 1998.<sup>114</sup> Similar legislations in Kenya would enable the country to define right to housing,

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<sup>105</sup> Ibid 236.

<sup>106</sup> Lawrence Juma, *'Nothing but a Mass of Debris: Urban Eviction and the Right of access to Adequate Housing in Kenya'* (2012) 12 Afr Hum Rts 487.

<sup>107</sup> A Okion Ojigbo, *'Ethnicity and Public land Policy in Kenya'* (1970) Historical Society of Nigeria, 363  
<<https://vpn.uonbi.ac.ke/proxy/https://www.jstor.org/stable/pdf/41856862.pdf>> Accessed on 4 August 2018.

<sup>108</sup> Ibid

<sup>109</sup> Catherine Boone, *'Land Conflict and Distributive Politics in Kenya'* (2012) Cambridge University Press 81,  
<<https://vpn.uonbi.ac.ke/proxy/https://www.jstor.org/stable/pdf/41804129.pdf>> Accessed on 4 August 2018.

<sup>110</sup> Aya Gruber (n 56) 236.

<sup>111</sup> Ibid 246

<sup>112</sup> Trading Economics, *'Kenya Population 1960-2018'* <<https://tradingeconomics.com/kenya/population>>  
Accessed on 5 September 2018.

<sup>113</sup> Ibid.

<sup>114</sup> Lilian Chenwi (n 8) 20.

define the right of tenants and landlords, and address unlawful evictions. Since the Bill of Rights in Constitution of Kenya is said to have borrowed heavily from that of South Africa, adopting similar legislations would help in furthering the right to housing in Kenya.<sup>115</sup> Kenya is yet to enact legislation to further the rights provided in article 43 of the Constitution. The only existing legislation on housing is Housing Act which was enacted in 1953 which is yet to be aligned with the Constitution 2010. The usefulness of Kenya Housing Act has thus dissipated.

The Constitution of South Africa at section 26(3) prohibits evictions and demolition without a court order.<sup>116</sup> A court of law must also take into account all the relevant factors before ordering an evictions.<sup>117</sup> The National Assembly should consider amending the Constitution of Kenya to prohibit demolitions and evictions without a court order.

Implementation of court decision is another lesson Kenya can learn from South Africa. For Instance, the Grootboom case in South Africa led to development of the 2003 Housing Assistance in Emergency Situations and establishment of a program for emergency housing and upgrading of informal settlements.<sup>118</sup> Since the delivery of *Mitu-Bell*<sup>119</sup> judgment in Kenya, there is no concrete legal framework developed to ensure measures suggested by the court were implemented. However, the enactment of Land laws (Amendment) Act 2016<sup>120</sup> provided mandatory procedure<sup>121</sup> to be followed during eviction, however, the procedure does not appear to be followed. This is a sad situation for a country that hold itself as a right regime.

The need to develop a test to measure the policy, legislative and other measures for achievement of progressive realization of the right to housing is a great lesson from South Africa. South African courts have developed the reasonableness test.<sup>122</sup> Although the Constitution of Kenya has

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<sup>115</sup> Ghai JC and Ghai Y, “*The Contribution of the South African Constitution to Kenya's Constitution*” in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (2018) Cambridge University Press 253-253.

<sup>116</sup> Section 26(3) of the Constitution of South Africa, 1996.

<sup>117</sup> Kate Tissington (n 11) 12.

<sup>118</sup> Kate Tissington (n 11) 44

<sup>119</sup> *Mitu-Bell welfare Society v Attorney General & 2 others* (2013) eKLR.

<sup>120</sup> Assented to on 31<sup>st</sup> august 2016.

<sup>121</sup> Section 152 G (1) of Land Laws (Amendments) Act 2016.

<sup>122</sup> Lucy Williams (n 3) 817.

mandated the State to take legislative, policy and other measures including the setting of standard to ensure the realization of the rights,<sup>123</sup> no such test have been developed.

