



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 264 OF 2013
(CONSOLIDATED WITH PETITION NO. 274 OF 2013)

WILLIAM MUSEMBI.....1ST PETITIONER
FRED NYAMORA.....2ND PETITIONER
VINCENT ONYUNO.....3RD PETITIONER
ELIJAH MEMBA.....4TH PETITIONER
JOSHUA KIBE.....5TH PETITIONER
MONICA WANJIRU.....6TH PETITIONER
MWENI KISINGU.....7TH PETITIONER
PAMELA ATIENO.....8TH PETITIONER
PURITY WAIRIMU.....9TH PETITIONER
BEATRICE WANJIRU.....10TH PETITIONER
GERTRUDE ANGOTE.....11TH PETITIONER

VERSUS

MOI EDUCATION CENTRE CO. LTD1ST RESPONDENT
INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

CONSOLIDATED WITH
PETITION NO. 274 OF 2013

MARGARET KANINI KELI1ST PETITIONER

ROSELINE MISINGO.....2ND PETITIONER

JOSEPH MWAURA KAMAU.....3RD PETITIONER

(on their own behalf and on behalf of 15 other residents of

Upendo City Cotton Village at Souch C Ward

VERSUS

MOI EDUCATION CENTRE CO. LTD1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE CABINET SECRETARY FOR LANDS HOUSING

& URBAN DEVELOPMENT.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners approached this court by way of these two petitions alleging violation, among others, of their right to housing guaranteed under Article 43 of the Constitution. They allege that they were all residents of City Cotton and Upendo villages situated in Nairobi, South C Ward, in which they have been living since the late 1960s.
2. The 10 petitioners in Petition No. 264 of 2013 have filed the petition on their own behalf and on behalf of 326 other residents of City Cotton/Upendo villages. The 11th petitioner is the Executive Director of Kituo Cha Sheria, a non-governmental organization that provides legal aid to indigent persons. Their petition is filed against **the Moi Educational Centre Limited** as the 1st respondent, the **Inspector General of Police** as the 2nd respondent, and the **Attorney General** as the 3rd respondent.
3. They first approached the court by way of a notice of motion and petition dated 13th May 2013. They were directed to serve the petition but no interim orders were issued. It appears that they then engaged, in the view of the respondents, in forum shopping, as they filed Petition No. 274 of 2013 over the same subject matter, alleging that they were threatened with eviction. They were in that case given interim orders. Their Counsel subsequently explained the non-disclosure on the basis that the petitioners in Petition No. 274 of 2013 did not know that the larger group had already filed Petition No. 264 of 2013.
4. The petitioners in Petition No. 274 of 2013 lodged their petition against the **Moi Educational Centre Limited**, the **Inspector General of Police**, the **Attorney General** and the **Cabinet Secretary for Lands, Housing and Urban Development**. The petitions were consolidated on 12th November 2013 and the petitioners given leave to amend their petition, which was done by way of the amended petition dated 26th July 2013 and supported by an affidavit sworn by Mr. William Musembi, the 1st petitioner.

The Petitioners' Case

5. The petitioners' case is set out in the amended petition dated 26th July 2013 and supported by the affidavit sworn by the 1st petitioner on the same date. The 1st petitioner has also sworn a further affidavit in support of the petition on 5th February 2014. They also filed written submissions and authorities.
6. The petitioners' claim arises out of their alleged forced eviction and the demolition of their homes on 10th and 17th May 2013 by persons alleged to have been acting on behalf of the 1st respondent and guarded by officers of the 2nd respondent. The eviction and demolition was from land alleged to be owned by the 1st respondent.
7. The affidavits sworn in support of the two initial petitioners by Mr. William Musembi in Petition No. 264 of 2013 and Ms. Margaret Kanini Keli in Petition No. 274 of 2013 are essentially in the same terms. These averments are repeated in the affidavit in support of the Amended Petition sworn by Mr. Musembi on 26th July 2013. It is useful to set out the facts of the case as they emerge from the said affidavit.
8. The 1st petitioner avers that he swears the affidavit on behalf of his co-petitioners, a list of whom is annexed to the affidavit. I note that while the petition is said to be brought by the 10 named petitioners on their own behalf and on behalf of 326 other petitioners contained in a list annexed to the petition, the list contains some 388 names, some of whom have not signed the list or indicated their national identity card numbers.
9. At any rate, the petitioners aver that the 336 petitioners were formerly residing in City Cotton and Upendo Villages, shanty informal wood and mabati settlements constructed on a portion of approximately 3 acres on LR No 209/11207 – Nairobi, situate off Langata Road next to Wilson Airport, Nairobi. The said LR No 209/11207 measures approximately 8.579 hectares in total. They allege that they had been living on the said land since 1968, and that the land was unalienated public land where only government houses Nos HG785 and HG 852 were erected.
10. They allege that upon moving to the said land, they erected semi- permanent houses and business structures, including bars, that were officially supplied with electricity power and water, and that they were licensed to carry on their businesses on the land by agencies of the Government of Kenya.
11. Mr. Musembi depones that sometime in the 1980s, the 1st respondent invaded the suit land and evicted about 200 families from City Cotton village, and that the said families were settled in Fuata Nyayo village, South B Estate, Nairobi, through the influence of then President Daniel Arap Moi. The 1st respondent then build a private primary school, the **Moi Educational Centre**.
12. The petitioners aver that the then President, Daniel Arap Moi, indicated at public rallies that they and the rest of the residents of City Cotton and Upendo Village would eventually be relocated from the suit land and given alternative land, but that this was never done. Instead, in January 1991, while the petitioners were already in occupation of the suit land, the government unlawfully allotted 8.579 hectares of the suit land to the 1st respondent.
13. The petitioners have annexed a copy of the 1st respondent's title to the land in dispute, as well as an excerpt from the **Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, June 2004 (the Ndung'u Report)** which they aver shows that the land was illegally or irregularly allocated to the 1st respondent and recommends revocation of its

title.

