



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NUMBER 239 OF 2014

KEPHA OMONDI ONJURO AND OTHERS.....PETITIONERS

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF LANDS

HOUSING AND URBAN DEVELOPMENT.....3RD RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF ROADS

TRANSPORT AND INFRASTRUCTURE.....4TH RESPONDENT

COMMISSIONER OF LANDS.....5TH RESPONDENT

NATIONAL LAND COMMISSION.....6TH RESPONDENT

JUDGMENT

Introduction

1. This judgement is the subject of the petition dated 22nd May 2014 by the petitioners herein and the cross petition dated 23rd June, 2014 by the 2nd Respondent in the main petition (hereinafter referred to as the Corporation).

The Petition

2. The petitioners described themselves as adult Kenyans of sound mind and residents of Kibera slums in Kibera constituency in Nairobi County within the Republic of Kenya.

3. The 1st Respondent is the legal representative of the Government of Kenya and the principal legal adviser to the Government pursuant to Article 156(4) of the Constitution.

4. The 2nd Respondent is a body corporate that regulates the conduct of railways and in particular the management and the running of the entire railway system within the Republic of Kenya.

5. The 3rd Respondent is in charge of the regulation and protection of all lands held by the Government and individuals in the Republic of Kenya.

6. According to the petitioners, they presented this petition on their own behalf and on behalf of the members and or residents of Kibera Slum.

7. It was their case the Corporation owns the Kenya Railway line together with the railway reserve which the Petitioners aver is a 30 metre wide strip on either sides of the railway line which runs from Mombasa through Nairobi to Busia traversing among others the Kibera slums where the Petitioners alleged they reside. The Petitioners stated that over the years the railway reserve has been heavily encroached majorly at the slum areas and efforts to resolve this issue have not borne any fruit.

8. The Petitioners averred that in 2004 the Corporation sent out notices of eviction to railway dwellers in Kibera and Mukuru settlements and the dwellers thereof got into negotiations with the Corporation where it was agreed that the Corporation should observe the World Bank guidelines for resettling Project Affected Persons (PAPs). The Petitioners added that the resolution to observe the World Bank Guidelines for PAPs put a stop to the evictions without relocation or compensation. The Petitioners asserted that this led the Corporation to obtain funding from the World Bank to facilitate the relocation and resettlement of the squatters that were in occupation of the railway reserve.

9. According to the Petitioners the resettlement and relocation exercise was to cost Kshs. 6,332,749,011.00 and it targeted to erect 9,500 units which units were to be erected within the outer 10 metre width strip of the railway reserve on each side of the railway. The Petitioners asserted that to fulfil this the Corporation in conjunction with the World Bank engaged the services of Pamoja Trust which was brought on board to carry out a study to establish a number of the illegal squatters who were occupying the railway reserve and the nature of adequate compensation necessary for them.

10. The Petitioners also stated that in 2010 a group known as the Social Economics and Geo-Spatial Engineers who are situated at the Muungano Support Trust (MuST) joined a team of urban professionals who were to advise the government of Kenya on resettlement of the over 10000 families living in the Kibera and Mukuru settlements. To enhance transparency the Petitioners asserted that MuST was joined by another group known as Muungano wa Wanavijiji and the two groups were tasked with conducting a comprehensive verification exercise which would be agreeable to all parties, and this exercise was to include verifiable registration during the enumeration process. Indeed, the Petitioners added that it was agreed that there were more PAPs who had encroached the railway reserve settlements since 2005, and after the construction failed to take off in 2010. After several meetings and resolutions between the constants/consultants, a Relocation Action Plan 2010 ("RAP2010") was agreed upon and this detailed how the government was to relocate the PAPs to a non-danger zone because construction of the units was to begin in March, 2010. The Petitioners contended that the names and photographs of those who were to be relocated are in the custody of the Corporation.

11. The Petitioners contended that the anticipated construction of the units in March 2010, failed to take off. It is also the observation of the Petitioners that between the first enumeration of PAPs in 2005 and the second enumeration in 2010 both referred to hereinafter as "cut off dates", many people had moved in and out of the railway reserve and as such the data collected in 2005 could not be relied upon.

12. The Petitioners asserted that eventually the project begun in January, 2014; but between 2010 and 2014 there had not been any modalities to stop, regulate or otherwise arrest any further encroachment on the railway reserve and as such any reliance on the RAP2010 which was based on the persons enumerated in 2010 will be detrimental and an audit ought to be conducted to reconcile the beneficiaries

and thus avoid injustice.

13. The Petitioners insisted that the 2010 data is inaccurate and flawed and argue that the cut-off date should be commensurate with the exact period when the project commenced because the Project Affected Persons are the people found in the line of the project when the relocation begins, failure to do which would amount to discrimination of any *bona fide* squatters who were not enumerated in 2010 but had encroached on the railway reserve not through a fault of their own and contrary to the Constitution of Kenya, World Bank Operation Policy and the Universal Declaration of Human Rights resolution 217 Article 111 of 10th December 1948 which informs the Relocation Action Plan.

14. The Petitioners contended that they were bitter that government officials were treating the PAPs resettlement project as their personal cash cow because residents are being promised a slot in the PAPs data and allocations if they parted with a certain amount of money. The Petitioners averred that several government officials were lobbying and allocating themselves units in the project and that there was a plan to settle people who are not genuine PAPs. The petitioners believed that the data of the PAPs which is in custody of the Respondents has been majorly doctored and can no longer be relied upon as a reflection of the position on the ground.

15. The Petitioners asserted that in accordance with Article 35 of the Constitution they have a right to access information concerning the allocation of the settlement units as well as the identity of the beneficiaries of these settlement units. The Petitioners averred that they have lived on the suit property as squatters for many years and they have derived their livelihood from the suit property yet they were issued with an eviction notice dated the 5th of June 2014 which notice threatened to demolish the educational, residential and commercial structures of the Petitioners in violation their right to education, human dignity, equality, freedom from discrimination, security of the persons, freedom of movement and residence, protection of their right to property. The Petitioners were therefore apprehensive that the alleged eviction would mean a shattered life for them because they would be rendered destitute; they were also apprehensive that the proposed demolition would be violent and would put their lives at risk thus violating their right to life and freedom from violence. The Petitioners insisted that they had a right to accessible and adequate housing as well as reasonable standards of sanitation and it was the court's duty to protect these rights. The Petitioners also stated that they had sought the indulgence of the Corporation with a view of harmonizing the list of PAPs to reflect the position on the ground to no avail.

16. It was on this accord that the Petitioners sought the following orders:

(a) A declaration that the notice by the 2nd Respondent is illegal, irregular, unprocedural and contrary to Articles 26, 27(2), (4) & (6), 29, 39, 40, 43, 47, 56 of the Constitution of Kenya and is therefore null and void.

(b) A declaration that any forceful eviction and/or demolition without a reallocation option is illegal, oppressive and violates the rights of Petitioners

(c) An order restraining any purported demolition and/or eviction by the 2nd Respondent, their agents, servants and/or employees against the Petitioners

(d) A declaration that the Petitioners herein are entitled to the full protection from discrimination and the same right has been violated

(e) A declaration that the Petitioners herein and other members of the public are entitled to the full enjoyment of the right to economic and social rights that are about to be violated

(f) Costs of the Petition

Or such other orders as this Honourable court shall deem just.

Cross Petition of the Corporation

17. According to the Corporation, the Petitioners are non-project affected persons who are illegally squatting within the area reserved for the Kenya-Uganda Railway line which illegal occupation will greatly jeopardize and paralyze the safe operation of the Kenya-Uganda Railway transport system and endanger the lives of the illegal occupants and the general public. The Corporation averred that it owns and operates various railway lines in the country including the oldest and well known Kenya-Uganda Railway line which runs from Mombasa to Nairobi through to Kampala, Uganda (hereinafter referred to as the Kenya-Uganda Railway Line). The Corporation asserted that the encroachment on the Kenya-Uganda Railway line and the railway reserve thereto within Nairobi's Kibera and Mukuru slums had been of great concern to the safety of the railway transport in the country and it tirelessly and dedicatedly tried to resolve this issue.

18. To the Corporation, the Kenya-Uganda Railway Line is a very important regional railway line and a major component of its operations and the rail services in Kenya and Uganda. It further contended that at all material times it had owned the railway line and reserve therein which is 5.2 metres from either side of the whole Kenya-Uganda Railway which translates to a corridor of 10.4 metres with the railway line. The Corporation averred that it was its duty to protect the rights of Kenyans including those illegally encroaching onto the railway reserve, to safety and dignity as enshrined in Articles 26, 28 and 29 of the Constitution.

19. It was the Corporation's position that the Petitioners and others put up illegal constructions which were in themselves a safety risk and may lead to serious loss of life and property in case of a train accident such as derailment or a fire because the goods transported by the trains are highly flammable liquids and hazardous materials. The Corporation emphasized that the purpose of the railway reserve is mainly to ensure the safety of all rail users and adjacent establishments, to secure the future of railway expansion and to provide a buffer zone against injury and loss of life to members of the public in case of railway accidents.

20. It contended that it had tried to prevent the squatters from encroaching on the railway line and the reserve therein through the use of the Railway Police but these efforts did not bear any fruit because they lacked the appropriate and necessary government support and goodwill. Due to lack of support from the government, the Corporation obtained funds from the World Bank to enable it relocate and resettle the squatters occupying the rail reserve in a bid to enhance the safety of rail transport and minimize loss of lives that may arise from a rail accident within the densely populated Kibera and Mukuru slums in Nairobi.

21. The Corporation then stated that they engaged the professional services of the renowned GIBB Africa to carry out a study to establish the number of all the illegal squatters occupying the rail reserve and the nature of the compensation that would be adequate to allow for their relocation and resettlement to secure area away from the Railway Line. This report was carried out for a period of 2 years and was concluded in 2010. The Corporation also engaged the services of Pamoja Trust a non-governmental organization with wide experience of working with the project affected persons and upon the conclusion of this report the Corporation procured funds for the implementation phase.

