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Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Mumbi Ngugi
Citation:	Mitu-Bell Welfare Society v Attorney General & 2 others[2013] eKLR
Advocates:	Mr Kinyanjui instructed by the firm of Mbutia Kinyanjui & Co. Advocates for the Petitioners. Mr Ojwang, Litigation Counsel, instructed by the State Law Office for the 1st & 3rd Respondents. Mr Mutua, Instructed by the firm of E.K. Mutua & Co. Advocates for the 2nd Respondent.
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO 164 OF 2011

MITU-BELL WELFARE SOCIETY.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA AIRPORTS AUTHORITY2ND RESPONDENT

THE COMMISSIONER OF LANDS3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner is a society registered under the provisions of the Societies Act, Cap 108 Laws of Kenya. According to its Chairman, one Benjamin Kaunda Gishemba, the society comprises residents of Mitumba Village which held some 3065 households or approximately 15, 325 men, women and children. I shall hereafter, for ease of reference, refer to members of the Mitu Bell Society as **‘the petitioners’**.

2. The petitioners state that at the time this petition was filed on 21st September 2011, they were all residents of Mitumba Village situated on Plot Number 209/12908, situated near Wilson Airport, Nairobi. The children from the village went to Mitumba Primary School, situated on Plot Number 209/12921, also located near Wilson Airport.

3. The petitioners allege that before they moved to the suit land, they were resident at Bella-Vue Village situated on Mombasa Road. They state that they were asked to leave Bella Vue and were assisted to move to Mitumba Village in 1992 by the then Nairobi Provincial Commissioner Mr Waiganjo, the then Chairman of the Nairobi City Commission, Mr Fred Gumo and the 2nd respondent. Upon their relocation, they put up their houses and businesses, as well as schools, churches and other social amenities at their new settlement. They have known Mitumba Village as their home and it forms the source of their livelihood, social life and education.

4. The petitioners contend that over the years, they have unsuccessfully sought the indulgence of the 3rd respondent to issue them with title documents for the land on which their village was situate; that the respondents have been aware that they were in occupation of the suit land; that they have been allocated funds from the Constituency Development Fund for the area, and their school has been

allocated examination centre numbers by the Kenya National Examination Council.

5. The petitioners state that on 19th November 2011 and on another occasion thereafter (though the exact date is not indicated in the pleadings), the 2nd respondent demolished their houses in the said village. The demolition was carried out despite there being in force an order issued by Gacheche J on 22nd September 2011 restraining the respondents from demolishing the village pending the hearing inter partes and determination of the application for conservatory orders.

The Petition

6. The petition filed on 21st September 2011 was amended by leave of the court on 1st December 2011, following the demolition of the petitioners' homes and their eviction from the settlement. The Amended Petition seeks the following orders:

(a) A declaration that the demolition by the 2nd Respondent is illegal, irregular, unprocedural and contrary to Art. 26, 27(2) (4) & (6) Art. 28 Art 29, Art 39. 40 Art. 43, Art.47, Art 56, of the Constitution of the Republic of Kenya and is therefore null and void.

(b) A declaration that any forceful eviction and or demolition without a relocation option is illegal, oppressive and violates the rights of the petitioners.

(c) An order restraining any purported demolition and or forceful eviction by the 2nd Respondent against the Petitioners.

(d) A declaration that the resident of Mitumba Village are legally entitled to plot number 209/12921 under file number 226958 for Mitumba primary school and plot Number 209/12908 under file number 176952 for the village respectively and in the alternative they are entitled to compensation and reallocation of another land or alternative shelter with access to education facilities, clean water, health care and food at the state's expense.

(e) A declaration that the Petitioners herein are entitled to the full protection from discrimination and the same right has been violated and they are entitled to full compensation as a result of loss suffered during and after the illegal demolition or their structures.

(f) A declaration that the Petitioner's 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 and or already violated.

(g) Costs of this Petition.

7. The Amended Petition is supported by the affidavit of Benjamin Kaunda Gishemba sworn on 1st December 2011 and a further affidavit sworn on 21st February 2012. The petitioner also filed written submissions dated 24th February 2012.

The Petitioners' Case

8. The petitioner's submitted through their counsel, Mr Kinyanjui, that this petition was prompted

by a notice published in the newspapers by the 2nd respondent on 15th September, 2011. The notice gave the residents of Mitumba village seven (7) days within which to vacate the suit land. The petitioners also filed a Chamber Summons application seeking, among others, an order in the following terms:

'That pending the hearing and determination of this application inter partes, a conservatory order be issued restraining the 2nd respondent or any of them and any state officer or organ of state from carrying on with the process of evicting and or demolishing any buildings, installations or erection situate or within the area better described as Mitumba village near Wilson Airport.'

9. Gacheche J granted interim orders on 22nd September 2011. However, despite this court order being duly served, the 2nd respondent went ahead and demolished the petitioners' houses, the primary school and other institutions in the village. The petitioners state that their household goods and building materials were all destroyed during the demolition, and they were left homeless.