14. The petitioners allege that they and the other villagers continued to reside in the village, and their children attended the nearby public primary schools. A list of the petitioners' primary school going children, their ages and the schools they attended is annexed to Mr. Musembi's affidavit as "**WM3**".
15. Mr. Musembi avers that all the respondents have always been aware of the existence of City Cotton and Upendo villages on the said land. He tenders as evidence a certificate of registration of the petitioners' self-help group known as "**City Cotton Community Based Organization**" issued on 14th April 2009 by the then Nairobi West District Gender and Social Development Officer.
16. With respect to the events immediately precipitating the filing of this petition, the petitioners aver that on 10th and 17th of May 2013, a gang of about 300 rowdy male youths armed with crude weapons including runguns, pangas, simis, axes, whips and metal bars, guarded by armed and unformed police officers from Lang'ata Police Station, invaded the larger City Cotton village and violently demolished several dwelling houses and business structures.
17. They assert that the demolition carried out on 10th and 17th May 2013 did not affect the residents of Upendo village, but that thereafter, the same gang and police officers using a "caterpillar" truck, continued to demolish the remaining dwelling houses and business structures on both City Cotton and Upendo villages and burned down building materials. By 30th May 2013, none of the structures that had been erected in the two villages was standing.
18. It is their case that during the brutal and violent eviction, they were not allowed to salvage any of their possessions, which were looted by the gang of youths while the police shot at the petitioners; that the gang of youths committed numerous crimes including attempted rape, assault, indecent assault, theft and arson; and that the petitioners could not report the commission of the said crimes to the police as it is the police who were overseeing the crimes.
19. The petitioners claim that they were not, prior to the eviction, furnished with any warning, notice to vacate or eviction order from a court of law; that the respondents refused to engage in any discussions or consultations on the threatened demolitions and evictions despite the request to do so by Kituo Cha Sheria in its letter dated 15th May 2013 addressed to the 1st respondent, the area Chief and the Officer Commanding Station (OCS), Lang'ata Police Station.
20. The petitioners allege that it is only after the evictions that the OCS Lang'ata Police Station served them with an order for levying distress purportedly issued against the 4th petitioner, **Elijah Memba** and one **Milcah Wanjiru** by the Chief Magistrate's Court at Milimani Commercial Courts in **Misc. Application No 303 of 2013**. The order was allegedly issued to one **Kangeri Wanjohi** t/a **Kindest Auctioneers** in favour of the 1st respondent on the basis that the 4th petitioner and the said **Milcah Wanjiru** were tenants of the 1st respondent and were in arrears of rent of Kshs 960,000/-.
21. The petitioners aver that it is this order that the gang of youths and the respondents executed in demolishing the two villages and evicting the residents; that the said **Elijah Memba** and **Milcah Wanjiru** deny ever having entered into a lease agreement in 2011 with the respondent or that they ever lived in any premises owned by the 1st respondent; that they build their own shacks when they moved into the land in 1979 and 1973 respectively; and they term the purported lease

agreement between them and the 1st respondent annexed to the application before the Chief Magistrate's Court as outright forgeries which they have reported to the police.

22. The petitioners allege violation of the rights of the elderly, a list of whom is annexed to the 1st petitioner's affidavit, the rights of children whom, as a result of the demolition, have been rendered homeless and have dropped out of school; and the petitioners' right to a livelihood as many of them were casual labourers in the nearby industrial area and are no longer able to seek employment there.

The Submissions

23. Learned Counsel for the petitioners, Mr. Mureithi, submitted that as the evictions and demolition are expressly admitted by the respondents, it is common ground that such evictions did indeed take place. It was also his submission that as the 1st respondent has conceded that there was no court order despite the 2nd respondent alleging that it had acted on the basis of a court order, such order as the 2nd respondent alleges to have acted in enforcement of must have been obtained fraudulently.
24. The petitioners assert that the rights that were violated by the respondents, namely the right to dignity, security of the person, housing under Article 43 and the rights of children and the elderly guaranteed under Article 53 and 57 respectively apply horizontally as against the 1st respondent. They rely for this proposition on the decisions in **Isaac Ngugi vs Nairobi Hospital High Court Petition No. 407 of 2012**; **Irene Grootboom and Others vs The Government of the Republic of South Africa and Others (2001) (1) SA 46** and **Mitu Bell vs Kenya Airports Authority High Court Petition No. 164 of 2012**. It is also their contention that the right to housing also entails the duty not to do anything to violate the right, and the need for due process to be followed.
25. With regard to the liability of the 2nd and 3rd respondents, the petitioners submit that these respondents are liable because they supervised the demolition; that as state actors, they have a duty to ensure that there is no violation of rights; that the two respondents were purporting to enforce an order of distress for rent against two of the petitioners for rent owed to the 1st respondent, yet the order did not authorize eviction; and that an order for distress for rent cannot translate to an eviction order. They pray that their petition be allowed and the following orders granted:
- a. ***A declaration that the demolition of the houses and business structures of the petitioners and their forced eviction without provision of alternative land and/or shelter/accommodation is a violation of the petitioners' fundamental rights to inherent human dignity, security of the person, right to life, accessible and adequate housing, prohibition of forced evictions, reasonable standards of sanitation, health care services, to clean and safe water in adequate quantities and to be free from hunger guaranteed by Articles 26(1),(3), 28, 29(c),(f), 43(1) as read with 20(5) and 21(1),(2) and (3) of the Constitution of Kenya 2010.***
 - b. ***A declaration that the demolition of houses and business structures of the petitioners and their forced eviction without service of any notice in writing or information and/or decisions regarding the threatened eviction is a violation of the petitioners' fundamental right to information guaranteed by Article 35(1)(a) and (b) of the Constitution of Kenya 2010.***