22. The Corporation asserted that the funding was obtained, the contract was awarded, the site was

handed over to the contractor who commenced construction in October 2013 and as such the project is at an advanced stage. The Corporation therefore believed that it and the Project Affected Persons who are listed within the project stand to suffer irreparable loss if the project was hindered.

23. The Corporation averred that the Project Affected Persons who were identified within the 10.4 Railway Reserve Meter corridor had facilities ranging from semi-permanent residential household structures, business premises, trees and crops and that the Relocation Action Plan ascertained the value of their interests and proposed alternative relocation areas within the appropriately developed premises. This, the Corporation averred, would ensure that the Project Affected Persons continued with their quality of life undisturbed pursuant to their fundamental rights and freedoms as envisaged in the Constitution.

24. According to the Corporation, all Project Affected Persons who were within the suit premises while the Relocation Action Plan was conducted were informed of the purpose of the Relocation Plan and they were all given an opportunity to participate in the formulation of the Relocation Plan before the 18th of December 2010. After this, the Corporation asserted that the consultations and contributions collected were compiled and submitted a report for approval and funding by the World Bank.

25. The Corporation's case was that a census was commissioned at the household level of all the Project Affected Persons within the Railway Line Reserve and that during this household survey, coordinates were taken for each Affected Person and the property to be affected by the Relocation Plan, interviews were conducted upon which the Affected persons were issued with unique Identification Cards (IDs) in duplicate as evidence of the consultations and for ease of identifying them upon completion of construction of the units. To the Corporation a total of 64 public meetings were held in the railway line reserves with members of the public that were to be affected by the relocation plan and a full replacement cost method was established to determine the value of the affected structures where they factored in the disturbance and supplementary costs to be incurred by the Affected persons upon relocation to the developed structure which developed structure was to be either similar or an improved structure at a suitable location near their current premises but not within the Railway Reserve.

26. It was the Corporation's case that the total number of affected persons units identified during the Relocation Action Plan exercise was 2,615 in Mukuru and 6,952 in Kibera totalling 9,567 units. It was its contention that the identified units to be constructed as per the Relocation Action Plan were to include residential and commercial owner occupied and tenant occupied structures, religious, educational and health institutions as well as public and private service utilities.

27. The Corporation averred that the affected Persons were identified through a rigorous mapping process where impacts of the Relocation Action Plan and the proposed change in land use pattern were analysed in relation to geographical zones to single out Affected Persons with the objective of incorporating their views in design of the mitigation measures and the resettlement plan upon which all the legitimately affected persons' views were incorporated into the Relocation Plan to reflect each person's preferences for resettlement.

28. The Corporation averred that the effective date of the Resettlement Action Plan was 18th December 2010 and that all the persons who were illegally occupying the Railway Reserve as of that date were identified and their names compiled in a list. It was the Corporation's view that subsequently during 2011 and 2012 other persons among them the Petitioners herein learnt of this project and now wish to opportunistically take advantage of the Relocation Action Plan by encroaching on the Railway Reserve with the intention to derail the project and jeopardize the implementation of the same. It was therefore the position of the Corporation that the illegal persons who only recently encroached on the Railway Reserve

were illegitimate and intended to exploit and frustrate the legitimate fundamental rights and freedoms of the genuine Project Affected Persons identified from accessing the alternative housing availed to them by the Project.

29. According to the Corporation the alternative housing to be availed to the genuine Project Affected Persons would be secure housing away from the danger attendant to their occupation on the Railway Reserve with secure tenure which would guarantee them legal protection against forced eviction, harassment and other threats. It averred that this alternative housing would include guarantee availability of health and education services, materials, facilities and infrastructure with access to natural and common resources like safe water, drainage and energy. The Corporation also asserted that the alternative housing would a habitable environment that is spacious and free from cold and dampness or other threats to health structural hazards and disease vectors and the Petitioners would also be guaranteed accessibility and proximity to their previous areas of residences and as such there would still be easy access to employers.

30. The Corporation also averred that the Relocation Plan Report factored in the length of time the legitimately Affected Persons were in occupation and it established that the Affected Persons had been on the site and in the neighbourhood for a considerable time fully acknowledging that some of them were well settled in their homes and employment, schooling and enjoyment of social amenities and therefore these Affected Persons had a greater claim to their protection unlike the new encroachers who recently moved in thereafter.

31. The Corporation therefore seek the intervention of this Honourable Court to direct the recent illegal occupiers of the Railway Reserve whose names do not appear in the list of the Project Affected Persons to move out of the Railway Reserve and allow the Corporation to proceed with the Resettlement Plan in which it had invested heavily in and which will ultimately secure rail transport in the country.

32. To the Corporation, the consequences of the court not granting an order of removal of the illegal recent encroachers would be the potential loss of numerous lives which might come about due to the accidents that might arise within the Railway Reserve akin to the incident at the Sinai slums along the Kenya Pipeline network. The Court was therefore urged to take cognizance of the fact that the Corporation acted in good faith and as responsible citizens by initiating the resettlement project which is an expensive venture and that the only pending proceeding in relation to the subject matter is Nairobi ELC No. 363 of 2013 **Kenya Railways Corporation vs. Human Needs Projects & 2 Others.**

The Interested Parties' Case

33. The 1st Interested Parties put in two affidavits sworn by **Mohammed Ouma Jumawho** who swore an undated replying affidavit in Nairobi in which he stated his authority to depose to facts known to him and other persons listed as interested parties; as well as **Victor Oluoch** who swore a replying affidavit in Nairobi dated the 1st of October 2014 in which he stated his authority to depose to facts known to him and other persons listed as interested parties.

34. The 1st Interested Party averred that they are residents within the area known as Katwekera which is between Soweto East Fly Over and Kianda, since 2010 and learnt about the existence of this suit vide a notice published in the Daily Nation. He averred that sometime in 2014 the Corporation issued a notice against them and other persons occupying the Katwekera area to vacate the railway reserve and remove all structures so erected on the reserve. While the 1st Interested Party acknowledged that the World Bank was the financier of the construction works related to the Relocation Action Plan, it was their position of that in accordance with the World Bank Operational Policy 4.12 and World Bank Operative

Directive 4.30, the said construction was to take place with minimal disturbance to the projected affected persons.

35. The 1st Interested Party averred that the Corporation in accordance with World Bank requirements engaged Pamoja Trust to undertake a study of the Relocation Action Plan for purposes of implementing the relocation of persons residing, undertaking business or otherwise occupying the railway reserve from the 60 metre railway operation corridor. The 1st Interested Party stated that the Corporation was to commence construction of the alternative accommodation for the Project Affected Persons within one year of the submission of the Relocation Action Plan and the tentative date set for this was the 1st of March, 2011. An initial Relocation action Plan, according to them was submitted to the World Bank by the consultant in 2005 and the same was subsequently revised in 2005/2006 which revision was necessitated due to certain socio-political developments and growth in extent of the population along the railway line and this resulted in the Relocation Action Plan Report in November 2010.

36. The 1st Interested Party contended that the Corporation only handed over the site to the contractor on the 24th of September 2013 and construction commenced sometimes in 2014. To the 1st Interested Party in the notice of eviction the Corporation alleged that a Relocation Action Plan had been formulated through a consultative process to identify the Project affected Persons and a cut-off date had been set for 30th April 2010. However, in the Cross Petition the Corporation deposed to the cut-off date being the 18th of December 2010 which date contradicts to the one indicated in the eviction notice.

37. It was the position of the Corporation that the Relocation Action Plan must be in accordance with the World Bank Requirements which emphasize the need for the exercise to be a consultative process including the determination of the cut-off date. According to the 1st Interested Party the cut-off date must be a date mutually agreed upon between the Corporation and the Project Affected Persons. It was the view of the 1st Interested Party that the Corporation failed to demonstrate that this date was mutually agreed upon.

38. The 1st Interested Party faulted the list of Project Affected Persons that was submitted to this court by the Corporation in their Cross Petition and contended that that list omitted the names of Affected Persons who had been issued with IDs, some of the affected person in this list are only identified by one name only, some of the affected persons in this list are no longer in occupation, the list also referred to vacant structures and absent tenants which was incorrect because some of the affected persons were away in church on the day the enumerators were on the ground and most importantly the 2nd Respondent ignored persons who came into occupation of the suit premises after the unilateral cut-off date of 2010 was set by the 2nd Respondent, ignoring the fact that the situation on the ground changed radically. The 1st Interested Party asserted that the population within the affected areas are dynamic and keep on changing and therefore as per the World Bank regulations a final census ought to have been carried out before issuing the eviction notice and commencing construction. The 1st Interested Party complained that they had been engaging the Corporation to audit the list of Project Affected Persons vis-à-vis the correct situation on the ground in order to harmonize the information but to no avail.

39. The 1st Interested Party also highlighted various contradictions in their affidavit wherein they stated that in the Relocation Action Plan issued in November 2010 by Pamoja Trust 6,952 structures were identified as affected and the consultant proposed construction of a total of 6,683 replacement units; yet the Corporation is alleging that there was a list of 997 Project Affected Persons which the 1st Interested Party averred was out of touch with the reality on the ground.

40. The 1st Interested Party also alleges that the Corporation interfered with the agreed design and architectural plans of the project especially with regard to the replacement units and no provision was

made for other social amenities such as educational, religious or health institutions. Further, the replacement units under construction currently were much smaller in size compared to the specifications stated in the Relocation Action Plan report and the 2nd Respondent gave explanations for the changes. The 1st interested Party purported that the units being constructed were 10000 units and there was no explanation as to whom the extra units belong to.

41. The 1st Interested Party averred that on the 20th of August 2010 they as residents submitted issues concerning the Relocation Action Plan report prepared by Pamoja Trust but these issues were not adopted despite a commitment being given that they would be adopted.