10. The petitioners allege violation of their fundamental rights and freedoms guaranteed under the constitution. They contend that by issuing them with a 7 day notice to vacate without giving reasons while knowing that they had been resident on the land for more than 19 years, and then demolishing their homes, the 2nd respondent violated their rights to life, human dignity, security of person, freedom of movement and residence, social economic rights, right to property, equality and non-discrimination and fair administrative action as guaranteed under Articles 26, 27, 28, 29, 39, 40, 43 and 47 of the Constitution. They contend that since they had lived on the land for more than 19 years, it was unreasonable and unconstitutional for the respondents to give them 7 days' notice to move out of their homes without affording them any reasons. They relied on the decision of the High Court sitting in Embu in **Ibrahim Sangor Osman –vs- Minister of State for Provincial Administration and Internal Security & 3 Others, Embu HCCC No. 2 of 2011** where Muchelule J held that a 21-day notice to vacate issued to people who had lived on the suit land since 1940 was insufficient and unreasonable.

11. They contend that since the 2nd respondent failed to give reasons in the notice requiring them to vacate, the demolitions were in total disregard of the law, particularly with regard to the right to adequate housing, and that it was also carried out in disregard of international prohibitions against forced evictions contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights.

12. The petitioners acknowledge that the 2nd respondent is mandated to administer, control and manage aerodromes and any other property vested in it. However, they asked the court to be guided by the case of **Susan Waithera Kariuki & 4 Others –vs- Town Clerk, Nairobi City Council & 2 Others, Petition No. 66 of 2006** where the Court, while recognising the duty of the City Council of Nairobi to plan the city, held that it was also under a duty to respect the constitutional rights of people.

13. They allege, however, that the suit land does not belong to the 2nd respondent, and if it did, its right to the land had been extinguished and the petitioners were entitled to the land by virtue of the doctrine of adverse possession as they had lived on the land for well over 19 years. They assert that contrary to claims by the 2nd respondent, their village was not on the flight path, and that even if it was, the acts of the 2nd respondent were discriminatory as there are other, multi-storied structures around the airport that were not demolished.

14. The petitioners allege further that the 2nd respondent did not consult with them before carrying out the demolition, and that it treated them in an inhumane and degrading manner. They allege that they were subjected to brutality and physical violence by the police who evicted them, and that police dogs

were released on them as they tried to re-construct their demolished structures. They therefore claim that their right to be treated with dignity guaranteed by Article 28 of the Constitution was violated; that it was unconstitutional for the respondents to evict such a large number of people from their dwellings where they have lived for many years and render them homeless, and that the government has an obligation to provide them with alternative housing, which it had failed to do.

15. They have relied on the provisions of the Universal Declaration of Human Rights and Article 21(2) of the African Charter on Human and People's Rights which provide that in case of eviction, the dispossessed people shall have the right to the lawful recovery of their property, restoration to their original situation as well as to an adequate compensation. They claim that they are entitled to compensation and relocation to another parcel of land or alternative shelter with access to educational facilities, clean water, health care and food at the state's expenses. They rely in this regard on the decision of Muchelule J, in **Ibrahim Sangor Osman –vs- Minister For State for Provincial Administration and Internal Security & 3 Others (supra)** in which he ordered the respondents to pay each of the 1,123 petitioners in that case Kshs 200,000, return them to the land they were evicted from, and construct houses for them.

16. The petitioners also allege violation of the rights of children guaranteed under the Constitution and international law. They claim that the forcible, violent and brutal eviction through demolition of their homes without according their children alternative shelter or accommodation and leaving them exposed to the vagaries of nature is a violation of the children rights to basic nutrition, shelter, health care, and education, among others, guaranteed by Article 21(3) and 53 of the Constitution.

The 1st and 3rd Respondents' Case

17. The 1st & 3rd respondent's case was presented by Mr Ojwang, Litigation Counsel, who relied on the grounds of opposition dated 15th November 2011 and undated submissions filed on 27th April 2012. The position taken by the 1st and 3rd respondents is that as the petitioners have failed to provide any evidence of their ownership of the suit land, they cannot claim violation of the right to property. Further, as the land belongs to the 2nd respondent which is a state entity, the doctrine of adverse possession cannot apply.

18. The respondents argue that the basis of the petitioners' claim is social economic rights, which rights are progressive in nature and are limited as provided under Article 25 of the Constitution; that the enjoyment of these rights and freedoms by any individual, including the petitioners, should not prejudice the rights and freedoms of others. Consequently, they take the view that the 3rd respondent has acted in accordance with the law by protecting the interests of property owners and not allocating to the petitioners what has already been allocated to another party. They contend also that there was nothing before the court to demonstrate any violation of the petitioners' constitutional rights as alleged, and that the petitioners had failed to raise any constitutional issue for the court to determine. They referred the court to the decision in **Rashid Odhiambo Aloggoh and 245 Others –vs- Haco Industries Misc. Appli. 1520 of 1999** where the court held that any applicant who alleges that his rights have been infringed must state clearly with supporting facts and instances where such rights have been infringed.

