



A compendium on economic and social rights cases

under the Constitution
of Kenya, 2010



EMBASSY OF SWEDEN

ENDPOVERTY
2015
millennium campaign



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“Overcoming poverty is not a gesture of charity. It is an act of justice. It is a protection of a fundamental human right, the right to dignity and a decent life”
Nelson Mandela (1918-2013)



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Asanteni sana.

A handwritten signature in black ink, appearing to be "G. Onyango".

Gilbert O. Onyango
Regional Director
The East African Centre for Human Rights (EACHRights)

About The East African Centre for Human Rights

The East African Centre for Human Rights was founded in May 2010 and registered as a Trust in Kenya in November of the same year. It was established to undertake human rights work within a regional context. It is the first regional human rights institution of its kind in East Africa that seeks to initiate and undertake programmes that will promote, protect and enhance human rights generally but with special emphasis on the promotion of the realization of economic and social rights in Kenya, Uganda and Tanzania.

The work of EACHRights is premised on the fact that *“all human rights are universal, indivisible and interdependent and interrelated...”* It is for that reason that EACHRights continually pushes for a society that is free from inequality and discrimination; that embraces equitable development; and respects, protects and fulfils economic and social rights.

To this end, EACHRights has the vision of *“a society that respects and upholds human rights and human dignity”*. In an effort to achieve this, EACHRights' mission will be *“to promote social justice in East Africa through research, capacity building, advocacy and public interest litigation”*. The strategic objectives include to be a leading think tank in the promotion, protection and enhancement of economic and social rights and equitable development among the vulnerable and marginalised groups; to expand within the East Africa region; and to enhance institutional sustainability, visibility, programmes and capacity.

1. Introduction

Poverty, inequality, socio-economic marginalisation and poor human development, are challenges that have bedevilled Kenya for a long time. The government has projected that, approximately 46-56 per cent of Kenyans are living below the poverty line,¹ though non-governmental organisations argue that this is an understatement and that, the more correct approximation is about 56-65 per cent of Kenyans are living below the poverty line.² The United Nations Development Programme (UNDP) in their annual Human Development Index (HDI) have consistently ranked Kenya as a low human development country, with the country being ranked at position 145 among the 186 ranked countries of the world in 2013.³

Inequality is also highly entrenched in Kenya, with poverty and inequality forming a vicious cycle, ensuring that poor and marginalised families and groups are unable to break away from their dire situations. The World Bank's World Development Indicators 2011 indicates that, inequality in Kenya is so high that in the African region it only compares favourably with that in South Africa, a country that had suffered many years of apartheid. The inequality Gini coefficient index⁴ for Kenya is 0.477 as compared to South Africa which has a Gini index of 0.631, Tanzania at 0.376 and Ethiopia at 0.336.⁵ The above dire inequality indicators are confirmed by the World Bank Poverty and Inequality Assessment Report which indicates that, the ratio of consumption between the top and bottom 10 per cent of the Kenyan population stood at 20:1 in the urban areas, and 12:1 in rural areas respectively. This compares adversely to the ratio of consumption in Tanzania which stood at 5:1 and that in Ethiopia which stood at 3.3:1.⁶

These are some of the challenges that led to the clamour for a new political and socio-economic dispensation in Kenya which culminated in the promulgation of a new Constitution on 27th August 2010. One of the major tools entrenched in the new Constitution for the amelioration of the dire poverty, inequality and socio-economic marginalisation of many Kenyans, and to enhance social justice and the egalitarian transformation in Kenya are the, economic and social rights in the Bill of Rights. The importance of these rights in enhancing the realisation of the egalitarian transformation of the Kenyan society was aptly captured by the High Court of Kenya in the case of John Kabui Mwai and Others v The Attorney General and 2 others as follows:⁷

In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that, the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10(2)(b). The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need.

¹Government of Kenya 'Poverty Reduction Strategy Paper: First Medium Term Plan 2008-2012' submitted to the International Monetary Fund (IMF) ii, <<http://www.imf.org/external/pubs/ft/scr/2010/cr10224.pdf>> accessed 8 March 2014.

²See Foundation for Sustainable Development 'Kenya: A development overview' Para 4, <<http://www.fsdinternational.org/country/kenya/devissues>> accessed 8 March 2014; J Kiringai et al 'Feminisation of poverty in Kenya: Is fiscal policy the panacea or Achilles' heel?' A paper presented during the 5th PEP Research Network General Meeting held on 18-22, 2006 at Addis Ababa, Ethiopia, <http://www.pep.net.org/fileadmin/medias/pdf/files_events/5th_ethiopia/Kiringai.pdf> accessed 8 March 2014.

³United Nations Development Programme (UNDP) Human Development Report 2013 'The rise of the South: Human progress in a diverse world' (2013) 146 <http://hdr.undp.org/en/media/HDR_2013_EN_complete.pdf> accessed 8 March 2014.

⁴The Gini coefficient varies from a range of zero (0) to 1 with zero indicating perfect equality between households, while the value of 1 indicates perfect inequality. The Gini coefficient of most African countries range from about 0.40 to 0.50, while most developed countries have a Gini ranging from 0.20 to 0.30, indicating that developed countries have less inequality than developing countries. See Egerton University, Tegemeo Institute Agricultural Policy and Development 'Rural incomes, inequality and poverty dynamics in Kenya' (2009) 8 <<http://www.tegemeo.org/documents/work/Tegemeo-WP30-Rural-incomes-inequality-poverty-dynamics-Kenya.pdf>> accessed 8 March 2014. Oxfam GB indicates that the Gini coefficient for the rural areas in Kenya is 0.38 while that of Nairobi is a staggering 0.59, indicating similar inequality levels to those in Johannesburg (South Africa) in the mid-1990s, see Oxfam Great Britain (GB) 'Urban poverty and vulnerability in Kenya: Background analysis for the preparation of an Oxfam GB urban programme focused on Nairobi' (September 2009) 3 <http://www.irinnews.org/pdf/Urban_Poverty_and_Vulnerability_in_Kenya.pdf> accessed 8 March 2014.

⁵The World Bank 'World Development Indicators 2011' (April 2011) 67-70 <<http://elibrary.worldbank.org/>> accessed 1 March 2014. See also Wolfram Alpha 'Gini index of African countries' <<http://www.wolframalpha.com/input/?i=Gini+index+of+African+countries>> accessed 1 March 2014.

⁶See The World Bank Poverty Reduction and Economic Management Unit Africa Region Report 'Kenya poverty and inequality assessment: Executive summary and synthesis report' (June 2008) 3 <<http://marsgroupkenya.org/pdfs>> accessed 1 March 2014.

⁷John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others, High Court of Kenya at Nairobi, Petition No. 15 of 2011, 6.

The entrenchment of justifiable economic and social rights in the Constitution gives the courts a prominent role in their realisation. The courts have a dual role as a forum where societal voices, especially those marginalised in the normal political processes, can articulate their needs and hold the government accountable for the realisation of those needs; as well as a facilitator of societal dialogue on the meaning, content, scope and the extent of the obligations arising from the entrenched economic and social rights. Despite this clear role entrenched in Articles 22 and 23 of the Constitution, economic and social rights adjudication has, to a degree been constrained by traditional mind-sets that hold onto an ideological distinction between civil, political and economic and social rights, terming the latter rights as non-justiciable.⁸ The supposed non-justiciability of economic and social rights has been based on three interrelated and often overstated arguments: vagueness and resource dependant nature of economic and social rights; separation of powers concerns and the counter-majoritarian character of judicial adjudication of economic and social rights; and the lack of judicial competence and capacity to adjudicate polycentric matters that require the balancing of competing social concerns, especially those that implicate policy and budgets.

The above non-justiciability challenges have been eroded by the, continued adjudication of economic and social rights cases at the international level and in comparative national jurisdictions, culminating in the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). This created a complaints mechanism for the quasi-judicial adjudication of economic and social rights at the international level.⁹ Apart from the continued adjudication that has clarified some of the supposed vagueness of economic and social rights, other concepts and mechanisms have also been developed to respond to the non-justiciability arguments. These include the conception that, the obligations arising from all human rights are a continuum extending from the obligation to respect (refrain from interference) to the obligation to fulfil (provide) and that both rights have resource implications; the development of wide standing provisions in many national constitutions allowing courts to engage experts with relevant knowledge on the polycentric issues in question as well as, the development of flexible and dialogic remedies that allow the courts to lay the general framework for the vindication of economic and social rights, with the specific policies for the amelioration of the conditions of the victims of violations, being developed by the specific political institutions of the State, thus respecting the doctrine of separation of powers.¹⁰

As shown above, the justiciability of economic and social rights and the competence of judicial officers to adjudicate them have been affirmed at the international level and in comparative national jurisdictions.¹¹ The question then is; what progress has been made by the Kenyan Courts in the adjudication of economic and social rights cases with the aim of achieving the egalitarian transformative aspirations of the Constitution of Kenya, 2010? The objective of this compendium therefore, is to undertake an analysis of the emergent jurisprudence from the Kenyan Courts in relation to these rights, especially those entrenched in Article 43 of the Constitution as read with Article 21(2). This analysis aims to determine the judicial trends in the adjudication of these rights as well as, tease out the opportunities and challenges emanating from their adjudication, with the purpose of directing future litigation on economic and social rights by courts, individual litigants and public interest litigation organisations.

The compendium is divided into five interrelated sections. After the introduction, section two looks at some of the key thematic issues that traverse all forms of economic and social rights adjudication such as; the rules of standing; the concept of indivisibility, interdependence and interrelatedness of rights; the horizontal application of the Constitution; as well as an analysis of the standard of progressive realisation that has been adopted at the national and international spheres for the realisation of economic and social rights. Section three undertakes a substantive analysis of the emergent economic and social rights jurisprudence of the Kenyan Courts in relation to the rights entrenched in Article 43 as read with Article 21(2) of the Constitution. They are, the right to health, the right to housing, the right to education, the right to food and the right to water. Section four proposes a way forward in the litigation and adjudication of economic and social rights cases by litigants and courts respectively, with a view in enhancing the achievement of the egalitarian transformation of the Kenyan society and the realisation of social justice for all. Section five is an appendix containing the texts of the relevant economic and social rights cases that have so far been determined by the Kenyan Courts.

⁸See for example the case of Charo wa Yaa v Jama Abdi Noor & 5 others, High Court of Kenya at Mombasa Misc. Civil Application No. 8 of 2011 (Charo case), discussed more elaborately in section 3.2.2 below.

⁹UNGA, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, <available at <http://www.refworld.org/docid/49c226dd0.html>> accessed 8 March 2014.

¹⁰For an elaborate discussion of these non-justiciability arguments and responses to them, see generally M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed.) Social rights jurisprudence: Emerging trends in international and comparative law (2008) 3, at 29-37; SA Yeshanew, The justiciability of economic, social and cultural rights in the African Human Rights System: Theories, laws, practices and prospects (2011) 59-99.

¹¹See for example the jurisprudence emanating from comparative national courts such as the Constitutional Court of South Africa, the Indian Supreme Court and the Constitutional Court of Colombia in chapters 4, 5 and 7 respectively in M Langford (ed.) Social rights jurisprudence: Emerging trends in international and comparative law (2008) 75-124 & 144-162.

2. Key thematic opportunities and challenges in the judicial adjudication of economic and social rights

2.1 Standing (locus standi)¹²

The Constitution of Kenya, promulgated by the Kenyan people in August 2010, gave the courts a prominent role as the guardians of the Constitution and as the main body charged with the protection of the entrenched fundamental rights and freedoms. This role of the courts is affirmed by the High Court of Kenya in the case of Republic v Independent Electoral and Boundaries Commission where the Court stated that: '[t]he Judiciary acts as the repository and watchdog and is enjoined to enforce and defend the Constitution.'¹³ Despite this important role, litigation in Kenya has remained majorly adversarial meaning, for the courts to contribute to the achievement of the transformative potential of the Constitution, litigants have to move the courts through filing of constitutional petitions.

This is a challenge that was contemplated by the Constitution and the response was to, entrench a broad standing provision in Articles 22 and 258 which give a wide array of persons the authority to institute litigation in the courts for the violation of fundamental rights and freedoms. In addition to individuals whose rights have been contravened or whose rights are threatened with contravention, the Constitution expands its standing jurisdiction to also entertain class actions and public interest litigation (PIL), as well as grant amici curiae status.¹⁵ The Constitution, in Article 22(3) has further made a requirement for the Chief Justice to make Rules to enhance the adjudication of constitutional rights. In fulfilment of this requirement, the Chief Justice has developed the Constitution of Kenya (Protection of Fundamental Freedoms) Practice and Procedure Rules, 2013, the so called Mutunga Rules, whose main objective is to facilitate access to justice to all persons approaching the courts under Article 22 of the Constitution.¹⁶ These Rules reiterate the wide standing provisions of the Constitution, enumerating procedures under which these parties are to approach the courts.¹⁷ In enhancing access to justice, the Rules require cases to be determined in a just, expeditious, proportionate and affordable manner, and further require the courts to take into account the situation of vulnerable groups such as the poor, illiterate, uninformed, and unrepresented as well as persons with disabilities.¹⁸

Further to the wide standing provisions, the courts have undertaken a lenient stand in relation to the awarding of costs in constitutional litigation dealing with matters of public interest. In the case of John Harun Mwau & 3 Others v Attorney General & 2 Others the Court held as follows:¹⁹

The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.

The lenient use of judicial discretion on costs was affirmed by the High Court in the case of Consumer Confederation of Kenya v Attorney General & 4 Others,²⁰ as well as other more recent cases.²¹ This lenient stand on costs is further reiterated in the Mutunga Rules which, even though stating that costs is at the discretion of the courts, further provides that in exercising that discretion, the courts should ensure access for the determination of rights and fundamental freedoms.²²

¹²Standing means the right to institute proceedings in court, to be heard by the court or the authority to address a court on a particular matter before the court.

¹³The Constitution of Kenya, Articles 23 & 165.

¹⁴Republic v Independent Electoral and Boundaries Commission & Another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 Others [2012] eKLR, para 78.

¹⁵The Constitution of Kenya, Articles 23 & 165.

¹⁶The Constitution of Kenya (Protection of Fundamental Freedoms) Practice and Procedure Rules, 2013, Legislative Supplement No. 47, 28 June 2013, Kenya Gazette Supplement No. 95, Rule 3(2).

¹⁷Mutunga Rules, Rules 4-7.

¹⁸Mutunga Rules, Rule 3(3)-(8).

¹⁹John Harun Mwau & 3 Others v Attorney General & 2 Others, High Court Petition No. 123 of 2011, para 179.

²⁰Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others, High Court Petition No. 88 of 2011, at paras. 43-46.

²¹Centre For Rights Education & Awareness (CREAW) & 8 others v Attorney General & another [2012] eKLR, para 67; Mathew Okwanda v The Minister of Health and Medical Services & 3 Others, High Court of Kenya at Nairobi, Petition No. 94 of 2012, para 25; Richard Were & 11 Others v Permanent Secretary Ministry of Health & 3 Others, High Court of Kenya at Nairobi, Petition No. 568 of 2012, para 23, among others.

²²Mutunga Rules, Rule 26.

Due to these broad standing provisions and the lenient use of discretion as to costs, diverse parties have filed cases in the courts for the vindication of economic and social rights. As will be noted in the substantive discussion of the cases in section 3 below, examples abound of public spirited organisations, institutions, and individuals who have undertaken class action suits or public interest litigation for the amelioration of the rights of poor, vulnerable and marginalised groups and communities, groups in the margins of society who may otherwise not have been able to initiate litigation on their own due to their lack of adequate human and financial resources.²³ The importance of a wide network of public spirited organisations, undertaking coordinated litigation to achieve a rights-based transformation, is affirmed by Varun Gauri and Daniel Brinks who contend that:²⁴

A rights-revolution can only occur if claimants can count on (a) litigation-oriented organisations that can support a prolonged and strategically planned litigation campaign; (b) extensive charitable or State funding; and (c) public interest or rights-oriented lawyers who can do the legal work.

If a rights revolution is to be achieved in the realisation of the transformative potential of the Constitution through the adjudication of economic and social rights, then more public spirited individuals and organisations need to join hands and work in a cooperative and coordinated manner in devising strategies for litigation and in the follow-up of court judgments.

2.2 Interrelatedness of rights and the need to balance competing rights

The Constitution of Kenya encapsulates the concept of interdependence and interrelatedness of rights by entrenching the entire corpus of rights, civil and political as well as economic, social and cultural in its Bill of Rights. This entails the recognition that, rights are mutually self-supporting and that the achievement of transformation is only possible if the entire corpus of fundamental rights are realised.²⁵ The importance of the concept of indivisibility and interrelatedness of rights was affirmed, in the South African context, by the South African Constitutional Court in the Grootboom case where the Court held as follows:²⁶

The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom.

The concept of indivisibility and interrelatedness of rights has also been adopted in the post constitutional dispensation in Kenya by the High Court of Kenya in the case of Federation of Women Lawyers Kenya and Others v The Attorney General and Others where the Court stated as follows:²⁷

In addressing that question, it is important to understand the basics which are that the rights contained in the Bill of Rights are interrelated and mutually supportive. The specific Constitutional rights must not be seen in isolation but must be understood in their textual settings and in their social and historical context.

Similarly in the Mitu-Bell case, the High Court affirmed the importance of the concept of interdependence, indivisibility and interrelatedness of rights, pointing to paragraph 5 of the Vienna Declaration and Programme of Action, to dispose of the argument of the Respondents that, as third generation rights, economic and social rights were not justiciable.²⁸ Further in finding the violation of the right to life, non-discrimination, equal protection and benefit of the law, the right to human dignity and right to personal security as per Articles 26-29 of the Constitution, the Court affirmed that, the realisation of these rights were not possible without the realisation of the economic and social rights entrenched in Article 43 of the Constitution.²⁹ To further emphasise this interrelatedness of rights, the Court stated as follows:³⁰

²³See for example In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, para 12, which detail a wide array of parties that were submitted to the case either as interested parties or amici curiae.

²⁴V Gauri & D Brinks 'Introduction: The elements of legalisation and the triangular shape of social and economic rights' in V Gauri & D Brinks (eds.), *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 1, at 15.

²⁵See Vienna Declaration and Programme of Action, A/CONF.157/23, para 5, available at <http://www.unhcr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en> (accessed on 3 March 2014).

²⁶Government of the Republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC), para 83.

²⁷Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another, High Court Petition No. 102 of 2011, 41-42.

²⁸Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011, (Mitu-Bell case), page 20-21.

²⁹Mitu-Bell case, pages 23-24.

³⁰As above.

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.