42. The 1st Interested party contended that the Corporation extensively relied on the Relocation Action Plan Report prepared for the Kenya-Uganda Railway which was not relevant in the present case as it was commissioned for the Kenya-Uganda Railway project being financed by the International Finance Corporation. Instead the position of the 1st Interested Party was that the Relocation Action Plan 2011 was intended to be a negotiated and agreed process financed by the World Bank in line with the Constitution of Kenya and the World Bank Operational Policy 4.12 and World Bank Directives 4.30 and not pursuant to the ***Kenya Railways Corporation Act***.

43. The Interested Parties averred that the list failed to take into account persons who came into occupation after the year 2010 and it also did not include other Project Affected Persons who were counted in the last census of 2010 and issued with IDs as such it did not reflect the position on the ground. The interested Parties also averred that the 2nd Respondent had been building temporary structures and moving the Project Affected Persons to the structures and in the process such individuals lost their status as Project Affected Person.

44. The Interested Parties also complained that the Corporation had not put any measures to track movement of individuals within the project affected areas. The Interested Parties added that the Corporation in blatant disregard of the World Bank regulations subjected individuals wishing to verify whether their names appear in the list of Project Affected Persons to a payment of Kshs. 1,000 perusal fee. To them, the Relocation Action Plan exercise is not a charity or favour to the Project Affected Persons since the Project Affected Persons will be required to pay for the alternative accommodation by way of lease of 45 years. Further, the Relocation Action Plan exercise is funded by the World Bank for purposes of providing humane relocation of Project Affected Persons with minimal losses on the Project Affected Persons as well as the Corporation who they aver are the custodians of the funds for this project in trust for the Project Affected Persons. The Interested Parties added that the impression created that the relocation initiative is by the Corporation was merely intended to divert attention of the court from the issues at hand.

45. The Interested Parties denied that the non-enumerated Project Affected Persons were opportunists because the cut-off date can only be determined on commencement of the construction works and not a rigid and absolute date which does not take into account the prevailing circumstances.

46. The Interested Parties averred that Petition Number 363 of 2013 relates to specific encroachers and the facts of the case are not applicable to this present Petition.

47. The Interested Parties averred that there is likelihood that they will miss out on the allocations of homes and the houses will be illegally and procedurally allocated to undeserving persons since they did not have their names on the list held by the 2nd Respondents as Project Affected persons yet they are genuinely likely to be affected by the eviction. The Interested Parties averred that the Relocation Action Plan was meant to do justice to the slum dwellers along the railway but if the evictions are allowed to

proceed before substantial issues were resolved then the same would be an exercise in futility.

The Corporation's Further Affidavit

48. The Corporation filed a further affidavit sworn by **A K Maina** on the 20th September 2014 in Nairobi which sought to respond to the Replying Affidavits filed by the Interested Parties therein in which it clarified and agreed with the Interested Parties that the width of the railway reserve is indeed 30 metres on either side of the line which translates to a 60m railway reserve however the reference to the railway reserve being 5.2 m on either side is erroneous but the said distance translates to the minimum recommended safe operation within the heavily encroached areas of Kibera and Mukuru. It further sought to clarify that the report prepared by GIBB Africa covered the Railway line all the way from Mombasa to Malaba area and that the report prepared by Pamoja Trust covered the contentious areas in Mukuru and Kibera, and the same is the one annexed to the Petitioner's affidavit. Further it was clarified that the number of Project affected Persons is 9005 and that the list that was attached to the Cross Petition was incomplete.

49. The 2nd Respondents asserted that the project commencement date was January 2011 when the World Bank approved the Relocation Action Plan report and they added that the project has at all points adhered to the timelines stipulated by the World Bank in so far as circumstances allow. The Corporation stated that the main engineering solution for Kibera and Mukuru area was the provision of an 8m concrete wall barrier between the railway line and the residents to ensure that the residents relocated to the units built within the walls and that the resettlements would occupy the 10m outer edge of the railway reserve leaving the 20m on either side of the track for railway operations, safety and expansion.

50. The Corporation agreed that the initial Relocation Action Plan of 2005 was revised and this was necessitated by the uprooting of the railway during the 2007/2008 post-election violence and the derailment of a train in 2009 leading to fatalities in Kibera. The Corporation added that in the derailment incident the fatalities occurred beyond the 5.2 metre safety zone proposed in both the initial and revised Relocation Action Plans thus casting doubts on the viability of these options; and the growth in the extent of encroachment since 2005 has also increased the scale of the problem.

51. The Corporation insisted that the Relocation Action Plan was an accumulation of proposals and recommendations of and by the members of the Mukuru and Kibera area who were consulted at every stage of compilation of the report and added that for purposes of the inclusion process the affected communities were divided into 9 segments for ease of administration of the project and each segment elected management committees to oversee the projects and enumeration and verification of the project affected persons were undertaken with the help of the segment committees.

52. In regard to the cut-off date the 2nd Respondents averred that it was mutually agreed that the cut-off date should be the date following the end of the enumeration process that involved identification, verification and mapping process for all the people living within the area and as such the cut-off date was 30th April, 2010 and the data as at the cut-off date is what the project engineers used to commence design for the houses factoring in the limited space available for the developments. The Corporation admitted that the conflicting cut-off dates is a mistake because the date provided as the cut-off date in the Cross Petition was lifted off the report by GIBB Africa which applied to the Mombasa-Malaba area and not the Kibera-Mukuru area and as such as confirmed by the Interested Parties the cut-off dates for identification, verification and mapping of Project Affected Persons was the 30th of April, 2010 and not the 18th of December, 2010.

53. The Corporation affirmed that the grievance mechanism in place allowed for any of the persons

aggrieved by the list of Project Affected Persons to raise their concerns with their appointed segment leaders and upon producing proof of enumeration and residency before the cut-off date within the reserve, are included in the list. The Corporation contended that the Interested Parties have never approached their segment leaders to resolve any of the issues they are alleging and that the first instance of grievance resolution of any issue with the Relocation Action Plan ought to be presented to the segment grievance committee made up of at least 10 inhabitants from the 9 areas specifically Mukuru kwa Njenga, Mukuru kwa Sinai, Mukuru kwa Reuben, Kisumu Ndogo, Katwekera, Laini Saba, Kianda, Soweto East and Mashimoni. According to the Corporation the segment grievance committee is therefore made up of people with a good knowledge of the people and the dynamics of the respective areas they come from and any dispute not resolved at this level is accelerated to the multi-segment grievance committee. However should the above two tiers fail to resolve a problem to the satisfaction of a complainant then they have the right to appeal to the Grievance Appeals Board comprising of 1 representative from the Project Implementation Team and 1 person appointed by the Project affected Persons and a neutral arbiter appointed by the two which Appeals Board has the powers of an Arbitration panel as provide for under the **Arbitration Act**. To the Corporation the above stated dispute resolution mechanism allows for recourse to the national judicial system which has always been open to any party dissatisfied with the decision of the Grievance Appeals Board.

54. The Corporation explained that on eligibility of persons to the Relocation Action Plan, Clause 14 of the World Bank Operational Policy 4.12 required that the borrower carry out census to identify the persons who would be affected by the project to determine who would be eligible for assistance and to discourage an inflow of people who were ineligible for assistance.

55. The Corporation further averred that the World Bank further required a borrower to develop a procedure satisfactory to the Bank for establishing the criteria by which displaced persons would be deemed eligible for compensation and other resettlement assistance such as provision for meaningful consultations with affected person and communities, local authorities, and where appropriate non-governmental organizations and specific grievance mechanisms. The Corporation asserted that the World Bank only releases funds for a project subject to compliance with the requirements as set out in the Operational manual; and as such considering the Bank gave its approval for the project it only follows that the 2nd Respondent adhered to the World Bank Operational manual 4.12. Further the World Bank Operational manual 4.12 at Clause 16 imposes a requirement for a cut-off date for all such projects and stipulates that any person who encroaches on the area after the cut-off date is not entitled to compensation or any other form of resettlement assistance.

56. In regard to the architectural plans, the Corporation depose that it was mutually agreed upon that they would be altered from the initial 5x4 metres to 4.5x4 metres after the enumeration process and upon realizing that the funds and space available would not be sufficient to put up 5x4 units as initially agreed upon. The Corporation added further that the 4.5x4 metres marks a difference of only 0.5 metres in the size of the unit and this has not affected the habitability of the houses in any way and that the housing units are self-contained; with adequate storage facilities that marks a significant improvement in the quality of life for the Project Affected Persons.

57. According to the Corporation, the Government of Kenya and the UN Habitat partnered in the Kenya Slum Upgrading Project with the aim to improve the livelihoods to the people living and working in the slums and informal settlements in the urban areas of Kenya through the provision of security of tenure and physical and social infrastructure as well as opportunities for housing improvement and income generation and that the Government of Kenya through the financing of the World Bank has also initiated Kenya Informal Settlements Improvement Project and the primary objective of this project is to improve living conditions in slums in selected cities in Kenya through improved security of tenure and

infrastructure in accordance with the plans developed in consultation with the community. It was therefore the position of the Corporation that the interested parties cannot therefore claim that the Government of Kenya has denied them the right to housing when they have not pursued legitimate channels availed to them to acquire adequate housing pursuant to their constitutional rights.

58. In the Corporation's view, the project is not a grant from the World Bank but a loan to the Government of Kenya which shall finance less than half of the value of the project and that the World Bank's contribution which is in form of a loan is Only US\$ 35 Million and the Kenya Government is contributing US\$47 Million which is 71.3% of the project value.

59. In response to the allegation of temporary structures being put up by the Corporation, it explained that these were not meant to disenfranchise the Project Affected Persons but to provide a temporary shelter for them during the period in which the Project Affected Persons have been removed from the construction site to allow for the construction of the permanent units and as soon as the constructions are completed the Project Affected Persons would be relocated into their permanent units and the temporary structures demolished.

60. In regard to the children right to education, the Corporation averred that it was agreed in the Relocation Action Plan with the Project Affected Persons that the children would be enrolled in existing public schools which have extra space capable of hosting their children. Indeed the Corporation added that the Relocation Action Plan established that there were a total of five public primary schools in Kibera with a total of 60 vacant classrooms and these had the capacity to absorb 300 pupils. Further, students in secondary schools also had the option of being absorbed in Olympic Secondary School and Raila Educational Centre the two new secondary schools in the area.