19. The respondents also submit that the petitioners are guilty of material non-disclosure as they have failed to disclose that they encroached on the 2nd respondent's land. They urged the court to dismiss the petition for non-disclosure of material facts and relied in this regard on the decision in **Kenya Bus Services Limited –vs- Attorney General and Others Misc. Civil Application No. 413 of 2005** where it was held that non-disclosure of material facts is sufficient to warrant the dismissal of a constitutional application.

The 2nd Respondent's Case

20. The 2nd respondent also opposes the Amended Petition, but did not file any documents directly in answer to either the Petition or the Amended Petition. In its written submissions which appear to be erroneously dated 15th March 2011 but were filed in court on 16th March 2012, the 2nd respondent states that it relies on two affidavits. The first was sworn by Ms Joy Nyaga, the 2nd respondent's Acting Corporation Secretary, on 26th October 2011, while a Further Affidavit was sworn by the 2nd respondent's Managing Director, Eng. Stephen Gichuki, on 9th February 2012. Ms Nyaga's affidavit is expressed to be in opposition to the application for conservatory orders dated 21st September 2011 while the affidavit sworn by Eng. Stephen Gichuki, on 9th February 2012 is in response to the petitioners' application dated 17th January 2012 seeking orders of contempt against the Managing Director for disobedience of the court order issued on 22nd September 2011. Nonetheless, I will consider these two affidavits as containing the 2nd respondent's answer to the petitioners' claim.

21. While conceding that eviction of the petitioners and demolition of their houses did take place as alleged, the 2nd respondent takes two approaches in its defence. It contends, first, that since the land the subject of this dispute belongs to it, there has been no violation of the petitioners' right to property under Article 40 of the Constitution. It contends, however, and this is the gist of the affidavit by Eng. Stephen Gichuki, that it did not carry out the demolitions which it claims were carried out by state and security agents as the settlement posed a security threat due to the war in Somalia.

22. Mr Mutua for the 2nd respondent questioned the justiciability of social economic rights. He submitted that such rights are second and third generation rights which impose a duty on the state to do certain things to guarantee the protection of these rights. Therefore, even if these rights are justiciable, a balance has to be struck, and the court must strive to address the question of availability of funds from the executive for their enforcement. The 2nd respondent relied on the decision of the Supreme Court of India in **Olga Tellis –vs- Bombay Municipal Corporation (1985) Supp SCR 51** where it was held that the respondent was justified in directing the removal of the petitioners who had encroached on pavements and footpaths. It also relied on the case of **Thiagray Soobramoney –vs- Minister of Health (Kwa-Zulu Natal) 9188 (1) SA 765** and submitted that in that decision, the Constitutional Court of South Africa stated that one of the limiting factors to the attainment of the constitutional guarantee to social economic rights is that of limited resources. Mr. Mutua also referred the court to the decision of the Constitutional Court of South Africa in **Irene Grootboom and Others v The Government of the Republic of South Africa and Others (2001) (1) SA 46** in which the court held that section 26 and 28 of the Constitution of South Africa do not entitle the petitioners to claim shelter or housing immediately upon demand. Similarly, the petitioners were not entitled to claim social economic rights two years after the promulgation of the Constitution.

Determination

23. The basic facts that gave rise to this petition are undisputed. The petitioners were all resident in the informal settlement known as Mitumba Village, which was situated near Wilson Airport, Nairobi. On 15th September, 2011, the 2nd respondent issued a notice to residents of the village, among others who had allegedly encroached on its land, to vacate within 7 days. The notice was signed by the Managing Director of the 2nd respondent.

24. About one week after the notice, the petitioners filed this petition, and on 22nd September 2011, the court granted an order restraining the eviction of the petitioners or demolition of their houses pending inter partes hearing of their application. However, in total disregard of the court order, the

evictions and demolitions were carried out on 19th November 2011 and on at least one other occasion thereafter.

25. The 2nd respondent contends that it did not carry out the demolitions, that the eviction and demolitions were carried out by the executive. Apart from the mention by the petitioners that police dogs were unleashed on them during the demolitions, thus suggesting police presence, there is no evidence that supports the involvement of any other state agency in the demolition. At any rate, the notice to vacate was issued by the 2nd respondent, which claims ownership of the land. The 2nd respondent is a state corporation. Consequently, whether the demolitions were carried out by the 2nd respondent alone, or with other state agents, what emerges is that the state or its agents demolished the petitioners' homes and evicted them from the land. The 1st and 2nd respondents are therefore, in my view, responsible for the evictions and demolition of Mitumba village.

26. Before going any further in considering the merits of the petitioners' case, it is important to point out that the eviction of the petitioners and demolition of their homes during the pendency of an order of the court went against all the tenets of the Constitution. This court did find on 13th June 2012 that the 2nd respondent, as the party which had issued the notice to vacate and which alleged ownership of the land, was in contempt of the order of the court, a finding that is now the subject of an appeal.