- c. A declaration that the demolition of houses of the petitioners without according their children alternative shelter and/or accommodation is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by Article 53(1)(b),(d) and (2) as read with Article 21(3) of the Constitution of Kenya, 2010 and article 28 of the Convention on the Rights of the Child.**
- d. A declaration that the demolition of houses of the petitioners who are elderly persons without according them alternative shelter and/or accommodation is a violation of the fundamental rights of the elderly of pursuit of personal development, to live in dignity, respect and free from abuse and to receive reasonable care and assistance from the State guaranteed by Article 57(b),(c) and (d) as read with Article 21(3) of the Constitution of Kenya, 2010.**
- e. A declaration that the 1st respondent unlawfully, illegally and/or irregularly acquired the suit land LR No LR No 209/11207 NAIROBI and has no lawful, legal title to the same or any superior rights over the same as against the petitioners.**
- f. An order of mandatory injunction do issue compelling the respondents to forthwith jointly and severally;**
- i. Furnish the Petitioners and this Honorable Court with all relevant written information containing details of;**

 - a. The status of ownership of the said LR No 209/11207-Nairobi and its entire history.**
 - b. The decision/s and reasons for the intended demolition of houses and structures, eviction notices, court order/s and/or any other written authority authorizing the demolition of houses and structures of the Petitioners from LR No 209/11207 Nairobi.**
 - c. Information exhibiting any efforts or plans by the respondents to provide alternative land or shelter or accommodation to the petitioners.**
- ii. Provide the petitioners with alternative land or accommodation or shelter**
- g. An order of mandatory injunction do issue compelling the 1st respondent to:**

 - i. forthwith surrender the suit land LR No 209/11207 – Nairobi together with all improvements, structures, buildings and developments thereon to the National Land Commission.**
 - ii. Render a true, faithful and accurate account of the profits made arising from the use of the suit land LR No 209/11207 – Nairobi.**
- j) General damages for violations of the petitioners' fundamental rights and freedoms in prayers (a) to (d) above.**
- k) Exemplary damages for highhanded, oppressive and arbitrary violation of the petitioners' fundamental rights and freedoms.**

l) Costs of this petition

m) Interest on prayers (j) to (i) above

The 1st Respondent's Case

26. The respondent opposed the petition and filed an affidavit in reply sworn by **Mr. Paul Chemng'orem**, the Chairman of the Board of Management of the 1st respondent, on 3rd September 2013, as well as submissions and authorities. The 1st respondent denies the bulk of the averments by the petitioners, terming them as unsubstantiated and inadmissible in law. Its case as presented by its learned Counsel, Ms. Manyarky, is that while it did carry out the evictions of the petitioners from its land, it is not liable for the alleged violation of the petitioners' rights as it is a private citizen, and that it is only the state that is liable with respect to the petitioners' rights.
27. In his affidavit in opposition to the petition, Mr. Chemng'orem avers that sometime in the early 1990s, the 1st respondent applied for allotment of the suit property and it was allotted and later issued with a title to the land namely L.R No 209/11207 measuring (8.579 Ha) approximately 21.2 acres. Later, as a result of an amalgamation, title number LR No 209/13695 to the land measuring 13.62 Ha) approximately 33.7 acres for a term of 99 years was issued to the 1st respondent.
28. It is the 1st respondent's case that the process leading to the issuance of its title was clean, above board and within the law and its ownership has never been challenged; that the petitioners' claim to have lived on the land since 1968 is unsubstantiated; and that if they had indeed lived on the land for that period of time, they ought to have applied for allocation of the land and not made a claim to it 45 years later.
29. The 1st respondent avers that the petitioners have illegally and intentionally encroached on its land, constructed structures, and wasted and damaged the original state of the suit property without any colour of right; that despite the petitioners' claim that they are poor, some, such as the 4th petitioner and many others, were landlords within City Cotton and Upendo Villages earning revenue from the illegal structures.
30. The 1st respondent further avers that the fact that the petitioners had been issued with business licenses or have paid for water and electricity did not confer ownership of the suit premises to them; that one does not need to prove ownership of land when applying for a water or electricity meter; that the documents relied on do not in any way relate to the petitioners' ownership of the suit property; and that the petitioners, contrary to the law, engaged in the illegal brewing and selling of alcoholic liquor and chang'aa within close proximity to the school compound.
31. While conceding that the eviction took place, Mr. Chemng'orem avers that sometime in 2009, the 1st respondent conducted a self-environmental audit assessment as directed by NEMA in which concern was raised on the sprawling slums, in reference to the petitioners' structures, within the school compound, and that the report recommended the removal of the structure. He avers further that the 1st respondent had made several attempts to remove the petitioners from the premises and had given them various notices to vacate the premises but to no avail; that it has on several occasions been prosecuted by the City Council for allowing the erection of unauthorized structures within the school compound; and that it has, as a result, suffered serious losses at the hands of the petitioners.
32. It is the 1st respondent's averment that having made numerous complaints to the law

enforcement authorities and the petitioners on the rising cases of crime and insecurity within the school and its environs, cases of dangerous armed criminals traced to the petitioners shanties, cases of selling alcoholic drinks and drugs within the school compound, the 1st respondent had no option but to have the petitioners removed from the premises to safeguard and protect the interest of the school going children. It avers that it used police officers to ensure law and order was maintained during the eviction process; that the eviction was therefore done within the confines of the law; and that it had followed international guidelines in removing the petitioners.