61. Apart from that the Relocation Action Plan made provision for day-care facilities within the constructed units at Kibera at strategic locations and that they identified 258 public utilities in Mukuru and 532 public utilities in Kibera comprising water tanks, water points, toilets and bathrooms which were common to all the residents in the area as their housing arrangements had limited space available for inclusion of these facilities within the housing units and that the designs for the relocation and business units provide for water and sanitary services.

62. According to the Corporation, the Interested Parties herein are not residents of Kibera estate or the Katwekera area which is between the Soweto Fly Over and Kianda as alleged and asserted that the Interested Parties hereto had other housing before the cut-off date of 30th April 2010 and they deliberately chose to forfeit their housing and swindle the legitimate Project Affected Persons of the houses.

63. According to the Corporation the right to adequate housing in the Constitution does not diminish a property owner's contractual and property rights and that to compel the 2nd Respondent to allocate the Interested Parties housing units would be to disenfranchise the Project Affected Persons and the 2nd Respondent of their right to property contrary to Article 40.

64. To the Corporation, the construction of the resettlement housing units cannot continue if the Petitioners are still on the suit property and it is therefore essential that they move out to allow for the construction of the relocation units.

Petitioners and Interested Parties' Submissions

65. It was the submission of the Interested Parties and the Petitioners that the intention of the project is

to settle slum dwellers along the railway lines in order to avert the danger of staying close to the railway and to avoid inhuman evictions as has always been carried out by the Corporation. The Interested Parties and the Petitioners further submitted that Project affected Persons means anybody who eviction from the railway reserve shall affect whether enumerated in 2010 or not. The Interested Parties and the Petitioners submitted that given the idea behind the housing scheme they qualify for the project as it was meant to help the slum dwellers and not enrich the 2nd Respondents.

66. The Interested Parties and the Petitioners submitted that they have been living in Kibera Slum Village for many years and were given a few days' notice by the 2nd Respondents to move out of their homes. They submitted that the notice and subsequent intended forceful demolitions and evictions are unconstitutional because the Corporation has not complied with Article 47(2) of the Constitution since no reasons were given in the notices that were served on the Petitioners and as such the right to administrative action was violated.

67. In support of their positions, the Interested Parties and Petitioners relied on **Susan Waithera Kariuki & 4 others vs. Town Clerk Nairobi City Council & 3 others [2013] eKLR** with respect to the relevance and applicability the general rules of international law and treaties or conventions ratified by Kenya. Based on **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration and Internal Security Embu Petition No. 2 of 2011 [2011] eKLR** it was submitted that international obligations are applicable and enforceable locally.

68. The Interested Parties and Petitioners submit that in reference to the above provisions the intended illegal demolitions and forceful evictions likely to be carried out by the 2nd Respondent are a total disregard to the procedural provisions of the law and in any event there were neither consultations made nor likely humane treatment for the Petitioners during the demolitions. The Petitioners aver that the demolitions are likely to be degrading to the extent where police dogs are being released to the Petitioners as they try to question the demolition.

69. The Petitioners regurgitated that they have resided on the properties where they are being evicted from for years and it would therefore be unreasonable and unconstitutional for the Respondents to give the Petitioners a short notice to vacate when consultations have been ongoing. They referred to the holding of Machelule, J in **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration and Internal Security** (supra) where the Judge held that a 21 day notice for people who had lived on the land since 1940 was insufficient and unreasonable. The Petitioners submitted that the notice to them was illegal because it was insufficient and unreasonable and in any event the 2nd Respondents do not own the land and the Petitioners are entitled under the doctrine of adverse possession.

70. The Petitioners and Interested Parties submitted that they ought to be treated with dignity as required under Article 28 of the Constitution. To them the Universal Declaration of Human Rights provides that a proper remedy for forced eviction is to return the victims as close as possible to the original situation before the violation occurred. (Banjul Charter Article 21(2))

71. In the alternative, the Petitioners and Interested Parties submitted that they are entitled to compensation and allocation to another land or alternative shelter with access to education facilities, clean water, health care and food at the states' expense and relied on Article 8 of the UDHR which provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law. The Petitioners and Interested Parties submitted that the forcible, violent and brutal eviction through demolition of homes without according them or their children alternative shelter and leaving them exposed to the elements

and vagaries of nature is a violation of their fundamental rights to physical and mental health and moral health and basic education for the children. The said parties urged the courts to exercise its power under Article 23 of the Constitution and grant them appropriate relief so as to promote the values of human dignity, social justice, inclusiveness, equality and human rights as enshrined in Article 10(2) (b) of the Constitution.

72. The Petitioners and the Interested Parties faulted the Cross petition for lack of accuracy because the document only listed 2000 Project Affected Persons instead of the enumerated 10,000; the cross Petition also annexed the wrong document in regard to the Project Affected Persons and this only demonstrates that the 2nd Respondents are using this project as a cash cow for their benefit.

2nd Respondent's Submissions

73. The 2nd Respondents submitted that the principles which apply to the case before the court are derived from the principles on "development-based eviction" as was set by the court in the case of **Satrose Ayuma & 11 Others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others Petition 65 of 2010** at paragraphs 81 -84 where relying on the UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007) the court held that:

"The Guidelines inter alia place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized in law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law."

74. The 2nd Respondents submitted that the exceptional circumstances in this case that warrant the Relocation Action Plan is the danger that the human encroachment on rail reserve pose among them being the risk to human lives and safety due to the proximity to the railway traffic; unsafe operating conditions; risk of damage to property in the event of accidents or derailments; dumping of waste onto the railway track which impedes track drainage and compromising track stability exposure of maintenance personnel to unhygienic conditions and disease due to disposal of faecal and other waste on the track; slow train speed which cause inordinate delays; increased incidents of train and human collision; interruption of train services; increase in crime incidents; risk to health of railway employees; risk to passengers; environmental degradation; interference with signalling systems which make it perilous for the continued occupation of the reserves.

75. The 2nd Respondents further submitted that social economic rights are inseparable with human dignity under Article 28 and referred to the submissions by Yash Pal in the **Satrose Ayuma Case** where he stated that **human dignity cannot be realized without the satisfaction of basic needs and that individuals cannot realize their full potential if they do not have the basic resources to enable them achieve it and to respect their dignity. As such dignity becomes the foundation for requiring states to provide social, economic and cultural support to individuals and groups.**

76. The 2nd Respondents insisted that they being a state entity and recognizing these obligations placed upon it facilitated the Relocation Action Plan as a means of not only managing the encroachment at the reserve but improving the lives of the Project Affected Persons because the plan will provide alternative shelter for the Project Affected Persons within the same location and improve the quality of life for all its

intended residents. They added further that they are constrained by its mandate which is limited to provision and development of railway service and therefore they could only undertake the relocation action plan within the existing social infrastructure and its existing assets and that is why the RAP is located within its property.

77. It was contended that under Section 13(2)(g) of the *Kenya Railways Corporation Act* it is provided that:

(2) Subject to this Act, the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the Corporation and in particular, without prejudice to the generality of the foregoing, shall include power— (g) to prohibit, control or regulate—(i) the use by any person of the services performed, or the facilities provided, by the Corporation; (ii) the presence of any person, vessel, vehicle or goods within any inland waterways port or on any premises occupied by the Corporation for the purposes of the Corporation.

78. Section 16 of the same Act on the other hand provides that the 2nd Respondent has power to enter any land to prevent accidents. The Project Affected Persons, it was contended mutually agreed upon the reallocations and it's wrongful for the Petitioners to interfere with the reallocation process as they will be disenfranchising the Project Affected Persons of their units despite the Project Affected Persons having undergone a protracted and comprehensive process to bring about the Relocation Action Plan. The 2nd Respondents submit that the Petitioners had up until 2010 the Petitioners had other housing unlike the Project Affected Persons and they chose to relocate to the affected areas borne out of opportunistic behaviour of taking advantage of the project.

79. The 2nd Respondents submitted that it is wrong for the Petitioners to advocate for their right to housing as the law recognizes the right of the project affected persons to own houses and the Corporation's right to regulate the use of its property under Article 40. Reliance was therefore placed on **Qazi vs. London Borough Harrow (2003) UKHL** which espoused that interference with the right to housing flowing from the application of the law such as unqualified right to recover possession following service of a notice to quit which has terminated tenancy with a view to making the premises available to others does not in itself violate the right to housing. The 2nd Respondents submit that it did issue the illegal squatters with notices of intended vacation as duly required by law and that these notices were sufficient to the Project Affected Persons to remove their structures. Therefore according to the 2nd Respondents the evictions are within the law and necessary in a democratic society in the interests of public safety and the economic well-being of the country.

80. The 2nd Respondents submitted that it was acknowledged mutually by the Government and the World Bank that the clearance of the encroaching structures would lead to potentially adverse impacts on communities along the rail network in the form of displacements, disruptions of livelihoods and loss of assets and property and as a result the housing to be provided had to adhere to the World Bank Operational Policy 4.12 which provides that:

Upon identification of the need for involuntary resettlement in a project, the borrower carries out a census to identify the persons who will be affected by the project (see the [Annex A, para. 6\(a\)](#)), to determine who will be eligible for assistance, and to discourage inflow of people ineligible for assistance. The borrower also develops a procedure, satisfactory to the Bank, for establishing the criteria by which displaced persons will be deemed eligible for compensation and other resettlement assistance. The procedure includes provisions for meaningful consultations with affected persons and communities, local authorities, and, as appropriate, nongovernmental

organizations (NGOs), and it specifies grievance mechanisms.

81. Clause 22 and 26 of the World Bank Operational Policy 4.12 on the other hand provide that:

As a condition of appraisal of projects involving resettlement, the borrower provides the Bank with the relevant draft resettlement instrument which conforms to this policy, and makes it available at a place accessible to displaced persons and local NGOs, in a form, manner, and language that are understandable to them. Once the Bank accepts this instrument as providing an adequate basis for project appraisal, the Bank makes it available to the public through its Info-Shop. After the Bank has approved the final resettlement instrument, the Bank and the borrower disclose it again in the same manner.