Taking this into account, the Court held that the demolition of the Petitioners' homes, in the face of government failure to provide them with adequate housing as per its constitutional obligations, was a manifest disregard for all of the Petitioners' rights. The Court emphasised that this failure of provision 'leaves them [the Petitioners] without a home, a means of livelihood; it robs them of their dignity, jeopardizes their right to health, and threatens their right to life'.³¹

To give effect to the concept of interdependence and interrelatedness of rights, the Kenyan Courts have adopted the rule of constitutional harmony, completeness, exhaustiveness and paramouncy which requires that the Constitution be interpreted as an integrated whole with no any particular provision destroying the other, but each provision sustaining the other provisions in the Constitution.³² Taking the above rule of harmony into consideration, the courts have had to balance competing rights taking into account the specific context of each particular case. This balance has especially been exercised in harmonising the right to property³³ vis-à-vis the right to housing in the context of forced evictions as is discussed more elaborately in section 3.2 below. The need for this balance was first affirmed by the High Court in the *Satrose Ayuma* case, preliminary ruling, where the Court stated that; where there is a danger of people being left homeless and destitute, their rights have to be balanced with the competing rights of property owners.³⁴ In the *Satrose Ayuma (Muthurwa)* merits judgment, the Court also expressly acknowledged the need to balance the right to property and the right to housing in determining whether or not the Respondents had violated the fundamental rights of the Petitioners.³⁵

Apart from balancing housing and property rights, the Kenyan Courts have also been called upon to balance economic and social rights in relation to other rights in the Bill of Rights. In the case of *PAO v Attorney General*, discussed more elaborately in section 3.1 below, the High Court was called upon to balance health rights vis-à-vis the protection of intellectual property in the context of the *Anti-Counterfeit Act, 2008*.³⁶ The Court held that taking into account the challenges of HIV/AIDs in Kenya, access to essential generic medicine for the preservation of the right to life, dignity and health of the Petitioners took precedence over the intellectual property rights of patent holders.³⁷ Similarly in the *Seventh Day Adventist* case, discussed more elaborately in section 3.4 below, the High Court undertook a balance of the right to education vis-à-vis the right to religion in the context of educational institutions, holding that the importance of access to education was a legitimate limitation to the right to manifest religion.³⁸ The adoption by the Kenyan Courts of an interdependent and relational conception of rights, together with their openness to the balancing of rights, to give precedence to economic and social rights vis-à-vis traditional civil and political rights, opens up opportunities for economic and social rights litigators to use the entrenched Article 43 rights to enhance the conditions of the poor, vulnerable and marginalised individuals and groups in Kenya.

2.3 Horizontal application of the Constitution³⁹

The horizontal application of the Constitution, especially the fundamental rights and freedoms entrenched in the Bill of Rights, has been a thorny issue in the constitutional law jurisprudence of the Kenyan High Court. The challenge has been occasioned by the arguments of Respondents in several cases that since they were private bodies, they did not have any human rights obligations and that the realisation of fundamental rights was an obligation of the State. In the cases of *COM v The Standard*

³¹As above.

³²*Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others*, High Court of Kenya, Petition No. 65 of 2010, para 54 (Decision of 30 August 2013) (herein after "Muthurwa ruling on merits"). See also *John Harun Mwau & Others v Attorney General & 2 Others* Petition No.2 of 2011, para 107.

³³The right to property is provided in Article 40 of the Constitution of Kenya, 2010 and it provides as follows: 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.

³⁴*Satrose Ayuma and others (on behalf of Muthurwa residents) v Kenya Railways Staff Benefit Scheme and others*, High Court of Kenya at Nairobi, Petition No. 65 of 2010 (Muthurwa Preliminary ruling), pages 19 & 24.

³⁵Muthurwa ruling on merits, paras 60-61 & 63.

³⁶*PAO & Others v The Attorney General*, High Court of Kenya, Petition No. 409 of 2009 (PAO case).

³⁷PAO case, paras 85-86.

³⁸*Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, High Court of Kenya, Constitutional and Human Rights Division, Petition No. 431 of 2012, paras 63 & 72-74.

³⁹Horizontal application of the Constitution entails the possibility of private persons being held accountable in constitutional litigation, that is, constitutional rights having application in the private sphere, see generally, D Chirwa 'The horizontal application of constitutional rights in comparative perspective' (2006) *Law, Democracy and Development Journal* 21-48.

Group Limited & another⁴⁰ and *Uhuru Kenyatta v The Nairobi Star Publications Limited*,⁴¹ Justice Lenaola relied on a pre-Constitution of Kenya, 2010 legal precedents, being *Kenya Bus Service Ltd & 2 Others v The Attorney General & 2 Others* (2005) eKLR, to hold that individuals did not have constitutional obligations and could not be sued as such through constitutional petitions.⁴²

The more correct position of the law in relation to the horizontal application of the Bill of Rights was stated by the High Court of Kenya in the case of *Anne Nyokabi Muguiyi v NIC Bank* which dealt with unfair and unjust working conditions, unfair dismissal and discrimination.⁴³ The Respondent bank had raised a defence against the constitutional application stating that since it was a private person, it was unable to breach the fundamental rights of the Petitioner, which according to it, could only be breached by the State and its organs.⁴⁴ The High Court, relying on Articles 2(1) (the supremacy of the Constitution), 20(1) (the application of the Bill of Rights to all law and its binding nature on all State organs and all persons) and 260 (which defined “person” to include ‘a company, association, or other body of persons whether incorporated or unincorporated) of the Constitution held that, the intention of the framers of the Constitution was for it to have both vertical and horizontal application.⁴⁵ The Court thus held that, the Petitioner had a right under Article 22 of the Constitution to vindicate her rights and that if the Court was to find a private person to have violated fundamental rights, the Court had jurisdiction to grant appropriate remedies.⁴⁶ This correct reading of the Constitution has been affirmed by the High Court in the case of *Amy Kagendo Mate v Prime Bank Limited & Another*⁴⁷ where the Court held as follows:⁴⁸

The jurisprudence that has emerged from this Court is that the Constitution now contemplates both vertical and horizontal application of the Bill of Rights. Article 2(1) and 20(1) both clearly provide that the Constitution binds all persons. This has been the finding of this court in various decisions, see Abdalla Rhova Hiribae & 3 Others-v-The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya –v- Betty Sungura Nyabuto & Another Petition No. 21 of 2010 and B.A.O & Another –v-The Standard Group Limited & 2 Others Petition No. 48 of 2011. Consequently, I agree with the petitioner that the Constitution binds both the state and non-state actors such as the respondents.

In the context of economic and social rights adjudication, the horizontal applicability of the Constitution was affirmed in the *Satrose Ayuma and Others v Kenya Railways Staff Benefits Scheme and Others*. The first Respondent the Benefits Scheme had argued that, according to the Interpretation and General Provisions Act (Cap. 2), it was not a public body and that the issues raised by the Petitioners as well as the judicial review relief sought were, appropriate for determination under private law and not public law.⁴⁹ It further argued that as a private body, it did not have any constitutional obligation to provide housing to the Petitioners.⁵⁰ The Court, using the test of what constitutes a public body as enumerated by the Indian case of *R.D Shetty v The International Airport Authority of India & Others* (1979) I S.C.R. 1042 as well as the interpretation of “public body” in Section 3(1) of the Interpretation and General Provisions Act, (Cap 2) held that, the first and second Respondents were public bodies and thus were subject to the Constitutional provision obliging them to observe, respect, protect, promote and fulfil fundamental rights.⁵¹

Despite holding that the first and second Respondents were public bodies, and thus had direct vertical obligations in relation to the fundamental rights in the Constitution, the Court went ahead to determine the horizontal applicability of the Bill of Rights to private bodies.⁵² On this issue, the Court held as follows:⁵³

Looking at the provisions of Articles 2(1),19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1st and 2nd Respondents...The Bill of Rights is therefore

⁴⁰COM v Standard Group Limited & another, High Court of Kenya, Petition No. 192 of 2011, [2013] eKLR.

⁴¹Uhuru Muigai Kenyatta V Nairobi Star Publications Limited, High Court of Kenya, Petition 187 of 2012, [2013] eKLR.

⁴²Uhuru Kenyatta v Nairobi Star, paras 6-12; COM v Standard Group, paras 14-15.

⁴³Anne Nyokabi Muguiyi v NIC Bank, High Court of Kenya, Petition No. 202 of 2011, [2012] eKLR.

⁴⁴Anne Nyokabi, para 12.

⁴⁵Anne Nyokabi, paras 26-27.

⁴⁶Anne Nyokabi, para 27.

⁴⁷Amy Kagendo Mate v Prime Bank Limited Credit Reference Bureau & another, High Court of Kenya, Petition No. 17 of 2013, [2013] eKLR

⁴⁸Amy Kagendo Mate, para 23.

⁴⁹Muthurwa ruling on merits, paras 32 & 52.

⁵⁰Muthurwa ruling on merits, paras 36 & 41.

⁵¹Muthurwa ruling on merits, paras 52-59.

⁵²Muthurwa ruling on merits, para 55.

⁵³As above.

not necessarily limited to a State Organ as argued by the 1st and 2nd Respondents and in saying so, I am alive to the provisions of Article 2(1) of the Constitution which provides that ‘this Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.

To further affirm the horizontal applicability of fundamental rights to private bodies, the Court in the Muthurwa case contended as follows:⁵⁴

It is thus clear to my mind that it would not have been the intention of the drafters of the Constitution and the Kenyan people who overwhelming passed the Constitution that, the Bill of Rights would only bind State Organs. A purposive interpretation as can be seen above would imply that the Bill of Rights binds all State Organs and all persons, whether they are public bodies or juristic persons.

The Court thus held that, the framers of the Constitution by adopting a wide definition of the term “person” intended that the Constitution should have both vertical and horizontal application.⁵⁵ The Court further stated that, taking Article 22 and 23 into account, individuals were entitled to apply to the courts for the vindication of their fundamental rights even if the violations were committed by private persons, and that the courts were constitutionally mandated to grant appropriate remedies for such violations.

Horizontal application of the Constitution, especially in relation to the protection of fundamental rights, is an important concept in the amelioration of economic and social rights violations as many of these rights are violated by private bodies. This is due to the reality that, most of the socio-economic resources are distributed or redistributed through the markets or through the family, two institutions that are mostly controlled by private institutions, be they private individuals or multi-national corporations. It is thus important that, victims of economic and social rights violations by private parties access the courts for the vindication of their rights similarly to victims of State violations.⁵⁶

2.4 Progressive realisation

2.4.1 Understanding progressive realisation

One of the most enduring challenges for the realisation of economic and social rights has been the standard that was adopted at the international level for their realisation. Due to the supposedly vague and resource-dependant nature of economic and social rights, the standard of progressive realisation to the maximum of available resources was adopted for their realisation. The standard was first entrenched in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The standard has further been entrenched in subsequent international human rights instruments that contain economic and social rights⁵⁷ as well as, in national constitutions that entrench justiciable economic and social rights.⁵⁸ The Constitution of Kenya similarly entrenches the same standard in Article 21(2) which provides that, ‘[t]he State shall take legislative, policy and other measures, including setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43’.

Due to the reality that States are differently situated in terms of infrastructural, human and financial resources for the realisation of economic and social rights, the standard of progressive realisation was meant to be a flexibility device, to allow States the necessary margin of appreciation in adopting measures for the realisation of economic and social rights taking

⁵⁴Muthurwa ruling on merits, para 58.

⁵⁵Muthurwa ruling on merits, para 59.

⁵⁶As above.

⁵⁷Convention on the Rights of the Child (UNCRC), Article 4; Convention on the Rights of Persons with Disabilities (UNCRPD), Article 4

⁵⁸The 1996 South African Constitution, sections 25(5), 26 & 27. See *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), para 45, where the South African Constitutional Court adopted, in the South African context, the meaning of the standard of progressive realisation as developed internationally by the CESCR.

into account their unique contextual situation. The standard was however, not meant to be a defensive tool for States to hide their lethargy or undue delay in adopting measures aimed at the realisation of economic and social rights. The necessity to expeditiously adopt national measures for the realisation of economic and social rights, as soon as their obligations come into force for a State, was emphasised by the Committee on Economic, Social and Cultural Rights (CESCR)⁵⁹ and further affirmed in the Maastricht Guidelines as follows:⁶⁰

The fact that the full realisation of most socio-economic rights can only be achieved progressively ... does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. [...] The State cannot use the "progressive realisation" provisions in Article 2 of the Covenant as a pretext for non-compliance.

The standard of progressive realisation can be divided into four parts: the obligation to take steps; the use of maximum available resources; the prohibition of retrogressive measures; and the obligation of international cooperation and assistance.

i) Obligation to take steps

The obligation to take steps, which is an immediate obligation, requires the State to put in place legislative, policy and programmatic framework in the context of a national strategic plan for the realisation of the entrenched economic and social rights. These steps must be deliberate, concrete, targeted, adequately financed and capable of realising the entrenched rights.⁶¹ Apart from the adoption and implementation of a national strategy for the realisation of economic and social rights, the State must also put in place sufficient, practical, accessible, affordable, timely and effective remedies, both judicial and administrative, for the protection and enforcement of economic and social rights should there be violations.⁶²

ii) The maximum available resources

The requirement that States use maximum of their available resources for the realisation of economic and social rights, is an acknowledgment that States have to balance competing social needs of differently situated people. The requirement therefore, affords the State a margin of appreciation in its use of its resources for the realisation of economic and social rights. It requires the State to prioritise the use of its resources for the realisation of economic and social rights (prioritisation of social spending) to meet the urgent needs of poor, vulnerable and marginalised groups and communities. This has been affirmed at the international level, by the CESCR which has emphasised that even in situations of severe economic constraints, marginalised and vulnerable groups must be protected through the adoption of low-cost targeted programmes.⁶³ This need for prioritisation has also been affirmed at the national level in the South African economic and social rights jurisprudence.⁶⁴

In the Kenyan context, the Constitution accords a margin of appreciation to the government in its adoption of measures and the allocation of resources in the realisation of economic and social rights by providing as follows:⁶⁵

[T]he court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

However, this discretion of the government to rely on the unavailability of resources as a defence for the non-realisation of economic and social rights is not absolute, and is constrained by the Constitution itself which places the onus on the

⁵⁹CESCR General Comment No. 3, para 9.

⁶⁰Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, guideline 8. See also the Limburg Principles, principle 21 which obliges States to expedite the realisation of the rights and not to use the "progressive realisation" standard to defer indefinitely efforts to ensure full realisation. The Limburg Principles were developed by a group of socio-economic rights experts in 1986 so as to enhance the elaboration of the provisions and obligations arising from the ICESCR, with the aim of improving the implementation of socio-economic rights. On the 10th Anniversary of the Limburg Principles, another group of over 30 socio-economic rights experts met in 1997 and elaborated the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. The objective of the Maastricht group was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies. To access the Guidelines, see <http://www.escr-net.org> (accessed on 15 March 2014).

⁶¹CESCR General Comment No. 3, paras 2 & 4.

⁶²CESCR General Comment No. 3, para 5; and General Comment No. 9, para 9.

⁶³CESCR General Comment No. 3, para 12; and General Comment No. 15, para 13.

⁶⁴See Grootboom, paras. 24, 52 & 99; Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhweho Intervening) 2001 (3) SA 1151 (CC), paras. 38-40.

⁶⁵The Constitution of Kenya, 2010, Article 20(5)(c).

government to demonstrate the unavailability of resources.⁶⁶ The Constitution further requires the government to prioritise its resources in the realisation of its economic and social rights obligations in relation to vulnerable groups by providing as follows:⁶⁷

[I]n allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.

The duty to prioritise the essential needs of these vulnerable and marginalised groups is further emphasised by the Constitution as follows:⁶⁸

All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

The requirement that the socio-economic needs of marginalised and vulnerable groups be prioritised is further reflected in Article 53 of the Constitution, which is not made subject to the standard of progressive realisation.

iii) International cooperation and assistance

The requirement that States use their maximum available resources for the realisation of economic and social rights dovetails into the obligation of international cooperation and assistance. International assistance and cooperation entails the obligation that, should a State lack the requisite resources for the realisation of economic and social rights, it should look to the international community for technical, human and financial resources for the realisation of the rights. The requirement for international cooperation in the realisation of rights was first entrenched in the United Nations Charter (UN Charter) Articles 1,⁶⁹ 55 and 56.⁷⁰ It has been incorporated in the ICESCR in Articles 2(1), 11(1)-(2),⁷¹ and 22.⁷² It has also been incorporated in the CRC,⁷³ and its two Optional Protocols,⁷⁴ CEDAW,⁷⁵ and CRPD.⁷⁶ International cooperation and assistance is thus, a facility that poor States can rely on to plug the financial or technical deficit likely to hamper the realisation of economic and social rights.

iv) Prohibition of retrogressive measures

The use of the term “progressive” necessarily prohibits the adoption of retrogressive measures by the State in the realisation of economic and social rights. According to Sepulveda, progression entails two complimentary obligations: ‘the obligation to continuously improve conditions, and the obligation to abstain from taking deliberately retrogressive measures except under specific circumstances’.⁷⁷ The Committee on Economic, Social and Cultural Rights has been very assertive against retrogressive

⁶⁶The Constitution of Kenya, 2010, Article 20(5)(a).

⁶⁷The Constitution of Kenya, 2010, Article 20(5)(b).

⁶⁸The Constitution of Kenya, 2010, Article 21(3).

⁶⁹UN Charter, Article 1(3), it enumerates one of the purposes of the UN as the achievement of international cooperation in solving international problems of economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms.

⁷⁰Article 56 encompasses the pledge of members of the UN to take joint and separate actions for the realisations of the aims of the UN as provided for in Article 56 and which include:

- a) the promotion of higher standards of living, full employment, and conditions of economic and social progress and development;
- b) solutions of international economic, social, health, and related problems.
- c) universal respect for, and observance of, human rights and fundamental freedoms for all...

⁷¹Article 11 provides for the right to adequate standards of living and the right to be free from hunger and it calls for international cooperation through the consent of States to enhance the

⁷²Article 22 engenders the responsibility of ECOSOC to bring to the attention of other UN organs reports on the implementation of the Covenant so as to assist those organs in deciding, in accordance with their respective competencies, international measures that they can undertake to assist States fulfil their Covenant obligations. For an elaboration of the obligations arising from Article 22, see CESCR General Comment No. 2 ‘International technical assistance measures (E/1990/23)’ available at <http://www.unhchr.ch/tbs/doc>. (accessed on 2 February 2014).

⁷³CRC preamble para.12, Articles 4, 17(b), 22(2), 23(4), 24(4), and 28(3). For an analysis of this provisions, see BI Hamm ‘A human rights approach to development’ (2001) 23(4) Human Rights Quarterly 1005, at 1014-1015; W Vandenhoe ‘Economic, social and cultural rights in the CRC: Is there a legal obligation to cooperate internationally for development’ (2009) 17 International Journal of Children’s Rights 23, at 41ff.

⁷⁴CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 10(4) which entails the responsibility of developed States (who are able to do so) to provide financial, technical and other assistance multilaterally, regionally or bilaterally so as to address the root causes of exploitation of children such as poverty and underdevelopment; CRC Optional Protocol on the Involvement of Children in Armed Conflict, preamble and Article 7 which refer to the requirement of international cooperation in the implementation of the Protocol and entails the responsibility of State parties (in a position to do so) to provide financial assistance through existing programmes or through a voluntary fund. For a more extensive discussion of the preparatory history and interpretation of international cooperation and assistance in the CRC and its two Optional Protocols.

⁷⁵CEDAW, preamble para 10.