33. The respondent denies that any crimes were committed during the eviction process as this was impossible in the presence of police officers; that if any crimes were committed, then such crimes ought to have been reported to the police and that the allegations made with regard to the commissions of crimes can only be answered by the auctioneer. It is its case that the petitioners, knowing that the suit property did not belong to them, had all the opportunity to peacefully vacate from the suit land but did not make use of such opportunity; that the 1st respondent is under no obligation to provide alternative settlement to the petitioners who are trespassers on its property; and that it was only protecting its fundamental right to ownership of property as provided for by Article 40 as read with Article 64 of the Constitution.
34. The 1st respondent further submitted that it has been wrongly sued as it has no capacity to meet the petitioners' claim. It contended that under Article 21, the fundamental rights alleged to have been violated are to be guaranteed by the state, and in the present circumstances, there is no horizontal application of the Bill of Rights. Ms. Manyarky submitted that the petitioners have not demonstrated breach on a balance of probability, relying in support on the decision in **Vitalis Lumiti & 55 Others vs Olaf Konner & 2 Others HCCC No 44 of 2012** and **Uhuru Kenyatta vs the Star Publication Ltd, Petition No 187 of 2012** where the court held that a claim for fundamental rights can only be brought against the state, not an individual.
35. It was also the 1st respondent's contention that the petitioners have not disclosed how the 1st respondent violated their rights; that the 1st petitioner had no authority from the 2nd - 11th petitioners to swear an affidavit on their behalf, and there is nothing in the list of petitioners to show that they come from City Cotton or Upendo village. It was its case that in the absence of a relationship between City Cotton and the 1st petitioner, Mr Musembi, his depositions were pure hearsay and should not be relied on. It therefore prayed that the petition be dismissed with costs.

The 2nd and 3rd Respondent's Case

36. Ms. Gitiri for the 2nd and 3rd respondents also joined in opposing the petition. She relied on grounds of opposition dated 10th June 2013, an affidavit in response sworn by **Mr. Dennis Omuko** on 17th August 2013 and submissions dated 17th February 2014.
37. In their grounds of opposition, the 2nd and 3rd respondent argue that the petition is frivolous, misconceived and otherwise an abuse of the court process, does not disclose any cause of action against the respondents, and does not disclose any constitutional violations or breaches by the respondents. They also argued that the orders sought by the petitioner are not tenable against them as no sufficient grounds have been advanced to warrant the grant of the orders.
38. In his affidavit sworn in opposition to the petition on 7th August 2013, Mr. Dennis Omuko, the Officer Commanding Police Station at Langata Divisional Police Headquarters swears that Kindest Auctioneers brought a court order dated 24th April 2013 to the Provincial Police Officer's Office (PPO) directing the police to supervise the eviction exercise for the purpose of maintaining

law and order. A copy of the order dated 24th April 2013 is annexed to his affidavit. He avers that the auctioneers paid for the private hire of police; that the order was served on the Officer in Charge, Langata Police Station, and the hire was approved by the PPO's office.

39. He concludes that the police provided security on 10th May 2013, and the eviction was carried out peacefully. He deposes that the eviction was carried out by the auctioneers and that no report of malicious damage to property was reported; that the auctioneers then came to fence the land on 17th May 2013 and in the process of so doing, those who had been evicted threw stones at them; and that the police were called in to maintain law and order, which they did.
40. Ms. Gitiri submitted that it is the duty of the police to maintain law and order under **section 24** of the **National Police Service Act**; that in the circumstances of this case, the police were acting on the court order annexed to the affidavit of Dennis Omuko; that there was a request for hire of 4 inspectors and 100 constables by Kindest Auctioneers to enforce the court order; and that the payment in respect thereof had been received and payment receipts in evidence of the hire of the police officers were attached in evidence. Ms. Gitiri drew attention to the deposition of Mr. Chemng'orem in which he deposed at paragraph 25 that the 1st respondent had sought the services of the police.
41. It was her contention that the onus was on the petitioners, if they had doubts about the court order, to bring it to the attention of the court that issued it; that section 62 of the National Police Service Act exempts the police from liability for acts done in obedience to a court warrant or order; that section 107 and 109 of the Evidence Act had not been satisfied by evidence showing that the police acted unlawfully, and that therefore the averments by the petitioners remain mere allegations. It was also Ms. Gitiri's contention that no orders were sought against the 2nd and 3rd respondent, and she therefore prayed that the petition be dismissed as against them with costs.

Submissions in Reply

42. In reply, Mr. Mureithi submitted that horizontal application of the Bill of Rights is anchored in Article 20 which provides that the Constitution binds all persons while Article 21 contains the positive obligations of the state. He distinguished the judicial authorities relied on by the 1st respondent as not being applicable to the present circumstances. Finally, with regard to the court order relied on by the 2nd respondent, it was Counsel's submission that it authorized distress for rent against two people, and therefore the provisions of section 62 of the National Police Act was not of assistance to the 2nd and 3rd respondents. According to Mr. Mureithi, the more appropriate section is section 104 of the National Police Service Act which provides for the use of police officers for private use, which use should be for public good and interest. It was his submission that rendering 300 Kenyans homeless cannot be in the public good.

