

Walking the Tight Rope: Balancing the Property Rights of Individuals with the Right to Housing of Informal Settlers

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Abstract

The Constitution of Kenya, 2010 provides for the right to property in Article 40. Further, in Article 43 (1) (b), it provides for the right to accessible and adequate housing. The purpose of this article is to show the conflict that arises between the right to property for owners of land and the right to housing of the informal settlers living on these privately owned lands. The main objective is to investigate the concept of illegal forced evictions and the legal framework that surrounds the practices that render such evictions against the principle of human dignity and the right to accessible and adequate housing in the context of informal settlements. The 2010 Constitution states that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. This renders important the concern that arises when persons informally settle onto land that they have no legal title to; what is the balance to be maintained between property rights and housing rights as provided for in the Bill of Rights.

I. Introduction

Those who live in informal settlements have no positive right under current Kenyan law to reside on the land they occupy.¹ In almost all cases, they have no alternative option since informal settlements represent the only means by which

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¹ Informal settlers may acquire the legal title to occupy the land if 12 years pass without any interruption from the owner of the land – doctrine of adverse possession; Section 7 of the *Limitation of Actions Act* (Chapter 22, Laws of Kenya) bars an action by any person to recover land after the end of twelve years from the date on which the right of action accrued to him.

they can realise their human rights, including work and housing.² In *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*³ (hereinafter the *Satrose Ayuma Case*), the first petitioner and other residents of Muthurwa estate were evicted from the premises they had been informally settling in. The residents of Kibera and Mukuru slums have similarly been forcefully evicted from their homes⁴ and so were the residents of Komora settlement within Savannah area.⁵

Any evictions that are carried out without due regard to constitutional requirements are illegal.⁶ Those that lack the proper involvement of all the persons to be affected and adequate notice of the evictions are illegal and against the whole substratum of human rights. The Basic Principles and Guidelines on Development Based Evictions and Displacement, however, exclude forced evictions which are carried out in accordance with the law and in conformity with the provisions of international human rights treaties from prohibition.⁷

There is a prevalence of informal settlements due to the failure of state mechanisms to address the core issues that result in the occurrence of these settlements. Hence, the eviction of the informal settlers does no good and only results in the evictees gathering elsewhere and forming more informal settlements.⁸

The Constitution of Kenya, 2010 (hereinafter the 2010 Constitution), entitles every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. In addition to this provision, the 2010 Constitution goes on to prohibit the enactment of legislation that would deprive, limit or restrict in any way the enjoyment of such property.⁹ Property, for purposes of this discussion, is limited to the interests in land re-

² Submission to the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of Pre – Sessional Working Group Discussion (Kenya), 4.

³ The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).

⁴ *Kepha Omondi Onjuro & Others v Attorney General & 5 Others* (2015) eKLR.

⁵ Submission to the United Nations Committee on Economic, Social and Cultural Rights by Kenya, 7.

⁶ Article 10, *Constitution of Kenya* (2010) calls for the due exercise of the principles of governance. The principles that have a bearing on eviction procedures include: the rule of law, participation of the people, human dignity and human rights, equity and accountability.

⁷ Basic Principles and Guidelines on Development Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), 3.

⁸ The UN-Habitat and the United Nations Human Rights Office of the High Commissioner, 'Forced evictions', Fact Sheet No. 25, 10.

⁹ Article 40, *Constitution of Kenya*, (2010).

sources as alluded to in the interpretation of the 2010 Constitution.¹⁰ Further, Article 43 (1)(b) provides for the right to accessible and adequate housing.

The right to housing directly conflicts with the right to private property in the case of informal settlements on private land. Therefore, since the right to housing and the right to property are both legitimate rights, it is necessary that there is a balance between these rights especially with regard to their enforcement in relation to lands which have informal settlements. It is imperative that justice is done and the poor are protected from the adversities of homelessness while it is also pertinent that the owners of land are guaranteed protection of the property they own. The problem is that the courts are seemingly unable to balance between the two rights and seem to lean towards the right to property and hence the prevalence of evictions from informal settlements.

This article meets pursues these objectives through the following questions: what is the international and national framework on protection from forceful evictions? What is the international and national framework on the protection of the right to own land, property and protection from deprivation of this right? What is the extent to which a balance between the above two rights can be achieved?

In order to complete the research on the conflict between the rights to private property and the implementation of the right to housing for squatters, the paper adopts the doctrinal research method, which involves the analysis of legal rules and formation of doctrines.¹¹ The analysis of legal rules in this case is towards the investigation of the framework that regulates forced evictions in Kenya and the right to housing in the informal settlement sector. It also analyses the obligations of states with regard to the right to housing and the protection of property.

The law does not always have the answers to the practical problems in society.¹² Therefore, in this case, it is imperative that the fundamental research method is applied as a supplement to the solution of the problem that arises in the analysis of the black-letter law (where a study of the law and its rules does not provide a solution to a certain social phenomenon). Here, an analysis of the

¹⁰ Article 260, *Constitution of Kenya* (2010).

¹¹ Chynoweth P, 'Legal research' in Knight A and Ruddock L (eds), *Advanced research methods in the built environment*, Blackwell Publishing, Oxford, 2008, 29.

¹² Chynoweth P, 'Legal research', 31.

law and its application is carried out within a particular social context.¹³ The specific context in this case is the evictions from informal settlements.

Section II of this paper discusses the legal theories that support the analysis of the issues identified in the research. Section III encompasses a review of the legal framework that regulates evictions in Kenya. The Section analyses the international framework and enquires whether these measures have been adopted in the municipal jurisdiction and if so, whether or not they have been effective. Section IV consists of an analysis of the justifications for private property. It investigates the framework governing the right to property in Kenya and under international law. Section V seeks to find out whether courts have been able to balance the rights of private land owners with those of possible evictees who settle into land they have no legal title to. Section VI gives a brief conclusion of all the issues arising from the body of this article while Section VII makes recommendations to correct the evictions problem and the resulting situations of homelessness.