27. Nonetheless, it is worth observing that the Constitution vests, at Article 159, judicial authority in the judiciary. It also vests in the High Court, under Article 165(3) (b), the jurisdiction to determine whether a right or fundamental freedom has been denied, infringed, violated or threatened with violation. At Article 22, the Constitution grants to every person the right to approach the court claiming that a fundamental right or freedom in the Bill of Rights has been violated or is threatened with violation. Upon such an application, the court has jurisdiction, under Article 23(3) (c), to grant a conservatory order. This is what the court (Gacheche J) did when the petitioners first appeared before her on 21st September 2011.

28. Article 2 and 20 of the Constitution impose an obligation on all persons and all state organs to respect and abide by all the provisions of the Constitution. Article 2(1) provides that **'This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.'** At Article 20(1), the Constitution provides that **'The Bill of Rights applies to all law and binds all State organs and all persons.'** It follows, therefore, that the respondents, even before the demolitions took place, were under an obligation to abide by the provisions of the Constitution not only not to violate any of the rights of the petitioners, but also to respect judicial authority and obey all such orders as the court may issue for the protection of the fundamental rights of the petitioners.

29. That the demolition took place at all in the face of a clear court order restraining the respondents is, even without more, a clear manifestation of disrespect not only for the constitutional authority of the court but also for the fundamental rights of the petitioners and the Constitution itself. If the state and its organs can so blatantly disrespect and disregard the sovereign will of the people as contained in the Constitution, then one fears for the establishment and maintenance of the rule of law in this country. The state and its agencies have an obligation to abide by the provisions of the Constitution, which include respect for human rights and the judicial authority of the courts. There are no two ways about it.

Issues for Determination

30. The respondents have all contended that there has been no violation of the fundamental rights of the petitioners, and have made four main arguments in support of their position. The first is that the

land in question does not belong to the petitioners but to the 2nd respondent; that the 2nd respondent was under an obligation, in performing its statutory duty under the Civil Aviation Act, to ensure air safety by removing the informal settlement which was on a flight path; that the demolitions was not carried out by the 2nd respondent but by the state in order to remove the threat posed by the village given the ongoing war in Somalia; and that the petitioners are claiming social economic rights which are progressive and cannot be granted at once.

31. In determining this matter, and taking into account the respective arguments of the parties set out above, I believe I am called upon to address my mind to three main issues:

- i) **What rights, if any, do the petitioners have over the subject property"**
- ii) **If the answer to i) above is in the negative, was their eviction and the demolition of their houses a Violation of their Rights under the Constitution"**
- iii) **If the answer to ii) above is in the positive, what relief should the court grant to the petitioners"**

i) Rights over the Subject Property

32. The petitioners allege violation of their right under Article 40, which provides as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

33. The respondents have submitted that there has been no violation of the petitioners' right to property as the petitioners have no right to the land in question, and that they have not produced any documentary evidence to show that they own the land or that it was allocated to them by the then Nairobi Provincial Commissioner. They maintain that the land belongs to the 2nd respondent and could therefore not be allocated to the petitioners. On their part, the petitioners claim that they were allocated the land, but in the alternative, since they have lived on the land for over 19 years, it vested in them by virtue of the doctrine of adverse possession.

Adverse Possession

34. This latter claim is easily disposed of in light of statutory provisions with regard to acquisition of title to land by way of adverse possession. Section 41(a)(i) of the Limitation of Actions Act (Cap 22) provides that:

'This Act does not-

(a) Enable a person to acquire any title to, or any easement over-

(i) Government land or land otherwise enjoyed by the government'.

35. The law that one cannot maintain a claim to government or public land by way of adverse possession is also well articulated in our jurisdiction. See **Peter Mwashu & Anor -vs- Javan Mwashu & Others, Eldoret HCC 38 OF 2004** and **Beatrice Syokau -vs- Kenya Airports Authority & Another Petition No 1 of 2012**. The 2nd respondent is a state corporation established under section 3(1) of the Kenya Airports Authority Act, Chapter 395 of the Laws of Kenya. It is not possible therefore for the petitioners to maintain a claim in adverse possession over its land in light of the above statutory provisions.

Allocation

36. The petitioners have also laid a claim on the land on the basis that it was allocated to them in 1992 by the then Provincial Commissioner of Nairobi, Mr Fred Waiganjo. There is no document in support of the alleged allocation in 1992 but the petitioners have adduced in evidence letters which they wrote to the 3rd respondent seeking allocation of the land to them. These include a letter dated 2nd June 2004, 18th June 2008, 28th January 2009, and 10th February 2009. There is no response from the 3rd respondent to these letters, and there is also no evidence that the land was ever allocated to the petitioners. In any event, under the law then in force as provided in the Government Lands Act, Cap 281 of the Laws of Kenya (now repealed), the Provincial Commissioner had no authority in law to allocate land.