26. For sector investment operations that may involve involuntary resettlement, the Bank requires that the project implementing agency screen subprojects to be financed by the Bank to ensure their consistency with this OP. For these operations, the borrower submits, prior to appraisal, a resettlement policy framework that conforms to this policy (see [Annex A](#), paras. 23-25). The framework also estimates, to the extent feasible, the total population to be displaced and the overall resettlement costs.

82. The 2nd Respondents submitted that in full compliance with the above requirements, the World Bank after accepting the proposals of the Relocation Action Plan document by Pamoja Trust made it available to the public through their Info shop.

83. It is the submission of the 2nd Respondents that they have complied with these tenets in designing and implementing the Relocation Action Plan. They demonstrate the same as follows; with regard to **legal security oftenure** the 2nd Respondents submitted that they are in the process of negotiating a 45 year Agreement for Lease with the Project Affected Persons following completion of some of the Relocation Action Plan units to safeguard the tenure of the units that will be allocated to the Project affected Persons and to guarantee them legal protection from forced eviction, harassments and threats. The 2nd Respondents submitted that it was agreed that the 45 year lease plan can only run from when the Project Affected Persons take possession and on expiration they would have priority to have the lease for the unit renewed in their favour.

84. With reference to **Availability of services, materials, facilities and infrastructure and Habitability**, the 2nd Respondents submitted that the RAP will secure a suitable safety zone which will enhance safety of both human and railway traffic and avoid the ever increasing train accident related conflicts. They added that the overall hydrology and drainage of the railway line will be improved due to the upgrading of the footpaths and drainage structures. The 2nd Respondents asserted that the RAP will also provide overhead bridges to divert human traffic and the footpath will foster easy access to other areas and social services like health facilities and this will improve commercial activities. The 2nd Respondents added that the improvement of commuter services will also lead to more transport options which will lead to cheaper and more reliable transport systems. It is the position of the 2nd Respondents that upon completion of the RAP delivery of portable water will be effective and sanitation services will be accessible. The 2nd Respondents also submitted that the adjacent residents of the project area have also benefited from hobs created by the construction ongoing within the area. The 2nd Respondents also submitted that with the improved infrastructure and security it is anticipated that the whole area of Kibera and Mukuru will be more vibrant and accessible to potential customers thus strengthening the symbiotic relationship between the businesses and surrounding formal estates. With regard to habitability the 2nd Respondents submitted that the basic relocation unit comprises single room spaces with a total area of 20m squared and this space comprises a kitchenette and sleeping area enclosed with a curtain screen,

the cooking space has a work top incorporated with a single drain sink and an MDF base cabinet and high level cabinet, the unit is linked from the ground level with a common staircase and has an individual water closet and shower area.

85. With regard to **Affordability** the 2nd Respondents submitted that the agreement to lease is currently being negotiated with the Project Affected Persons at between Kshs. 200 – 1000/= per year which is very minimal compared to the current tenancy rates enjoyed in the area and the residents have not been asked to contribute any monies towards the construction of the implementation of the Relocation Action Plan.

86. With regard to **Accessibility and Location** the 2nd Respondents submitted that the Project Affected Persons have been resettled within the same area that they live thus allowing them to continue with their lives unaffected; the slums are also within close proximity of the Central Business District and Industrial Area where the residents can easily access facilities and opportunities.

87. With regard to participation and feedback of the Project Affected Persons in the Relocation Action Plan the General Comment No. 7 of the CESCR on forced evictions demands that genuine consultations are done with those affected and adequate reasonable notice for all affected is done prior to the eviction. The 2nd Respondents submitted that the Project Affected Persons were identified, verified, consulted and contributed substantively on the RAP.

88. The 2nd Respondents submitted that at the commencement of the process Pamoja Trust Mapping and Enumeration Team undertook a reconnaissance of Kibera and Mukuru settlements so as to familiarize themselves with the situation on the ground and meet the project affected persons and assess the level of community awareness of the intended relocation. The 2nd Respondents added that Pamoja Trust applied a three-pronged approach in the identification of affected persons by numbering all structures and identification of project affected person types, GIS mapping of all physical features of the reserve such as topological features, project affected person structures, infrastructure and open spaces and social economic enumeration of all project affected persons. The 2nd Respondents submitted that the Project Affected Persons were organized to participate in all three exercises so as to ensure transparency and accountability and this was done by mobilizing representative community teams who were trained and provided with daily subsistence. The 2nd Respondents added that for ease of data collection and management, the settlements were clustered into zones and the numbering and mapping teams were then selected from these zones and the minimum requirement was that one came from these zones and was a Project Affected Person.

89. The 2nd Respondents submitted that Mukuru was divided into three zones namely Mukuru kwa Reuben, Mukuru kwa Njenga and Mukuru Sinai and due to the encroachment in Mukuru kwa Njenga it was further divided into three clusters namely – Sisal, Riara and Vietnam while Kibera was clustered into six zones namely Kianda, Gatwekera, Kisumu Ndogo, Mashimoni, Laini Saba and Soweto East. The 2nd Respondents further submit that a team of 60 people in Mukuru, 20 from each zone was identified for numbering and mapping and another 60 people were identified from Kibera resulting in a total of 120 people for mapping and a further 120 people were identified from Mukuru to undertake the social economic enumeration while 150 were identified in Kibera.

90. The 2nd Respondents submitted that each structure on the ground had a number written on the door and the unit of numbering was a household such that if one structure housed more than one household then the different households would share the same house number but different letters.

91. It was further submitted that **Pamoja Trust** filled a log sheet of all the numbered structures and each

log sheet contained details of observable features such as structure number, structure use, structure type, construction materials and any special/peculiar characteristics. According to the 2nd Respondents the Project Affected Persons numbers provided in this report were based on the numbering and enumeration process and the analysis of the log sheets provided the total number of structures in the settlements categorized in terms of their use thus it indicated the number of residential units, business units and institutional units.

92. Further submissions were to the effect that the enumeration teams then administered a questionnaire to every numbered structure where the residential questionnaire captured the details of all people living within the structure while the business and institution questionnaires captured the number of persons operating in the business and institutions and that the teams were provided with the exact number of forms as the number of structures identified in the numbering process and if a questionnaire got damaged it was returned to Pamoja Trust cancelled and replaced with a fresh form this was to ensure that only genuine projected affected persons were enumerated. The 2nd Respondents also submit that Pamoja Trust ensured the safe storage of enumerations forms both filled and unfilled and for each enumerated structure and acknowledgement slip was issued and this was produced in triplicate and the advisor retained copies that would be passed on to the client. The 2nd Respondents assure that the community and Pamoja Trust carried out the data collected and Pamoja Trust developed community registers for public display at central accessible sites in all villages; in fact the project affected persons in both Mukuru and Kibera carried out peer auditing processes as part of the data verification.

93. The 2nd Respondents submit that the month of February 2010 was spent conducting awareness meetings and this was necessary because the failure to implement the earlier Relocation Action Plan undermined the credibility of the Kenya Railways Corporation in the eyes of the Project Affected Persons. The 2nd Respondents submitted that a series of meetings were held in both Kibera and Mukuru and they took into account the fact that the revised Relocation Action Plan was part of the earlier process in which enumerations had been done and PAPs identified. The 2nd Respondents submitted that initially the PAPs were of the view that the earlier RAP be implemented and consideration be given to the initial PAPs who were identified, however later consensus was reached on the need to carry out fresh enumerations as it was agreed that the situation on the ground had changed drastically with more structures having been constructed and also the Mukuru reserve was also utilized by an oil pipeline and high voltage electricity cable and space for an alternative solution within the reserve was limited.

94. The 2nd Respondents provide that the social team worked closely with the PAPs in identifying mappers and enumerators who were trained over a period of two weeks after which pre-testing of the tools was conducted, numbering and mapping was carried out and finally the enumeration questionnaire was administered.

95. The 2nd Respondents submitted that during the first Relocation Action Plan several savings schemes had been formed as a means of organizing the PAPs and a vehicle for communication such as Mwanzo Mpya, Railway Hawkers, Reuben Railway Flyover Saving Scheme, Sinai Saving Scheme and Kwaraza and now four additional schemes were formed during this Relocation Action Plan and they have a total of 830 members. The 2nd Respondents added that these schemes have formed a local network called NJERUSI (Njenga, Rueben and Sinai) and they meet every Friday to discuss issues arising from relocation.

96. The 2nd Respondents submitted that Pamoja Trust held various meetings with different government entities including the Planning Department of the City Council to explore possibilities for collaboration in the resettlement of traders within existing City Council markets and also on the possible use of advertising revenue for the maintenance of footpaths and other public facilities within the reserve. The

2nd Respondents also submitted that Pamoja Trust also held meetings with the Kenya Slum Upgrade Project on the need to set up a housing fund for the PAPs and these meetings addressed the issue of identification of the PAPs who stood to benefit from both KENSUP upgrading and the RAP where it was agreed that such a fund would be modelled along the lines of the Civil Servants Housing Fund. The 2nd Respondents also submitted that Pamoja Trust also sought the participation of the Ministry of Lands and Settlement and the Ministry of Housing in the enumeration and mapping process as a means of validating the information gathered. The 2nd Respondents also submitted that meetings were held with the National Housing Corporation as well as a network of civil society organizations mobilized around the issue of shelter to brief its members and to seek its support in dealing with some challenges being experienced. These meetings, the 2nd Respondents submitted, assisted in building awareness and reducing the resistance to the RAP after which a cut-off date which was the last date of the survey was set at 30th April, 2010 and no new persons were eligible for compensation afterwards.