II. Theoretical Framework

The idea behind international human rights instruments is that there is something about each and ‘every human being, simply by virtue of being a human being’ that dictates that certain choices should be made while others should be totally abandoned.¹⁴ The concept of every human being having human rights by virtue of being a human being has been alluded to in the Universal Declaration of Human Rights¹⁵ (hereinafter UDHR) to the effect that no discrimination is to be exercised in the acquisition of any of the freedoms and rights therein. The relevant attribute upon which each and every human being possesses human rights is the inherent dignity of each member of the human family.¹⁶

Economic, social and cultural rights (hereinafter ESCRs), a subset of human rights, are defined as the rights concerned with the material bases of the

¹³ Consultative Group on Research and Education in Law, Law and Learning: *Report to the Social Sciences and the Humanities Research Council of Canada* (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) as cited in Hutchinson, Terry C and Nigel D, ‘Defining and describing what we do: Doctrinal legal research’ 17 *Deakin Law Review*, 1 (2012), 102.

¹⁴ Perry MJ, *The idea of human rights: Four inquiries*, Oxford University Press, New York, 2000, 13.

¹⁵ *The Universal Declaration of Human Rights*, 10 December 1948, General Assembly resolution 217 A (III).

¹⁶ Article 2, *Universal Declaration of Human Rights* (1948).

well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for the members of a particular society.¹⁷ These rights are aimed at ensuring that human beings have the ability to obtain and maintain a decent standard of living consistent with their human dignity.¹⁸ Their protection is embedded on the principle of dignity which affirms that people who are deprived of these rights are denied of the opportunity to live their lives with dignity.¹⁹

i. Progressive realisation of economic, social and cultural rights

The 2010 Constitution²⁰ has prescribed that these rights can only be materialised over the course of time and depending on the resources available for those purposes.²¹ Progressive realisation would then require that states strive to fulfil, observe, protect and promote these rights to the fullest extent possible even in the midst of financial challenges, as is often the case in developing nations. Countries with more money therefore have a greater duty to ensure that these rights are realised. The determinant for a country's success is the collective rights that are actually enjoyed by the people as measured against the resource capabilities of the State in question.²²

Even though states are given the leeway to progressively achieve their mandate towards ESCRs, this by no means, implies that States are completely exempted from carrying out their duties. This cannot consequently be employed as a tactic for non-compliance with obligations.²³ As noted by Sepúlveda,

¹⁷ O'Connell P, *Vindicating socio-economic rights: International standards and comparative experiences*, Routledge Research in Human Rights Law, New York, 2012, 3.

¹⁸ Viljoen F, 'The justiciability of socio-economic and cultural rights: experience and problems' in Donders Y and Volodin V (eds), *Human rights in education, science and culture: Legal developments and challenges*, UNESCO Publishing, Paris, 2007, 53-54; *John Kabui Mwai and Others v Kenya National Examination Council and 2 Others* in the High Court of Kenya at Nairobi, Petition No 15 of 2011.

¹⁹ De Vos P, 'Substantive equality after Grootboom: The emergence of social and economic context as a guiding value in equality jurisprudence' *Acta Juridica* (2001), 64.

²⁰ Article 21 (2), *Constitution of Kenya* (2010).

²¹ Chenwi L, 'Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' *De Jure Law Journal* (2013), 743.

²² Fukuda-Parr S, Lawson-Remer T and Randolph S, 'Measuring the progressive realization of human rights obligations: An index of economic and social rights fulfilment' *University of Connecticut Department of Economics Working Paper Series 22* (2008), 7.

²³ The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/Cn.4/1987/17, Annex; reproduced in the 9 *Human Rights Quarterly* (1987), 122-135; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, guideline 8; CESCR General Comment No. 3, *The Nature of States Parties' Obligations (article 2, para 1, of the Covenant)*, para 9.

progressive realisation entails twin obligations; that of ensuring that there is continuous improvement of the situation that the right seeks to protect and the abstinence from deliberately employing retrogressive measures to the fulfilment of ESCRs.²⁴

In *Mitubell Welfare Society v Attorney General and 2 Others*,²⁵ Ngugi J stated as follows:

“The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that *no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations*. Article 21 and 43 require that there should be ‘progressive realization’ of social economic rights, implying that *the State must begin to take steps, and I might add, be seen to take steps, towards realization of these rights*.”

Alston has argued that the legal implication of terming ESCRs as rights is that there must arise from them some minimum entitlements whose absence would render that a violation under the International Covenant on Economic, Social and Cultural Rights ICESCR²⁶ (hereinafter ICESCR). These minimum entitlements are to be accorded, as a matter of priority, to the most vulnerable members of the society.²⁷ The United Nations Committee on Economic, Social and Cultural Rights (hereinafter CESCR) noted that if ICESCR were to be read in a manner as not to establish a minimum core obligation, it would be largely deprived of its *raison d’être*. Consequently, any evaluation as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.²⁸

The challenge, as identified by Young, is in the application of the concept of minimum core where basic questions have gone unanswered. These questions include the following: whether the minimum core is country or region specific? Is the minimum core of one country the same as that of the other? Is it context specific or does it employ an overall or generalised application mode? More

²⁴ Sepúlveda M, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerpen, 2003, 319.

²⁵ Petition No.164 of 2011 (emphasis added).