Kenyan courts should learn from South African courts<sup>124</sup> to meaningfully the parties involved in house disputes with an aim of settling the disputes. The move would help in reducing case backlog and also fasten the resolution of disputes related to housing. A mundane form of engagement can be found in the Kenya Civil procedures rules, Kenya 2010, which provide for parties to a suit to try to resolve contested issues.<sup>125</sup> The Constitution of Kenya provides that the courts shall be guided by alternative forms of dispute resolution.<sup>126</sup> The mechanism are yet to be fully embraced by Kenyan courts with regard to social and economic rights.

Kenya should borrow from Rental Housing Act of South Africa to balance the rights of tenants and landlords.<sup>127</sup> This would protect all tenants irrespective of the amount of rent charged. In Kenya, the only Act that appears to protect residential tenants is Rent Restriction Act.<sup>128</sup> The Act applies to rental houses whose rent does not exceed two thousand five hundred Kenya shilling.<sup>129</sup> With the rise in cost of living, it is difficult to find a house whose rent fall below that amount. The Act has not been amended to reflect the current economic situation and therefore not useful in handling the current housing problem in Kenya.

PIE Act of South Africa made it mandatory for evictees to be provided with an alternative shelter before eviction and consider the duration of occupation of squatters.<sup>130</sup> This is fundamental procedure that should be adopted by Kenyan authorities and which would preserve the dignity of the evictees. The Constitution of Kenya does not contain an express provision on how the eviction should be carried out. The Kenya *Land (Amendment) Act 2016*, is wanting in many ways as it does

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<sup>123</sup> Article 21(2) of the constitution of Kenya, 2010.

<sup>124</sup> *Occupiers of 51 Olivia Rd. v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.).

<sup>125</sup> Order 11 rule 3 of civil procedure rules 2010.

<sup>126</sup> Article 159 of the Constitution of Kenya, 2010.

<sup>127</sup> Rental Housing Act (n 46)

<sup>128</sup> CAP 296 of laws of Kenya

<sup>129</sup> Section 2(c) of Rent restriction Act

<sup>130</sup> Section 4 of PIE Act, 1998.

not consider the length of time the evictees have been on the land and availability of alternative land before eviction. Kenya Land (Amendment) Act 2016 should be amended to include these circumstance for preservation of the dignity of the evictees.

Making the cost of housing affordable is an essential lesson from Singapore. Singapore provided affordable loans, offered public housing at subsidized costs, and made the duration of loan longer.<sup>131</sup> In Kenya, housing has been commercialized such that only a small percentage are able to afford decent housing.<sup>132</sup> If the government of Kenya can adopt similar measures, majority of Kenyans would afford houses.

Finally, the government of Kenya should learn from Singapore to adopt Highrise housing so as to house its growing population. This would work well in the cities and major town which are characterized with high population.

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<sup>131</sup> Ayer Gruber (n 56) 246.

<sup>132</sup> Marie Huchzermeyer, *'Slum Upgrading in Nairobi Within the Housing and Basic Market'* (2008) *Journal of Asian and African Studies* 20

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.7870&rep=rep1&type=pdf>> Accessed on 30 August 2018.



## **CHAPTER FIVE**

### **SUMMARY OF THE FINDINGS, CONCLUSION, AND RECOMMENDATIONS**

#### **5.0 Introduction**

This chapter will offer a summary of the findings, conclusion, and recommendations. Various measures that may be undertaken by the government to realize the right to adequate housing will be discussed. The recommendations are mainly informed by analysis of housing in South Africa and the Singapore which are extensively discussed in the previous chapter.

#### **5.1 Summary of the findings**

The purpose of the study was to carry out an evaluation of the right to housing in Kenya with a view to finding out the reason for poor realization of the right. The study set out five questions that it intended to provide answers in the course of the evaluation of the right to housing. The first question sought to establish the nature, content and the scope of the right to housing. The second question sought to know how the legal provisions on the right to housing can be realized. Third question sought to establish the nature of the violation of the right to housing. The fourth question sought to know the obstacles that hinder the realization of the right to housing. The last question sought to find out the possible areas of reforms that can lead to actualization of the right to housing.

The study had hypothesized that the existing laws, policies and regulatory framework are inadequate to achieve full realization of the right to housing in Kenya. The study has managed to prove the hypothesis. However, the study has established that the realization will require more than just legal framework. Political good will be required.