97. The 2nd Respondents contended that cash compensation was considered as an option however after extensive consultation it was agreed that it was not a viable option as many of the occupants of the reserve preferred resettlement rather than cash compensation because their residential and business locations were linked to other facilities such as schools for their children and sources of income and social networks which could only be maintained through resettlement. Further the 2nd Respondents submitted that it was only the absentee structure owners who were interested in cash compensation as they have no real stake in the resettlement beyond their monetary interest while other PAPs had the misconception that they would get cash compensation and still maintain their presence in the railway reserve which would defeat the whole purpose of the RAP. The 2nd Respondents submitted that it was decided as far as possible that compensation in the form of replacement housing and trading facilities was the best. In addition the RAP offered trading stalls along the footpath with equivalent or higher income opportunities and in direct proximity to clientele and assisted relocation was provided to single female households with small children. The 2nd Respondents submitted that for those who could not continue employment in relocated business that RAP incorporated them with information on optional employment and linked them with credit providers to finance start-up businesses.

98. The 2nd Respondents asserted that courts in English and European jurisdictions have consistently held that Article 8 of the European Charter on Human Rights which provides for the right to respect for one's private and family life, his home and his correspondence subject to certain restrictions that are in accordance with the law and necessary in a democratic society cannot be read to diminish the proprietor's contractual and property rights as such the 2nd Respondents believe that the right to adequate housing was not meant to diminish the proprietary rights of the landowner. See **Qazi vs. London Borough of Harrow** (supra).

99. It is the 2nd Respondent's position that Article 40 of the Constitution subject to Article 65 of the same stipulates that every person has the right either individually or in association with others to acquire and own property of any description and the state or any other person cannot for that matter arbitrarily deprive someone of their property unless such deprivation arises from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with Chapter 5 of the Constitution and the same must be for a public purpose or public interest with such acquisition being carried out in accordance with the Constitution and statute. The 2nd Respondents asserted that even where the state acquires property as envisaged in Article 40 of the Constitution the Constitution requires that such persons shall be promptly paid in full and accorded just compensation for the deprivation but this right shall not extend to property that has been found to be unlawfully acquired.

100. The 2nd Respondents submit that it is undisputed that the railway reserve is vested in the Corporation and that Petitioners are trespassers who recently came onto the reserve. According to the

2nd Respondents, the Petitioners have admitted to having illegally encroached on the railway reserve. The 2nd Respondents submitted that rights which the Petitioners and Interested Parties seek to enforce through the Petition are an express attempt to deny and diminish the Corporation's right to property as envisaged in the Constitution and that the Petitioners and Interested Parties seek to interfere with a project which has been designed to benefit and resettle persons who were on the railway reserve as at the cut-off date. According to the 2nd Respondents the Petitioners and Interested Parties expressly admitted that they came after the cut-off date and as such they are not legitimate beneficiaries of the project.

101. The 2nd Respondents submitted that under property law the Petitioners have no right to occupy the railway reserve or the housing units being built by the Relocation Action Plan and the 2nd Respondents have an unqualified right to possession of the Railway Reserve as such these are exceptional circumstances under which eviction is necessary in a democratic society. The 2nd Respondents also argued that the Petitioners have not pleaded or alleged facts which give them a special claim to remain within the reserve to the detriment of the legitimate PAPs.

102. To the 2nd Respondents, in regard to economic and social rights, under Article 43 every person has the right to the highest attainable standards of health care which includes a right to health care services including reproductive health care; accessible and adequate housing and to reasonable standards of sanitation, to be free from hunger and to have adequate food of acceptable quality; to clean and safe water in adequate quantities and to education however paragraph 5 of the Vienna Declaration and Programme of Actions adopted by the World Conference on Human Rights stated that all human rights are universal, indivisible and interdependent and interrelated and that in as much as the Petitioners have a right to housing the said right cannot be the basis for curtailing other people's rights especially where such rights equally deserve protection of the court.

103. It was submitted that Article 24(1) of the Constitution provides that when determining an issue of limitation of rights such ought to be done in a manner that is least restrictive to the enjoyment of the right and this means that the proportionality principle dictates that the court leans in favour of the least restrictive method of limitation. The 2nd Respondents added that the balance of convenience weighs in favour of the PAPs and the Corporation with this being the least restrictive method of enjoyment of the rights as it would guarantee the over 9000 residents of Kibera and Mukuru a right to housing. The 2nd Respondents referred to the holding in the **Qazi case (supra)** where the learned Judge states that a tenant cannot remain in possession as against the landlord and to hold otherwise would mean that Article 8 of the ECHR can vest property rights in the tenant and diminish the landlord's contractual and property rights.

104. The 2nd Respondents while relying on Article 26 of the Constitution which guarantees the right to life, recalled that on the 12th of September, 2011 when the police reported that more than 100 people had been burned to death in a fire where people had encroached on a fuel pipeline reserve in the Sinai slum, which could have been avoided had the people not encroached on the fuel pipeline. The 2nd Respondents submitted that the foregoing scenario could easily replicate itself in the rail reserve where numerous informal settlements have sprouted. The further stated that with the expected enhanced capacity of the railway line the risk of loss of life from the hazards posed by the trains could substantially increase.

105. According to the 2nd Respondents based on **Satrose Ayuma Case:**

“any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision; that

alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions; that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of the properties that may be damaged during the evictions.”

106. The 2nd Respondents concluded by distinguishing the dispute in question with other lauded eviction cases. The 2nd Respondent's position with respect to **Satrose Ayuma Case (supra)**, was that Satrose and her family had lived on that property all their lives and they had not known any other home contrary to the Petitioners herein. In the **Ibrahim Sangor Case (supra)** the Petitioners were some 1,122 persons who had been living on the suit property which was un-alienated public land from 1940; in the **Susan Waithera case (supra)** the Judge held that despite the fact that the Petitioners had a right to housing under the Constitution this right could not be properly asserted over a public road as this clearly interfered with the rights and interests of a much larger public.

Determinations

107. I would begin by emphasizing the importance of this case as it is of a great public interest and will have far reaching implications in projects of this kind. I have had the opportunity to study the Petition, Cross Petition and Affidavits as well as the documentation annexed for and against this Petition.

53. I would like to begin my analyses by establishing what the legal position is in Kenya in regard to adequate housing and forced evictions and demolitions. It is imperative at this juncture to appreciate that there is no legal framework existent in Kenya guiding evictions and demolitions. This unpleasant position could not have been better expressed than by **Lenaola, J** in **Satrose Ayuma Case (supra)** in which the learned Judge lamented:

“...the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands. Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. I believe time is now ripe for the development of eviction laws and the same sentiments were also expressed by Musinga J. (as he then was) while considering the issues in this matter at an interlocutory stage, where he stated as follows;

“The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto”.

108. However, Article 2 (5) and (6) of the Constitution of Kenya provides:

(5) The general rules of international law shall form part of the law of Kenya;

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

109. The United Nations Basic Principles and Guidelines on the position in regard to development based evictions and settlement 2007 which by virtue of the aforesaid Constitutional provisions form part of Kenyan law set out the threshold to be observed prior to evictions as follows:

PRIOR TO EVICTIONS

Urban or rural planning and development processes should involve all those likely to be affected and should include the following elements:

(a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives;

(b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups;

(c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan;

(d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options;

(e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.

38. States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate.

39. During planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and vulnerable and marginalized groups, and, when necessary, through the adoption of special measures or procedures.

40. Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare.

41. Any decision relating to evictions should be announced in writing in the local language to all individuals concerned, sufficiently in advance. The eviction notice should contain a detailed justification for the decision, including on: (a) absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions. All final decisions should be subject to administrative and judicial review. Affected parties must also be guaranteed timely access to legal counsel, without payment if necessary.

42. Due eviction notice should allow and enable those subject to eviction to take an inventory in order to assess the values of their properties, investments and other material goods that may be damaged. Those subject to eviction should also be given the opportunity to assess and document non-monetary losses to be compensated.

43. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. The State must make provision for the adoption of all appropriate measures, to the maximum of its available resources, especially for those who are unable to provide for themselves, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available and provided. Alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted.

44. All resettlement measures, such as construction of homes, provision of water, electricity, sanitation, schools, access roads and allocation of land and sites, must be consistent with the present guidelines and internationally recognized human rights principles, and completed before those who are to be evicted are moved from their original areas of dwelling.

110. In Ibrahim Sangor Osman vs. Minister of State for Provincial Administration and Internal Security (supra) the Court made reference to the provisions of the United Nations Office of the High Commissioner for Human Rights in “The Right to Adequate Housing” Article 11.1; Forced Evictions, where it is stated:

“Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

111. Lenaola, J dealt with the issue of “adequate” housing in Satrose Ayuma Case (supra) in which while relying the General Comment No. 4 to the CESCR to the effect expressed himself as follows:

“My reading of General Comment 4 also reveals that the right to housing should be ensured to all persons irrespective of their income or access to economic resources. Under this General Comment, the CESCR has outlines seven key features to be considered when assessing whether housing is adequate or not and they are as follows:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal

protection against forced eviction, harassment and other threats. 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;

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;⁵ Geneva, World Health Organization, 1990.

(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) Cultural adequacy. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

112. This position was appreciated by the Supreme Court of South Africa in South African Constitutional Court in **Government of the Republic of South Africa and Others vs. Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169** where the Court expressed itself as follows:

“The right delineated in section 26(1) is a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.”

113. The evidence before this court indicates that the Resettlement Advisory Services for the Review of the Relocation Action Plan in Kibera and Mukuru which was drafted in conjunction with the 2nd Respondent, Ministry of Transport and Pamoja Trust prepared by the 2nd Respondents at Page 9 of the Report:

“recognized the need for a clear corridor operation in Kibera and Mukuru to improve railway safety and operation. It is therefore proposed as far as possible to implement the relocation of people residing, undertaking business or otherwise occupying the reserve (Project Affected Persons) from the 60 meter railway operation corridor.”