²⁶ *The International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3; Alston P, ‘Out of the abyss: The challenges confronting the new United Nations Committee on Economic, Social and Cultural Rights’ 9 *Human Rights Quarterly* (1987), 352-353.

²⁷ Rosa S and Dutschke M, ‘Child rights at the core: A commentary on the use of international law in South African court cases on children’s socio-economic rights’ A Project 28 Working Paper, May 2006, Children’s Institute, University of Cape Town, 13.

²⁸ General Comment No. 3, para. 10.

importantly, who gets to decide what it is?²⁹ This notwithstanding, the minimum core approach has been hailed as being able to facilitate the courts' more stringent evaluation of the state's defences for non-realisation of minimum obligations of the most vulnerable members of society and the ability of the courts to give a more detailed timeline of compliance.³⁰

ii. *The use of the reasonableness approach to ESCRs*

The issue at hand when the courts apply the reasonableness approach is whether the policies and directives employed by governments are *reasonably capable* of facilitating the realisation of the socioeconomic rights in question. The court's approach is designed to allow government a margin of discretion to contend that the specific policy choices adopted have given effect to ESCRs.³¹

'A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.'³²

In the same vein, O'Regan J asserted that the purpose of the reasonableness standard was to show that the Court required that the duty holder of the right in question performs their obligations with reasonableness. There was need to balance between ensuring that the State (the duty holder in this case) carried out its constitutional mandate and leaving the State with the freedom to choose the most appropriate form of action to take.³³

Alston and Quinn have written that the State must take steps towards ensuring the realisation of ESCRs and this has been espoused as an immediate

²⁹ Young KG, 'The minimum core of economic and social rights: A concept in search of content' 33 *The Yale Journal of International Law* (2008), 114-115.

³⁰ Bilchitz D, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights*, Oxford University Press, Oxford, 2007, 142.

³¹ Liebenberg S, 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in Woolman S and Bishop M (eds), *Constitutional Conversations*, Pretoria University Law Press, Pretoria, 2008, 305.

³² *Government of the RSA v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC), para 41.

³³ *Rail Commuters Action Group v Transet Limited t/a Metrotrail* 2005 2 SA 359 (CC), 2005 4 BCLR 301 (CC), para 87.

obligation.³⁴ The obligation requires that the State undertake deliberate, concrete and targeted steps aimed at, and capable of fully realising of these rights.³⁵

The South African Constitutional Court has rendered its opinion on the reasonableness criteria and it has held that the approach encapsulates a set of various criteria that must be evaluated before the measures taken by the state can be deemed to have been reasonable in its quest to fulfil its obligation. These measures must be comprehensive, coherent and coordinated, and must also be properly conceived and implemented; be inclusive, balanced, flexible and make appropriate short, medium and long term provisions for people in desperate need or in crisis situations, whose ability to enjoy all human rights is most in peril; clearly set out responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation; be tailored to the particular context in which they are to apply and take account of the different economic levels in society; be continuously reviewed to corresponding changes in society; be transparent and have its contents made known appropriately and effectively to the public; and allow for meaningful or reasonable engagement with the public or affected people and communities.³⁶ The Court noted that these factors were not exhaustive and more had to be considered varying on a case-to-case basis.³⁷

iii. Conceptual framework

Research in this paper shall adopt an integrated approach to analyse the extent to which a balance between the right to property and the right to housing has been carried out by the courts. It shall incorporate the progressive realisation mechanism to analyse whether states have done anything to achieve the obligations set in law for the guaranteeing of the right to housing within the context of the conflict that arises with the right to private property; whether the policies and directives issued by the government to try and protect and promote these rights have been reasonable in the specific context and whether any failure by the State to progressively and reasonably achieve its obligations with regards to housing

³⁴ Alston P and Quinn G, 'The nature and scope of state parties obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987), 159-160.

³⁵ General Comment No. 3, paras. 2, 4; Article 21 (2), *Constitution of Kenya* (2010).

³⁶ Chenwi L, 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' (2010), 5.

³⁷ *Kbosa v Minister of Social Development; Mablaule v Minister of Social Development* 2004 6 SA 505 (CC), 2004 6 BCLR 569 (CC), 44.

is what has led to the persistent forced evictions and the seeming favour of the land owners.

The importance of the use of the purposive rule of interpretation with regard to the Bill of Rights and especially the ESCRs in the quest to realise the transformative potential of the 2010 Constitution shall be restated.³⁸ This shall be with immense reflection on Kenya's historical injustices especially with land resources and reckless allocation that caused many to be left landless and land to belong only to a chosen few.³⁹ This integrated approach also involves viewing of the Bill of Rights with generosity and with the possibility of the widest possible application. This has been endorsed by the courts in Kenya where the High Court in the *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another*⁴⁰ held that the Bill of Rights has to be interpreted in such a way that gives the maximum benefit of the rights protected therein considering the social conditions, experiences and perception of the people of this country.⁴¹ The 2010 Constitution, at various instances, indicates this growing need to ensure that the rights are interpreted and enforced in a manner that brings greatest benefit to the benefit holders and that promotes the dignity of individuals and communities.⁴²

There is then the right to property that seemingly conflicts with the right to housing in the case of informal settlements; every person has the right to own property of any description and anywhere in the country.⁴³ Blackstone famously stated that;

‘There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’⁴⁴

³⁸ Orago N W, ‘Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution’, Doctor of Law Thesis, University of the Western Cape, 16 August 2013, 272-273.

³⁹ Syagga P, ‘Public land, historical land injustices and the new Constitution’ *Society for International Development (SID) Constitution Working Paper Series* No. 9 (2011), 11.

⁴⁰ High Court Petition No. 102 of 2011.