37. Title in the land, therefore, appears to be vested in the 2nd respondent, although the petitioners aver, and documents before the court suggest, that there may have been allocation of this land to private individuals. This issue is not, however, falling for determination in this matter nor is this the appropriate forum for dealing with any such alleged allocation. Suffice to say that there is nothing before me to support the petitioners' claim that they have a legal basis for alleging ownership of the land. Consequently, I find that the petitioners have no legitimate claim to the land, and cannot therefore maintain a claim for violation of their right to property under Article 40 in respect of the land.

ii) Whether the Eviction Was in Violation of the Petitioners' Constitutional Rights

38. The question, however, is whether, even if the land belongs to the 2nd respondent and the petitioners had unlawfully encroached on it, the 2nd respondent, or indeed any person or organ of state, was entitled to remove the petitioners in the manner in which they were removed. If the manner of removal was unlawful, did it amount to a violation of the petitioners' rights under the Constitution"

39. The starting point in considering this issue is to consider the reasonableness or otherwise of the 2nd respondent's notice dated 15th September 2011, which required the petitioners and others to vacate its land within seven days. The notice is headed 'Reminder Notice', but there is nothing to indicate that the 2nd respondent had ever issued any other notice to the petitioners to vacate the subject land. The assumption therefore is that the only notice that the petitioners received was the one requiring them to vacate the land within 7 days from 15th September 2011. Two questions arise in this regard. Was it reasonable to give the petitioners only 7 days to vacate land on which they had been living for many years, which they knew as home" Upon their failure to vacate, was it permissible for the 2nd respondent or any organ of state to violently evict them from the land and demolish their homes" I believe the answer to both these questions is in the negative.

40. This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international

guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of the Constitution make the general rules of international law and any treaty or convention that Kenya has ratified part of the law of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by The United Nations Office of the High Commissioner for Human Rights in **General Comment No. 7 “The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments).”** Paragraph 15 and 16 provide as follows:

“15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of rights recognized in both the international covenant on human rights. The committee considers that the procedural protections which should be applied in relation to forced evictions include:

(a) an opportunity for genuine consultation with those affected;

(b) 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 reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be is available.” (Emphasis added)

41. The High Court in Kenya had occasion to consider the issue of evictions and the lack of appropriate legal mechanisms to govern evictions in the case of **Satrose Ayuma & 11 Others -vs- Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others Petition No. 65 of 2010**. In granting an injunction restraining the eviction of the petitioners in that matter, the court noted with concern the lack of legal guidelines governing evictions in Kenya, whether such intended evictions are from formal or informal settlements. Justice Musinga stated as follows in his judgment:

'At some particular point in time the tenants will have to move out of the estate but when that time comes, that ought to be done in a humane manner. The challenge of providing accessible and adequate housing as required under Article 43(b) of the Constitution is all evident. 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.' (Emphasis added)

42. In the case of **Susan Waithera Kariuki & 4 Others –vs- Town Clerk Nairobi City Council & 2 Others Petition No. 66 of 2011**, Justice Musinga was again confronted with the issue of eviction of residents of an informal settlement in Nairobi. While holding that the eviction of the residents from their homes in the settlement would be in violation of the petitioners' right to housing, he observed as follows:

'While I agree that the 1st respondent has a duty to control developments in the city of Nairobi as required under the Local Government Act as well as the Physical Planning Act, the protection of the petitioner's fundamental right as guaranteed under the constitution overrides the aforesaid duty and responsibility of the 1st respondent. The petitioners have resided on the properties where they are being evicted from for many years. It is unreasonable and indeed unconstitutional for the respondents to give the petitioners one or two day notice to move out of their respective homes even without giving them any reason thereof and immediately upon expiry of the short notice embark on forceful eviction and demolition of their homes. The petitioners ought to be treated with dignity as required by our constitution. It is unconstitutional to forcefully evict such a large number of people from dwellings where they have lived for more than forty years and render them homeless overnight. The government has a constitution obligation to provide them alternative housing.....even though it is important that the 1st respondent plans the City of Nairobi properly, and that may entail having to evict some people from informal settlements and on road reserves for purposes of road expansion and or beautification, the constitution rights of those people must be respected and given due consideration'.

43. Similarly, in **Ibrahim Sangor Osman & Another –vs- Minister for State for Provincial Administration & Another (Supra)**, the court held that a notice to vacate within 21 days issued to the petitioners in that case was unreasonable, and the subsequent evictions were a violation of the rights of the petitioners to accessible and adequate housing under the Constitution.

44. I agree fully with the sentiments of the court in the above matters. It is unreasonable, unconscionable and unconstitutional to give persons in the position of the petitioners seven days' notice within which to vacate their homes, and then demolish their homes without giving them alternative accommodation. It exacerbates the violation when the eviction is carried out, as in this case, even after those affected have sought and obtained the intervention of the court. I therefore find and hold that the eviction of the petitioners from Mitumba Village after a 7 day notice was unreasonable.

45. I now turn to consider whether, as claimed by the petitioners, the eviction and demolition resulted in violation of their rights under the Constitution.

Violation of the Right to Property under Article 40

46. As indicated above, the petitioners' claim to ownership of the land, either by way of adverse possession or through allocation by the Provincial Commissioner, cannot be maintained. However, the protection of property under Article 40 of the Constitution which is set out above extends to other property besides land. This is because Article 260 of the Constitution defines property as follows:

“property” includes any vested or contingent right to, or interest in or arising from—

(a) land, or permanent fixtures on, or improvements to, land;

(b) goods or personal property;

(c) intellectual property; or

(d) money, choses in action or negotiable instruments;

47. The constitutional right to property thus extends to, and must therefore include protection of, goods and personal property. The petitioners claim that in the eviction from the premises, their houses and household goods were destroyed, the 2nd respondent did not give them an opportunity to salvage any of their goods, and they were left destitute.