Analysis and Determination

43. The fact of the eviction of the petitioners from the subject premises has not been disputed, nor is there doubt at whose behest it was carried out, the 1st respondent having readily admitted that it evicted the petitioners, whom it refers to as trespassers, from its property. It is also not in dispute that the petitioners have been in occupation of the land in dispute. While the 1st respondent disputes the petitioners' contention that they had been on the suit land since 1968, it concedes that they were on the land for some time, and that it has been making various attempts to evict them. In its own document the Self Environmental Audit Report (annexure "PCK2"), it concedes at paragraph 4.2 titled "**Sprawling Slums**" that the slums "**have sprawled to one**

side of the school compound, occupying approximately 4 acres and housing over 1000 people. The housing units are of iron sheets with poor planning sanitation and space.” It is worth observing that the likelihood is that the petitioners were in the suit land as they allege, or at any rate long before its allocation to the respondents, for it is quite unlikely that the 1st respondent would have allowed the invasion of its property by over 1000 people if it was already the owner of the property.

44. It is also common ground that the eviction was carried out in the presence of police officers, the only dispute being the exact reason for their presence during the eviction, and whether their actions were in consonance with their duties as officers of the state as provided under the National Police Service Act. While the 2nd and 3rd respondent allege that the eviction was on the basis of a court order issued in **Milimani Chief Magistrate’s Court Civil Case No. 303 of 2013**, which they have annexed to the affidavit sworn in opposition to the petition, the 1st respondent effectively disowns the said order, with Mr. Chemng’orem deposing that it is a stranger to the facts related to the alleged court order.
45. The petitioners allege violation of their rights under Articles 28, 29, 43, and the rights of children under Article 53 as well as the rights of the elderly guaranteed under Article 57 of the Constitution. They further allege violation of their right to information in that the demolitions and eviction were carried out without any notice or any information given to them regarding the intended demolition. It is also their claim that the title to the property was acquired illegally and irregularly by the 1st respondent, and they seek various orders with regard thereto, alleging that the 1st respondent has no better title to the property than they have.

Issues for Determination

46. At the core of this petition is the question whether, in carrying out the eviction of the petitioners from land which admittedly the petitioners had no legal title to, the respondents violated the petitioners’ rights as alleged. Should the court find a violation of these rights, the second consideration is the liability of the respondents. In this regard, the 1st respondent has contended that it is not, as a private entity, liable with regard to violation of the petitioners’ fundamental rights. Finally, the court will consider the remedies, if any, that the petitioners are entitled to should it find in their favour.

Applicable Law

47. In considering this matter, I am guided by the provisions of the Constitution and the guarantees of rights contained therein. The Constitution imposes on the courts and other state organs the responsibility to ensure, in so far as is possible, that the rights and aspirations of citizens set out in the Constitution are realised.
48. Article 22 expands the rules of standing and allows any person to file a petition alleging that his rights or those of another, or indeed those of a group, have been violated or are threatened with violation. It provides as follows:

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.”**

49. Article 22(3)(d) provides that in determining matters brought under Article 22, **“the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.”**

50. Article 28 contains the constitutional guarantee to the right to human dignity. It provides that **“Every person has inherent dignity and the right to have that dignity respected and protected”** while Article 29 guarantees to everyone the right to freedom and security of the person.

51. At Article 43, the Constitution guarantees to all social economic rights in the following terms:

“(1) Every person has the right—

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**
- (b) to accessible and adequate housing, and to reasonable standards of sanitation;**
- (c) to be free from hunger, and to have adequate food of acceptable quality;**
- (d) to clean and safe water in adequate quantities;**
- (e) to social security; and**
- (f) to education.”**

52. Articles 53 and 57 contain specific guarantees of rights to children and older members of society respectively.

53. As a state party to various international conventions and in keeping with the constitutional provisions at Article **2(5)** and **(6)**, and in particular in compliance with its international obligations as a signatory to the International Covenant on Economic, Social and Cultural Rights, the state has committed itself to safeguard the rights of citizens to the rights set out in the Convention, including the right to housing and the other social economic rights set out in Article 43. Article 11 of the Convention states that

‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’

54. The state has also made specific policy pronouncements and commitments with regard to the right to housing. It committed itself, in **Sessional Paper No. 3 of 2004 On National Housing**

Policy for Kenya, to the upgrading of slums and informal settlements as part of its housing policy for Kenya. Paragraphs 30-33 of the Housing Policy state as follows:

30. Upgrading of slum areas and informal settlements will be given high priority. It will be undertaken with minimal displacement to cater for proper planning and provision of necessary infrastructure and related services. Appropriate upgrading measures will be instituted for existing slum areas taking into account key upgrading components that cover security of land tenure, provision of basic infrastructural facilities' and services improvement of housing structure and the social-economic status of the target community.

31. The Government will streamline acquisition of land for housing the poor, adopt appropriate tenure systems, planning standards to suit given slum settlements and prevent unwarranted destruction of existing housing stock and displacement of the residents. Upgrading will be integrated to take into account socio-economic activities that improve livelihoods of target communities.

32. The Government will also facilitate slum upgrading through integrated institutional framework that accommodates participatory approaches involving relevant stakeholders, particularly the benefiting communities while enhancing co-ordination at national level. Upgrading will take into account factors of ownership of land and structures, age of settlement, and affordability. Appropriate compensation measures will be instituted for disposed (sic) persons where necessary.

33. In order to improve the living conditions of a large proportion of the populations in urban areas, appropriate slum upgrading measures will be instituted for each slum/informal settlement, taking into account the above main components and factors. To further address proliferation of slums and informal settlements, the Government will ensure supply of minimally developed but incrementally upgradable low-cost housing.

55. The state had made this commitment in the Sessional Paper in 2004, some six years before the promulgation of the Constitution, and nine years before the eviction of the petitioners. It had, as part of its obligations to citizens, committed itself to taking the specific policy measures enunciated in the policy to ensure that its citizens had access to housing.