⁴¹ *Federation of Women Lawyers case, Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another* High Court Petition No. 102 of 2011, 9, 17.

⁴² Articles 19 (2); 20 (3)(b), (5)(b); 259 (1), *Constitution of Kenya*, (2010).

⁴³ Article 40, *Constitution of Kenya* (2010); Article 260, *Constitution of Kenya* (2010) describes property to include: (a) land, or permanent fixtures on, or improvements to, land; (b) goods or personal property; - these delineations are most paramount as evictions tend to affect the fixed structures on the land and the personal belongings of those being evicted.

⁴⁴ Blackstone W, *Commentaries on the laws of England* in Four Books, vol. 1 (1753) (ed) George Sharswood, 304 http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf on 1 December 2015.

Kameri-Mbote contends that to determine the effectiveness of the property system in Kenya, there needs to be an evaluation of various social relationships and how they have been impacted upon by the institution of property and whether social dimensions that greatly affect its efficiency are adequately considered. She employs the use of four criteria to determine this evaluation: stability, predictability, justice and fairness.⁴⁵

This is important in analysing the effect of proposed evictions on the relationship between the private land owners or the government and the evictees. Further, these four markers may also prove useful in addressing the various competing interests at play – the right to enjoy private property and the right to housing and the freedom from evictions.

III. The Legal Framework Regulating Forced Evictions

Forced evictions are defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land that they occupy, without the provision of, and access to, appropriate forms of legal or other protection.⁴⁶ This practice inevitably affects the rights of persons. The rights affected include other rights and not solely restricted to the right to housing, and this is because human rights are interdependent.⁴⁷ The practice of forced evictions that is contrary to the required laws in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing.⁴⁸

Forced evictions are carried out in both developed and developing countries, in all regions of the world. Often these are large-scale evictions, where entire communities of tens or even hundreds of thousands of people are removed. Most of the victims are usually the indigent living in informal settlements. The effect on the lives of those evicted is devastating, leaving them without homes and subject to deeper poverty, discrimination and social exclusion. Such communities are invariably evicted against their will, and in most cases, without any compensation or alternative housing.⁴⁹

⁴⁵ Kameri-Mbote P, 'The land question in Kenya: Legal and ethical dimensions', in Gachenga E, Franceschi L, Akech M and Lutz D (eds), *Governance, institutions and the human condition*, Strathmore University Press, Nairobi, 2009, 222-223.

⁴⁶ General Comment No. 7: The right to adequate housing (Article 11.1): forced evictions, para. 3.

⁴⁷ General Comment No. 7, para 4.

⁴⁸ Commission on Human Rights Resolution 2004/28.

⁴⁹ Forced Evictions - Towards Solutions?, Second Report of the Advisory Group on Forced Evictions

i. *International law regulating the practice of evictions*

One result of the promulgation and implementation of the 2010 Constitution was the concept of application of the general rules of international law and any treaties and conventions ratified by Kenya, which are now part and parcel of the legal framework of Kenya in the various legal fields.⁵⁰

The International Covenant on Civil and Political Rights⁵¹ (hereinafter IC-CPR) prescribes for individual freedom against ‘arbitrary or unlawful interference’ with the home, and also provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.⁵² One of the key things that the State is required to do in the case that persons are facing evictions is to ensure that alternative housing is provided to those who would inevitably end up homeless.⁵³ Additionally, General Comment No. 7 on the right to housing (forced evictions) by CESCR also calls for appropriate measures of protection and due process in the event that evictions are carried out. The procedures recommended are:

- i) an opportunity for *genuine consultation* with those affected;⁵⁴
- ii) *adequate and reasonable notice* for all affected persons prior to the scheduled date of eviction;
- iii) *information on the proposed evictions*, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected especially where groups of people are involved,
- iv) government officials or their representatives and neutral parties are to be present during an eviction;

to the Executive Director of UN-HABITAT, 1.

⁵⁰ Articles 2 (5), (6), *Constitution of Kenya* (2010); Kabau T and Ambani J O, ‘The 2010 Constitution and the application of international law in Kenya: A case of migration to monism or regression to dualism?’ *Africa Nazarene University Law Journal* (2013), 37.

⁵¹ *The International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

⁵² Article 17, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

⁵³ General Comment No. 7, para. 13; *Susan Waithe Kariuki v The Town Clerk, Nairobi City Council*, High Court of Kenya, Nairobi, Petition No. 66 of 2010 (2011) KLR 1, 9; Chenwi L, ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ 8 *Human Rights Law Review*, 1 (2008), 128.

⁵⁴ Yacoob J noted the importance of consultations with the affected persons in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* (2008) ZACC 1 stating that it has the potential to contribute towards the resolution of disputes and to increased understanding and care if both sides are willing to participate in the process.

- v) all persons carrying out the eviction to be properly identified;
- vi) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- vii) provision of *legal remedies*; and
- viii) provision, where possible, of legal aid to persons who are in need of it to seek *redress from the courts*.⁵⁵

Juma notes that stemming from the legal definition of the term forced evictions is a two-pronged objective clause: the prevention of evictions and the protection of evictees.⁵⁶ The prevention of evictions has been identified with the term legal security of tenure which CESCR described as a factor that ought to be taken into consideration when determining whether or not there is adequacy in housing and by implication the regulation of the extent to which evictions could have a bearing on security of tenure and the right to housing.

General Comment No 4 has opined that regardless of whether an individual is occupying any house or piece of land as a rental (public and private) accommodation, or on a lease, as an owner, or as part of emergency housing and informal settlements, every person should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.⁵⁷

With regard to the protection of evictees objective, the Commission on Human Rights stated that the practice of forced evictions violated human rights and particularly the right to housing.⁵⁸ Additionally, the Commission on Human Rights recommended that evictions which are determined to be lawful be carried out in a manner that does not violate any of the human rights of those evicted.⁵⁹

⁵⁵ General Comment No 7, para. 15 (emphasis added); Basic principles and guidelines on development-based evictions and displacement, Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, paras. 37-59.