⁷⁶CRPD preamble para I; Articles 2, 32, 37 & 38.

measures in its general comments, delineating very stringent conditions for such retrogressive steps to be acceptable. It has affirmed that, deliberately retrogressive measures must be fully justified in relation to the totality of the Covenant rights and in the context of the maximum use of available resources.⁷⁸

The CESCR has further elaborated in General Comment Number 19, in relation to social security, the criteria that it will use when considering the justifiability of retrogressive measures. The criteria entails: the reasonableness of the action; comprehensive examination and consideration of alternatives to the retrogressive action; genuine participation of the affected groups in decision-making; the long term adverse impact of the action and whether it deprives access to the minimum essential levels of rights; and, the presence or otherwise of independent national review.⁷⁹ However, despite the flexibility allowing States to justify retrogressive measures, the CESCR in General Comment Number 14 has further stated that, any such measures which affect the minimum core content of Covenant rights is a violation of the Covenant.⁸⁰ The Maastricht Guidelines also provide that the adoption of deliberately retrogressive measures by states is a violation of their obligation under the Covenant.⁸¹

v) Immediate obligations

The CESCR further affirmed that, even though the ICESCR adopted the standard of progressive realisation, it also has aspects that require immediate realisation. These immediate obligations are as follows: non-discrimination;⁸² obligation to take steps; obligation to realise the minimum core content of substantive economic and social rights;⁸³ trade union rights;⁸⁴ obligation to ensure fair wages and equal remuneration for equal work;⁸⁵ the obligation to take measures for the protection of children and young person's without discrimination; the obligation to penalise by law, the employment of young children and young persons in dangerous or harmful work, and the duty to prohibit child labour;⁸⁶ the duty to provide compulsory primary education free of charge;⁸⁷ obligation to respect the freedom of parents to choose schools for their children;⁸⁸ the freedom to establish and direct educational institutions;⁸⁹ the freedom essential for scientific research and creative activity;⁹⁰ obligation to monitor implementation of the Covenant rights,⁹¹ which include; the duty to submit initial and progressive reports to treaty monitoring bodies,⁹² among others.⁹³

2.4.2 Progressive realisation in Kenya's judicial jurisprudence

The standard of progressive realisation has been raised by Respondents, especially the Attorney General, in several cases dealing with fundamental rights. In the Kenyan context, the standard of progressive realisation has mostly been canvassed by the courts in relation to the right to equality, especially in relation to the requirement of affirmative action and the two-thirds gender rule in elective and appointive positions. Due to the importance that the equality principle and right plays in the realisation of entrenched economic and social rights, it is thus important that the elaboration of the progressive realisation standard in this context be analysed, as that use of progressive realisation will inform the courts on economic and social rights cases where the issue arises for determination.

⁷⁷M Sepulveda The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights (2003) 319.

⁷⁸CESCR General Comment No. 3, para. 9; General Comment No. 13, para 45; General Comment No. 14, para 32.

⁷⁹CESCR General Comment No. 19, para 42. Retrogression must be justified by a reference to the totality of the rights in the Covenant taking into account the state's full use of the maximum of its available resources.

⁸⁰General Comment No. 14, para. 48.

⁸¹Maastricht Guidelines, Guideline 14(e).

⁸²CESCR General Comment No. 20, para 7, which provides that '[n]on-discrimination is an immediate and cross-cutting obligation in the Covenant'. The CESCR has also stated, in General Comment No. 13, para. 43 that State Parties have an immediate obligation in relation to the right to education, such as the guarantee that the right will be exercised without discrimination of any kind.

⁸³Limburg Principles, principle 25, which provides that 'State Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all'.

⁸⁴ICESCR, Article 8.

⁸⁵CESCR, Article 7 (a) (i).

⁸⁶CESCR, Article 10(3).

⁸⁷CESCR, Article 13(2) (a); CESCR General Comment No. 13, para. 51.

⁸⁸CESCR, Article 13(3).

⁸⁹CESCR, Article 13(4).

⁹⁰CESCR, Article 15(3).

⁹¹In relation to housing, see, CESCR General Comment No. 4, para. 13. Monitoring requires the development of relevant indicators and benchmarks for each of the substantive socio-economic right, see Sepulveda – Nature of SER obligations (n 77 above) 363. According to the Maastricht Guidelines, guideline 15(f), failure to monitor the realisation of socio-economic rights is a violation of the Covenant.

⁹²AR Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23, at 25.

⁹³See Sepulveda – Nature of SER obligations (n 77 above) 175 & 345; L Chenwi 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' (2010) 37 available at <http://www.spil.org.za/agentfiles/434/file/Progressive%20realisation> (accessed on 10 February 2014). 37ff.

In the Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another case, a Petition challenging the gender composition of the Supreme Court, one of the arguments fashioned by the Respondents was that affirmative action, as provided for in Article 27(8) of the Constitution, was intended to be realised progressively by the State putting in place legislative and other programmes to achieve that objective.⁹⁴ In opposing this argument, the Petitioners argued that, it was misplaced and that the Constitution intended the gender rule to apply immediately.⁹⁵ The important constitutional provisions in the determination of this issue were Articles 27(6) and 27(8) which provided as follows:

To give full effect to the realization 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 [Article 27(6)].

In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender [Article 27(8)].

In its analysis of these provisions, the Court noted that they must be interpreted in their context taking into account other constitutional provisions due to the requirement that the Constitution be interpreted as an integrated whole.⁹⁶ Having set out this interpretive framework, the Court proceeded to state as follows:⁹⁷

The language of Article 27(8) on a plain reading cannot be said to originate a specific and substantive right on which an individual or group of persons can purport to base a claim, what the Article does is to create a duty directed at the State as an entity in International law i.e. to take legislative and other measures to implement an international principle which is universally decreed and accepted. Equally Article 27(8) does not create any duty or a right which can be directed definitively against the 2nd Respondent to perform its functions in a particular manner.

This reasoning of the Court was based on a reading of international law, especially ICESCR and CEDAW that the only obligation of the State to realise the rights therein was to take legislative and policy measures.⁹⁸ To further support its reasoning, the Court misread Article 21(2) of the Constitution of Kenya, 2010 as follows:

Article 21(2) clearly states that the State shall take legislative policy and other measures including the standards to achieve the progressive or the immediate realization of rights within the Bill of Rights.

Having elaborated on its understanding of these provisions of the Constitution and international law, the Court proceeded to hold as follows:⁹⁹

These measures, in our view, are by their nature progressive in character since enactment of legislation and formulation of policies on basis of determining the realization and achievement of such rights. It is therefore right to say that since they are to be achieved through legislation and policy measures, they are progressive in character and can only be attained over a period of time. We also agree with Mr. Paul Muite learned counsel for 2nd Respondent that the rights under Article 27(6), (7) and (8) are aspirational in nature. They create legitimate expectation on the part of the citizens that the Government would indeed formulate and undertake legislative and policy measures.

The Court thus held that, the rights in Article 27(8) had not crystallised and they could only be crystallized once the State had put in place the requisite legislative and other measures for their implementation.¹⁰⁰

⁹⁴FIDA-Kenya case, pages 38-39

⁹⁵FIDA-Kenya case, page 38.

⁹⁶FIDA-Kenya case, pages 40-42.

⁹⁷FIDA-Kenya case, pages 42.

⁹⁸As above.

⁹⁹FIDA-Kenya case, pages 42-43.

¹⁰⁰FIDA-Kenya case, page 51.

It is our view that this understanding of progressive realisation is flawed, and entails a misreading of international law. As has been stated above, despite the adoption of the standard of progressive realisation, international human rights law requires that certain obligations are of an immediate nature. One such obligation is equality and non-discrimination in access to political, social, economic and cultural resources and opportunities. This obligation is not only contained in the ICESCR, but is also entrenched in the ICCPR,¹⁰¹ which is generally accepted to contain immediate obligations. The immediate nature of this obligation was affirmed by the CESCR in its General Comment Number 16 where it dealt extensively with quality and non-discrimination in international human rights law, stating specifically that, '[t]he equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties'.¹⁰² It is thus clear that the Court erred in its interpretation of international law, and thus its interpretation of the standard of progressive realisation cannot stand.

Following hot on the heels of the FIDA-Kenya case, was the case of Centre for Rights Education and Awareness (CREAW) and 8 others v Attorney General & another, where the issue of the progressive realisation in relation to the equality provisions and the two-thirds gender rule in Article 27(8) was also canvassed.¹⁰³ The petition challenged the appointment/deployment of County Commissioners by the President on the ground, among others, that in appointing only 10 women and 37 men to occupy the 47 positions, the President had breached Articles 10 and 27(8) of the Constitution.¹⁰⁴ In support of their case, the Petitioners relied on the case of Milka Adhiambo Otieno & Another v The Attorney General & Another, High Court at Kisumu Petition No. 33 of 2011, which had dealt with the gender rule and digressed from the holding of the FIDA-Kenya case, as to the progressive nature of the gender rule.¹⁰⁵ The Petitioners further argued that, the Constitution was clear on the rights that were subject to the standard of progressive realisation, and that these were rights that required the application of resources.¹⁰⁶ The Respondents on the other hand argued that there were no sufficient women who qualified to be appointed as County Commissioners, and that Article 27(8) of the Constitution was subject to the standard of progressive realisation.¹⁰⁷

In determining the case, the Court held that the appointments had not met the requirements of Article 27(8) of the Constitution as there were, sufficient qualified women to enable the State satisfy the constitutional requirement of the gender rule.¹⁰⁸ On the progressive realisation argument, the Court, unlike the FIDA-Kenya Court discussed above, properly acknowledged that, Article 21(2) of the Constitution only applied to the rights contained in Article 43 of the Constitution, and not all the rights in the Bill of Rights.¹⁰⁹ In this context, the Court stated as follows:

The Constitution is thus very clear on what rights are subject to the progressive realisation test-the social and economic rights to health care, education, water, housing, and sanitation. Such rights require the allocation of resources, and as is the case with similar provisions in the [ICESCR], the state's obligation is made subject to the availability of resources. Had it been the intention to make the principle that not more than two thirds of elective and appointive positions should be of the same gender subject to progressive realisation, nothing would have been easier than for the Constitution to make this specific provision.

The Court thus departed from the dicta in the FIDA-Kenya case and adopted the reasoning of the Court in the Milka Adhiambo Otieno case, holding that the equality provisions of the Constitution were not subject to the standard of progressive realisation.¹¹⁰

Though the CREAW and Milka Adhiambo Otieno cases did not expound on the nature and content of the standard of progressive realisation, they affirmed that the standard was to be applied in relation to economic and social rights, and that should the issue of availability of resources arise, it was the duty of the State to show that resources were not available for the realisation of the rights.

¹⁰¹International Covenant on Civil and Political Rights, Article 3. See also United Nations Charter, Article 1(3).

¹⁰²CESCR General Comment No. 16 'Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights' E/C.12/2005/3 (2005), para 16.

¹⁰³See also CESCR General Comment No. 3, para 5.

¹⁰⁴Centre For Rights Education & Awareness (CREAW) & 8 others v Attorney General & another, High Court of Kenya, Petition No. 207 & 208 of 2012, [2012] eKLR (CREAW case).

¹⁰⁵CREAW case, para 11-16.

¹⁰⁶CREAW case, para 14.

¹⁰⁷CREAW case, paras 26-29.

¹⁰⁸CREAW case, paras 43-46.

¹⁰⁹CREAW case, para 47.

¹¹⁰CREAW case, paras 50-51.

The two-thirds gender rule has been the subject of a Kenyan Supreme Court Advisory Opinion, in which the Attorney General had requested the Court to determine, among other things, the progressive nature of the gender rule.¹¹¹ The Attorney General argued that, a reading of Article 27(6) gave the State discretion which was to be exercised in good faith and in a progressive manner.¹¹² The Attorney General's arguments were opposed by all the Interested Parties and the amici in the case, who argued that the gender rule in elective positions as provided in Article 81(b) and other provisions of the Constitution was of immediate application.¹¹³ They reiterated, as had been held in the two High Court cases above, that progressive realisation standard only applied to economic and social rights under Article 43, and to persons with disability as per Article 54 of the Constitution.¹¹⁴ In its majority opinion, the Supreme Court was of the view that the "immediate application" argument did not take into account the fact that, the gender rule in the Constitution was a new a right that was to be implemented in progression, and that this failure bore a "forensic shortfall" which was to be taken account of in rendering the advisory opinion.¹¹⁵

The Court stated that in order for it to give an opinion, it had to determine, among other things, 'what constitutes progressive realisation of a right'.¹¹⁶ In determining this issue, the Court stated that "progressive realisation" connotes 'a phased-out attainment of an identified goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State'.¹¹⁷ It noted that the requisite measures will vary depending on the nature of the right and the prevailing social, economic, cultural and political environment.¹¹⁸ The Court proceeded to state as follows:¹¹⁹

[T]he inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; it depends on the mechanisms provided for attainment of gender-equity; it depends on the nature of the right in question; it depends on the mode of constitution of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); it depends on the identity and character of the players who introduce the candidates for appointment or election; it depends on the manner of presenting candidature for election or nomination.

Having noted the above, the Court went ahead to hold that progressive realisation, as developed under international law, signified that there was no mandatory obligation resting on a State to take particular measures, at a particular time to achieve an intended objective, which in this particular case was the realisation of the gender equality principle.¹²⁰ It further stated that even if an obligation is enumerated in mandatory terms, but required protracted measures for its realisation such as the adoption of legislative and policy measures, it was not necessarily inconsistent with the standard of progressive realisation.¹²¹ The Court thus held that the gender rule was subject to the standard of progressive realisation and was to be achieved overtime 'by means of positive and good-faith exercise of governance discretion'.¹²² The Court further stated that '[a]ffirmative action programmes require careful thought multiple consultations, methodical design, co-ordinated discharge. Such measures cannot, by their very nature, be enforced immediately'.¹²³

Despite the majority opinion that the gender rule was subject to progressive realisation, the Chief Justice issued a dissenting opinion which, in my view, stated the correct position of the law and affirms the holdings of the High Court in the CREAW and the Milka Adhiambo Otieno cases. In the Dissenting Opinion, the Chief Justice castigated the interpretation of Article 81(b) which depended solely on the interpretation of the word "shall" indicating that this was contrary to the broad holistic and

¹¹¹In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, paras 1-2 & 27-30 (Gender Rule Advisory Opinion).

¹¹²As above.

¹¹³Gender Rule Advisory Opinion, paras 31-46. Dissenting Opinion of the Chief Justice on the Gender Rule, paras 3.10-3.16.

¹¹⁴Gender Rule Advisory Opinion, para 36.

¹¹⁵Gender Rule Advisory Opinion, para 40. In stating this fact, it seems as if the Supreme Court was looking for a foothold from which to divert from the prevailing opinion that the gender rule was subject to immediate realisation. See also para 41 for the development of this argument by the Court.

¹¹⁶Gender Rule Advisory Opinion, para 48.

¹¹⁷Gender Rule Advisory Opinion, paras 49 & 53.

¹¹⁸As above.

¹¹⁹Gender Rule Advisory Opinion, para 59.

¹²⁰Gender Rule Advisory Opinion, paras 60-61.

¹²¹As above.

¹²²Gender Rule Advisory Opinion, paras 62-65.

¹²³Gender Rule Advisory Opinion, para 66.

purposive form of interpretation decreed by the Constitution itself.¹²⁴ Having taken account of the history of subjugation of women in all spheres of life in Kenya, the Chief Justice was of the view that, an argument calling for the progressive realisation of the gender rule flew in the face of that history and the Kenyan context taking into account the progressive practice of affirmative action in the other East African countries such as Rwanda, Uganda and Tanzania.¹²⁵ Having analysed the history of gender discrimination in Kenya, the Chief Justice stated as follows:¹²⁶

I see no reason a Constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination among women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A constitution does not subvert itself. Deciding that women vying for county representation have rights under constitution while their counterparts vying for Parliament and the Senate are discriminated against would result in that unconstitutional position. This Article read with the provisions of Articles 27(4), 27 (8) and 81 (b) make it abundantly clear that the two-thirds gender principle has to be immediately realized.

The Chief Justice further stated that an interpretation providing for the immediate realisation of the gender rule was supported by the constitutional values and principles contained in Article 10 of the Constitution, and that the progressive realisation dicta of the majority would subvert these values.¹²⁷

Equality, as a constitutional value and as a substantive right, plays an important role in the realisation of economic and social rights, and the subjection of equality to the standard of progressive realisation would have had a negative effect in the development of progressive constitutional jurisprudence aimed at the realisation of the rights entrenched in the Constitution. It is thus important that the Courts stick to the two progressive High Court decisions discussed above and the Dissenting Opinion of the Chief Justice in the Gender Rule Opinion that affirms the immediate nature of the equality provisions of the Constitution. Economic and social rights advocates should also look to use the dicta of the majority in the Supreme Court Gender Opinion Rule, especially the argument that the immediate or progressive nature of a right is not self-evident, to push through the immediate realisation of aspects of economic and social rights such as those that have been determined to be of immediate application as enumerated in section 2.4.1 above. This argument can also be used to enhance the realisation of the obligations of the State to respect and protect economic and social rights, obligations that do not require a substantial outlay of resources for implementation. Such progressive adoption and use of the supposedly negative dicta coming from the majority opinion of the Supreme Court can go a long way in enhancing the realisation of economic and social rights, with the objective of achieving the transformative aspirations of the Constitution.

In the specific context of the realisation of economic and social rights, the High Court has determined that the standard of progressive realisation does not leave the entrenched rights bereft of content. It did so in the cases of *Mitu-Bell Welfare Society v Attorney General & 2 others* and *Okwanda v The Minister of Health and Medical Services & 3 Others* as follows:¹²⁸

Article 21 and 43 require that there should be 'progressive realisation' of economic and social rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realisation of these rights.... 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 economic and social rights, and what policies, if any, it has put in place to ensure that the rights are realised progressively, and how the petitioners in this case fit into its policies and plans.

These cases thus provide a good base for the continued litigation of economic and social rights in the context of the standard of progressive realisation.

¹²⁴Dissenting Opinion of the Chief Justice on the Gender Rule, paras 9.1-9.2.

¹²⁵Dissenting Opinion of the Chief Justice on the Gender Rule, paras 11.1-11.9.

¹²⁶Dissenting Opinion of the Chief Justice on the Gender Rule, para 11.5.

¹²⁷Dissenting Opinion of the Chief Justice on the Gender Rule, para 11.6.

¹²⁸*Mitu-Bell Welfare Society v Attorney General & 2 others* pages 21-23 & 31; *Okwanda v The Minister of Health*, paras. 15 & 16.

2.5 The nature of economic and social rights obligations of the State

The economic and social obligations of the State serve the double purpose of setting the direction for policy choices and limiting the policy choices available to the State.¹²⁹ These obligations are contained in Article 21 of the Constitution which contains the State's duty to observe, respect, protect, promote and fulfil the rights in the Bill of Rights.¹³⁰ These obligations have been discussed at the international sphere using the tripartite typology of respect, protect and fulfil; and it has been affirmed at that level that these continuum of obligations apply to both civil and political rights as well as economic, social and cultural rights.¹³¹ This affirmation can be gleaned from the jurisprudence of the African Commission on Human and Peoples' Rights in the case of SERAC v Nigeria where the Commission held as follows:¹³²

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - civil and political rights and economic, social and cultural - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.

It is not enough for a State to concentrate on the realisation of only one aspect of these obligations, but efforts must be geared towards the realisation of the entire continuum as these obligations are interrelated & interdependent.¹³³ These obligations are summarily discussed hereunder in turn.

2.5.1 Obligation to observe

The obligation of the State to observe fundamental rights is basically a requirement that the State (all levels, arms and organs) takes into account the fundamental rights entrenched in the Constitution in all spheres of governance, especially in the development of its legislative, policy and programmatic frameworks that may have adverse consequences for the enjoyment of rights.