48. The petitioners have not given particulars of which of their goods were destroyed during the eviction, but it must inevitably follow that such goods as the petitioners had in their dwellings, and the materials the houses were made of, were destroyed during the demolition. Not only did the respondents violate the petitioners' right to housing by evicting them from the subject property and destroying their dwellings, but they also violated their right by the violent nature of the eviction and demolition, and the unleashing of police dogs, thereby denying the petitioners a chance to salvage any of their personal and household goods.

Violation of the Right to Housing and Other Social Economic Rights

49. Article 43 of the Constitution contains the constitutional guarantee to social economic rights. The relevant provision of this Article for our purposes is as follows:

43. (1) Every person has the right—

(a)

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

50. The 2nd respondent has contended that the claim by the petitioners is for social and economic rights, which are second generation and progressive in nature and should therefore not be claimed two years after the promulgation of the Constitution.

51. Such an argument fails to recognise the essential connection, inter-dependence and indivisibility of rights and more importantly, is made in ignorance of the fact that the classification of rights as first or second generation has long been abandoned, and the indivisibility and interdependence of human rights recognized. Paragraph 5 of the 1993 **Vienna Declaration and Programme of Actions** adopted by the World Conference on Human Rights on 25th June 1993 states that:

‘All human rights are universal, indivisible and interdependent and interrelated.’

52. With regard to the justiciability of social economic rights which the 2nd respondent also challenges, I can do no better than to quote **General Comment No. 9 on the Domestic Application of**

the International Covenant on Economic, Social and Cultural Rights, CESCR, General Comment 9, The Domestic Application of the Covenant (Nineteenth session, 1998), U.N. Doc.E/C.12/1998/24 (1998), para. 10 in which the Committee on Economic, Social and Cultural Rights (CESCR) states as follows:

'The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.'

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

54. Consequently, when the state or a state agency such as the 2nd respondent demolishes the homes of poor citizens such as the petitioners who live in informal settlements such as Mitumba village, when it does so after a seven day notice, without giving them alternative accommodation, it violates not only the rights of the petitioners but the Constitution itself and the obligations that it imposes on the state, both at Article 21 and 43, but also in the national values and principles of governance set out in Article 10 which include **'(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.'**

55. Article 43 of the Constitution imposes on the state a positive obligation to ensure access by its citizens to social economic rights, and as the respondents rightly argue, access to these rights is progressive, and is dependent on the availability of resources. However, Article 21(1) of the Constitution provides that:

'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.'

56. There is thus an obligation on the state to **'observe, respect, protect, promote and fulfil'** socio-economic rights and in particular, the right to adequate and accessible housing. The duty to **respect** implies that the state has a duty to refrain from interfering directly or indirectly with the enjoyment of the right. In other words, the state not only has a positive duty to fulfil the rights guaranteed under Article 43 by taking positive steps to ensure access by citizens, but it also has a negative obligation not to do anything that impairs the enjoyment of these rights. Thus, with regard to the right to housing, it is violated when evictions and demolitions, as in the current case, are carried out, leaving citizens homeless. In the **Irene Grootboom** case relied on by the 2nd respondent, the Constitutional Court observed, in its analysis of section 26 of the Constitution of South Africa, which is similar to our Article 43, that:

'Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.'

57. In the present case, the state had an obligation to protect the petitioners' existing homes, rudimentary as they were, while doing what it could, to the extent of its available resources, to ensure

their progressive access to adequate housing. It cannot properly argue, as it has in this case, that since the petitioners had no right to the land, their houses in Mitumba Village could be demolished arbitrarily without providing them with alternative accommodation. The state has an obligation to 'observe, respect, protect, promote and fulfil' the petitioners' right to adequate housing, and the actions by the 2nd respondent in this case was unlawful and unconstitutional.

Violation of Civil and Political Rights

58. The petitioners have also alleged violation of their rights under Articles 26, 27, 28, 29 and 47 of the Constitution, while the respondents argue that violation of these rights has not been made out. The Constitution guarantees to all citizens, at Article 26, the right to life, Article 27 contains the non-discrimination provisions and guarantees to everyone equal protection and benefit of the law, while Article 28 recognises the inherent dignity of all and guarantees to all the right to have that dignity respected. At Article 29, the right of everyone to security of the person and to freedom from violence from either private or public sources is guaranteed. Article 47 contains the constitutional guarantee to fair administrative action.

59. In my view, enjoyment of these rights, which the 2nd respondent would like to see in the now discarded division of rights as first and second generation, is not possible without the social economic rights which our Constitution guarantees at Article 43. A failure by the state to ensure that citizens have access to the rights guaranteed by Article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in the Constitution. The deliberate state or state agency action to deprive the petitioners of the housing that they had provided for themselves, through self-help means, and in the face of state failure to meet its constitutional obligation to provide them with adequate housing, manifests a callous disregard for all the petitioners' right: it leaves them without a home, a means of livelihood; it robs them of their dignity, jeopardizes their right to health, and threatens their right to life.