⁵⁶ Juma L, 'Nothing but a mass of debris', 492.

⁵⁷ General Comment No. 4: The Right to Adequate Housing (Article 11 (1) of the Covenant), para. 8 (a).

⁵⁸ Commission on Human Rights Resolution 1993/77, para 1.

⁵⁹ Preamble to Resolution 2004/28.

As for local legislation, the Eviction and Resettlement Bill⁶⁰ has provided as mandatory some requirements that are to be met during the procedure of evictions.⁶¹ It is worth noting that the regulations contained therein cannot be upheld as the Bill has not been passed in parliament and this has caused increased injustice with regard to the practice of evictions in this country due to the lack of a legislative mechanism to govern the conundrum that has become forced evictions. However, this could be a direction as to possible future action on evictions in Kenya.

The prohibition of forced evictions is a legal measure that can be taken immediately and is not dependent on resources. Lack of title and residency in informal settlements are often used as a justification for forced evictions. However, respect for human rights is independent from a particular status, including ownership. A state unable to fulfil the right to adequate housing for all should consider various solutions, including allowing people to provide some level of housing on their own, even if this is done through the creation of informal settlements. States are also obliged to take immediate measures aimed at conferring legal security of tenure on those persons and households currently lacking such protection, in genuine consultation with them.⁶²

ii. What constitutes the right to housing?

CESCR has held the view that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Instead, it should be seen as the right to live somewhere securely, peacefully and with dignity. This approach is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which ICESCR is premised. The inherent dignity of the human person from which the rights in ICESCR are said to derive requires that 'housing' be interpreted so as to be alive to a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in Article 11 (1) of ICESCR must be read as referring to adequate housing and not just to housing.⁶³

⁶⁰ *The Evictions and Resettlement Bill*, 2014.

⁶¹ The Bill requires that there is notice of at least 30 days to those who are to be evicted, adequate consultations with regards to the issue of resettlement, a private land owner cannot evict any persons on his land without a court order.

⁶² The UN-Habitat and the United Nations Human Rights Office of the High Commissioner, 'Forced evictions', Fact Sheet No. 25, 9.

⁶³ General Comment No. 4, para 7.

The 2010 Constitution prescribes that every person has the right to accessible and adequate housing.⁶⁴ The Court in *Susan Waithera Kariuki v the Town Clerk, Nairobi City Council*⁶⁵ acknowledged that the 2010 Constitution was inadequate to the extent that it lacked a precise definition or description of the concept of ‘adequate housing’.

Several factors have been identified that are required for consideration in order to determine whether housing is adequate or not. These are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.⁶⁶ Legal security of tenure embodies the benefits in the bundle of rights that would presumably shield an owner of property from forced eviction. The idea seems to be that all persons should have some form of security that guarantees them legal protection against forced eviction. This means that the right to housing places a positive obligation on states to ensure that informal settlements are secure places of residence and that persons living there are protected.⁶⁷ The lack of secure tenure has been identified by the Government of Kenya as the greatest danger to persons living in informal settlements.⁶⁸

IV. The Right to Property

i. Property defined/ land as property

Property has a diverse number of meanings that can be ascribed to it. To the ordinary person, property is simply a thing represented in the physical *res*.⁶⁹ It was thus defined as: ‘... any external object over which the right of property is exercised. In this sense it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in.’⁷⁰

Legally, property is seen as a mental concept, an expectation that the property owner has of being able to enjoy a certain advantage from that which is pos-

⁶⁴ Article 43 (1)(b), *Constitution of Kenya*, (2010).

⁶⁵ *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others* (2011) eKLR, Petition Case No 66 of 2010, 5.

⁶⁶ General Comment No. 4, para 8.

⁶⁷ Juma L, ‘Nothing but a debris’, 482.

⁶⁸ Amnesty International, *Kenya - The unseen majority: Nairobi's two million slum dwellers* (2009).

⁶⁹ Kameri-Mbote P, Odote C, Musembi C and Kamande W, *Ours by right: Law, politics and realities of community property in Kenya*, Strathmore University Press, Nairobi, 2013, 29; Corbin A, ‘Comment: Taxation of seats on the stock exchange’ 31 *Yale Law Journal* (1922), 429.

⁷⁰ *Wilson v Ward Lumber Co* (1895) 67 Federal Reporter, 677.

sessed. This expectation can only be strong and permanent by guarantee of the law.⁷¹ To this end, the owner of private land is only able to enjoy his land if the law can guarantee the protection of this right.

Blackstone wrote that property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.⁷² Hohfeld on his part stated that the legal concept of property was not comprised only of rights but also entailed powers and privileges.⁷³

Conversely, property is also conceived as a set of interests or bundle that can be enjoyed by the holder.

‘The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing.’⁷⁴

Property is now, more and more, primarily seen as an amalgamation of various legal relations between persons and only consequentially as relating to certain physical objects. There is no fixed meaning of property.⁷⁵ Honoré posited that the bundle of rights existed as incidents of ownership or property. These incidences include the following: the right to possess, use, manage, to the income of the thing, capital, security, transmissibility and absence of term, prohibition of harmful use and the liability to execution and the incident of residuary.⁷⁶

Bell and Parchomovsky have argued that only assets which have the capacity to enhance social welfare through stable ownership should be brought under the ambit of the law.⁷⁷ This is important for the consideration of land as property, particularly in Kenya where it is a key economic and social factor that caters to the needs of many⁷⁸ and has been at the centre of violence that has rocked the country.