On the first question, the study has established that there is poor understanding on the nature, scope and the content of the right to housing in Kenya. There are laws providing the content and scope of the right but there is no awareness. The international laws declarations, general comments, and literature by respected authors have clarified on the right. However, illiteracy and poor creation of awareness of the right by the government has contributed to its ignorance.

The study has also evaluated the ways in which the legal provisions on the right to housing can be enforced in Kenya. The study has considered the necessary legislations, creating capacity among the citizens and involvement of individuals and non-state actors in the housing. More recommendations are considered below in this chapter. Possible reforms have also been recommended.

The study has identified various violations of the right to housing. They included the failure of the government to observe its primary responsibility of protect, promote and fulfill its obligation on the right to housing. It also established that individual citizens and private corporations can violate the right under the horizontal obligation.

A number of obstacles to the implementation and the enforcement of the right. They include lack of legislation on Housing; lack of understand of housing in Kenyan context, corruption, lack of political goodwill, high population, poverty, and illiteracy.

The study has achieved its objective of finding out the cause of poor realization of right to housing in spite of the right having been expressly provided in the Constitution of Kenya and international law.

### **5.2.1 Area of further research**

In the course of the research, it was established that some slum dwellers were once moved from slums in Kibera to decent houses in neighboring land, however, they rent out the houses and returned to the slums. This has been found to be an area that requires further research to establish the reasons why one would love to stay in a slum when he/she has been provided with a house by the State.

### **5.3 Conclusion**

The main aim of this paper was to evaluate and find out why the right to adequate housing in Kenya is far from being realized despite the right being recognized at international human rights laws as well as the Constitution of Kenya.

The paper proceeded in five chapters. The problem of research is introduced in chapter one. Kenya has represented itself as a right regime yet the housing right is neglected. Justification for the study is also made in this chapter, tracing the housing problem to the colonial period. The enactment of the constitution with an elaborate bill of rights and ratification of international conventions has not resolved the housing problems. Theories underpinning the right to housing, namely the natural law theory and Hohfeld's theory of rights have been analyzed. Lastly, a detailed literature review on housing has been undertaken for clearer understanding on right to housing.

Chapter two has evaluated the legal framework on the right to housing, its nature, scope, and contents. International law, regional and national law were evaluated and criticized. Non-binding law such as UDHR were analyzed. The chapter found that poor enforcement of the law was the major problem. The country is yet to enact laws that can help actualize the constitutional right to housing.

Chapter three has a general topic of realization of right to housing in Kenya. The chapter has discussed the role of the government of Kenya. The obligation has been found to be that of respecting, protecting, promoting and fulfilling the rights of Kenyans to adequate housing. An evaluation of various forms of violations of right to housing in Kenya has been made. The chapter has also discussed the implementation and enforcement of right to housing in Kenya. Lastly, the role of citizens of Kenya, corporations, and non-governmental bodies has been evaluated and the conclusion is that the achievement of the right requires joint effort of the state, citizens and other bodies.

Chapter four made a comparative analysis of the right to housing in Kenya, South Africa, and Singapore. The aim was to learn best practices and if they can be adopted in Kenya to enable realization of right to housing. South Africa has made great process in the realization to housing. The constitution has enshrined the right to housing and has subsequently, caused various legislative measures to be adopted in realization of the same. In turn, a number of laws promoting the right to housing have been enacted. The courts in South Africa have been of immense help making very progressive interpretation on the right to housing.

Singapore has provided housing to its citizens in a very unique way. It adopted legislation that enabled the government's massive power, acquire private property for construction of public houses. The government also provided cheap loans to the people to buy houses. The government

finally came up with a plan to control the population. Small families could get public houses faster than big families.

Full realization of the right to adequate housing in Kenya is achievable. It only requires commitment from the government and all people of Kenya. Various arms of the government ought to play their roles. The parliament should enact laws on housing such as Housing Act and Rental Housing Act. The executive should come up with positive policies and draft bills for promotion and protection of the right to housing. Cost of construction materials, loans to the citizens and creating capacity among the people should be included in the policy. The high population in Kenya is a challenge to full realization of the right and therefore needs to be controlled. The political good will be needed at the top. The people of Kenya must also play their role and avoid social evils such as corruption.