Constitutional Requirement for Consultation and Participation

60. The 2nd respondent has justified the eviction and demolition of the petitioners' homes on two grounds. It avers, first, that the petitioners' village was stationed on a flight path as it was situated near Wilson Airport, and it was therefore necessary for it to be demolished. In the affidavit of Eng. Stephen Gichuki, the 2nd respondent contends that it did not carry out the demolitions; that they were carried out by the executive branch of government because of the security threat posed by the village due to the on-going war in Somalia.

61. The court recognises that there may be instances when eviction of people may be necessary, and that considerations of national security may be one reason for such evictions. It is, however, recognised that even in such instances, there is a need to follow due process: that those to be affected should be given notice, and that there should be consultation and participation of those to be affected by the removal process. The 2nd respondent has relied on the case of **Olga Tellis & Others v Bombay Municipal Corporation (supra)** to support its contention that the removal of the petitioners was justifiable. However, while the court in that case allowed the evictions of the pavement dwellers to proceed, it did recognise their right to be heard, and that a process that did not allow this would violate the right to shelter and a livelihood:

It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, must conform to the means of justice and fair play. Procedure which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action

taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards; the action must be within the scope of the authority conferred by law and secondly, it must be reasonable.'

62. In our jurisdiction, Justice Musinga observed in **Susan Waithera -vs- city Council of Nairobi (supra)**, that performance of a statutory duty cannot excuse violation of citizens' constitutional rights.

63. It is regrettable that there is yet to be enacted legislation that governs evictions. However, even without such legislation, there are sufficient guidelines provided by the Constitution and international law which the state, in line with its constitutional obligation and as a signatory to international covenants, should follow. The principle of consultation and participation of the people is entrenched in the Constitution in the national values and principles; Article 47 requires fair administrative action, which encompasses the notion of notice, consultation and a right to be heard before adverse action is taken. More directly and explicitly, as I have indicated above, the United Nations Office of the High Commissioner for Human Rights guidelines, incorporated into our law by Article 2(5) and (6) of the Constitution, provide a clear benchmark for states to follow in dealing with persons who, for whatever reason, including considerations of security, have to be removed from land that they have been living on.

64. With such clear constitutional and international law guidelines on how persons in the position of the petitioners should be dealt with, there cannot be, in my view, any justification for the acts of the respondents in the instant case. Not only did the state fail in its constitutional responsibility to respect the rights of the petitioners by not taking any action that would violate their rights, it also failed to honour its obligation under international law and the Constitution to only take action after due process involving consultation and participation of the petitioners.

Right to Non-discrimination and Equal Protection of the Law

65. The petitioners contend, and this was not denied by the respondents, that demolishing their houses was discriminatory and in violation of Article 27(2), (4) and (6) of the Constitution as the respondents did not demolish multi-storied buildings which are in the same location as Mitumba Village. These constitutional provisions are as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3).....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5)

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past

discrimination.

66. The petitioners have annexed to the affidavit in support of their petition a report by a non-governmental organisation known as Pamoja Trust. The report, which is dated May 2011 and titled **'Mitumba Enumeration Report'**, states that Mitumba Village, which is situated near Wilson Airport in South C, Nairobi, is surrounded by developed residential apartments which the report names as including Midland Apartments, Parkview Apartments, and Soledo Apartments. The report describes the petitioners' houses as temporary **'shacks made of mud and rusty iron sheets'**.

67. Which begs the question: if the demolition of Mitumba village was for security reasons, either because it posed a risk due to its proximity to Wilson Airport's flight path, or because of the security threat that resulted from the war in Somalia, can the 2nd respondent convincingly argue that such a threat was posed only by the indigent, marginalised, denizens of Mitumba village" Did not the apartments which surrounded the village pose as much of a risk because of being on the flight path" Is it assumed that terror only resides in the downtrodden informal settlements of our cities"

68. What the demolition of this village for allegedly being on the airport's flight path or posing a security threat, while leaving multi storied buildings which surrounded it intact demonstrates, in my view, in the absence of any other explanation, is that it was occupied by citizens whom the state and its agents did not deem deserving of consideration, who could be uprooted without explanation or consultation. Rather than meeting its constitutional obligation to protect the marginalised and ensure equity, social justice and non-discrimination, it acted in a manner that displayed callous disregard for the very marginalised people it is bound by the Constitution to protect. There is evident therefore, in the selective demolition of Mitumba village, violation of the right to non-discrimination and equal protection of the law guaranteed under Article 27(1), (2) and (4) of the Constitution.

Violation of the Rights of Children

69. Children are perhaps the most vulnerable of the vulnerable and marginalised groups that the state has an obligation to protect in accordance with Article 10 on the National Values and Principles, Articles 53 and 54 on protection of children and persons with disabilities respectively, and Article 56 on protection of the marginalised. The state's constitutional obligation to **'observe, respect, protect, promote and fulfil'** enjoyment of social economic rights is particularly important with regard to these groups, who, more often than not, are limited in their capacity to provide for themselves. In the event of an eviction such as took place in this case, it is these groups which are most affected, and disproportionately so. As the United Nations Office of the High Commissioner for Human Rights also observed at paragraph 10 of General Comment No. 7 (supra):

'Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction.'