⁷¹ Bentham J, *Theory of legislation*, by Hildreth R (Translator), 112-113, <https://archive.org/details/legislation00bentuoft> on 3 December 2015.

⁷² Blackstone W, *Commentaries on the laws of England*, 304.

⁷³ Hohfeld W, ‘Fundamental legal conceptions as applied in judicial reasoning’ *Yale Law School Faculty Scholarship Series*, Paper 4378, (1917), 717.

⁷⁴ *Eaton v B C & M R R Co*, (1872) 51 New Hampshire, 511.

⁷⁵ Merrill T and Smith H, ‘What happened to property in law and economics?’ 111 *The Yale Law Journal* (2001), 357-358; Merrill T, ‘Property and the right to exclude’ 77 *Nebraska Law Review* (2014), 737.

⁷⁶ Honoré A, ‘Ownership’ in Guest AG (ed), *Oxford essays on jurisprudence*, Oxford University Press, London, 1961.

⁷⁷ Bell A and Parchomovsky G, ‘A theory of property’ 90 *Cornell Law Review* (2005), 563.

⁷⁸ The Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Land, Government Printer, (June 2004) (The Ndung’u Report), xvii.

In light of this noted prominence of land utility in Kenya, it is worth noting the words of the scholar Epstein who stated that the right to property embraced the idea of the right to exclude.⁷⁹ The right to exclude has even been argued to be the *sine qua non* of the property rights legal framework; without it, there is essentially no right to property.⁸⁰ This may be a justification for the prevalence of the need of private land owners to want to evict informal settlers from their lands because they deem this to be a power that comes with the right to property that they hold due to their ownership of the land. Property rights are good against the world⁸¹ and may hence be employed as a basis to evict any persons from lands that are privately owned.

Property exists for many reasons but essentially to govern the conflicts that arise in the set of legal relationships between various persons in relation to things. The property regimes mediate the various conflicting interests by allocating exclusive rights.⁸² A property law system urges decision makers (land owners) to consider not only their self – interests but also the needs and concerns of other individuals.⁸³

ii. *Protection of the right to property*

a. International Law & Regional Human Rights Instruments

International law instruments that have been ratified by Kenya are part of the law of the country by virtue of Article 2(6) of the 2010 Constitution. Other general principles of international law are also part of the municipal law by virtue of Article 2(5) of the 2010 Constitution.

UDHR proclaimed that, ‘everyone has the right to own property alone as well as in association with others’ and that ‘no one shall be arbitrarily deprived of his property.’⁸⁴ The International Convention on the Elimination of All Forms of Racial Discrimination stipulates a general undertaking of State parties to eliminate racial discrimination and guarantee ‘the right to own property alone as well

⁷⁹ Epstein R, *Takings: Private property and the power of eminent domain*, Harvard University Press, Cambridge, Massachusetts, 1985, 65.

⁸⁰ Merrill T, ‘Property and the right to exclude’, 730.

⁸¹ Dorfman A, ‘The society of property’ 62 *University of Toronto Law Journal*, 4 (2012), 563.

⁸² Rose C, ‘Property as storytelling: Perspectives from game theory, narrative theory, feminist theory’ in Rose C, *Property and persuasion: Essays on the history, theory, and rhetoric of ownership*, Westview Press, Boulder, 1994, 28.

⁸³ Dagan H and Heller M, ‘Conflicts in property’ 6 *Theoretical Inquiries in Law* (2005), 37-39.

⁸⁴ Article 17, *Universal Declaration of Human Rights*.

as in association with others.⁸⁵ The International Convention on the Elimination of All Forms of Discrimination against Women requires the equal treatment of women and men in respect to ownership of property.⁸⁶ Regionally, the African Charter on Human and Peoples' Rights (AfCHPR) guarantees the right to property and outlines the public need and general interest of the community as legitimate grounds for limiting the right. The encroachment on the right must also be in 'accordance with the provisions of appropriate laws'.⁸⁷

b. Kenyan Law

Under Kenyan law, property is protected under the 2010 Constitution in Article 40 which states that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Article 260 defines property to include land. Parliament has been barred by the 2010 Constitution from enacting any laws that would allow the State or any other person to arbitrarily deprive a person of property of any description or to limit, or in any way restrict the enjoyment of the right to property. This implicitly means that every person who has acquired land in any part of any country has the right to enjoy his property without the interference of informal settlers who encroach on these lands and subsequently begin to use the land for settlement and housing.

The question, therefore, is to inquire whether the property rights of these individuals are more important than the right to housing of these informal settlers who are usually poor people who have no money to acquire land of their own to prevent evictions from the land.

V. The Balance Between Property Rights and Housing Rights

This section shall meet its objectives by analysis of case law and constitutional provisions with regard to human rights and how courts have attempted to reach a balance between these two rights.

⁸⁵ Article 5 (v), *The International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195.

⁸⁶ Articles 15(2) and 16(1)(h), *The International Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13.

⁸⁷ Article 14, *The African Charter on Human and Peoples' Rights*, adopted in 1981.

i. *Kenyan courts*

Prof Ghai submitted in the *Satrose Ayuma Case*⁸⁸ that the residents of Mu-thurwa Estate should not have been evicted because it is against human dignity in the context of Kenya's socio-economic background, and that the 2010 Constitution promotes human dignity and that it was not right for the Respondents to claim property rights since human dignity triumphs over all other rights.⁸⁹ In this case, the petitioners were evicted from land owned by the respondents. The Court noted that there were competing interests between the petitioners and the respondents as regards the suit premises.⁹⁰ The Court went on to hold that there had been a violation of the petitioners' right to housing as the evictions had been carried out inhumanely and against the international minimum standards.⁹¹ There had been inadequate notice and insufficient consultation with the affected persons.