56. While it is recognized that the state cannot provide housing to everyone at once, it is under a negative obligation not to deprive citizens of such shelter as they have through evictions and demolition of informal settlements and to protect them from deprivation by others. Where such evictions and demolitions are deemed necessary, the state and all persons are bound to observe certain procedural requirements on evictions. In General Comment No. 7, “**The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR**, the United Nations Office of the High Commissioner for Human Rights states 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 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. (Emphasis Added)

57. Finally, it is important to consider the application of the Bill of Rights, which the first respondent has argued does not apply to it as it is a private person. 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.*** Article 20(1) is couched in similar terms and provides that ***“The Bill of Rights applies to all law and binds all State organs and all persons.”*** Further, the interpretation section of the Constitution contained at Article 260 defines a person as follows: ***“person” includes a company, association or other body of persons whether incorporated or unincorporated”.***

58. In its interpretation of the above provisions, this court has taken the view that the Bill of Rights applies both vertically-as against the state, and horizontally-against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual. Article 2(1) and 20(1) of the Constitution are clear that the Bill of Rights applies and binds all state organs and all persons-see the decision of the court in ***Abdalla Rhova Hiribae & 3 Others -vs- The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya –vs- Betty Sungura Nyabuto & Another Petition No. 21 of 2010 B.A.O & Another -vs- The Standard Group Limited & 2 Others Petition No. 48 of 2011 and Duncan Muriuki Kaguuru & Another –vs- Baobab Beach Resort & Spa Ltd High Court Petition No. 233 of 2012.*** Consequently, should the court be satisfied that in the circumstances of this case there was a violation of the rights of the petitioners by the respondents, then the 1st respondent would be liable along with the state for such violation.

Preliminary Observations

59. It is worth making, at the outset, certain observations with regard to the matters raised in this petition. First, there is an admission, frank and unapologetic, that the 1st respondent carried out the eviction of the petitioners from the subject land. At paragraphs 22-25 of his affidavit, Mr. Chemng'orem states as follows:

22. That the 1st respondent has on several occasions been prosecuted by the city council for allowing the erection of unauthorized shanties/structures within the school compound and thus the school has suffered serious losses in the hands of the petitioners...

23. That the petitioners have failed to show any action taken by them in having their interest on the suit property registered and despite being fully aware that they do not have any legal interest in the suit premises they have from time to time been an obstacle to the 1st respondent's intention to carry out any developments and or having quiet enjoyment of the suit property.

24. That having made numerous complaints to the law enforcement authorities and the petitioners on the rising cases of crime and insecurity within the school and its environs, cases of dangerous armed criminals traced to the petitioners shanties, cases of selling alcoholic drinks and drugs within the school compound, the 1st respondent had no option but to have the petitioners removed from the premises to safeguard and protect the interest of the school going children. Attached and marked "PKC5" are coloured photographs of bhang weed growing freely at the demolition site and administration police, area chief and the District Officer who were present at the site ordered for them to be uprooted and burnt.

25. That the 1st respondent indulged (sic) the police officers to ensure law and order was maintained during the eviction process and was therefore done within the confines of the law."

60. The 1st respondent does not contend that it had a court order to carry out the evictions. It even disowns the one on the basis of which the 2nd respondent purports to have acted. Mr. Chemng'orem depones at paragraph 27, in answer to the petitioners' averments on the court order, as follows:

"That the petitioners allegations raised in paragraph 17 to 19 of the affidavit sworn by William Musembi can only be answered by the auctioneer – Kangeri Wanjohi t/a Kindest Auctioneers who is not party to these proceedings as the 1st respondent is a stranger to the said proceedings and has no instructions to represent him in these proceedings."

61. From the foregoing, it can be concluded that the eviction of the petitioners was not sanctioned by the law and authorised through a court order. From the 1st respondent's averments and submissions, it seems to have had enough of the 'trespassers' on its land, and determined to evict them without bothering to go through a legal process. It did, however, seek to safeguard its actions, or at least ensure that there was no violence in the process of eviction: it hired police officers to oversee the eviction and the construction of a wall round the subject property once the petitioners had been removed from the land and their houses demolished.

62. It is true, as submitted by Ms. Gitiri, that police officers can be hired for private purposes. Section 104 of the National Police Service Act, Cap 84 of the Laws of Kenya, provides as follows with regard to private use of police officers:

- 1. *The Inspector-General may on application by any person, station an officer for duty at such place and for such period as the Inspector-General may approve.***
- 2. *Notwithstanding subsection (1), the Inspector-General shall only deploy an officer for private use for the protection of public good or interest.***
- 3. *The monies paid for the private use of the police as specified in subsection (1) shall be paid to the Treasury.***

(4) *The Inspector-General shall make regulations generally to give effect to this section.*

63. As pointed out by Mr. Mureithi, however, such hire of police officers for private use can only be done for "***protection of public good or interest.***" As the state organ charged with the responsibility of ensuring security and protecting citizens, the National Police Service is expected to be governed by the national values and principles of governance contained at Article 10 of the Constitution. Article 10(2) states that the national values and principles include **(a) patriotism,**

national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized..” Whichever way one looks at the actions of the 2nd respondent, it cannot be for the protection of public good or interest, upholding the rule of law, or protection of the marginalized, indeed it is downright improper and unlawful, to deploy police officers to assist in the eviction of an entire community without the sanction of a court of law.