2.5.2 Obligation to respect

In developing the obligation accruing from the rights entrenched in the African Charter in the SERAC case, the African Commission defined the obligation to respect human rights as, requiring the State to refrain from interfering with the existing fundamental rights of rights-holders; to respect the right-holders autonomy, freedom and resources; as well as the liberty of their actions in using the resources available to them individually and collectively in the realisation of their fundamental rights.¹³⁴ Malcolm Langford groups State actions that violate the obligation to respect as: interfering with self-organising efforts or key resources of individuals or associations that detract from the realisation of their economic and social rights; denying individuals or specific groups access to existing government socio-economic programmes or employment opportunities on arbitrary, unreasonable or prohibited grounds; or unreasonably adopting retrogressive measures through the removal or scaling down of the government's legislative or programmatic frameworks that people rely on to meet their basic socio-economic needs.¹³⁵

The majority of cases considered in section three below dealt majorly with the obligation to respect, basically requiring the State to refrain from evicting people unless the required procedural guarantees are provided in the cases dealing with evictions;¹³⁶ requiring the State to amend provisions of an Act of Parliament that would have constrained access to generic anti-retroviral drugs in the case dealing with the right to health, among others.

2.5.3 Obligation to protect

The obligation to protect, has grown in significance with globalisation and its attendance growth in the power of multi-national

¹²⁹Yeshanew (n 10 above) 219.

¹³⁰The duty to fulfil its obligations in the realisation of human rights is further entrenched by the Constitutional requirement that the State to enact legislation aimed at fulfilling obligations under international law, see The Constitution of Kenya, 2010, Article 21(4).

¹³¹The tripartite typology was first expounded by Henry Shue in H Shue, Basic Rights: Subsistence, affluence and US Foreign Policy (1980). The typology has been used extensively by the CESCR in its general comments such as CESGR General Comment No. 12, para 15; CESCR General Comment No. 14, paras 33-37; CESCR General

¹³²Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR) 2001, para 44.

¹³³Yeshanew (n 10 above) 226.

¹³⁴SERAC case, para 45.

¹³⁵Langford – From practice to theory (n 10 above) 16.

¹³⁶See Langford – From practice to theory (n 10 above) 14-15, where he affirms that eviction cases basically relate to the duty to respect.

corporations coupled with the difficulties that have been experienced at the international level in developing human rights accountability mechanisms for these corporations. Globalisation has also led to the challenges of commodification and privatisation of socio-economic goods and services that were previously provided by the State to private corporations. Due to the above challenges, the State's duty to protect has been the major mechanism available to rights-holders to challenge the practices of private bodies that violate fundamental rights.¹³⁷

This obligation entails the responsibility of the State to protect right-holders against political, economic, and social interferences of their rights by third parties which lead to the violation or threats of violation of their fundamental rights.¹³⁸ The State is thus under a duty to put in place effective legislative, policy, administrative and regulatory structures to ensure that third parties do not violate the rights of right-holders, and further requires the State to put in place effective judicial and other remedial measures for the vindication of rights in instances of violation. The African Commission found Nigeria in violation of this obligation for failing to put in place effective regulatory mechanisms and failing to undertake due diligence to ensure that Shell Petroleum Company did not contaminate the land, water and food sources of the Ogoni People in the Niger Delta Region.¹³⁹ In reaching this decision, the Commission relied on the Inter-American Court case of *Velasquez Rodriguez v Honduras* where it was held that, 'when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens'.¹⁴⁰ Further in relation to the destruction of the houses of the Ogoni people by agents of Shell Company, African Commission found as follows:¹⁴¹

... Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivation as well as guarantee access to legal remedies.

The obligation to protect can be used together with the horizontal application of the Constitution as discussed in section 2.3 above, in enhancing the protection of rights-holders from the violation of their rights by third parties, be they private individuals or multi-national corporations. Several of the cases considered in section 3 below dealt with the obligation to protect, especially the right to food case which had required the State to put in place measures to control oil prices with the objective of stabilising the prices of basic commodities. Cases requiring the balance of competing rights such as the balancing of the right to education, the best interest of the child and the right to manifest religion in educational institutions also fit in this category.

2.5.4 Obligation to promote

The obligation to promote, similar to the obligation to protect, also requires the State to put in place the necessary legislative, policy and programmatic framework aimed at creating a conducive environment for people to freely enjoy and exercise their fundamental rights. This conducive environment for the enjoyment of rights is to be achieved through human rights education, advocacy and awareness creation, the promotion of tolerance and peaceful co-existence between different groups or communities.¹⁴²

2.5.5 Obligation to fulfil

The duty to fulfil is a positive obligation requiring the State to move its machinery towards the actual realisation of the rights in question.¹⁴³ It is divided into two: the obligation to facilitate and the obligation to provide. The obligation to facilitate requires the State to take steps, through the adoption of national strategic plans, for the realisation of the entrenched socio-economic right. It thus requires the State to put in place conducive legislative, policy and programmatic framework to enable people meet their own socio-economic needs using their own resources as well as for private actors to work together with the State in public-private partnerships for the realisation of the entrenched economic and social rights. The duty to provide on the other hand requires the State to provide the actual socio-economic goods and services to poor, vulnerable and marginalised groups

¹³⁷For an analysis of the challenges of globalisation, the growth of multi-national corporations and the difficulties of their regulation, see S Joseph 'Liability of multi-national corporations' in M Langford (ed.) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 613-627.

¹³⁸SERAC case, para 46.

¹³⁹SERAC case, para 57.

¹⁴⁰As above.

¹⁴¹SERAC case, para 61.

¹⁴²SERAC case, para 46.

¹⁴³SERAC case, para 47.

who are unable to meet their socio-economic needs using their own resources due to circumstances beyond their control. The duty will for example, require the State to provide adequate food to people in arid and semi-arid areas facing starvation due to drought and famine.

Cases calling on the State to fulfil economic and social rights are hard to come by, but an exception was the Okwanda case where the duty to provide was raised by the Petitioner. Unfortunately, the presiding judge felt that the case was insufficiently particularised by the Petitioner's lawyers, leading to the case being thrown out by the Court.¹⁴⁴ It was thus basically a missed opportunity in relation to developing jurisprudence on the positive duty of the State to provide socio-economic goods and services to rights-holders who are unable to provide for themselves due to circumstances beyond their control.

¹⁴⁴Okwanda case, paras 24-25.

3. The realisation of economic and social rights in Kenya: A substantive analysis of the jurisprudence of the Kenyan Courts

Since the promulgation of the Constitution in 2010, the Kenyan Courts have adjudicated several cases on the economic and social rights entrenched in Article 43, producing an indigenous jurisprudence aimed at elaborating the nature, scope and content of these rights taking into account Kenya's history as well as economic, social, cultural and political context. This jurisprudence has been mixed, at times progressive taking into account the dictates of the new transformative Constitution, and at times regressive, holding onto the relics of the past as contained in judicial precedents decided under the old constitutional dispensation. The objective of this section is to look at the economic and social rights cases that have been determined by the courts since the inception of the Constitution with the aim of showing the trends in judicial reasoning in the realisation of these rights.

3.1 The right to the highest attainable standard of health

3.1.1 Normative provisions on the right to health

Human health is an intrinsic good which enhances the enjoyment of the other fundamental rights and freedoms.¹⁴⁵ Even though the full extent of the right to health cannot be fully and completely achieved, an adoption of a rights-based approach to healthcare requires that the State and other relevant societal actors put in place the requisite framework to enhance access to healthcare goods and services as well as, access to other determinants of health such as proper nutrition, clean and safe drinking water, clean environment and sanitation, among others. The adoption of this rights-based approach has been reflected internationally and nationally in the entrenchment of the right to highest attainable standard of physical and mental health in international legal instruments as well as in national constitutions and legislations. One of the earliest conceptualisations of the right to health was in the 1946 Constitution of the World Health Organisation which provided that, 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being' and defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity".¹⁴⁶ The right to the highest attainable standard of health has since been entrenched in several international legal instruments such as the Universal Declaration of Human Rights, the ICESCR, the CRC, CEDAW and the UNCRPD.¹⁴⁷

The content of the right and the obligations arising for States from the right have been elaborated by the CESCR in its General Comment Number 14 which adopts a broad interpretation of health rights to include the underlying determinants of health such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.¹⁴⁸ It further enumerates the essential elements of the right to health with are: availability, accessibility, acceptability and quality; elements that the State must ensure are in place for people to truly enjoy the right to health.¹⁴⁹ In the Kenyan context, the right to the highest attainable standard of physical and mental health is provided in Article 43(1) (a) which states that, '[e]very person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care'.

3.1.2 Judicial adjudication on the right to health

The first case on the right to health determined under the Constitution of Kenyan 2010 was PAO v Attorney General, a case decided in 2012.¹⁵⁰ This was a Petition filed to challenge the constitutionality of sections 2, 32 and 34 of the Anti-Counterfeit

¹⁴⁵CESCR General Comment No. 14 'the right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2000/4 (2000), para 1.

¹⁴⁶1946 Constitution of the World Health Organisation, adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States, preamble, para 1, available at http://www.who.int/governance/eb/who_constitution_en.pdf (accessed on 17 February 2014).

¹⁴⁷UDHR, Article 25; ICESCR, Article 12; CRC, Article 24; CEDAW, Articles 11 & 12; UNCRPD, Article 25, African Charter on Human Rights, Article 16, among others, see CESCR General Comment No. 14, para 2.

¹⁴⁸CESCR General Comment No. 14, paras 4 & 11.

¹⁴⁹CESCR General Comment No. 14, paras 12f.

¹⁵⁰PAO & Others v The Attorney General, High Court of Kenya, Petition No. 409 of 2009 (PAO case).

Act sections, which were likely to adversely affect access to affordable essential drugs and medicines, especially generic anti-retroviral medication for persons living with HIV.¹⁵¹ The Petitioners argued that in severely limiting access to affordable essential drugs and medicines, the impugned sections of the Anti-Counterfeit Act infringed on their right to life, human dignity and health contrary to Articles 26(1), 28 and 43 of the Constitution.¹⁵² The Petitioners' case was based on the reasoning that, in adopting a broad definition of counterfeit goods which encompassed generic medication and the giving of wide powers to the police to confiscate such medication, the Act was likely to increase the costs of HIV medication substantially, making the medication unaffordable to poor, vulnerable and marginalised individuals who rely on the cheap generic medication.¹⁵³ The Petitioners further argued that the restriction of access to generic medication will disproportionately limit their rights contrary to Article 24(2)(c) which provides that limitations of rights should not derogate from the core or essential content of the rights.¹⁵⁴ In its defence, the government reiterated its concern for, and its obligations to realise the right to health for all people in Kenya, basing its prohibition of counterfeit medication on that obligation.¹⁵⁵ It argued that the definition of counterfeit goods in the Anti-Counterfeit Act did not include generic medication.¹⁵⁶

In determining the case, the Court took account of the economic and social context of the HIV pandemic in Kenya, especially the reality that it constitutes a serious threat to life and health of many Kenyans and is a major challenge to socio-economic development.¹⁵⁷ Using statistical data, the Court estimated that the number of people living with HIV in Kenya was between 1.3-1.6 million people, with the general prevalence rate in the country being at 7.4%.¹⁵⁸ It further estimated the cumulative number of children living with HIV to be around 184, 052 by 2009, though efforts were being made by the government to reduce mother to child transmission of HIV.¹⁵⁹ The Court noted that the majority of those living with HIV in Kenya were poor and were financially incapable of accessing branded ARV medication, and so relied on generic medication which was cheaper and more accessible to them.¹⁶⁰ The Court then stated that the socio-economic context had to be taken into account in reviewing the constitutionality of the impugned provisions of the Anti-Counterfeit Act, contending that should the implementation of the provisions have the effect of limiting access to generic ARV medication, then they would ipso facto threaten the health and lives of the Petitioners and other similarly placed individuals, and would thus be in violation of their constitutional rights.¹⁶¹

Having laid down the economic and social context of the case, the Court affirmed the place of international law as an authentic source of law in the Kenyan domestic legal system as per Article 2(6) of the Constitution, and indicated that it was bound to have recourse to these source of law in its elaboration of the meaning and content of the right to health.¹⁶² Relying on CESCR General Comment Number 14, the Court adopted a broad interpretation of the right to health, referring not only to the right to healthcare, but also including other underlying determinants of health such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.¹⁶³ The Court contended that access to medication was subsumed in the underlying determinants of health, and State failure to put in place measures to ensure access to medication was a violation of the right to health of its citizens.¹⁶⁴ The Court further relied on jurisprudence from comparative jurisdictions such as South Africa where the Constitutional Court of South Africa had, in the Treatment Action Campaign case,¹⁶⁵ held that access to medicines was an essential component of the right to health and failure of the State to ensure such access was a violation of the constitutional right to health.¹⁶⁶ Having undertaken this analysis, the Court concluded as follows:¹⁶⁷

¹⁵¹PAO case, para 1.

¹⁵²PAO case, para 2.

¹⁵³PAO case, paras 9-25 & 34-37. The Petitioners state that over 90% of persons living with HIV in Kenya depended on generic medication imported by the government and donors, at para 19.

¹⁵⁴PAO case, para 20.

¹⁵⁵PAO case, para 39.

¹⁵⁶PAO case, para 40-43.

¹⁵⁷PAO case, para 44-46.

¹⁵⁸PAO case, para 47.

¹⁵⁹PAO case, paras 46-49.

¹⁶⁰PAO case, paras 50-51.

¹⁶¹PAO case, paras 52-54.

¹⁶²PAO case, para 55. Some of the international conventions providing for the right to the highest attainable standard of physical and mental health are ICESCR Article 12, CEDAW Article 12 and CRC Article 24(1).

¹⁶³PAO case, paras 61-62.

¹⁶⁴PAO case, para 63.

¹⁶⁵Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) 2002 (5) SA 703 (5 July 2002).

¹⁶⁶PAO case, para 65.

¹⁶⁷PAO case, para 66.

The State's obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines. Any legislation that would render the cost of essential drugs unaffordable to citizens would thus be in violation of the State's obligations under the Constitution.

The Court held that the definition of counterfeit as contained in section 2 of the Anti-Counterfeit Act was likely to be read to include generic medication, and was thus likely to adversely affect the manufacture, sale and distribution of generic equivalents of patented drugs.¹⁶⁸ This would affect the availability of generic drugs in Kenya, with adverse consequences to the right to health, dignity and life of the Petitioners and similarly placed individuals.¹⁶⁹ Affirming the importance of the right to health vis-à-vis the protection of intellectual property in the context of the ambiguously drafted section 2 of the Anti-Counterfeit Act, the Court stated that 'There can be no room for ambiguity where the right to health and life of the petitioners and the many other Kenyans who are affected by HIV/AIDS are at stake'.¹⁷⁰ The Court thus held that the enforcement of the Anti-Counterfeit Act, as far as it limited the availability, accessibility and affordability of essential generic medication, was a breach of the Petitioners' rights to life, dignity and health; and that it was incumbent on the State to make the necessary amendments to the Act taking into account its constitutional obligation, to ensure access to the highest attainable standard of physical and mental health for its citizens.¹⁷¹

One of the defining characteristics of the PAO case is the Court's use of the economic and social context of HIV and the challenges it poses to Kenya as a State in assessing the constitutionality of the impugned sections of the Anti-Counterfeit Act. The use of context brings out the vulnerability and the special situation of the Petitioners, making that situation count in the balancing of rights in constitutional litigation. This is a progressive approach to adjudication which has the potential to enhance the amelioration of the dire economic and social situations of litigants, with the effect that the transformation envisaged by the entrenchment of economic and social rights in the Constitution of Kenya, 2010 is realised.

The second case touching on the right to the highest attainable standard of physical and mental health was the Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others.¹⁷² It was a public interest case brought on behalf of persons with mental disability who were discriminated due to inadequate policies aimed at the realisation of their rights.¹⁷³ The Petitioner prayed for a declaration that, the Respondents had discriminated persons with mental disability, in the provision of support and services in contravention of the Constitution; a mandatory order for the Respondents to establish a sound legal framework addressing the needs of persons with mental disability such as education, health, financial support, among others.¹⁷⁴

Despite acknowledging the challenges facing persons with mental disability, the Court was helpless to determine the case as it was inadequately presented by the Petitioner, stating as follows:¹⁷⁵

[[I]t is unfortunate that the petition and the supporting deposition are inadequate for this court to conduct an inquiry necessary to reach any conclusions to determine whether rights are violated as alleged. A case such as that presented is not about legal arguments but facts and evidence presented to support legal arguments.

In reaching this conclusion, the Court relied on the previous cases of Anarita Karimi Njeru v Attorney General [1979] KLR 154 and Trusted Society of Human Rights Alliance v Attorney General and Other Nairobi Petition 229 of 2012, which provided that constitutional petitions must be pleaded with particularity, indicating the constitutional provisions infringed and the manner of their infringement.¹⁷⁶ Due to the failure of the Petitioner to set out its case in a proper manner with adequate particularity and clarity, the Court was unable to undertake an assessment of the petition to determine the constitutionality or otherwise of government policy in relation to people with mental disability.¹⁷⁷

¹⁶⁸PAO case, para 78.

¹⁶⁹As above.

¹⁷⁰PAO case, paras 85-86.

¹⁷¹PAO case, paras 87-88.

¹⁷²Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others High Court Petition No. 155A of 2011 (Kenya Society for Mentally Handicapped case).

¹⁷³Kenya Society for Mentally Handicapped case, para 5.

¹⁷⁴Kenya Society for Mentally Handicapped case, para 6.

¹⁷⁵Kenya Society for Mentally Handicapped case, paras 9 & 11.

¹⁷⁶Kenya Society for Mentally Handicapped case, paras 11-12.

¹⁷⁷Kenya Society for Mentally Handicapped case, paras 13-17.

The challenge in this case was that, it was a general and omnibus case dealing with the entire spectrum of constitutional rights relating to persons with mental disability, that is the right to education, health, employment, access to justice, political rights, equal protection of the law, non-discrimination, among others. The difficulty associated with the omnibus nature of the Petitioners' case is further exacerbated by the failure of the Petitioners to provide sufficiently detailed or particularised evidence to demonstrate the actual violation of these numerous constitutional rights. The petition portrays a hastiness and lack of sufficient research and meticulous preparation on the part of the Petitioners in the filing and litigation of the case. The hastiness is evidenced by the filing of the case prior to the completion of a study by the Kenya Human Rights and Equality Commission that would have informed and directed the preparation of the petition to ensure that it was properly particularised and sufficiently captured the contextual situation of persons with disabilities in Kenya.¹⁷⁸ The lack of sufficient preparation and lack of seriousness in the litigation of serious cases of public interest was admonished by the High Court in the COFEK case, where the presiding Judge, Justice Mumbi Ngugi, had the following to say:¹⁷⁹

It must be stated that in bringing matters such as this before the court, which have a critical bearing on the rights, lives and livelihoods of citizens, it is not enough to make bare statements with regard to the violation of rights without seriously addressing oneself to the manner in which the violations have occurred and the reasonableness or otherwise of the measures taken to avert or ameliorate their impact. At this nascent stage in the implementation of the new Constitution, parties in the position of the Petitioner, should they determine to take on cases which have a bearing on the public interest, must take them on with all due seriousness.