In *William Musembi & 13 others v Moi Education Centre Co Ltd & 3 Others*,⁹² the Court found that the demolition of the petitioners' houses and their forced eviction by the first, second and third respondents without provision of alternative land or shelter and without the proper sanction of the law was a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing. It was stated that evictions just perpetuated a long and never-ending cycle of informal settlements on other peoples' land. The Court noted thus:

'Unlike the birds of the air, men, women and children whose dwellings have been demolished will not fly away and perch on a tree, and then begin to rebuild their nests afresh. As most of those evicted from informal settlements are often poor, *they become homeless, join the ranks of the dispossessed in the streets, or find another vacant piece of land to put up their shacks and continue with their precarious existence until the next eviction and demolitions.*'⁹³

ii. *South African jurisprudence*

Although South African cases are not binding precedents in Kenya, they are relied upon in this paper to show the experiences that the courts have had in

⁸⁸ *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*, The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).

⁸⁹ *Satrose Ayuma Case*, para 29.

⁹⁰ *Satrose Ayuma Case*, paras 60-61.

⁹¹ UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007).

⁹² Petition No 264 of 2013, in the High Court of Kenya at Nairobi (2014) eKLR.

⁹³ *Musembi Case*, para 79 (emphasis added).

dealing with the balancing of these rights. Their analysis provides insight of the direction that constitutional courts tend to take when dealing with such matters. The Constitutional Court of South Africa has been instrumental in the development of case law with regard to socio – economic rights such as the right to housing (which is the subject of this discussion).

The content of the Bill of Rights needs to be interpreted in its specific social and historical context within which it is placed.⁹⁴ Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal*⁹⁵ (hereinafter the *Soobramoney Case*) similarly held:

‘We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.’⁹⁶

Based on the above quotation from the judge in the *Soobramoney Case*, it can be seen that he acknowledges the transformative power of the Constitution to change the situation of the citizens of South Africa living in deplorable conditions and that unless the Constitution realises this potential, it will not have served its purpose of transformation of society as conceived by its makers. As long as society keeps being in a deplorable state, then the Constitution will have failed the test of transformation. It will only be as worth as the paper it is written on and nothing more.

In *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and another*⁹⁷ (hereinafter the *Modderklip Case*), Modderklip Boerdery (Pty) Limited owned of a portion of the farm Modder East, which adjoins Daveyton Township. During the 1990s, due to overcrowding, residents of Daveyton began settling on a strip of land between Daveyton and the farm. This came to be known as the Chris Hani infor-

⁹⁴ *The Government of the Republic of South Africa & 3 Others v Irene Grootboom & Others*, The Constitutional Court of South Africa 2001 (1) SA 46 (CC), paras 22, 25.

⁹⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁹⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), para. 8.

⁹⁷ The judgment at the Supreme Court of Appeal of South Africa is a consolidation of two cases: One being an application for leave to appeal against the judgment of Marais J in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) (‘the eviction case’); and the second, an appeal against a judgment of De Villiers J in *Modderklip Boerdery (Edms) Bpk v President van die RSA en andere* 2003 (6) BCLR 638 (T).

mal settlement. At the beginning of May 2000, about 400 persons, who had been evicted by the municipality from Chris Hani, moved onto a portion of the farm and erected about 50 shacks. By October 2000, there were about 4 000 residential units inhabited by about 18,000 persons. On 18 October 2000, Modderklip made an application for the eviction of the occupiers under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act.⁹⁸ The application, succeeded and Marais J issued an eviction order on 12 April 2001. The occupants were given two months to vacate but they did not heed this notice.

Harms JA agreed with the finding of De Villiers J who had found that the refusal of the occupiers to obey the eviction order amounted to a breach of Modderklip's right to its property entrenched by section 25(1) of the Bill of Rights,⁹⁹ which provides that 'no one may be deprived of property except in terms of law of general application'.¹⁰⁰ The judge, however, held that the order could not be executed – humanely or otherwise – unless the state provided some alternative land.¹⁰¹

The state failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual.¹⁰²

The judge very aptly held that the problem was two – pronged: First, there was the infringement of the rights of Modderklip. Second, enforcement of Modderklip's rights would have impinged on the rights of the occupiers. Moving or removing them was no answer and they would have to stay where they were until other measures could be devised. Requiring of Modderklip to bear the constitutional duty of the state with no recompense to provide land for some 40,000 people was also not acceptable.¹⁰³ Further, the judge noted that it was up to the courts to provide effective relief to those who had been adversely affected by a

⁹⁸ 19 of 1998.

⁹⁹ Section 25, *The Constitution of the Republic of South Africa*.

¹⁰⁰ *Modderklip Case*, para 21.

¹⁰¹ *Modderklip Case*, para 26.

¹⁰² *Modderklip Case*, para 30; *East London Western Districts Farmers' Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 75I-76B:

'In our system of law, however, the bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens. The situation no doubt called for prompt action by the respondents. Such action, however, required not merely the alleviation of the lot of the refugees but simultaneously the protection of the farming community into whose midst so many distressed persons were being precipitately introduced. The respondents failed to secure the latter.' (Per Hoexter JA.)