64. Which brings me to the court order relied on by the 2nd and 3rd respondents. Aside from the fact that the 1st respondent has distanced itself from it, a perusal of the order makes it evident that it was not an eviction order, and could therefore not have formed a basis on which police officers, properly directed and properly exercising their powers, could have acted. The relevant parts of the order, which bears in the title the name of the auctioneer, Kangeri Wanjohi t/a Kindest Auctioneers, the 1st respondent, Moi Educational Centre, as landlord, and the two alleged tenants, Milcah Wanjiru and Elijah Memba, is in the following terms:

1. THAT an order be and is hereby issued authorizing the OCS Langata Police Station to assist the Auctioneer KANGERI WANJOHI T/A KINDEST AUCTIONEERS and his agents to execute instructions to levy distress to the premises occupied by Tenants Milcah WANJIRU and ELIJAH MEMBA at L. R. No. 209/13695 along Mai Mahiu Road, Nairobi West, and remove the proclaimed moveable assets for the purpose of auctioneering them to recover the rent arrears amounting to Kshs. 960,000/= plus other incidental costs of the distress.

2. THAT the officer in Charge, Langata Police Station to supervise the exercise for the purpose of maintaining Law and Order.”

65. Assuming it was an order genuinely issued by a court of law, it could only have been used to levy distress against the two people named in it. It would have been unlawful to evict even these two people on the basis of that order, let alone evicting the residents of two entire villages.

66. Further, the request by the auctioneer for 4 police inspectors and 100 police officers to effect the court order for distress for rent against the alleged tenants should have put the 2nd respondent on notice: such a large contingent of officers cannot possibly have been required to levy distress on one man and one woman. In the circumstances therefore, the acts of the respondents were unlawful and unjustified.

67. The petitioners have alleged violation of their constitutional rights as a result of the acts of the respondents which, as I have found above, were ipso facto unlawful. I will now turn to a consideration of the alleged violation of the petitioners' rights.

Violation of Constitutional Rights

68. It is, I believe settled that a party alleging violation of constitutional rights must demonstrate, with a reasonable degree of precision, the rights alleged to have been violated and the manner of violation-see **Anarita Karimi Njeru -vs- Republic** (supra); **Trusted Society of Human Rights Alliance -vs- the Attorney General & 5 Others, Petition No. 229 of 2012**, and **International Centre for Policy and Conflict -vs- Independent Electoral and Boundaries Commission Petition No. 398 of 2012**. It is therefore incumbent on the petitioners to demonstrate the violation of rights under Articles 28, 29, 35, 43, 53 and 57 of the Constitution. This, I believe, they have done.

69. It is undisputed that the eviction did take place as alleged, and that the petitioners were as a result removed from the place they knew as home. The petitioners allege that the eviction took place at 4.00. a.m, and that it was carried out violently by gangs of youth who demolished their homes and carried away their personal belongings. While the respondents deny that there was violence or commission of criminal acts, or that the petitioners' goods were carried away, they have not disputed the averment that the eviction took place, or that it took place in the early hours of the morning; or that at the end of it, all the petitioners' structures which had been erected on the subject land had been demolished and a wall erected around the premises.
70. The petitioners allege that there was no notice of the intended eviction given to them, and that after the first eviction on 10th May 2014, they wrote to the respondents through Kituo Cha Sheria asserting that no eviction could proceed without a court order, but that the evictions proceeded again on 17th May 2013 and thereafter until all the residents of the village had been removed.
71. I have considered the documents annexed to the 1st respondent's affidavit and found that the order authorized distress for rent against two people. It did not authorize the eviction of the two persons named therein, and certainly could not form the basis of the eviction of all the residents of the two villages. On the face of it therefore, the eviction of the petitioners was unlawful for having been carried out with no lawful order for its execution and with no notice given to the petitioners.
72. The issue of forced evictions and its resultant negative impact on the rights of those evicted has been considered in many decisions in this jurisdiction. In **Satrose Ayuma & 11 Others -vs- Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others Petition No. 65 of 2010, Lenaola J** found that the respondents had violated the petitioners' right to housing in the manner it had carried out the evictions, including the demolition of sanitary facilities and the wall to the premises occupied by the petitioners. In that case, the court cited with approval the position taken by the African Commission on Human and Peoples' Rights on the right to housing in Africa in the case of **The Social Economic Rights Centre & Centre for Economic and Social Rights vs Nigeria, Com. No.155/96 (2001)** where 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.” (Emphasis added.)

73. Clearly therefore, even had the sanction of the court been sought by the respondents, the interests of the petitioners would have been taken into consideration, and their eviction considered as a measure of last resort.
74. In the case of **Mitu Bell Welfare Society –vs- The Attorney General and Another High Court Petition No. 164 of 2011**, the court reached a similar conclusion on evictions and for reasons

similar to those reached by the court in the case of **Satrose Ayuma** (supra). The court observed at paragraph 54 to 56 of its judgment as follows:

[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 Bills 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...."

75. Thus, even if, as alleged by the respondents, the petitioners were not the lawful owners of the property, they could not be lawfully evicted violently, in the wee hours of the morning, with no notice being given to them, and no alternative accommodation provided.
76. It is therefore somewhat redundant to ask whether the eviction of the petitioners resulted in a violation of their rights under the Constitution. Even the ordinary man in the street, confronted with the facts now before me, would answer the question in the affirmative.
77. It is acknowledged by the 1st respondent that the petitioners had been residing in the villages for quite some time. The 1st respondent refers to them as trespassers. It also acknowledges that there were children resident in the two villages; and it can also be assumed, as is inevitable in every human community, that there were elderly persons and persons with disabilities. A list of elderly persons is in fact annexed to the petition.
78. An eviction of the nature undertaken by the respondents does not just violate the right to housing. Encompassed in a person's dwelling is their family life, their ability to take care of their children; their ability to live a secure and dignified life. When they are denied their shelter, their dignity, security, and privacy is impaired.
79. Unlike the birds of the air, men women and children whose dwellings have been demolished will not fly away and perch on a tree, and then begin to rebuild their nests afresh. As most of those evicted from informal settlements are often poor, they become homeless, join the ranks of the

dispossessed in the streets, or find another vacant piece of land to put up their shacks and continue with their precarious existence. Until the next eviction and demolitions.