Further to the demonstration of seriousness in preparation and litigation of important constitutional matters, litigators must also have in mind the role of the courts in a constitutional democracy and be aware of the possibilities that litigation as a strategy can achieve in the transformation of a society. Taking the institutional limitation of the courts in achieving transformation into account, it would be advisable for constitutional litigators to adopt an incremental strategy in constitutional litigation, dealing with one right at a time and giving an opportunity for the Courts to develop the law progressively, one step at a time. This challenge was noted by the Court who stated as follows:¹⁸⁰

In a nutshell, what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court's purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and a party who comes before the Court.

It is hoped that litigators will appreciate the limitations of judicial adjudication of economic and social rights in the achievement of social transformation, and employ other political and popular mobilisation strategies to complement litigation in enhancing the realisation of the fundamental rights of individuals and communities that live in the margins of society.

The next right to health case to reach the courts was *Okwanda v Minister of Health and Medical Services and 3 Others*,¹⁸¹ a case filed by an elderly man who was suffering from diabetes mellitus and who had no financial means to manage the disease due to its prohibitive costs.¹⁸² In filing the petition, the Petitioner sought a declaration that he was entitled to the highest attainable standard of health, accessible and adequate housing, adequate food of acceptable quality, clean and safe water in adequate quantities and to social security as per Article 43 of the Constitution and Article 11 of the ICESCR as read with Articles 2(5) and (6) of the Constitution; and that the State had a constitutional obligation to satisfy the same.¹⁸³ In their defence, the Respondents argued that the petition lacked clarity and precision in setting out the violations; did not disclose a reasonable cause of action and did not demonstrate how the Respondents failed to perform their constitutional duties.¹⁸⁴

¹⁷⁸Society for Mentally Handicapped case, paras 3-4.

¹⁷⁹Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others, High Court Petition No. 88 of 2011 (COFEK case), paras. 43-45.

¹⁸⁰Society for Mentally Handicapped case, para 18.

¹⁸¹Mathew Okwanda v The Minister of Health and Medical Services & 3 Others, High Court of Kenya at Nairobi, Petition No. 94 of 2012 (Okwanda case).

¹⁸²Okwanda case, para 2.

¹⁸³Okwanda case, para 6.

¹⁸⁴Okwanda case, para 8.

The Okwanda Court affirmed the importance of the entrenched economic and social rights in the amelioration of the conditions of poor and vulnerable individuals and groups who live in the margin of society, acknowledging that failure to deal with issues of poverty, ignorance, unemployment and disease will undermine the whole foundation of the Constitution.¹⁸⁵ In determining the case, the Court contended that it had to satisfy itself that the Petitioner had made out a positive case that the State had failed in its duty to observe, respect, protect, promote and fulfil the fundamental rights in the Bill of Rights, and this had to be done with due particularity.¹⁸⁶ After an analysis of the petition, the Court held that no evidence was placed before it to indicate that the State had violated its constitutional obligations with regard to the Petitioner.¹⁸⁷ The Court stated as follows:¹⁸⁸

On the basis of the material before the court, I find that at least the Government Hospitals provide healthcare to the petitioner at a cost. Whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was the subject of evidence and argument before me. The issue of the prohibitive costs involved in accessing the treatment and whether such treatment should be free bearing in mind the necessity to progressively realize these rights was not explored in the depositions and therefore there is no basis upon which I can make a finding one way or the other.

The Okwanda case was based on a similar litigation strategy as the Society for Mentally Handicapped case, wholesale combination of a plethora of rights, making it difficult for the Petitioners to adequately particularise the substantive violations of the numerous rights relied on. As a result, it faced the same fate, dismissal by the Court, despite the important issues that were raised in the case. As was noted earlier, it would be advisable that litigators adopt an incremental approach to give an opportunity for the judges to make decisions that can be implemented by the political institutions of the State.

It is felt, however, that the Court in the Okwanda case was too quick to pull the trigger in dismissing the case. The Court, as a major enforcer of the fundamental rights in the Constitution and as the guardian of the Constitution should have done more to ensure that justice is achieved. The Court acknowledged that there were important issues raised in the case, and also affirmed the obligation of the government to put in place a comprehensive framework for the realisation of the rights in question.¹⁸⁹ The Court then avoided making any orders, stating as follows:

It is not unreasonable for the petitioner and other concerned Kenyans to demand that a concrete policy framework be rolled out and implemented to address the containment and treatment of various health afflictions. These, however, are matters of policy which the State is expected to address in light of its clear constitutional obligations. In the absence of a focused dispute for resolution by the court, I am reluctant to express myself on the broad matters raised in the submissions unless there is sufficient material that there has been a violation of the Constitution and the court is required to act to provide the requisite relief.

Since the government, which should have been expected to have access to all the policies for the realisation of the rights relied by the Petitioners, had not placed those policies before the Court to show the measures it had put in place to progressively realise the rights in question, the Court should have made an order that the government, within a stated period of time, places before the Court, via a sworn affidavit, the measures it had put in place to ensure the progressive realisation of the rights in question. Such an approach was taken by the court in the Muthurwa judgment, where, even though the Court had failed to find a violation of the right to water, it still went ahead to ask the government to reform its water laws to bring them into line with the Constitution. A failure to make any such progressive order may lead the Okwanda judgment to be termed as a case of judicial avoidance to adjudicate on rights that might be considered controversial.

Despite the conservative approach adopted by the High Court in the Society for Mentally Handicapped and Okwanda cases, the encouraging signs in the adjudication of the right to health as exemplified in the POA case gives hope that the constitutional impetus towards the adoption of a progressive and transformative approach to the protection of the right to the highest attainable standard of physical and mental health will eventually outweigh any reluctance or hesitation that may remain on the part of the courts in realising this fundamental right.

¹⁸⁵Okwanda case, para 13.

¹⁸⁶Okwanda case, paras 17-18.

¹⁸⁷Okwanda case, para 19.

¹⁸⁸Okwanda case, para 21.

¹⁸⁹Okwanda case, para 24.

3.2 The right to accessible and adequate housing and to reasonable standards of sanitation

3.2.1 Normative provisions on the right to housing

The right to adequate housing is one of those rights in international human rights law that are universally acknowledged, having been recognised in numerous international law instruments, binding and non-binding, as well as in over 100 national constitutions,¹⁹⁰ but which infamously continues to be observed more in breach than in actual realisation.¹⁹¹ The right has been entrenched in the UDHR,¹⁹² the ICCPR,¹⁹³ the ICESCR,¹⁹⁴ the International Convention on the Elimination of All forms of Racial Discrimination (CERD),¹⁹⁵ the CEDAW,¹⁹⁶ the CRC,¹⁹⁷ the Convention on the Rights of Persons with Disabilities (CRPD),¹⁹⁸ the 1951 Convention Relating to the Status of Refugees (Refugee Convention),¹⁹⁹ the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990 Migrant Workers' Convention),²⁰⁰ and the International Labour Organisation Convention 169.²⁰¹

At the regional level, the main human rights document, the African Charter on Human and Peoples' Rights (African Charter) does not expressly recognise the right to housing. However, this right was recognised to be intrinsic to other protected rights in the Charter by the African Commission on Human and Peoples' Rights (the African Commission) using an implied rights theory (which entails the recognition of rights not explicitly provided for in a treaty through the expansive interpretation of the expressly enumerated rights) in the case of *SERAC v Nigeria*.²⁰² The Commission found that:²⁰³

[a]lthough the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health [Article 16], the right to property [Article 14] and the protection accorded to the family [Article 18(1)] forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected.

The Commission further found out that the right to housing, as implicitly protected under the Charter, encompasses the right to protection against forced evictions.²⁰⁴

Further to the African Charter, the right to adequate housing, in relation to women, has been expressly recognised in the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,²⁰⁵ which provides in Article 16 that:

[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

¹⁹⁰For a discussion of constitutional provisions entrenching the right to adequate housing, see UN Housing Rights Programme (UNHRP) Report No. 1 'Housing rights legislation: Review of international and national legal instruments' (2002) Part III, at 28-30 & Part IVA, at 36-40, available at <http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf> (accessed on 10 February 2014).

¹⁹¹S Leckie 'The human right to adequate housing' in A Eide, C Krause & A Rosas (eds.), *Economic, social and cultural rights: A textbook*, 2nd revised edition (2001) 149, at 149; S Leckie 'Where it matters most: Making international housing rights meaningful at the national level' in S Leckie (eds.), *National perspectives on housing rights* (2003) 3, at 4-5.

¹⁹²Universal declaration of Human rights (hereinafter UDHR), Article 25.

¹⁹³ICCPR, Article 17 which entrenches the right not to be subjected to arbitrary or unlawful interference in one's privacy, family or home.

¹⁹⁴ICESCR, Article 11 which 'recognise 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'.

¹⁹⁵CERD, Article 5(e)(iii).

¹⁹⁶CEDAW, Articles 14(2)(h) & 15(2).

¹⁹⁷CRC, Articles 16(1) & 27.

¹⁹⁸CRPD, Articles 9 & 28.

¹⁹⁹1951 Refugee Convention, Article 21. This protection is augmented, in cases of internally displaced persons (IDPs) by the UN Guiding Principles on Internal Displacement, Principle 18; and also by the UN Principles on housing and property restitution for refugees and displaced persons, also known as the "Pinheiro Principles", especially Principles 2, 12, 13 and 18.

²⁰⁰1990 Migrant Workers' Convention, Article 43(1)(d).

²⁰¹ILO Convention 169, Articles 16 & 20(2)(c). The protection of indigenous people by this Convention is augmented by the provisions of the 2007 United Nations Declaration on the Rights of Indigenous People, especially Article 21(1) which recognises their right to improved housing.

²⁰²Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHR/LR 60 (ACHPR 2001), para. 64, reprinted in C Heyns & M Killander (eds.), *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 251, at 260.

²⁰³SERAC case, para. 60.

²⁰⁴SERAC case, para. 63.

²⁰⁵Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005) Article 16, reprinted in C Heyns & M Killander (eds.), *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 47, at 54.

The Protocol also protects women in relation to matrimonial property and inheritance rights, entrenching their right to continue living in their matrimonial houses whether they remarry or not.²⁰⁶ In relation to children, the African Charter on the Rights and Welfare of the Child (African Children's Charter) also explicitly recognises the rights of children to adequate housing and contains the commitment of States to assist parents in the realisation of that right.²⁰⁷ The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), also provides for the protection of housing rights of internally displaced persons in its Article 9. All these conventions have been signed and ratified by Kenya, making the Kenyan government legally obliged to ensure the realisation of the right to adequate housing. The legal force of these international provisions is further enhanced by the entrenchment in the Constitution of Kenya of a right to accessible and adequate housing, coupled with Articles 2(5) and (6) of the Constitution which make ratified international legal instruments directly applicable in the Kenyan domestic jurisdiction.²⁰⁸

The right to adequate housing has been entrenched as a justiciable right in the Constitution of Kenya, Article 43(1) (b), which provides that 'every person has the right to accessible and adequate housing and to reasonable standards of sanitation'. The right to housing is also provided for, in relation to children, in Article 53 of the Constitution which guarantees every child's right to shelter.²⁰⁹ The provisions on the right to housing are further bolstered by the entrenched right to property²¹⁰ and land rights.²¹¹

3.2.2 Judicial adjudication of the right to housing

The right to housing in Kenya has been litigated mostly in its negative aspect, that is, the prevention of forced evictions or the provision of procedural remedies in instances when evictions are unavoidable.²¹² In many instances, adjudication has been occasioned by a conflict between the right to housing as entrenched in the Constitution and other competing constitutional rights such as the right to property, as well as the imperatives of planning laws. At the onset of adjudication on the right to housing, especially its negative aspect of protection against forced evictions, courts have adopted a divergent approach to the interpretation of housing rights and its place in the overall constitutional framework. This can be seen in the case of *Charo Wa Yaa v Jama Abdi Noor (Charo case)*,²¹³ where the Court adopted a restrictive approach to housing rights, on one hand, and in the cases of *Satrose Ayuma and Others v Kenya Railways Staff Benefits Scheme & others (Muthurwa – Preliminary ruling)*²¹⁴ and *Susan Waithera Kariuki and others v The Town Clerk, Nairobi City Council and others (Waithera case)*,²¹⁵ on the other hand.

a) Conservative and restrictive interpretation of the right to housing: Charo case

The Charo case concerned an application by about 270 households for an interim injunctive order, restraining the Respondents from forcefully evicting them without the provision of alternative land or accommodation in contravention of the right to housing as is enshrined in Article 43(1)(b) of the Constitution as well as a conservatory order to maintain the status quo ante pending the hearing and determination of the main case.²¹⁶ The Petitioner specifically urged the Court, to take into account the judicial paradigm shift in the interpretation and application of the law of trespass and evictions required by the adoption of the transformative Constitution and as is envisaged in Article 20(3) of the Constitution as follows:²¹⁷

²⁰⁶African Women's Protocol, Article 21 (1).

²⁰⁷African Charter on the Rights and Welfare of the Child (1990/1999), Article 20(2), reprinted in C Heyns & M Killander (eds.), *Compendium of key human rights documents of the African Union*, 3rd edition (2007) 62, at 68.

²⁰⁸For an extensive discussion on these provisions, see N Orago 'The Constitution of Kenya, 2010 and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *African Human Rights Law Journal* 415-440.

²⁰⁹The Constitution of Kenya, 2010, Article 53(1)(c).

²¹⁰The Constitution of Kenya, 2010, Article 40 which guarantees the right of people, individually or in association with others, to acquire and own property in any part of Kenya as well as further guaranteeing against arbitrary deprivation of property and the payment of just, prompt and equitable compensation in instances of compulsory acquisition by the State.

²¹¹See The Constitution of Kenya, 2010, Part five, especially Article 60(1) which provides for equitable access to land, the security of land tenure, as well as the elimination of gender discrimination in law, customs and practices related to land, among others. Part five further requires, in Article 68(c) for parliament to enact legislation protecting matrimonial property, especially the matrimonial home, in instances of divorce as well as protecting dependants and spouses of a deceased person having an interest in land.

²¹²An exception is the Okwanda case where one of the myriad prayers was for the provision of a reasonable stipend for the renting of a decent house as part of Article 43 of the Constitution. However, due to the omnibus nature of the case and the lack of particularisation of the myriad of rights in the case, the Court was unable to make any determination on the positive aspect of housing rights.

²¹³*Charo wa Yaa v Jama Abdi Noor & 5 others*, High Court of Kenya at Mombasa Misc. Civil Application No. 8 of 2011 (Charo case).

²¹⁴*Satrose Ayuma and others (on behalf of Muthurwa residents) v Kenya Railways Staff Benefit Scheme and others*, High Court of Kenya at Nairobi, Petition No. 65 of 2010 (Muthurwa Preliminary ruling).

²¹⁵*Susan Waithera Kariuki and others v The Town Clerk, Nairobi City Council and others*, High Court of Kenya at Nairobi, Petition case No. 66 of 2010 (Waithera case).

²¹⁶See Charo case, at pages 2-4 which details the case of the Petitioner. The Petitioner asked the Court to order that due process, taking into account the constitutional values of human dignity and social justice, be followed in the eviction of the households, taking into account their constitutionally entrenched fundamental right to housing, at 3-4.

²¹⁷Charo case, pages 4 & 12. The Counsel for the Petitioner urged the Court to balance the competing right to housing and property on a scale of the constitutional values that underlie the Constitution, contending that the enjoyment of the right to property must be for the greater good of the entire community, at 11-12.

[The Court should adopt] a novel, progressive judicial task [and thus] consider and grant the prayers sought [as] these rights are of a provenance...heretofore not known to the [law] of Kenya, and it is incumbent on this Honourable Court to interpret the new parameters under which these newly-acquired rights may be enjoyed, enforced and protected...[The] Court and its officers [have to] recognise [a] paradigm-shift that the Constitution [...] seeks to bring about, rather than... seek to interpret new rights on the basis of old law.

Further, the Petitioners, through a subsequent application, requested the Court to allow them to construct makeshift shelters on the property, so as to protect themselves and their families from the impending long rains which would have adverse consequences to their health and well-being.²¹⁸ The Respondents, on the other hand, argued that the land in question was private land subject only to private law,²¹⁹ and that the State was not responsible for the applicants' lack of shelter and was thus under no obligation to provide alternative accommodation or shelter to the applicants.²²⁰

The Charo Court declined to espouse a progressive and purposive interpretation of the right to adequate housing, calling it an aspirational right and also failed to adopt a transformative concept of adjudication which reflected the paradigm shift as was advocated by the Petitioners.²²¹ In the end, the Court failed to adopt a balanced normative framework recognising the important human interests underlying both property rights and housing rights, instead simply reaffirming the privileged position of property rights under common law. This, in effect watered down the transformative potential of the entrenched housing rights in providing the requisite protection to the poor, marginalised and vulnerable groups faced with real threats of homelessness.²²² The Court's reasoning for this was that the adoption of such a paradigm shift required an extensive and substantial body of sociological and comparative legal research material, which had not been laid before the Court.²²³ This reasoning flies in the face of the mandate of the Court as the guardian of the Constitution and as the protector of fundamental rights. The Court in this instance had the responsibility, as well as requisite judicial tools, to either call for further evidence from the Petitioner or on its own motion call for expert institutions to make submissions in the case so that the important constitutional questions are effectively dealt with for the benefit of the Petitioner and all other similarly situated poor and vulnerable people in crisis situations. In failing to do so, it is submitted that, the Court abdicated its judicial responsibilities, to the detriment of the Petitioners, and in the process created a retrogressive jurisprudence lacking in the protection of the right to housing for people in crisis situation who face forced evictions, and subsequently, homelessness.²²⁴

²¹⁸Charo case, pages 8-10. The negative and condescending judicial attitude to socio-economic rights in this particular instance is indicated by the judge's reference to this application as being "based on expediency and on transient ecological conditions", at 8. This attitude is further reflected later in the ruling when the Court dismisses the Petitioner's application, with costs, contending that it has no jurisdiction to entertain the same as it is not related to the main suit, and that its adjudication 'would be inconsistent with the constitutional obligation of the Court, to resolve disputes justly, in accordance with the law, including the existing law of jurisdiction', at 19-21. This reasoning is not only reflective of a lack of appreciation of the meaning, content and extent of the right to housing, but is also reflective of a lack of understanding of the continuum of obligations that the right to housing entails. A proper understanding of the content of the right to housing would have enabled the judge to appreciate that emergency temporary shelter or accommodation for people in crisis situations was an intrinsic component of the right to housing and was thus intricately related to the main suit, which was against the forced eviction of the applicants. This particular understanding would have mandated the Court to adjudicate the relevant application and to flesh out the responsibility of the State to provide temporary accommodation to the applicants so as to protect them from the elements pending the final determination of the main case. Failure to adjudicate the application, taking into account the fact that the untenable position of a lack of proper shelters for the applicants was due to the actions of the 1st Respondent to demolish their houses, was an abdication, by the Court, of its judicial responsibility.

²¹⁹This argument was the basis of the Court's judgment, as the Court basically asserted that private property rights trumped housing rights, and there was thus no violation of the right to housing, see Charo case, pages 19-20.