#### **5.4 Recommendations**

The research has unearthed a number of problems that hinder full realization of right to housing. To address those problems, a number of recommendations have been proposed. Some recommendations will require a short-time to implement, some medium while others will need a long-term. Some recommendations are continuous. For purposes of this study, a short term will mean a period of less than five years, medium term between five to ten years, while long term will entail ten years and above.

#### **5.5 Short-term recommendations**

The government will need to take immediate action to put the country on the path of the realization of the right. Some of the measures will have to be continuously reviewed to ensure they are in tandem with time. The following measures will require less than five years for the government to implement.

### 5.5.1 Legislative measures

The Constitution of Kenya provides legislation as one of the measures the state should take in order to achieve progressive realization of the rights guaranteed under article 43.<sup>1</sup> International Convention on Economic, Social and Cultural Rights has proposed similar measures.<sup>2</sup> There is, therefore, need for the parliament of Kenya to enact laws that expressly protect and promote the right to adequate housing.

The first step should be a comprehensive amendment of the Housing Act.<sup>3</sup> This Act was enacted in 1953. It needs to be amended so as to align it with the Constitution of Kenya, 2010. Kenya's Bill of Rights having borrowed heavily from the South African constitution, will be advisable to also borrow the contents of some of their Acts. Reading from the Housing Act in South Africa, the Kenya Housing Act should have a provision on slum clearance scheme, emergency housing, housing fund and mode of acquisition of land for construction of houses.

This paper proposes enactment of Rental Housing Act. The Act should define the rights of the tenant and the landlord. When the rights of the tenant are clear and protected by the state, the tenancy disputes will be minimized. The law should also make it mandatory for the landlord and the tenant to have a formal meeting to resolve the dispute before referring the dispute to the Rent Tribunal. The accessibility of the tribunal should be made easy and both parties enlightened on its procedures.

Due to the persistent problem of unlawful evictions, Illegal Eviction Act should be enacted. The law should define lawful and unlawful eviction. The procedure of lawful eviction should be provided. The time of eviction and duration of notices should be clearly prescribed. A provision for an alternative provision of shelter should be included in the Act so as to preserve the dignity of the evictees. Whether the evictees entered the land unlawfully should not be a consideration for provision of an alternative housing under the Act.

The right to housing cannot be separated from the right to land. As such, there is need for a temporary Act giving the government powers to acquire land for public housing. The Act may be referred to as Land Acquisition Act for Public Housing. The Act should stand repealed once

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<sup>1</sup> Article 21(2) of the Constitution of Kenya

<sup>2</sup> Article 1 of ICESCR.

<sup>3</sup> Cap 117 of the laws of Kenya.

enough land for public housing has been acquired by the state. The cost of land should provide for the purchase price of land in different areas to avoid loss of public land. This will prevent commercialization of land for public housing. The State should, however, provide alternative houses for people especially slum dwellers.

### **5.5.2 Granting supervisory powers to courts**

A number of judgments from the High Court of Kenya have been overturned on appeal on the basis of the courts lack of supervisory powers. For instance, *Mitu-bell Welfare Society vs Attorney General & 2 Others*<sup>4</sup> the High court had directed in its judgment, the State to return to court within 60 days of the judgment and table measures intended to take in realization of right to housing. The court of appeal ruled that the high court lacked post-judgment power to supervise its orders.

These measure may require constitutional amendment. If courts are granted supervisory powers on social economic rights after the judgment, the state will be compelled to initiate measures to actualize the right to housing.

The National Assembly has the central role in ensuring the court have supervisory power. It will require a constitutional amendment with two-third majority votes.

### **5.5.3 Promotion of the right to housing**

A number of Kenyans may not be aware of the existence of the right to adequate housing. The Kenya National Commission on Human Rights (KNCHR) should have the primary role of promotion of the right to housing. Since the mandate exist already in the constitution, the Kenya National Commission on Human Right Act should be amended by the National Assembly to require the KNCHR to make monthly report to the respective committee of parliament on the promotion of right to housing. Penalties should be imposed on the commissioners on noncompliance. The NGOs and professional bodies should make it their mandate to promote awareness to the right to housing. This can be done through seminars, workshop, and publication.