¹⁰³ *Modderklip Case*, para 41.

constitutional breach.¹⁰⁴ It was held in *Fose v Minister of Safety and Security*¹⁰⁵ that the courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies.¹⁰⁶

The final judgment in the *Modderklip Case* is a fine example of the awareness that some judges have to the difficulties that arise between the right to housing of informal settlers and the right to enjoy private property. The finding that the eviction could not be enforced without the state providing for alternative land for settlement by the settlers can be termed as acceptance of the obligation of the state to provide housing, even though this may be done progressively in the face of financial difficulties or inadequacy of land. If finances and unavailability of alternative land prove to be the case, the reasonable thing may indeed be to let the settlers stay on the land they occupy as the state acquires it for a fee or finds alternative means of dealing with the situation. In this case, the judge ordered for the residents to remain on the lands until alternative land was found. This would go a long way to transform society from the perpetual scene that is witnessed where settlers such as these are taken out of land and left with nowhere else to go.

The balance that was reached in this case was appropriate as it served to protect the rights of the informal settlers by letting them have a place to stay and at the same time, finding that the state had not met its obligations to protect the housing rights of the settlers. The judgment also served to protect the right to private property of Modderklip by holding that it was entitled to damages for the occupation and the declaration that the state had been in violation of Modderklip’s rights.

In *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁰⁷ (hereinafter the *Grootboom Case*), Mrs Irene Grootboom and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and they were granted certain relief. The appellants were ordered to provide the respondents with shelter.

¹⁰⁴ *Modderklip Case*, para 42.

¹⁰⁵ 1997 (3) SA 786 (CC).

¹⁰⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), para 69 (per Ackermann J).

¹⁰⁷ *Grootboom Case*, 2001 (1) SA 46 (CC).

Yacoob J noted that the state was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.¹⁰⁸ In light of my proposal in section II to use the progressive realisation approach to the implementation of ESCRs, where the state must be seen to be doing something, the Court similarly noted that the measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means.¹⁰⁹ The South African Constitutional Court noted:

'Progressive realisation' shows that it was contemplated that the right could not be realised immediately. Nevertheless, the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.'¹¹⁰

This statement shows that the state must make a concerted effort to provide for housing. The steps must be reasonable, they may take time but the state must begin to take those steps so desperately needed to accord justice to those who need it the most in society.

The Court also noted that the State has a negative obligation in terms of the right to housing that is, not to interfere with the enjoyment of the right. This obligation had been violated when the municipality funded the eviction of the respondents earlier than the notice had indicated, without giving the victims a chance to salvage their belongings.¹¹¹ To conclude, the Court held that the State must foster conditions to enable citizens to gain access to land on an equitable basis.¹¹²

De Vos notes that in the Constitutional Court's approach to social and economic rights in *Grootboom Case*, lies the understanding of the role of the Bill of Rights (particularly the equality provisions and the provisions guaranteeing social and economic rights) as a transformative document aimed at addressing the deeply entrenched social and economic inequality in society.¹¹³

¹⁰⁸ *Grootboom Case*, para 24.

¹⁰⁹ *Grootboom Case*, para 41.

¹¹⁰ *Grootboom Case*, para 45.

¹¹¹ *Grootboom Case*, para 88.

¹¹² *Grootboom Case*, para 93.

¹¹³ De Vos P, 'Grootboom', 'The right of access to housing and substantive equality as contextual

Ultimately, when there is a clash between property rights and the genuine despair of people in dire need of accommodation,

‘the judicial function is not to establish a hierarchical arrangement between the different interests involved. It is not the task of the judiciary to automatically privilege, in an abstract and mechanical way, property rights over the housing rights of those affected.’¹¹⁴

In such instances, the function of the court is ‘to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each case’.¹¹⁵ Therefore, the state must show equal accountability to occupiers and landowners.¹¹⁶ It must show that it adequately considered the interests of both the land owners and the occupiers.

VI. Conclusion

It can be said from the various cases above that the balance to be reached between the right to housing of occupiers and the right to property of the individual land owners is a delicate one. The courts seem to be most interested in enforcing justice for both parties. The courts have been keen to interpret the constitution in a transformative way that changes society for the better by attempting to reduce the inequalities that exist with regard specifically to the right to housing. This transformative approach to interpretation contextualises the various legal texts and interprets them against the backdrop of the problem facing the most vulnerable groups in society affected by a specific human rights issue with the intention to transform the lives of those aggrieved by giving them effective solutions. The State is mandated to provide alternative lands for resettlement in the case that evictions are to take place from lands it owns or from land owned privately by citizens. Ultimately, the balance can only be reached appropriately on a case to case basis. It is important for the various stakeholders to deal with the problem of informal settlements before the matters ultimately appear in court – most importantly at the point of policy formulation, law making and budget allocations.

fairness’ 17 *South Africa Journal on Human Rights* (2001), 259.

¹¹⁴ *Port Elizabeth Municipality v Various Occupiers* 2004(12) BCLR 1268 (CC), para 23.

¹¹⁵ *Modderklip Case*, para 22.

¹¹⁶ Chenwi L, ‘Putting flesh on the skeleton’, 135.

VII. Recommendations

The enactment of the Evictions and Resettlement Bill, 2014 is important in order to have legislation in place that will govern the process of evictions. Court judges should also be more alive to the difficulties culminating from the balance to be carried out in the case that there is a conflict between housing and property rights. They should not be quick to issue eviction orders as was done by Marais J in the initial *Modderklip Case* (as noted above).

Furthermore, the minimum and maximum acreage should be considered in order to avail more land for the settlement, by the government, of those who are unable to acquire their own pieces of land. This will deal with the situation where a single individual owns a lot of land that is left unutilised whilst many other persons suffer from the lack of it. Additionally, Kenyan lawyers, NGOs and civil society groups should do more to participate in the bringing of such actions before our courts in order to build our local jurisprudence. These groups should be more proactive in pushing for the improvement of the utilisation of land resources and for the promotion and protection of the right to housing.