²²⁰Charo case, pages 6-8 & 15-17. See AJ van der Walt "The State's duty to protect property rights owners v the State's duty to provide housing: Thoughts on the Modderklip case" (2005) 21 South African Journal of Human Rights 144, at 150-151, who, in analysing the Modderklip judgments of both the High Court and Supreme Court of Appeal, avers that the fundamental interpretive move which informed the judgments was the recognition of the duty of the State to provide alternative land or accommodation for the occupiers taking into account their fundamental constitutional right to housing once they had been evicted from the property. This was reflective of the new constitutional paradigm which reconciled the private property rights of landowners vis-à-vis the State's constitutional duty towards people in crisis situations or threatened with homelessness. The Kenyan State thus cannot escape this obligation to provide alternative accommodation.

²²¹Charo case, page 12. This failure of the Court to adopt a transformative and progressive approach to socio-economic rights interpretation and adjudication is due to the influence of the classical liberal legal culture subsisting in Kenya prior to the promulgation of the Constitution of Kenya, 2010. If the courts are to facilitate the realisation of the transformative potential of the Constitution, there is need for judges, practitioners and other participants in socio-economic rights adjudication to revisit and refashion this formalistic liberal legal culture and adopt creative as well as innovative responses to socio-economic rights claims, see S Liebenberg, Socio-economic rights adjudication under a transformative constitution (2010) 43-44.

²²²In this particular context, the Court should have had regard to the comparative SACC case of Port Elizabeth Municipality, paras. 17-23 & 30-38, where that court warned against the abstract and mechanical privileging of either property or housing rights, and instead called for courts to strive for a principled and just solution which balances and reconciles the competing constitutional interests in the context of the specific case.

²²³Charo case, page 12.

²²⁴See Liebenberg - Adjudication under transformative constitution (n 221 above) 46, who contends that courts have the responsibility to affirm the fundamental nature of socio-economic rights because judges are:

[t]rained to interpret the nature and scope of rights, to systematically analyse evidence, to listen carefully to all parties to the litigation, to explore the implications of their arguments with them, to research relevant precedent, academic literature, international and comparative foreign law, and ultimately to write a judgment which provides transparent [and] comprehensive reasons for the conclusions reached.

The Court further held that the applicants had already been evicted by an earlier lawful court order without analysing the lawful nature of the previous order of eviction.²²⁵ On this particular issue, the Charo Court failed to take into account international and comparative law requirements for a lawful eviction. It was open to the Court to assess the previous eviction order taking into account the persuasive international and comparative law jurisprudence such as the General Comments Number 4 and 7 of the CESCR as well as, the UN Guidelines on Evictions, which provided specific procedural requirements for an eviction to be considered legal and procedural. It should also have undertaken a comparative analysis of similarly situated national jurisdictions such as South Africa, where the courts have now consistently held that ‘a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that, a reasonable alternative accommodation is available even if only as an interim measure’.²²⁶ If the Court had undertaken this analysis, it would have had no trouble adopting a paradigm shift in relation to forced evictions in accordance with the prayers of the Petitioners’ counsel, and would have set aside the previous eviction order, which had not met the constitutional requirements needed for a just and humane evictions.

Lastly, the Charo Court asserted that the right to housing was an aspirational right, subject to the standard of progressive realisation,²²⁷ and further failed to discuss the obligations of the State arising from the right to housing in relation to the applicants and similarly situated individuals and groups.²²⁸ In making this argument, the Court relied on the Grootboom case, paragraph 41, which dealt with the analysis required to ascertain the reasonableness of a government plan, for the realisation of the right to housing. In our view, the choice of the paragraph is indicative of either the Judge’s hastiness in trying to dispose of the case or is a sign of selective reading to justify an already preconceived judgment.²²⁹ The Court should have read and relied instead on paragraph 45 of the Grootboom judgment, which was more relevant to the issues in question and which specifically dealt with the meaning of progressive realisation, espousing the meaning of the standard of progressive realisation as elaborated on by the CESCR in its General Comment Number 3, paragraph 9.

Two important components of the standard of progressive realisation, and which are to be undertaken immediately, deserve to be mentioned here. First, the State must put in place measures, including legislative, policy and programmatic measures to enhance the realisation of the right to housing. Secondly, the minimum core content forms an intrinsic component of the standard of progressive realisation, and the CESCR stated that the reading of the obligations arising from the ICESCR without the minimum core deprives the Covenant of its *raison d’être*.²³⁰ Even though the SACC did not expressly adopt the minimum core in the Grootboom case, it still held that a government plan for the realisation of rights which did not take into account the urgent needs of those in crisis situations were unreasonable, thus espousing the basic ideals of the minimum core approach.²³¹ It is submitted that the Court should have demanded that the State take the requisite steps to implement the National Housing Policy as well move with haste to enact the relevant housing Bills into legislation to enhance the protection of the housing rights of the applicants and other similarly placed individuals. The Court should have further demanded that the programmatic frameworks to be developed by the State for the implementation of the National Housing Policy and related legislation, must contain a minimum core content component realisable immediately so as to ameliorate the shelter needs of the applicants.

²²⁵Charo case, page 17-18

²²⁶See for example: Port Elizabeth Municipality, para. 28.

²²⁷Charo case, page 18-19. In terming the right to housing as an aspirational right, the court failed to transcend the negative/positive rights dichotomy to embrace an understanding of all rights, civil, political, economic, social and cultural as containing a continuum of obligations, all of which require resources, albeit at varying degrees, to realise. Terming the right to housing as “aspirational” is, therefore, contrary to the Constitution which entrenches the entire corpus of human rights as justiciable and obliges the State to observe, respect, protect, promote and fulfil all rights entrenched in the Constitution (Article 21(1)).

²²⁸In this particular instant, the court failed to properly heed the voices of the poor and vulnerable litigants who were before it as it failed to adequately engage with the normative content of the right to housing. See Liebenberg - Adjudication under transformative constitution (n 221 above) 46, who, in acknowledging the difficulty faced by poor litigants in bringing cases to the courts, avers as follows:

If disadvantaged litigants do succeed, against the odds, in marshalling the substantial resources of money, time, energy and emotional commitment entailed in bringing a case to the courts, the least they can expect is a judgment which engages seriously with the normative commitments underlying the particular rights invoked.

²²⁹See Liebenberg - Adjudication under transformative constitution (n 221 above) 341, who contends the following:

If the rights and values associated with socio-economic rights and substantive equality are marginalised in the adjudication of legal disputes between private parties, the law will be skewed in favour of those already able to wield the power that access to property and economic resources provides. The ultimate consequence will be to undermine the Constitution’s commitment to eradicating entrenched patterns of socio-economic disadvantage.

²³⁰The court thus made an ideological choice to disregard the values and purposes that were intended to be promoted by the entrenchment of justiciable socio-economic rights in the Constitution of Kenya, 2010.

²³¹CESCR General Comment No. 3, para. 10.

b) Broad, progressive and purposeful interpretation of the right to housing: Muthurwa (preliminary ruling), Waithera, Ibrahim Songor Osman, Mitu-bell and Muthurwa (ruling on merits)

i) Muthurwa – preliminary ruling

The Muthurwa case was an application brought under the Constitution of Kenya and international law, being Articles 2(5), 43(1) (b) and 53(1)(c) of the Constitution, Article 25 of the UDHR, Article 11 of the ICESCR, Article 27 of the CRC and Article 26 of the CRPD, and it sought a Conservatory Order to protect the Applicants from the demolition of their homes and their forced eviction by the Respondents.²³² Like in the Charo case discussed above, the Respondents' defence was that the property in question was private and not public land and they were thus not under any obligation with regard to the housing rights of the Applicants.²³³

The Court acknowledged that, the First Respondent was the legally registered owner of the property in question, and thus had property rights in accordance with Article 40 of the Constitution.²³⁴ It held that there was a conflict between the Respondents' property rights and the Applicants' housing rights, and that this conflict called for judicial balancing on the part of the Court so as to realise the transformative aspirations of the Constitution.²³⁵ The Court contended that the Constitution provided a guide to the courts when balancing competing rights; and the guidelines were the need to preserve the dignity of individuals, promote equality and social justice and to enhance the realisation of the potential of all human beings in accordance with Article 19(2) as well as, the provisions of Articles 20(3)-(4) and 259(1).²³⁶ Further, the Court noted the dearth of appropriate legal guidelines to guide courts in relation to housing rights and forced evictions, Kenya not having adopted an evictions guideline.²³⁷ To fill this legal lacuna, the Court resorted to international and comparative law for standards to enable it to effect the requisite balance.²³⁸ It relied extensively on CESCR General Comments Number 4 and 7 to understand the content as well as obligations of the State in relation to the right to housing, acknowledging that even though the Applicants had to move from the property at some point, their eviction must be undertaken in a humane manner.²³⁹

Further, the Court acknowledged the paradigm shift in adjudication that was intended by the promulgation of the Constitution of Kenya 2010, holding that courts were expected to go beyond the previously applied test in the granting of temporary injunction, as was set out in the case of *Giella v Cassman Brown Co Ltd* (1973) E.A. 358, in restraining the breach of fundamental rights.²⁴⁰ It held that:²⁴¹

[t]he court has a duty to consider whether grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights. The court is enjoined to give an interpretation that promotes the values of a democratic society based on human dignity, equality, equity and freedom. Dignity of the people ought to be a core value in our constitutional interpretation.

The Court thus granted the interim injunction prayed for by the Applicants, not only because they had demonstrated a prima facie case with likelihood of success, but also because their fundamental rights and freedoms had been violated or were likely to be violated.²⁴²

ii) Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others

The transformative judicial thinking exhibited by Justice Musinga in the Muthurwa preliminary ruling is further enhanced in his ruling in the Waithera case. The case concerned the demolition of houses and threatened eviction of the Applicants from

²³²Grootboom, paras. 64-69.

²³³Muthurwa case, pages 1-15. The application by the Applicants and their advocates is extensive, bringing to the Court's attention very useful tools to help the Court in determining the case, including General Comments 4 and 7 of the CESCR as well as the UN Eviction Guidelines.

²³⁴Muthurwa case, pages 15-18.

²³⁵Muthurwa case, pages 18-19. The aim of the property owner was to evict the Applicants, demolish the houses in the suit property and to construct modern residential and commercial buildings thereon.

²³⁶Muthurwa case, pages 19-20 & 24-25.

²³⁷Muthurwa case, page 20-22.

²³⁸Muthurwa case, page 28. The Court noted the need for the State to comprehensively put in place measures to address forced evictions, especially through the adoption of clear policy and legal guidelines, at 32.

²³⁹As above.

²⁴⁰Muthurwa case, pages 29-32.

²⁴¹Muthurwa case, pages 23 & 27.

²⁴²Muthurwa case, page 27.

their homes, which were in informal settlements, on the ground that the houses were built on road reserves.²⁴³ The First Respondent's defence was that it had no mandate and capacity to allocate land to, or to resettle, the homeless.²⁴⁴ The Court relied on international law to define "adequate housing" as it had not been defined by the Constitution, and in this regard used CESCR General Comment Number 7, paragraphs 15-16 to define the parameters that had to be met for an eviction to be legal.²⁴⁵ To further enhance its balance of the competing right to housing and property rights, the Court affirmed the importance of reliance on the constitutional principles enshrined in Article 10, human dignity as enshrined in Article 28, the values underlying an open and democratic society based on human dignity, equality, equity and freedom as is enshrined in Article 20(3)-(4), as well as the requirement that the Constitution is interpreted in a manner that promotes its purposes, values and principles as well as advance the rule of law, human rights and fundamental freedoms as is enshrined in Article 259(1) of the Constitution.²⁴⁶

The Court thus held that Applicants' right to housing overrode the First Respondent's duty to plan the City, and that it was unconstitutional to forcefully evict the Applicants from the houses they had occupied for over forty years with the consequence that they are rendered homeless.²⁴⁷ The Court held that the government had an obligation to provide alternative accommodation if eviction was to be undertaken humanely, relying on the *Modderklip* case by the Supreme Court of South Africa to support its finding.²⁴⁸ The Court thus granted the Conservatory Order which was sought by the Applicants and also ordered the Respondents to bear the costs of the application.²⁴⁹ The *Waithera* Court further called on the State to expeditiously put in place the requisite legislative, policy and programmatic framework which sufficiently catered for the short-, medium- and long-term housing needs of everyone, but that responded to the special needs of the most vulnerable and marginalised people living in crisis situations, such as the applicants.²⁵⁰ Further, the Court called on the State to develop and adopt appropriate eviction guidelines, in line with the UN Basic principles and guidelines on development-based evictions and displacement, so as to enhance the realisation of the right to adequate housing as well as to enhance the protection of people threatened with evictions.²⁵¹

iii) Ibrahim Songor Osman v Attorney General & 3 others

The practice of reliance on international and comparative jurisprudence for the interpretation and protection of housing rights, as exhibited in the *Muthurwa* preliminary ruling and in the *Waithera* case, is further exemplified in the *Ibrahim Songor Osman* case which entailed an application by a group of 1,122 people who had been forcefully evicted from an un-alienated public land that they had been occupying since the 1940s.²⁵² The Petitioners approached the Court citing a violation of both civil and political rights as well as economic, social and cultural rights contained in the Constitution of Kenya 2010, especially the right to life under Article 26(1) and (3), the right to human dignity under Article 28 and 29, the right to information under Article 35(1), the right to property under Article 40, the right to housing, food, water and health as contained in Article 43(1) as well as the right to fair administrative action under Article 47.²⁵³ They sought a permanent injunction restraining the Respondents from evicting them in future, a mandatory injunction ordering the Respondents to provide them with suitable and permanent alternative land, shelter or accommodation, and an order for general, aggravated and exemplary damages.²⁵⁴

Even though the petition was undefended, the Court proceeded to undertake a substantive analysis of international law, especially the provisions of the ICESCR, the ICCPR, and the African Charter on Human and Peoples' Rights on evictions,

²⁴³*Muthurwa* case, page 32-33. The sensitivity of the Court to the importance of the constitutional issues raised is illustrated by it not burdening the Respondents with the costs of the application, at 34.

²⁴⁴*Waithera* case, pages 1-5.

²⁴⁵*Waithera* case, page 5.

²⁴⁶*Waithera* case, pages 8-9.

²⁴⁷*Waithera* case, page 9-10. See also van der Walt – Thoughts on *Modderklip* (n 220 above) 157, who calls this type of constitutionally-inspired interpretation aimed at the development of the common law the "radiation effect of the Constitution" or "indirect horizontal application".

²⁴⁸*Waithera* case, pages 10-11.

²⁴⁹*Waithera* case, pages 11-14. See also *Modderklip*, para. 26 for similar affirmations in the South African context.

²⁵⁰*Waithera* case, page 16-17.

²⁵¹*Waithera* case, pages 14-16. The Court quoted the *Grootboom* judgment of the SACC as to the requirement that the government develops a policy that responds to the long, medium and short-term needs of the people.

²⁵²As above. It should be noted that even though efforts have been made to draft the Evictions and Resettlement Guidelines, 2011 and the Evictions and Resettlement Procedures Bill, 2012.

²⁵³*Ibrahim Songor Osman v Attorney General & 3 Others*, High Court Constitutional Petition No. 2 of 2011. Similarly, see the case of *Musa Mohammed Dagane & Others v Attorney General*, High Court Constitutional Petition No. 56 of 2009, which although filed under the previous Constitution was able to find that the eviction of the Petitioners were unlawful for failing to fulfil requirements similar to those enumerated under the UN Guidelines on Evictions. The Court thus held that the Petitioners were entitled to compensation from the State.

²⁵⁴*Ibrahim Songor* case, pages 4-6.

and relied on the jurisprudence emanating from both the CESC and the Human Rights Committee in determining that the Respondents had violated all the rights as per the Petitioners' petition.²⁵⁵ The Court then provided substantive remedies as requested by the Petitioners, ordering the Respondents by a mandatory injunction to return the Petitioners to the land from which they were evicted, to reconstruct for them reasonable residences or houses with all the requisite social amenities to be mutually agreed upon by all the parties, a permanent injunction restraining the respondents from forcefully evicting the Petitioners in future as well as damages of Kshs. 200,000 for each of the 1,122 Petitioners.²⁵⁶

iv) Mitu-Bell case

This was a petition filed by a group of 3065 households, approximately 15,325 men, women and children, who were residence of Mitumba Village, near Wilson Airport, Nairobi, a place they had occupied for over 19 years.²⁵⁷ On 1 December 2011, Kenya Airports Authority (KAA), the second Respondents in this case, proceeded to demolish the Petitioners' village, despite an interim conservatory order that had been issued by a court of law, with the aim of forcibly evicting them from the land.²⁵⁸ The Petitioners contended that the forced eviction had violated their constitutional rights such as the right to human dignity, right to housing and right to property.²⁵⁹ In their defence, the Petitioners argued that the land in question belonged to them, so they were unable to violate property rights of the Petitioners. They further argued that, economic and social rights were subject to progressive realisation and availability of resources, and could not be delivered by the State immediately upon demand.²⁶⁰

In deciding the case, the Court had to determine the nature of the Petitioners' rights over the suit property, whether the demolitions violated their economic and social rights and the remedy for any violations.²⁶¹ On the first issue, the Court determined that the land in question belonged to KAA.²⁶² On the issue of the lawfulness or otherwise of the forced evictions, the court commenced its analysis by stating that the 7 day notice to vacate given to the Petitioners was unreasonable.²⁶³ In making that decision, the court decried the absence of any legislative framework or any guidelines for the evictions of persons occupying land that they are not legally entitled to occupy.²⁶⁴ Due to this lacunae, and taking into account Article 2(5) and (6) of the Constitution, the Court sought reliance on the CESC General Comment Number 7, specifically paragraphs 15 and 16, which provides safeguards in situations of unavoidable evictions such as:²⁶⁵

- An opportunity for genuine consultation;
- Adequate and reasonable notice;
- Information on proposed evictions and alternative use of the subject land;
- Presence of government officials during evictions;
- Identification of persons carrying out the eviction;
- Eviction not to be carried out at night or in bad weather;
- Provision of legal remedies, and where possible legal aid to enhance access to remedies;
- Measures to ensure that evictions do not result in homelessness or expose people to vulnerability for the violation of their rights, especially alternative housing or resettlement.

Subsequent to finding that the notice to vacate was unreasonable, the Court held that even though the land did not belong to the Petitioners, they had other forms of personal property on the land which was destroyed during the evictions, and thus their right to property under Article 40 of the Constitution was violated.²⁶⁶ In determining the Petitioners right to housing, the Court emphasised the interdependence, indivisibility and interrelatedness of rights, indicating that economic and social rights, just like any other right in the Constitution was justiciable and was ripe for enforcement.²⁶⁷ The Court thus affirmed that economic and social rights in Article 43 of the Constitution entailed the obligation of the State and all its agents to observe,

²⁵⁵Ibrahim Songor case, pages 6-7.

²⁵⁶Ibrahim Songor case, pages 8-11.

²⁵⁷Ibrahim Songor case, pages 11-12.

²⁵⁸Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011, pages 1-2.

²⁵⁹Mitu-Bell case, pages 2-7.

²⁶⁰As above.

²⁶¹Mitu-Bell case, pages 7-9.

²⁶²Mitu-Bell case, page 12.

²⁶³Mitu-Bell case, page 14.

²⁶⁴Mitu-Bell case, page 15-19.

²⁶⁵As above.

²⁶⁶As above.