114. Indeed under page 4 of the bundle annexed to the 2nd Respondents further affidavit dated the 20th day of September 2014 it is provided that:

“The PAP Identification process commenced with an aggressive awareness building programme. Those living along the railway reserve were informed of KRC’s intention to reclaim the railway reserve in order to improve safety and KRC’s operations. The proposed recommendation to resettle the PAPs on the outer edges of both sides of the reserve was also shared and the need for identifying the persons affected appreciated.....The PAP Identification process comprised three main exercises; the identification and mapping of every structure in the 60m reserve in Kibera and Mukuru using GIS technology; a comprehensive social economic enumeration process and finally the taking of digitized photographic images of the PAPs.....A door to door house numbering and ground trothing exercise was thereafter carried out. During this exercise every single door along the reserve was given a unique identification number and this unique number was written on the door and also reflected on the digital map.”

115. A reading of page 5 of the annexed bundle goes on to state that:

“A questionnaire was prepared and administered to the occupants of every structure that was mapped. The questionnaire sought amongst other things to identify the name of the head of each household enumerated. It also sought to find out whether the occupant was a tenant or the owner of the structure he or she occupied. If the occupant was a tenant the name of the person who owned the structure was also collected. All this information was keyed in and analysed and enumeration certificates were issued to the PAPs. As the enumeration process was being undertaken a technical team was working on preparing preliminary designs. This team walked the line identified and mapped the areas that were suitable for construction and prepared architectural designs and costs for the RAP.”

116. Further reading on page 5 of the annexed document provides that:

“The second phase of the RAP commenced...months after the cut-off date. In this second phase of the RAP a PAP verification exercise was carried out. The mapping and enumeration information gathered during the enumeration exercise was printed out and posted in prominent places in the project area. The PAPs were given an opportunity to peruse this information and to rectify any errors. Segment level and multi-segment grievance committees were set up to address any grievances raised. An opportunity was provided to those who may have been left out during the enumeration process to raise their grievances with the grievance committees. Those who had legitimate claims were considered and their names included in the PAP enumeration register.....Astheverificationprocesswasunderway,atechnicalteammade up of architects engineers and surveyors reviewed the preliminary designs that had been earlier developed. A social and environmental impact report was prepared and approved by the National Environmental Management Authority (NEMA). This team further prepared the final detailed designs for the project and presented and obtained approvals from the relevant statutory bodies for development.”

117. Under the Implementation Phase on Page 6 of the document it is reported that:

“During this final phase of the RAP a Relocation management Unit (ReMU) was created by the Kenya Railways to be in charge of the PAP relocation process. Pamoja Trust was also contracted by the government to provide technical support and advisory services. Relocation Implementation Guidelines were developed and preparations for the relocation of the first 1000 PAPs in both Kibera and Mukuru commenced. Three main processes were agreed upon under the guideline. These are the vetting of the PAPs, the resolution of grievances and the development of leaseholds for the PAPS.”

118. The information provided in the report is that:

“the vetting process would comprise three main exercises namely public meetings, an indoor vetting and a door to door vetting exercise also training on how to conduct the vetting and handle complaints was conducted. Under the indoor vetting exercise, the report provides that cluster leaders were elected, public barazas were held in each area to build awareness about the RAP and impending relocation and those present were informed about the need to vet the information collected during the enumeration and verification exercises. The PAPs were also informed on the grievance mechanism and a public space was provided where the PAPs could ascertain whether their names were on the enumeration register.”

119. The report also provides that:

“under the door to door vetting exercise the cluster leaders were given a list with the names and house numbers of PAPs in their cluster which had been derived from the enumeration register and the leaders visited each structure to inform the occupants that the project was now being implemented. The Cluster leaders checked the name given and the number painted on the structure against the enumeration list and if the same tallied with that on the list the section leader requested the PAP to authenticate the information by signing the register. The report also provides that the section leader was to find out whether the PAP household had any special cases such as a person living with disability, a bed ridden member of the household or an aged person requiring special consideration and any other special grievances which were keyed into the complaints register.”

120. In regard to negotiation for leaseholds of the PAPs, it was noted that:

“it was essential that the PAPs participated in the formulation of lease agreements. A representative system for engagement was agreed upon and a negotiation team elected which commenced negotiations with Kenya Railway Corporation lawyers on the terms of the lease agreement and once the negotiations are completed the draft leases will be prepared and shared with the PAPs.”

121. It has been summarized by the **UN Habitat Fact Sheet No. 21/ Rev. 1** that: In general, international human rights law requires Governments to explore all feasible alternatives before carrying out any eviction, so as to avoid, or at least minimize, the need to use force. When evictions are carried out as a last resort, those affected must be afforded effective procedural guarantees, which may have a deterrent effect on planned evictions. These include:

- a) An opportunity for genuine consultation;**
- b) Adequate and reasonable notice;**
- c) Availability of information on the proposed eviction in reasonable time;**
- d) Presence of Government officials or their representatives during an eviction;**
- e) Proper identification of persons carrying out the eviction;**
- f) Prohibition on carrying out evictions in bad weather or at night;**
- g) Availability of legal remedies;**
- h) Availability of legal aid to those in need to be able to seek judicial redress.**

122. **Have the residents that were living and trading by the railway reserve been given an opportunity for genuine consultation**" My answer would be in the affirmative because the evidence on the record indicates that there was an aggressive awareness plan, followed by identification of the potentially affected persons and this was done through identification and mapping of every structure in the 60m reserve in Kibera and Mukuru using GIS technology; a comprehensive social economic enumeration process and finally the taking of digitized photographic images of the PAPs; this was then followed by filling in of questionnaires to establish the persons within any residential or business

structure and whether one owned the structure they lived in or they were tenants; subsequently a rigorous verification exercise was done both in public and door to door where considerations of vulnerable groups were taken into account prior to the first phase of the relocation plan being undertaken. The vetting process would comprise three main exercises namely public meetings, an indoor vetting and a door to door vetting exercise also training on how to conduct the vetting and handle complaints was conducted. Under the indoor vetting exercise, the report provides that cluster leaders were elected, public barazas were held in each area to build awareness about the RAP and impending relocation and those present were informed about the need to vet the information collected during the enumeration and verification exercises. The PAPs were also informed on the grievance mechanism and a public space was provided where the PAPs could ascertain whether their names were on the enumeration register.

123. Were the Project Affected Persons given adequate notice" It is not in dispute that an initial RAP was submitted to the World Bank by Pamoja Trust and COWI in 2005 and this was subsequently revised due to socio-political developments such as the post-election violence of 2007/8 as well as the derailment of a train in 2009 which led to fatalities in Kibera beyond the 5.2 metre safety zone proposed in both RAPs. Therefore in my view the proposed relocation plan is an issue that has been on the ground and in the knowledge of the project affected persons for at least 9 years now which I hold is adequate notice.

124. Was there availability of information on the proposed eviction in reasonable time" Under the door to door vetting exercise the cluster leaders were given a list with the names and house numbers of PAPs in their cluster which had been derived from the enumeration register and the leaders visited each structure to inform the occupants that the project was now being implemented. The Cluster leaders checked the name given and the number painted on the structure against the enumeration list and if the same tallied with that on the list the section leader requested the PAP to authenticate the information by signing the register. The report also provides that the section leader was to find out whether the PAP household had any special cases such as a person living with disability, a bed ridden member of the household or an aged person requiring special consideration and any other special grievances which were keyed into the complaints register.

125. Having analysed the above it is my considered view that the Relocation Action Plan and the run up to the notice in the daily nation to vacate the railway reserve had been carried out within the required legal framework where parties have held continuous consultations on the project and have engaged at diverse levels.

126. The next issue for determination is with respect to the alleged human rights violations raised by the Petitioners and Interested Parties vis-à-vis the proposed evictions and demolitions. It is my position that the Petitioners and Interested Parties are driving an agenda that their right to adequate housing is being violated and they are being discriminated against yet they are bonafide beneficiaries of the project.

127. The UN Habitat Fact Sheet No. 21/ Rev. 1 opines that:

“One of the most common misconceptions associated with the right to adequate housing is that it requires the State to build housing for the entire population, and that people without housing can automatically demand a house from the Government. While most Governments are involved to some degree in housing construction, the right to adequate housing clearly does not oblige the Government to construct a nation’s entire housing stock...It is sometimes believed that the protection against forced evictions prohibits development or modernization projects that entail displacement. There are inevitable needs for the redevelopment of certain areas in growing cities

and for public agencies to acquire land for public use and infrastructure. The right to adequate housing does not prevent such development from taking place, but imposes conditions and procedural limits on it. It is the way in which such projects are conceived, developed and implemented that is important...”

128. This position was supported by the decision in *Grootboom Case* (supra) where the Court held:

“In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state’s obligations in respect of other socio-economic rights. The state’s obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live. Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state’s obligation is defined by three key elements that are considered separately: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.”

129. The UN Habitat Fact Sheet No. 21/ Rev. 1 further states that:

“It is sometimes believed that the right to adequate housing equates to a right to property or property rights. Some also argue that the right to adequate housing threatens the right to property. The right to own property is enshrined in the Universal Declaration of Human Rights and other human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (d)(v)) and the Convention on the Elimination of All Forms of Discrimination against Women (art. 16(h)), although absent from the two Covenants. The right to adequate housing is broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that everyone has a safe and secure place to live in peace and dignity, including non-owners of property. Security of tenure, the cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements. As such, it is not limited to the conferral of formal legal titles. Given the broader protection afforded by the right to adequate housing, a sole focus on property rights might in fact lead to violations of the right to adequate housing, for instance, by forcibly evicting slum-dwellers residing on private property. On the other hand, protection of the right to property might be crucial to ensure that certain

groups are able to enjoy their right to adequate housing. The recognition of spouses' equal rights to household property, for instance, is often an important factor in ensuring that women have equal and non-discriminatory access to adequate housing.”

130. The UN Habitat Fact Sheet No. 21/ Rev. 1 reveals that:

“Discrimination means any distinction, exclusion or restriction made on the basis of the specific characteristics of an individual such as race, religion, age or sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. It is linked to the marginalization of specific population groups and is generally at the root of structural inequalities within societies. In housing, discrimination can take the form of discriminatory laws, policies or measures; zoning regulations; exclusionary policy development; exclusion from housing benefits; denial of security of tenure; lack of access to credit; limited participation in decision-making; or lack of protection against discriminatory practices carried out by private actors.”