80. In such circumstances, given the fact that, as recognized at Paragraph 5 of the 1993 **Vienna Declaration and Programme of Actions** adopted by the World Conference on Human Rights on 25th June 1993 stated in the Geneva ***'All human rights are universal, indivisible and interdependent and interrelated,'*** all the petitioners rights guaranteed in the Bill of Rights and which the state is under an obligation, under Article 21(1) ***to observe, respect, protect, promote and fulfil,*** are reduced to mere unattainable aspirations.

81. Article 19 (2) is clear on why it is necessary to recognize and protect human rights:

"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."

82. It is therefore the finding of this court that by their actions which deprived the petitioners of their housing and rendered them homeless, the respondents did violate the petitioners' rights guaranteed under Articles 28, 29, 43, 53 and 57 of the Constitution.

83. The 1st respondent has sought to justify its actions on the fact that it had made numerous complaints to the ***"law enforcement authorities and the petitioners on the rising cases of crime and insecurity within the school and its environs"***, as well as cases of ***"dangerous armed criminals traced to the petitioners shanties."*** It had also made complaints about the sale of alcoholic drinks and drugs within the school compound. It must be observed, first, that the responsibility of controlling crime and insecurity lies with the 2nd respondent, not with the petitioners.

84. Secondly, the fact that the petitioners had to live in shanties and shacks cannot be blamed on them. It is a reflection of the state's failure to meet its obligations to work towards the progressive realization of citizens' right to safe and adequate housing. That the state defends the eviction of the petitioners, that it stands guard as the petitioners are evicted, and has not even deigned to proffer any plan or policy for their resettlement or housing, demonstrates its abject failure and that of its organs and officers to internalize and implement its obligations under the Constitution.

Disposition

85. Having found that the respondents violated the petitioners' constitutional rights, it follows that the 1st respondent is liable for such violation, even though it is a private person, as the Bill of Rights applies both vertically and horizontally. The state is also liable for the acts of the officers under the 2nd respondent who used their statutory power, not to protect the marginalized in society, such as the petitioners, but to assist the 1st respondent to deprive the petitioners of even the little that they had.

86. The petitioners have prayed for a variety of orders. They seek a declaration that the 1st respondent unlawfully, illegally and/or irregularly acquired the suit land LR No 209/11207 Nairobi and has no legal title to the property. They also seek other orders consequent to the said declaration. I am, however, not in a position to issue orders in relation to the legality or otherwise of the 1st respondent's title. The determination of that issue is, I believe, best left to the National

Land Commission or a court of law seized of that particular matter which can call for the relevant evidence and examine all such documents pertaining to the allocation of the land to the 1st respondent as it deems necessary for it to establish the validity or otherwise of the title.

87. I do find, however, that the petitioners are entitled to, and I issue, the following declarations:

- i. ***That the demolition of the petitioners' houses and their forced eviction by the 1st, 2nd and 3rd respondents without provision of alternative land or shelter is a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing;***
- ii. ***That the demolition of the petitioners' houses without according their children alternative shelter or accommodation is a violation of the fundamental rights of children guaranteed by Article 53 of the Constitution;***
- iii. ***That the said eviction and demolition of the petitioners' houses was a violation of the rights of elderly persons guaranteed by Article 57 of the Constitution.***

88. The petitioners have also sought general and exemplary damages for violations of their fundamental rights. In light of my findings above, I believe that they are entitled to damages for the said violations. An award of damages will not make up entirely for the violation of the petitioners' rights, nor for the disruption of their lives and the affront to their dignity that the acts of the respondents occasioned. However, it will hopefully serve as a reminder to the 1st respondent that it is not so privileged as to have an unfettered right to violate the rights of the poor.

89. With regard to the state, it is important for its officers to remember that its cardinal duty and the duty of all its officers is to safeguard the rights of all, without discrimination, but particularly so, the rights of the vulnerable in society, the poor, children, the elderly and persons with disability. Its officers should never be used to carry out the unlawful acts of any citizen, however powerful.

90. The 1st respondent is the author of the unlawful acts that led to the violation of the petitioners' rights. The state, through the National Police Service, chose to aid the 1st respondent against the interests of the petitioners, poor marginalised residents of the two informal settlements. In the circumstances, I believe that they should bear liability for the violation of the petitioners' rights.

91. I therefore make orders as follows:

- i. The 1st respondent shall pay a sum of **Kenya Shillings One Hundred and Fifty Thousand (Kshs 150,000)** to each of the petitioners in the consolidated petitions.
- ii. The state shall pay to each of the petitioners the sum of **Kenya Shillings One Hundred Thousand (Kshs 100,000)**.
- iii. The petitioners shall also have interest on damages in (i) and (ii) above from the date of judgment until payment in full.
- iv. The petitioners shall also have the costs of the consolidated petition.

Dated, Delivered and Signed at Nairobi this 14th day of October 2014

MUMBI NGUGI

JUDGE

Mr. Mbugua Mureithi instructed by the firm of Mbugua Mureithi & Co. Advocates for petitioner.

Mrs Manyarki instructed by the firm of Manyarkiy & Co. Advocates for 1st respondent.

Ms Gitiri Litigation Counsel instructed by the State Law Office for the 2nd and 3rd respondents



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)