²⁶⁷Mitu-Bell case, pages 19-20.

respect, protect, promote and fulfil these rights, especially the right to adequate and accessible housing.²⁶⁸ In demolishing the houses of the Petitioners, the Respondents were in violation of these obligations, especially the obligation to refrain from interfering with the enjoyment of fundamental rights.²⁶⁹ The Mitu-Bell case also found a violation of the rights of vulnerable groups such as children, the elderly and persons with disability as per Articles 53 and 56 of the Constitution, as the demolition of homes, school and other infrastructure in the village impacted negatively on these vulnerable and marginalised groups.²⁷⁰

Having found the Respondents in violation, the Court, taking into account Article 23 of the Constitution, adopted expansive and elaborate orders to remedy the violation of the Petitioners' rights.²⁷¹ It adopted a structural interdict requiring the State to report to it within 60 days from the date of the judgment, the current State policies and programmes for the provision of shelter and the realisation of the right to housing.²⁷² The Court also ordered meaningful engagement between all the parties to the case and other relevant stakeholders to develop a plan for the realisation of the housing rights of the current Petitioners, and for that report to be filed with the Court within 90 days.²⁷³ By adopting such progressive orders, it is hoped that the Courts will force the State to put in place the requisite legislative, policy and programmatic framework for the realisation of the right to adequate and accessible housing.

v) *Muthurwa case– Ruling on merits*

The jurisprudence of the High Court has grown with regard to substantive and procedural protection of people against forced evictions as has been evidenced by the cases discussed above. This growth was further reflected in the merits judgment of the Court in the case of *Satrose Ayuma and Others v Kenya Railways Staff Benefits Scheme and Others*. In his determination of the case on merits, Justice Lenaola acknowledged that the first Respondent was the registered owner of the suit property and had the intention of demolishing the Estate to put up modern residential and commercial buildings.²⁷⁴ Taking these into account, the Judge affirmed that the gravamen of the case was forced eviction and synthesised the issues to be determined as: whether the first Respondent was entitled to evict the Petitioners from the Estate, and if such eviction/threatened eviction violated or would violate the fundamental rights of the Petitioners.²⁷⁵ The Court then contended that in order to determine the issues raised in the Petition, it had to balance the right of the first Respondent to property vis-à-vis the housing rights of the Petitioners.²⁷⁶

The Court then delved into an analysis of the nature of the right to housing as entrenched in the Constitution of Kenya, 2010 taking into account the provisions of international and regional legal instruments.²⁷⁷ The Court laid the principles to be observed when interpreting the right to housing, contending that the criteria to be adopted in the interpretation of the right did not demand 'mathematical precision, scientific exactitude... or talismanic formalism', but required 'a sober, liberal, dynamic and broad approach that would require an examination of the normative components of the right to housing generally as well as the nature of the right to adequate housing specifically'.²⁷⁸ Taking the above principles into account, the Court proceeded to analyse the jurisprudence emanating from the CESCR, especially the Committee's General Comments Numbers 4 and 7, acknowledging that these General Comments are crucial in clarifying the nature, content and scope of the right to housing and the obligations arising thereon.²⁷⁹ The Court, relying on General Comment Number 4, thus affirmed the importance of a broad interpretation of the right to adequate housing as the "as the right to live somewhere in security, peace and dignity".²⁸⁰ In further elaborating the need for a broad interpretation of the right to accessible and adequate housing, the Court adopted the interpretation fashioned by the South African Constitutional Court in the case of *Government of the Republic of South Africa*

²⁶⁸Mitu-Bell case, pages 20-21

²⁶⁹Mitu-Bell case, pages 22-23.

²⁷⁰As above.

²⁷¹Mitu-Bell case, pages 28-29.

²⁷²Mitu-Bell case, pages 29-32.

²⁷³As above.

²⁷⁴As above.

²⁷⁵Muthurwa ruling on merits, para 51.

²⁷⁶As above.

²⁷⁷Muthurwa ruling on merits, paras 60ff.

²⁷⁸Muthurwa ruling on merits, para 64-67. Some of the international and regional legal instruments which the Court acknowledged provide for the right to housing and which have been ratified by Kenya include: the UDHR, the ICESCR, the ICCPR, the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the CEDAW Convention, the CRC and the African Charter.

²⁷⁹Muthurwa ruling on merits, para 68.

²⁸⁰Muthurwa ruling on merits, para 69.

²⁸¹Muthurwa ruling on merits, para 70. The Court acknowledged that the right to adequate housing is interrelated with and mutually supportive of other rights, especially the

v Grootboom & Others as follows:²⁸¹

*[H]ousing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.*²⁸²

In this context, the Court held that the right to housing in Article 43 of the Constitution should be read to ensure access to adequate housing to all Kenyans irrespective of their income or access to economic resources.²⁸³ In assessing the adequacy of housing, the Court asserted that recourse must be had to the seven components of the right to housing, as elaborated in General Comment Number 4 which are: legal security of tenure to guarantee protection against forced eviction, harassment and other threats; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location in a place that guarantees access to employment options, health care services, schools, child care centres and other social amenities; and cultural adequacy.²⁸⁴

In criticising the prevalent practice of forced evictions in Kenya by both public and private entities, the Court in the Muthurwa case affirmed that the protection from forced evictions forms an integral part of the right to accessible and adequate housing as entrenched in the Constitution of Kenya, 2010.²⁸⁵ Relying on CESCR General Comment Number 7 on forced evictions, the Court affirmed the importance of the right to housing in the enjoyment of other interrelated rights, noting that forced evictions violated other rights such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.²⁸⁶ The Court adopted the interpretation of forced eviction as enumerated in General Comment Number 7 as:²⁸⁷ the permanent removal against their will of individuals, families and or communities from the homes which they occupy without the provisions of, and access to) appropriate forms of legal or other protection.

Due to the lack of a national legislation on forced evictions, the Court in the Muthurwa case further relied on the UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007),²⁸⁸ emphasising that evictions must only be carried out as a measure of last resort, must be authorised by law, must be carried out in accordance with international human rights law, must only be undertaken for the purpose of promoting the general welfare, must ensure that a fair compensation is paid, and must not result in homelessness or render individuals vulnerable to the violations of other fundamental rights.²⁸⁹ Should a decision be made that evictions are unavoidable; the Court affirmed that there must be procedural safeguards put in place to ensure that the evictions are carried out under conditions that are respectful of human dignity. The procedural safeguards are supposed to be put in place prior to evictions,²⁹⁰ during evictions²⁹¹ and after evictions.²⁹²

Further to reliance on the UN Principles and Guidelines on Evictions, the Court also relied on the jurisprudence of the African Commission on Human and Peoples Rights in the Case of SERAC v Nigeria, where the Commission stated as follows:²⁹³

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

right to human dignity, and asserted the importance of the right to human dignity in interpreting the right to adequate housing.

²⁸²Muthurwa ruling on merits, para 73-74.

²⁸³Government of the Republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC), para 35.

²⁸⁴As above.

²⁸⁵Muthurwa ruling on merits, paras 74 & 78.

²⁸⁶As above.

²⁸⁷Muthurwa ruling on merits, para 76.

²⁸⁸Available at http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf (accessed on 5 February 2014).

²⁸⁹Muthurwa ruling on merits, paras 79-82. See UN Principles and Guidelines on Evictions, para 21.

²⁹⁰Muthurwa ruling on merits, para 82; UN Principles and Guidelines on Evictions, paras 37-44.

²⁹¹Muthurwa ruling on merits, para 83; UN Principles and Guidelines on Evictions, paras 45-51.

²⁹²Muthurwa ruling on merits, para 84; UN Principles and Guidelines on Evictions, paras 52-58.

²⁹³Muthurwa ruling on merits, para 85; Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR) 2001, para 63.

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.

After having adopted this broad framework and elaboration of the nature, content and scope of the right to housing, the Court proceeded to examine the merits of the Petitioners case, holding that the efforts of the first Respondent to evict the Petitioners violated their right to housing.²⁹⁴ The Court then adopted expansive remedies to enhance structural reforms aimed at the protection of Kenyans from forced evictions and to provide appropriate judicial and other safeguards in instances where evictions are unavoidable.²⁹⁵ In this light, the Court ordered the government to development a legal framework on evictions based on international standards to enhance the protection against forced evictions, ensure security of tenure, legalise informal settlements and control the process of slum upgrading.²⁹⁶ The Court also ordered the government to put in place comprehensive legislative, policy and programmatic framework for the progressive realisation of the right to housing, emphasising that three years after the promulgation of the Constitution, the right had crystallised and was ripe for enforcement.²⁹⁷ Further to the orders of the Court, the court retained jurisdiction on the case and adopted a supervisory mandate requiring the government to report to the Court within 90 days, by the failing of an affidavit, the details of the measures that the State had put in place to enforce the specific orders of the Court in relation to a comprehensive housing and evictions framework.²⁹⁸ In relation to the specific Petitioners in the case, the Court ordered meaningful engagement between them and the first Respondent on an eviction plan that was respectful of the UN Guidelines on Evictions, which was to be filed in Court within 60 days of the judgment.²⁹⁹ Even though the 60 days had elapsed by the time of writing this analysis, the Plan envisaged by the Court has not yet been developed and the case has been appealed to the Court of Appeal.

The Muthurwa merits judgment is the latest case that has been determined by the Kenyan Courts in relation to the right to housing in general and the protection against forced evictions in particular. It shows that the Kenyan Courts have aspired to adopt a broad and expansive interpretation of the right to housing, aimed at the protection of the most poor, marginalised and vulnerable individuals, groups and communities in Kenya. This is in line with the constitutional imperative that requires the enjoyment of rights to the extent permitted by the nature of the rights, the infusion of the purposes and objectives of the Bill of Rights in constitutional interpretation, and the requirement that special measures be put in place to protect the rights of the poor, vulnerable and marginalised groups and communities.³⁰⁰ It is hoped that other courts, especially the superior courts such as the Court of Appeal and the Supreme Court will similarly adopt this progressive interpretation of the right to housing, with the consequence that the egalitarian transformation envisioned by housing provisions of the Constitution of Kenya, 2010 is realised.

3.3 Right to education

3.3.1 Normative provisions on the right to education

Education is a foundational right and one of the key elements in the holistic development of all the facets of the human person. This importance of education is captured in CESCR General Comment Number 13 as follows:³⁰¹

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make.

This importance is reflected in several international human rights instruments that entrench the right to education including Article 25 of the UDHR, Articles 13 and 14 of the ICESCR, Article 29(1) of the CRC, Article 17 of the African Charter on Human

²⁹⁶Muthurwa ruling on merits, paras 107-109.

²⁹⁷As above.

²⁹⁸Muthurwa ruling on merits, paras 110-111.

²⁹⁹Muthurwa ruling on merits, paras 111 (c) & (d).

³⁰⁰Muthurwa ruling on merits, para 111 (e).

³⁰¹See the Constitution of Kenya, Articles 20(4) & 21(3).

³⁰²CESCR General Comment No. 13: The Right to Education (Art. 13), para 2, Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural

and Peoples' Rights, Article 11 of the African Children's Charter, among others.³⁰² In assessing the adequacy of the measures that have been put in place to enhance the realisation of the right to education, the CESCR has indicated that it will use the criteria of availability, accessibility (physical, economic and non-discriminatory), acceptability and adaptability, with the concept of the best interest of the child being the glue that holds the elements of the criteria together.³⁰³

The right to education is provided for in Article 43(1) which provides that everyone has a right to education. It is further supported by Article 53(1)(b) which provides that, every child has the right to free and compulsory basic education. Taking into account the expansive structuring of the provisions of international law providing for the right to education, the cryptic way that the right is provided for in the Constitution is wanting. However, any difficulties with these cryptic provisions are ably cured by Article 2(5) and (6) of the Constitution which incorporates international law as part of the Laws of Kenya. The broad international law provisions on the right to education as well as their interpretation by the relevant international monitoring mechanisms thus forms important guides to the Kenyan Courts in their interpretation and application of the constitutional provisions on the right to education.

3.3.2 Judicial adjudication of the right to education

The right to education was raised in the seminal case of *John Kabui Mwai and Others v Kenya National Examination Council and Others*,³⁰⁴ a case challenging a quota system introduced by the Respondents in the selection of students from primary school to public national schools. In the application of the quota formula in the selection of Form One students to national schools in the year 2010, only 1,224 out of the available 4,517 were to be reserved for students in private schools.³⁰⁵ This quota system was challenged by the Petitioners for being discriminatory against learners from private schools and thus unconstitutional.³⁰⁶ The Petitioners' major contention was that the quota system policy violated the rights to free and compulsory education as provided in Article 53(1)(b) and (d), right to protection from inhuman treatment, right to equal protection and equal benefit of the law as well as a violation of the concept of the best interest of the child.³⁰⁷ The Court was called upon to determine whether or not the quota system policy was discriminatory against learners from primary schools.³⁰⁸

Having affirmed the entrenchment of the right to education in Articles 43(1)(f) and 53(1) as well as the entrenchment of the concept of the best interest of the child in Article 53(2), the Court further affirmed the applicability of international law in the Kenyan context as per Article 2(6) of the Constitution.³⁰⁹ On international law, the Court noted the protection of the right to education under Articles 13 and 14 of the ICESCR and the elaboration of these provisions by the CESCR in General Comment Number 13.³¹⁰ The Court, taking into account General Comment 13, acknowledged that accessibility is one of the most important essential features of education in all its forms, and that accessibility to educational institutions and programmes must be without discrimination.³¹¹ The Court further stressed the special circumstances of vulnerable people and affirmed that, specific efforts must be put in place to ensure access to education for these vulnerable groups through the adoption of temporary special measures.³¹² These special measures aimed at, enhancing de facto equality for disadvantaged groups was held not to be a violation of the right to non-discrimination in education, so long as 'the measures do not lead to the maintenance of unequal or separate standards for different groups and provided they are not continued after the objectives for which they were taken have been achieved'.³¹³

Having looked at the normative content of the right to education as per General Comment Number 13, the Court had to decide whether the quota system policy of the State was discriminatory against learners in private schools. It noted that, relying in the South African Case of *President of the Republic of South Africa & Another v Hugo*, that the discrimination that is prohibited by the Constitution is unfair discrimination, that is, the unfair or prejudicial treatment of persons or group of persons based on

Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10).

³⁰²See CESCR General Comment No. 13, para 5.

³⁰⁴CESCR General Comment No. 13, paras 6 & 7.

³⁰⁵*John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition No. 15 of 2011 (John Kabui Mwai case)

³⁰⁶*John Kabui Mwai case*, page 2.

³⁰⁷*John Kabui Mwai case*, pages 2-3. According to the Petitioners, the basis of the discrimination against learners from private schools was 'their social origin, place of birth and or perceived economic status of their parents and or guardian' at 4.

³⁰⁸As above.

³⁰⁹*John Kabui Mwai case*, page 5.

³¹⁰*John Kabui Mwai case*, pages 6-7.

³¹¹As above.

³¹²As above.

³¹³As above.

³¹⁴As above.

certain characteristics.³¹⁴ The Court noted that not all differential treatment leads to a violation of the equality provisions of the Constitution and that such treatment must be analysed subjectively and objectively to determine whether a violation of the equality rights has occurred.³¹⁵ In undertaking this analysis, the Court took into account Kenya's unequal historical context as well as the entrenchment of an affirmative action provision in Article 27(6) of the Constitution and held as follows:³¹⁶

The special provisions of Article 27(6) make it a unique set of constitutional provisions. When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection. Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognising the necessity of corrective measures, namely those envisaged in Article 27(6), which were at the same time given the status of constitutional guarantee. It was out of the realisation that unequal people cannot be treated equally. Comparisons between different groups are necessary to discern the differential effect of policy and to assist the court in properly characterizing and identifying the groups that are relevant to the particular Article 27 at hand.

The Court thus noted that the policy of the government was aimed at tempering merit with equity, acknowledging that even though the policy treated the two groups of learners differently, it did not amount to unfair discrimination.³¹⁷ This was because of the challenges that were bedevilling the government's efforts to provide free primary education in public schools such as overcrowding, lack of teachers, lack of parental support, inferior infrastructure, among others, which, of necessity, made it more difficult for children from public schools to excel in examinations.³¹⁸ Taking this situation into account, the Court noted that if merit was the only consideration in accessing national public secondary schools, the majority of the available slots will be taken up by learners from private schools, to the detriment of learners from public schools toiling under difficult circumstances.³¹⁹ The Court thus held that the government quota system was not discriminatory.³²⁰

In a nutshell, the Court recognised the importance of a substantive conception of equality in the achievement of social justice and the enhancement of human dignity. It therefore, held that a government policy aimed at providing more opportunities in national schools, to students from public schools as opposed to students from private schools, was legitimate as it was an affirmative action aimed at achieving substantive societal equality and reducing the huge inequality gap between the rich and the poor in Kenya. Though a laudable intervention, the Court, however, failed to address the most important issue, which is the responsibility of the State to improve the quality of education in public schools to be at par with the quality of education in private schools. In giving legal validity to the affirmative action quota system policy, the Court should have limited the application of that legal validity for a given period of time, say five years, the period within which the State would have been required to put in place measures aimed at improving the quality of education in public schools to the standard being exhibited in private schools. In this way, the Court would have ensured that substantive equality is achieved for all students, not only the few from public schools who would have made it to national public secondary schools, as the other good public schools were not subjected to this quota system. The effects of the failure of the Court is apparent, especially in relation to the intake of students to good "extra county public schools" in the 2014 selections where over 85% of the slots were taken up by learners from private schools, to the detriment of learners from public schools.³²¹ With such piecemeal judicial interventions, it is unlikely that the transformative aspirations of the Constitution of Kenya, 2010 will be achieved.

The High Court also had an instance to elaborate on the right to education in the case of Seventh Day Adventist Church (East Africa) Limited v Minister for Education and 3 others, a case which required the balancing of the right to religion enshrined in Article 32 of the Constitution and the right to education enshrined in Articles 43(1)(d) and 53 (1)(b).³²² The Petitioner, suing in an individual and representative capacity, sought orders for a declaration that, the Respondents had violated the right to

³¹⁴John Kabui Mwai case, page 8.

³¹⁶John Kabui Mwai case, pages 8-9.

³¹⁷As above.

³¹⁸John Kabui Mwai case, pages 10-11.

³¹⁹As above.

³²⁰As above.

³²¹As above.