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<sup>4</sup> *Mitu-bell Welfare Society vs Attorney General & 2 Others* [2013]eKLR.

Professional bodies like the Law Society of Kenya should create legal camps to educate people on the right to housing.

The government should introduce housing in the primary school curriculum and inculcate ethical approaches to housing among the children. By doing this, an ethical culture will be created among Kenyans who will start seeing housing as a right rather than a business venture. The responsibility of developing the appropriate curriculum should be borne by the ministry of education through the Kenya Institute of Curriculum Development.

The measures should be initiated within five years however it has to be a continuous exercise.

#### **5.5.4 Setting aside special funds to deal with emergency housing needs**

Natural calamities and man-made risk has resulted to violations of housing rights. For example, heavy rains may result to displacement of people from their homes. Man-made risk may include bursting of dams destroying houses. The State should legislate for special funds to provide emergency houses during such disasters.

It would more effective if the fund is entrusted to the county government because it is closer to the people. However, the entities dealing with corruption must be keen to ensure the fund is not misused. The measure should be continuous.

#### **5.5.5 Fighting corruption in the housing sector**

Corruption is a social evil that may hinder the achievement of right to housing. It should be a joint effort of various agency of the State. These include the Director of the Public Prosecution (DPP), Ethics and Anti-Corruption Commission (EACC), Office of the President, Directorate of Criminal Investigation, and National Intelligence Service. The officers from the ministry of housing should not own more than one house from the government. This will prevent them from acquiring houses and disposing them at a higher price. The money allocated for housing should be well protected from corrupt government officers. The anti-corruption court should be given more powers to deal with corrupt officers.

The Ethics and Anti-Corruption Commission should be given prosecutorial powers to deal with corrupt individuals. DPP, DCI, and EACC should create a database of the ownership of houses in Kenya and keep on reviewing it to establish corruption in the ownership.

#### **5.5.6 Involvement of non-state actors in the provision of housing**

Everyone has a role to play in fulfillment of the right to housing. The non-Governmental Organizations (NGO) should be encouraged by the state to participate in the provision of houses. The executive arm of the government through the office of the president should take the initiative. The state should, however, make the environment conducive for NGOs to engage in housing work. It should not interfere with their operation through politics. It should assist the NGOs in acquiring land for housing so as to keep the cost of constructions low which should translate to affordability.

The individual citizens should be encouraged to engage in the construction of these houses. However, the government must control the price of the housing. The state should put in measures to regulate the prices to ensure the individuals are in business and at the same time, the citizens can afford the houses.

#### **5.5.7 Lowering the costs of construction materials**

High cost of construction materials has made housing unaffordable. Cost of cement, iron sheets, timbers, metals among others, should be offered at a low price. Government should further lower taxes on the construction materials to enable people build houses for themselves. If prices are lower, the government will have a moral authority in fixing the cost of houses made by the private developers. It should monitor the outlets in the country to prevent exploitation of the people from overpricing the constructions materials. Kenya Revenue Authority should be mandated to ensure uniformity in the price of construction materials.



## **5.6 Medium-term recommendations**

Some measures will require longer than five years mainly because of financial requirements. These recommendation will require between five to ten years to implement. They have to be continuous because of change variables in housing.

### **5.6.1 Adequate budgeting for the houses**

The executive should allocate a big share to housing in its financial year. The parliament should ensure adequate budget for houses is passed. To achieve the progressive realization of the right to housing, capital has to be committed. The financing should however not strain the taxpayers. The government should prioritize housing in the budget. If well prioritized, it would take shorter time to construct affordable public houses.

### **5.6.2 Adoption of high-rise residential buildings in urban areas**

The population of Kenya is growing fast yet the land is scarce. To take care of growing population in the cities, there is need to formulate a policy recommending high-rise buildings in certain areas in the cities. The policy should be enacted after putting necessary legislation on acquiring land for house development have been put in place. The national government through the cabinet should formulate the policy and have the national assembly pass it. The county government should be mandated to enforce the policy

### **5.6.3 Provision of loans to citizens**

To enable the citizens afford the houses constructed by the government and other non-state actors, a board should be created under the Housing Act with power to offer loans to Kenyans limited to purchasing houses. The interest should be as low as 3% p.a to attract Kenyans to purchase houses. The period of payment should also be long so that the citizen is not burdened when repaying the loans.