70. The petitioners claim that the forcible, violent and brutal eviction through demolition of their homes and without according their children alternative shelter or accommodation and leaving them exposed to the elements and vagaries of nature is a violation of the fundamental rights of the children to basic nutrition, shelter and health care and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education as guaranteed by Article 21(3), 53(1)(b),(c),(d) and (2) of the Constitution.

71. The evidence before me indicates that there was within Mitumba Village, a primary school-

albeit an 'informal' primary school, as it is described in the Pamoja Trust Mitumba Village Enumeration Report, which the children of the village attended. The school appears to have been formally recognised by the state and state organs and allocated examination centre numbers and funds from the Constituency Development Fund. The petitioners aver, and this is not disputed, that the school was demolished alongside the village on 19th November 2011.

72. There has been no averment by any of the respondents that in the period leading up to and during the demolition, they took any action to provide for the needs of vulnerable groups, particularly children. It is therefore uncontested that the actions of the respondents in demolishing the village resulted in a violation of the rights of the petitioners' children under the Constitution.

Disposition

73. The upshot of my findings above is that the petitioners have made out a clear case of violation of their constitutional rights by the 1st and 2nd respondents following the demolition of Mitumba Village on 19th November 2011 and on a subsequent occasion thereafter. As I have stated before, the actions of the respondents in this case are all the more reprehensible as the demolition was carried out while there was in force an order of this court restraining the demolition of the petitioners' houses and other institutions in the village. The inescapable conclusion is that, whether alone or with other state agents, the 2nd respondent, which had issued to the petitioners the notice to vacate within 7 days, committed egregious violations of the rights of the petitioners. The state and the 2nd respondent are, in my view, jointly and severally liable for the violation of the petitioners' rights in the demolition of the petitioners' houses.

iii) What Relief are the Petitioners Entitled to"

74. Having found a violation of the petitioner's right, I must now address my mind to the appropriate relief to grant the petitioners. Under Article 23 of the Constitution, this court has power to grant various reliefs to parties coming before it, including declarations of rights, injunctions, conservatory orders, and compensation. In considering the appropriate relief in this case, I must bear in mind that the petitioners before me were a community who were deprived of their shelters and rendered homeless, and that the state has a constitutional obligation to take appropriate legislative and police measures to ensure that the petitioners have access to the rights set out in Article 43.

75. The petitioners have asked the court to grant them various orders and declarations. In light of my findings above, I believe that the petitioners are entitled, and I therefore grant, the following declarations:

(i) That the demolition by the 2nd Respondent of the petitioners' houses situate in Mitumba Village near Wilson Airport was illegal, irregular, unprocedural and contrary to Articles 26, 27(1) (2) and (4), 28, 29, 40, 43, 53 and 56 of the Constitution.

(ii) That any forceful eviction and or demolition without a relocation option is illegal, oppressive and violates the rights of the petitioners.

76. The petitioners also seek a declaration that they are entitled to compensation for the loss suffered during the demolition, as well as relocation to another parcel of land or alternative shelter with access to education facilities, clean water, health care and food at the state's expense.

77. In directing my mind to what other relief, apart from the declarations above, to grant the petitioners for the violation of their rights as set out above, I am constrained by the dearth of useful information with regard to the exercise by the state of its constitutional mandate. I must therefore register my concern with the manner in which the respondents, particularly the 1st respondent as the Legal Advisor of the state, and with the constitutional mandate to safeguard the public interest, has dealt with this matter. It appears to me that the state has yet to appreciate fully the obligation placed upon it by the Constitution. Admittedly, the Constitution was promulgated just about two and a half years ago. However, with respect to social economic rights, the state, as a signatory to the International Convention on Economic, Cultural and Social Rights, was aware, or should have been aware well before the promulgation of the Constitution, of its obligation, as now enunciated in Article 21 and 43, to observe, respect, protect, promote and fulfil the social economic rights of citizens.

78. Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection that the petitioners have not demonstrated a right to the land, or how their rights have been violated. Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.

79. In the circumstances, before I can make any further orders with regard to the appropriate relief for the petitioners in this matter, I direct as follows:

i) That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.

ii) That the respondents do furnish copies of such policies and programmes to the petitioners, other relevant state agencies, Pamoja Trust (and such other civil society organisation as the petitioners and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioners' grievances), to analyse and comment on the policies and programmes provided by the respondents.

iii) That the respondents do engage with the petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the petitioners' grievances following their eviction from Mitumba Village.

iv) That the parties report back on the progress made towards a resolution of the petitioners' grievances within 90 days from today.

Dated Delivered and Signed at Nairobi this 11th day of April 2013

MUMBI NGUGI

JUDGE

Mr Kinyanjui instructed by the firm of Mbuthia Kinyanjui & Co. Advocates for the Petitioners.

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