131. In this case, the petitioner's case is not that they ought not to be evicted from the railway reserve area. Their contention is that the intended evictions have not taken into account the ever-changing dynamics of the slum dwellers who occupy the said reserve. On the part of the Respondents, it is contended that the petitioners are not genuine PAPs but are in fact persons who have taken advantage of the project to encroach onto the area with a view to being compensated after the cut-off date.

132. That a cut-off date is a crucial component of the resettlement project in these kinds of undertakings cannot be gainsaid. Without a cut-off date, it would be impossible to successfully carry out any meaningful resettlement plan which would be beneficial to deserving persons.

133. This case has many similarities to **Government of the Republic of South Africa and Others vs. Grootboom and Others** (supra). In that case the court recognised that:

“The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.” This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order...The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.”

134. It is the duty of the State to bridge the gap between the “haves” and “have nots” in the society in order to avoid situations where people who live in intolerable conditions are not tempted to invade the lands of others so as to enable them eke a living. The government is under a duty not only to protect property but also to take proactive steps to ensure that social and economic rights of the people are given meaning and not to merely to adopt a position of non-interference. As was held in **Grootboom**

Case (supra):

“Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state’s section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.”

135. Right from the Preamble to our Constitution there is the recognition that in enacting the Constitution, the people of Kenya were alive to the recognition that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, *social justice* and the rule of law. Article 10 of the Constitution binds all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; make or implement any public policy decision, to national values and principles of governance which include *participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability and sustainable development.*

136. To paraphrase **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258**, although the national values and principles of governance enshrined in Article 10 of the Constitution are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

137. To achieve the Constitutional aspiration Article 19(1) of the Constitution which falls within Chapter 6 (the Bill of Rights) gives prominence to the foregoing by providing that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies and that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote *social justice* and the realisation of the potential of all human beings.

138. With respect to socio-economic rights, the State is enjoined to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. Accordingly, in implementing housing policy decision the State must ensure that the rights of the marginalised and vulnerable groups are protected.

139. Social and Economic Rights are provided for in Article 43 of the Constitution and these include the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. The Constitution further provides that a person is not to be denied emergency medical treatment and enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants. This includes the elderly. It is therefore the State’s duty to provide accessible and adequate housing as well as

reasonable standards of sanitation. For the State to forcefully evict persons from a land they have occupied for decades without offering them alternative accommodation which accommodation itself must be reasonably habitable taking into account their circumstances would be to neglect its Constitutional mandate.

140. This Court appreciates that the State is enjoined to carry out its development agenda for the prosperity of the nation. In so doing it may be necessary to put into place mechanisms some of which will necessarily disrupt people's way of life. Such disruption however must be systematic and must be undertaken with as minimal pain as possible. In so doing the State must adhere to the provisions of Article 28 of the Constitution which provides that every person has inherent dignity and the right to have that dignity respected and protected.

141. In this case the petitioners, while not seriously challenging their eviction, contend that guidelines relating to eviction which have received judicial approval must be strictly followed regardless of whether the Government has title or not. To the applicants, what they oppose is the unprocedurally and capricious administrative action taken by the Respondents.

142. In my view, where the State allows people to occupy land be it government or private for a considerable period of time so that the people consider the said land to be their homes, it would be inhuman for the State to suddenly evict them forcefully therefrom without affording them an opportunity to seek alternative mode of accommodation. It must always be remembered that under Article 21, it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and is therefore mandated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article of the Constitution. Apart from that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

143. In so deciding this Court ought not to be understood to be encouraging the culture of land invasion. Far from it. People who take it upon themselves to invade other people's private lands ought not to benefit from such invasions. However genuine landless people have a right and a legitimate expectation that the State will provide them with adequate housing and shelter. As was held in **Grootboom Case** (supra):

“This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.”

144. As was held by **Lenaola, J** in **Satrose Ayuma Case**:

“...the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)* have provided some guidance to States on measures to adopt in order to ensure that development-based evictions, like the present one, are not undertaken in contravention of existing international human rights standards and violation of human rights. These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the right to adequate housing for all

those threatened with eviction, at all times. The Guidelines *inter-alia* place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorised by law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction; that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with international human rights commitments; that any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision; that alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effect of evictions; that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions and most importantly that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations. Finally, that there must be resettlement measures in place before evictions can be undertaken. The Guidelines go further to lay down the conditions to be undertaken during evictions as follows; that there must be mandatory presence of Governmental officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks. The UN Guidelines in addition provide what ought to happen after the eviction; that the person responsible must provide just compensation for any damage incurred during eviction and sufficient alternative accommodation and must do so immediately upon evictions. At the very minimum, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities.”

145. The learned Judge further held:

“These important guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48th Ordinary Session it adopted the *Principles and guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*. Accordingly, the African position on the right to housing can be understood from the African Commission on Human and Peoples' Rights case of *The Social Economic Rights Centre & Centre for Economic and Social Rights vs Nigeria, Com. No.155/96 (2001)*. In the judgment, the Commission stated that;

“Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a Court should consider before authorising forced evictions or demolitions is the impact on vulnerable and disadvantaged groups. A Court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable

alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities”

54. According to the learned Judge:

“From what I stated elsewhere above, it is very important for the Respondents to understand that the notion of the right to adequate housing is simply not a right to four walls and a roof but it has other elements to it including those that have been articulated under General Comment No.4 as reproduced in this judgment all which constitute a fundamental shift in the realization of the right to adequate housing. This court has a duty and an obligation to protect that right at all times. Indeed it is now clear that it is important to safeguard the Petitioners right to adequate housing due to their long history on the suit premises, which for some of them spans for decades. They have formed an attachment with the suit premises and it matters not, in my view, whether those homes are informal settlements, dilapidated houses or shanties. They must be protected and therefore I agree with the sentiments of Sachs J. in *Port Elizabeth Municipality vs Various Occupiers (2005) (1) SA 217 (CC)* where he stated that;

“The longer the unlawful occupiers have been on the lands, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities. And as such the greater their claim to the protection of the Courts.”

55. As was held in the said case that:

“It does not matter that the Applicants do not hold title to the suit premises and even if they had been occupying shanties, the 1st Respondent was duty bound to respect their right to adequate housing as well as their right to dignity. Wherever and whenever evictions occur, they are extremely traumatic. They cause physical, psychological and emotional distress and they entail losses of means of economic sustenance and increase impoverishment. In this case, I must therefore agree with the Petitioners that their eviction from the suit premises without a plan for their resettlement would increase levels of homelessness and this Court must strive to uphold the rights of the Petitioners and especially the right to be treated with dignity. In so holding I find support in the South African Constitutional Court case of *Occupiers of 51 Olivia Road, Berea Township, And 197 Main Street. Johannesburg vs City of Johannesburg (2008) ZACC 1* where Yacoob J. stated as follows;

“It became evident during the argument that the City had made no effort at all to engage with the occupiers at any time before proceedings for their eviction were brought. Yet the city must have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance. In these circumstances, those involved in the management of the municipality ought at the very least to have engaged meaningfully with the occupiers both individually and collectively. Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is not a closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine; (a) what the consequences of the eviction might be, (b) whether the city would help in alleviating those dire consequence, (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period, (d) whether the city had any obligations to the occupiers in the prevailing circumstances and (e) when and how the city could or would fulfill these obligations.

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process ...”

146. Similar position was taken in **Susan Waithera Kariuki & 4 others vs. Town Clerk Nairobi City Council & 3 others** (supra) where the learned Judge held that:

“Even though it is important that the first Respondent plans the City of Nairobi properly, and that may entail having to evict some people in informal settlements on road reserves for purposes of road expansion and/or beautification, the Constitutional rights of those people must be respected and given due consideration.”

147. Similarly, Muchelule, J in **Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal Security** (supra) expressed himself as follows:

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

148. Having considered the parties’ respective cases in this petition and cross-petition, I am not satisfied that the petitioner’s case that the Respondent has not complied with the UN Guidelines on Evictions. The Respondent has outlined the steps it has taken towards ensuring compliance with the said Guidelines which steps this Court cannot say were not the correct steps to be taken.

149. The Petitioners however contend that the project has been turned into a “cash cow” for a few government officials who intend to take advantage of the project to enrich themselves at the expense of deserving residents. This allegation cannot be wished away. The project is meant to benefit those who genuinely deserve to reap the benefits of the project. Accordingly care must be taken to ensure that those who deserve to benefit from the project are the ones who actually benefit therefrom.

150. It is therefore important that as the project is implemented, its implementation must be undertaken in order to achieve the aim and purpose for which the project is meant.

1) That the petitioner’s petition fails and is dismissed.

2) The Respondent’s cross-petition succeeds and it is hereby ordered that the recent illegal occupiers of the Railway Reserve whose names do not appear in the list of the Project Affected Persons do move out of the Railway Reserve and allow the Corporation to proceed with the Resettlement Plan.

3) Their eviction however will have to take into account the following factors:

i) that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.

ii) that there must be a mandatory presence of Governmental officials and security officers.

iii) that there must be compliance with the right to human dignity, life and security of the evictees.

iv) That the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.

v) that no one is subjected to indiscriminate attacks.

4) The project will be undertaken in strict compliance with the specifications with the full participation of the stakeholders including the segment committees, Pamoja Trust, the Social Economics and Geo-Spatial Engineers who are situated at the Muungano Support Trust (MuST), Muungano wa Wanavijiji as well as the Kenya National Commission on Human Rights Commissioners.

5) The Respondent to file quarterly report in court on the progress of the project until further orders of the Court.

6) Liberty to apply granted.

7) Each party will bear the costs of these proceedings.

Dated at Nairobi this day 4th of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oronga for the Petitioners and thw3rd Interested Parties

Mr Ochieng for Mr Agwara for the Respondent

Mr Nyabea for Mr Naikuni for the 2nd Interested Parties

Cc Patricia



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