A board to be known as Board for Affordable Housing should be created through an amendment in the Housing Act to carry out the mandate. The board should comprise of people of high integrity

and who are ready not to own new houses during their tenure. They should have extensive knowledge of various tribal culture in the country.

It would be good practice for the price of houses constructed by the government to be kept lower than that of private developers. This will prevent commercialization of housing and many people will afford houses. The commercial enterprises on housing will be forced to halt overpricing their houses so as to compete with government houses. The state will thus manage to make housing a non-commercial enterprise.

#### **5.6.4 Involvement of National Youth Service in the housing projects**

The law should require all students to join the national youth service after completing the secondary education and before joining the university or tertiary education. The youth should then offer their service for the construction of the houses. This should be carried out as a department within the ministry of devolution. No private contractor should be contracted to provide housing. The youth should be provided with the necessary equipment and skills to provide the service.

If well harnessed, the workforce can prevent wastage of money on expensive contractors. The national youth service should offer adequate training to the youth to enable them construct quality houses. The government will only be required to provide state engineers. Considering the number of jobless youth in the country, the project can be very successful.

#### **5.6.5 Rural development**

To curb urban-rural migration, there is need for the State to engage in economic development of rural areas. The migrants who migrate to urban areas will be able to get jobs in the rural areas thus reducing the housing pressure in Nairobi. The State should set aside a special fund for the county government to engage in houses provision.

The County government should engage in supplying sufficient of water and ensuring there is good sanitation in the rural areas.

The state should, however, develop a clear housing policy for rural housing development to ensure the funds are spent for only housing and without corruption. The measure out to be continuous.

## **5.7 Long-term recommendations**

The following recommendations will require more than fifteen years to implement due to their very nature. Some will have a paradigm shift in our culture while some will require change of generation so as to change the way of thinking.

### **5.7.1 Population control**

The high population of Kenya may make it hard for provision of housing to all Kenyans. There is, therefore, need for population control. This may call for an amendment to the Constitution of Kenya to limit the right to family.<sup>5</sup> This should be followed by Population Control Act to regulate the number of children a family should have. The polygamous marriage should be limited by one demonstrating that he can adequately house a large family. The function can easily be carried by a department under Ministry of Health. The department should be required to make quarterly report to parliament on effort made on population control.

The government should create incentives to encourage families to have fewer children. For example, a family with three children and below should be given priority in purchasing low-cost government houses. Many families will endeavor to get few children so as to access the affordable houses from the government. The ministry should make regular publication countrywide on importance of a small families.

The ministry of health should have massive powers under control by the national parliament to conduct a family planning procedure on an individual who is incapable of carrying a family planning and who surpassed the limit of the number of the children required.

### **5.7.2 Creating capacity among the citizens**

The government should create capacity among its people to build houses for themselves. This can be done through elimination of factors that create this incapacity. The function has to be carried by all three arms of the government. To begin with, poverty should be eliminated. Jobs should be

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<sup>5</sup> Article 45 of the Constitution of Kenya, 2010.

created to enable the people earn money for the houses. Education to create the skills for the available jobs in the market should be a priority. By creating this capability, the citizens will not entirely rely on the government for the provision of the houses.

These call for necessary legislation to empower the people. The judiciary have to give progressive judgment that empower the citizens. It should not act as hindrance to the implementation by issuing orders that would stall government policies in creating capacities for the citizens to provide houses for themselves.

### **5.7.3 Limiting the resale of public houses**

The proposed board for affordable housing should limit people in selling the houses purchased from the government. One should get consent from the board appointed for public housing before selling. Those who have sold their houses should also be prohibited from acquiring new houses from the government before a period of three years has expired. The resale price should also not be higher than the purchase price. Through this regulation, the commercialization of housing will be limited. A record of people who have acquired houses should be kept by the state and details made available and accessible on the e-citizen portal for everyone. Corruption, fraudulent purchases and sale of housing will be eliminated.

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