³²²KTN News, 11th February 2014.

religion of Seventh Day Adventist (SDA) students in public schools as well as an order requiring the Respondent to promulgate the requisite regulations directing public schools, to respect the relevant students' religious rights complete with administrative enforcement and complaint procedures.³²³ The petition was based on the reasoning that, even though public schools had traditionally accommodated the religious practices of SDA students, this had changed from 2011 onwards, and that public schools had sought to restrict or curtail the opportunities for the manifestation of religion through the observance of the Sabbath, which commenced on Friday sunset up to Saturday sunset.³²⁴ These violations were based on the practices of suspending SDA students from schools, for failure to attend Saturday classes; the conduct of exams on Saturdays and failure to provide make-up exams or classes for SDA students who fail to sit for the exams or attend classes on Saturday; failure to exempt SDA students from cleaning duties on Saturday; and the suspension of students for promoting Sabbath worship.³²⁵ The Petition was supported by the Submissions of the amicus curiae, the Kenya National Gender and Equality Commission who elaborated on the international nature of the right to freedom of conscience, thought and religion, and argued that the right to manifest religion, the second aspect of the right to religion, can only be limited if it is in the interest of public safety, protection of public order, health or morals, and in the protection of the rights of others.³²⁶ It submitted that the obligation to justify the limitation of the rights of the SDA students to manifest their religion rested on the State who had the obligation to demonstrate that the requirements of Article 24 of the Constitution had been met.³²⁷

In their defence, the Respondents and the Interested Party (The Board of Governors of Alliance High School) argued that the right to religion, especially its aspect of the manifestation of religion, was not absolute and was subject to reasonable and justifiable, limitation in an open and democratic society based on human dignity, equality and freedom in line with the factors enumerated in Article 24 of the Constitution.³²⁸ They argued that all students, including SDA students had a fundamental right to education, and that the right to religion had to be balanced with the right to education in the instance.³²⁹ The Respondents further argued that, the orders sought by the Petitioners will unduly burden the schools who will face hardship in trying to complete their curriculum within the set school days taking into account, the ban on holiday tuitions by the Basic Education Act, section 37(1).³³⁰ The Board of Governors of Alliance High School further argued that, they have made reasonable accommodation in requiring all students including SDA students, to only attend Saturday classes up to 11 a.m., after which they are free to attend Sabbath prayers.³³¹

The Court enumerated two issues to be determined: first, whether the right to religion of SDA students was violated and to what extent; secondly, whether the right to religion was absolute or if it could be limited as provided by Article 24 as read with Articles 43(d) and 27 of the Constitution.³³² In undertaking its analysis of these issues, the Court set out an important constitutional principle in relation to the Bill of Rights, the equal importance of all the rights entrenched in the Bill of Rights.³³³ Having stated this principle, the Court held that in order to determine the issues in question, it had to fairly balance the relevant competing rights taking into account relevant interpretive principles such as broad, liberal, generous and purposive interpretation of the Constitution so as to give effect to its spirit, purposes, values and principles; the requirement that the Constitution be interpreted as an integrated whole so as to give effect to the greater purpose of the Constitution; as well as requirement that rights be enjoyed to the greatest extent consistent with the right in question and that courts adopt the interpretation that favours the enforcement of rights.³³⁴

Having noted the above principles, the Court started its analysis of the right to religion, acknowledging that the right has two aspects: freedom to adopt a religion or hold a belief, an aspect which is absolute; and the freedom to manifest ones religion or belief in worship, observance, practice and teaching, an aspect subject to limitation as prescribed by law as necessary to protect public safety, order, health or morals, or the fundamental rights of others.³³⁵ It noted that, the present case involved the

³²³Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others, High Court of Kenya, Constitutional and Human Rights Division, Petition No. 431 of 2012.

³²⁴Seventh Day Adventist, paras 2-3.

³²⁵Seventh Day Adventist, paras 4-11.

³²⁶Seventh Day Adventist, paras 7 & 55.

³²⁷Seventh Day Adventist, para 28.

³²⁸Seventh Day Adventist, paras 29-32.

³²⁹Seventh Day Adventist, paras 13 & 22-25.

³³⁰Seventh Day Adventist, para 14.

³³¹Seventh Day Adventist, paras 14-15 & 20.

³³²Seventh Day Adventist, paras 19-20.

³³³Seventh Day Adventist, para 32.

³³⁴Seventh Day Adventist, para 33.

³³⁵Seventh Day Adventist, paras 35-39.

second aspect of the right to religion, which was subject to limitation.³³⁶ The Court, relying on the case of Nyakamba Gekara,³³⁷ states that legitimate limitation to the right to manifestation of religion may consist of ‘uniform policies at work or school, or requirement to work at certain times or carry out certain tasks’. The question to answer in the instant case was, therefore, whether failure of accommodation of the SDA students was reasonable and justifiable in a democratic society as per Article 24 of the Constitution.³³⁹

In responding to the above challenge, the Court relied on the principle of the best interest of the child that traverses both national and international children’s rights instruments, stating that in any decisions affecting children, the children’s best interest should be the paramount consideration. Analysing this principle in relation to the right to manifest religion, the Court relied on the Canadian case of *P v S 108 DLR (4th) 287* at 317, where it was held as follows:³⁴⁰

I am of the view, finally that there would be no infringement of the freedom of religion provided for in s. 2(a) were the Charter to apply to such orders when they are made in the child’s best interests. As the court has reiterated many times, freedom of religion, like any other freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child’s best interests, without thereby infringing the parents’ freedom of religion.

It thus held that, it was in the best interest of all students, including the SDA students, to receive an education, and this constituted a legitimate limitation to the right to manifest religion, especially in a school context.³⁴¹ In support of this position, the Court noted the importance of having a similar programme for all students in the attainment of equality, the achievement of high quality of education, good order, certainty and uniformity.³⁴² The Court further showed that the limitation was reasonable as the Interested Party had shown that they had made reasonable accommodation to allow the SDA students to hold their prayers from 11 a.m. on Saturday, and so they were still able to manifest their religion and obey the Sabbath.³⁴³

Having determined that the SDA students’ rights to manifest their religion was legitimately limited, the Court, however, noted the importance of the issues that were raised in the Petition and its inability to determine whether reasonable accommodation had been made in all schools as was the case with the Interested Party’s school. The Court thus, ordered the parties to engage in dialogue with the aim of coming up with appropriate regulations or directives describing how reasonable accommodation was to be made in all schools for the limited manifestation of the right to religion of SDA students throughout the Country, and that such regulations should also provide for administrative enforcement and complaint mechanism.³⁴⁴ This was an important intervention which ensured that SDA students were allowed to enjoy their right to manifest their religion to the extent possible in a school context, taking into account the primary objectives of schools which is the provision of education, as per the dictates of Article 20(2) of the Constitution which requires rights to be enjoyed ‘to the greatest extent consistent with the nature of the right’ in question.

This was a Godsend opportunity for the Kenyan Courts to develop local jurisprudence on limitation of rights in relation to Article 24 of the Constitution, especially in relation to the enumerated factors in that Article. Even though the Court relied on the Canadian case of *R v Jakes (1986) 26 DLR 4th Edition at 227*, in stating the proportionality test, it would have been more informative for the Court to deal specifically and systematically with the factors enumerated in Article 24, teasing out their content and how they interact with each other, and with the facts of the present case to reach the decision that the Court finally adopted. The Court should have determined whether there was a law of general application allowing for the limitation in question; whether the factors enumerated in Article 24 were to be read conjunctively or disjunctively; and whether any particular

³³⁶Seventh Day Adventist, paras 40-53

³³⁶Seventh Day Adventist, paras 53-55.

³³⁷Nyakamba Gekara v Attorney General & 2 others, High Court of Kenya, Constitutional and Human Rights Division, Petition No. 82 of 2012, [2013] eKLR.

³³⁸Seventh Day Adventist, paras 56-57 (emphasis on original document).

³³⁹Seventh Day Adventist, para 58.

³⁴⁰Seventh Day Adventist, para 62.

³⁴¹Seventh Day Adventist, paras 63 & 72-74.

³⁴²Seventh Day Adventist, paras 64-67.

³⁴³Seventh Day Adventist, paras 69-71.

³⁴⁴Seventh Day Adventist, para 77.

³⁴⁵S v Manamela and Another (Director-General of Justice Intervening) (CCT25/99), 2000 (3) SA 1, available at <http://www.saflii.org.za/za/cases/ZACC/2000/5.html>

factor carried more weight than the other factors in a proportionality analysis. Such analysis would have gone a long way in developing the limitation jurisprudence in the Kenyan context in relation to Article 24 of the Constitution as was done in the South African context by the Constitutional Court in the case of *S v Manamela and Another*.³⁴⁵

3.4 The right to be free from hunger; and to have adequate food of acceptable quality

Kenya is and has been a food deficient country for a long time, with perennial droughts affecting several parts of Kenya annually, especially the arid and semi-arid regions. These areas have always been reliant on food aid from governmental and non-governmental organisations, with the State failing to develop any comprehensive, sustainable and long-term plan of action to deal with the question. With the entrenchment of the right to food in the Constitution, it was hoped that the State will finally develop a comprehensive plan for food security not only for these areas, but for the country in general. It was also hoped that, the entrenchment of the right to food in the Constitution will provide the requisite advocacy tools for individuals, communities and groups to hold the government accountable for the improvement of the food security situation, especially through the courts. The question then is, how has the right to adequate food of acceptable quality been understood in Kenya and have the courts had an opportunity to enforce this right?

3.4.1 The normative provisions on the right to adequate food

The right to food was first expressly entrenched in the UDHR as an important component of the right to adequate standard of living.³⁴⁶ As an international binding legal right, the right to adequate food was first expressly enshrined in Article 11 of the ICESCR as an, integral component to the right to an adequate standard of living. Article 11 not only incorporates the right to adequate food, but also goes further to recognise the fundamental right of everyone to be free from hunger.³⁴⁷ Specific to children, the right to adequate food is envisaged in Article 24(2)(c) of the CRC which envisages it as a component of the right to health, and which encompasses the obligation of the State to take appropriate measures to combat, disease and malnutrition through the provision of adequate nutritious food and clean drinking water. The right to adequate food for specific groups is further entrenched in Articles 12(2) and 13 of CEDAW, and Article 28 of CRPD.

The right to adequate food is also recognised in the African Human Rights System as an implied legal right, though not expressly provided for in the African Charter. The right was derived from the right to life (Article 4), the right to dignity (Article 5), the right to health (Article 16), and the right to economic, social and cultural development (Article 22) by the African Commission in the case of *SERAC v Nigeria*.³⁴⁸ It is further recognised in the Protocol to the African Charter on the Rights of Women in Africa which, in making provision for the right to food security, affirms the obligation of the State to ensure that women have the right to adequate and nutritious food.³⁴⁹ In relation to children, the African Charter on the Rights and Welfare of the Child also recognises the right to adequate food within the right to health, requiring State Parties to ensure the provision of adequate nutrition and safe drinking water, as well as undertaking societal education with regard to child health and nutrition, advantages of breastfeeding, hygiene and environmental sanitation.³⁵⁰

In international law, the right to food has been defined as:³⁵¹

The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.

This definition captures all the relevant components of the right to food, which include accessibility of food either by

(accessed on 14 February 2014).

³⁴⁶UDHR, Article 25.

³⁴⁷ICESCR, Article 11 (2).

³⁴⁸Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001), para 64.

³⁴⁹Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005) Article 15, reprinted in C Heyns & M Killander (eds.) Compendium of key human rights documents of the African Union, 3rd edition (2007) 47, at 54.

³⁵⁰African Charter on the Rights and Welfare of the Child (1990/1999), Article 14 (c) & (h), reprinted in C Heyns & M Killander (eds.) Compendium of key human rights documents of the African Union, 3rd edition (2007) 62, at 66.

³⁵¹O de Schutter "The right to food" available at <http://www.srfood.org/index.php/en/right-to-food> (accessed on 5 January 2014). See also J Ziegler et al, The fight for the right to food: Lessons learned (2011) 15

³⁵²Ziegler et al (n 351 above) 16-18.

production or purchase, adequacy and safety of food, sustainability of food acquisition for present as well as future generations, cultural or consumer acceptability of available food, dietary sufficiency of food, and State accountability for the realisation of the right to food.³⁵²

3.4.2 Judicial adjudication of the right to adequate food

The Kenyan Courts have shown a propensity towards the protection of economic and social rights, acknowledging their competence to undertake adjudication relating to the right to food in the case of Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others.³⁵³ The case challenged the failure of the relevant governmental agencies taking the necessary fiscal, regulatory, good governance and other necessary steps to control, stabilise or reduce high fuel prices, leading to the high cost of subsistence goods and services, and thus violating the right to be free from hunger as well as the right to adequate food as enshrined in Article 43 of the Constitution and in the UDHR.³⁵⁴ In its determination of the case, the Court affirmed its jurisdiction to adjudicate economic and social rights by stating that:³⁵⁵

[I]t is not in dispute that the court has jurisdiction to determine whether there has been a violation of the economic and social rights set out in Article 43. The inclusion of the rights in the Bill of Rights, and the vesting of jurisdiction in the High Court under Article 165 to determine whether a right or fundamental freedom has been violated, is a clear indication of the intention by Kenyans to ensure social transformation through the protection of these rights.

Despite the willingness of the Court to entertain the case, the Petitioner failed to provide sufficient evidence linking the actions or omissions of the Respondents and the violations of the relevant economic and social rights, leading to the case being thrown out by the Court.³⁵⁶ This was a golden opportunity for the Court to expound on the right to adequate food in Kenya, but the opportunity was lost due to the poor litigation strategy by the Petitioner, leaving the Court to lament the laxity and the lack of seriousness with which public interest litigation of such fundamental importance was conducted. The Court stated as follows:³⁵⁷

It must be stated that in bringing matters such as this before the court, which have a critical bearing on the rights, lives and livelihoods of citizens, it is not enough to make bare statements with regard to the violation of rights without seriously addressing oneself to the manner in which the violations have occurred and the reasonableness or otherwise of the measures taken to avert or ameliorate their impact. At this nascent stage in the implementation of the new Constitution, parties in the position of the Petitioner, should they determine to take on cases which have a bearing on the public interest, must take them on with all due seriousness.

With the progressive thinking of the courts and their willingness to adjudicate the right to adequate food as indicated by the COFEK case above, it was hoped that more cases will be filed in the Courts for the vindication of the myriad violations of the right to food in Kenya. Sadly, there has been no other test case filed to enable the courts develop the content of the right to adequate food in Kenya and the obligations accruing to the State with the entrenchment of the right in the Constitution.

3.5 The right to clean and safe water in adequate quantities

3.5.1 Normative provisions on the right to water

Despite the important role water plays in the sustenance of life of all kinds of species, and in the realisation of other dependant fundamental rights such as, the right to the highest attainable standard of physical and mental health as well as, the rights related to an adequate standard of living as encapsulated in Articles 25 of the UDHR and 11 of the ICESCR, a right to water had not expressly been entrenched in an international legal instrument. Water is a scarce resource, and its sustainable management is key to the overall growth and development at the national and international level. The challenge of scarcity and the importance

³⁵²Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others, High Court Petition No. 88 of 2011 (COFEK case).

³⁵⁴COFEK case, pages 1-3. The Petitioner was seeking an order that the Respondents undertake requisite legislative, policy and other measures to control the rise in price of fuel and thus bring down the cost of living, at paras. 30 & 34.

³⁵⁵COFEK case, 4.

³⁵⁶COFEK case, 4-5.

³⁵⁷COFEK case, paras. 43-45.

³⁵⁸ICESCR General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and

of water thus calls for a rights-based approach to water management. A rights-based framework on the management of water has been developed by the CESCR in its General Comment Number 15, where the right to water is developed as a component of the right to an adequate standard of living under Article 11(1) of the ICESCR.³⁵⁸

According to the CESCR, the right to water entitles right-holders to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.³⁵⁹ The right to water contains both entitlements and freedoms, with the freedoms being the maintenance of access to existing water supplies and freedom from interference through contamination or arbitrary disconnections; while the entitlements include a system of water supply and management that engenders equality of opportunity in accessing water resources.³⁶⁰ For the right to water to be realised, water supply must be adequate to ensure human dignity, life and health, and the adequacy is determined by factors such as availability, accessibility (physical, economic and non-discriminatory) and quality of supply.³⁶¹ Like all the other fundamental rights, the right to water entails a continuum of the obligations of the State as understood within the tripartite obligations, which are to respect, protect and fulfil human rights.³⁶² The pronouncements of the CESCR on the right to water, have gained support at the international level with the UN General Assembly declaring in July 2010 'the right to a safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights'³⁶³ and the Human Rights Council also affirming the fundamental nature of the right to water.³⁶⁴ At the national level, the right to water has been entrenched as a fundamental constitutional right in section 27 of the 1996 South African Constitution, a Constitution that was informative in the drafting of the Constitution of Kenya, 2010.

In the Kenyan context, the right to water is provided for in Article 43(1)(d) which provides that, '[e]very person has the right to clean and safe water in adequate quantities'.

3.5.2 Judicial adjudication of the right to water

The right to water was litigated in the Muthurwa case as part of the measures that had been taken by the Kenya Railways Staff Benefits Authority to evict the residents of Muthurwa Estate. The Petitioners alleged that in disconnecting their water supply, demolishing their toilets and bathrooms, their right to water and adequate sanitation was violated by the Respondents.³⁶⁵ The Petitioners linked the violation of their right to clean and safe water in adequate quantities to their right to housing, contending that the disconnection of water to the Estate by the Petitioners amounted to wrongful eviction, as it was undertaken solely for the purpose of frustrating the Petitioners to force them to vacate their houses in the Estate.³⁶⁶ In stating their case on the right to water, the Petitioners, relying on comparative cases decided in other jurisdictions,³⁶⁷ argued that the entrenched right to water obliges the State to provide the basic amount of water necessary for survival with little or no compensation at all or that the State put in place subsidized tariffs for the poor, vulnerable and marginalised individuals and groups to enable them access adequate water for their survival.³⁶⁸

In its analysis of this segment of the Petitioners' case, the Court had recourse to international and comparative law. It acknowledged that, the right to water has been expressly provided for in CRC, CEDAW and CRPD, and has been implied in the ICESCR as per CESCR General Comment Number 15 and in the jurisprudence of the African Commission in relation to the African Charter.³⁶⁹ The General Comment provides that:³⁷⁰

Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11), para 3.

³⁵⁸CESCR General Comment No. 15, para 2.

³⁶⁰CESCR General Comment No. 15, para 10.

³⁶¹CESCR General Comment No. 15, paras 11-16.

³⁶²CESCR General Comment No. 15, paras 20-29 & 37-38.

³⁶³UN General Assembly, The human right to water and sanitation, Resolution adopted by the General Assembly on 28 July 2010, available at <http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E> (accessed on 17 February 2014).

³⁶⁴Human Rights Council, Human rights and access to safe drinking water and sanitation, Resolution 7/22, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf (accessed on 17 February 2014).

³⁶⁵Muthurwa ruling on merits, para 18.

³⁶⁶As above.

³⁶⁷Residents of Bon Vista Mansions v Southern Metropolitan Local Council (2002) (6) BCLR 625; Vishala Kochi Kudevella Samarkshana Samithi v State of Kerala (2006) (1) KLT 919.

³⁶⁸Muthurwa ruling on merits, para 18.

³⁶⁹Muthurwa ruling on merits, paras 94-95. The African Commission has implied the right to water from the right to the highest attainable state of physical and mental

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.

Further to these international normative provisions on the right to water, the Court acknowledged the importance of the direct incorporation of the right to water in the Constitution of Kenya, 2010 in Article 43(1)(d) as well as Article 56(e), which places an obligation on the State to put in place affirmative action measures to ensure reasonable access to water for minority and marginalised groups.³⁷¹ The Court, however, noted that the mere normative entrenchment of the right to water, without any subsequent affirmative action by the State to ensure the actual realisation of this right for poor, vulnerable and marginalised groups, was not enough.³⁷²

The Court affirmed its responsibility to comprehensively develop and elaborate on the normative content of the entrenched economic and social rights, especially the right to water, to give the State sufficient guidelines for the realisation of these rights.³⁷³ In its efforts to develop the content of the right to water, the Court relied on CESCR General Comment Number 15, which provides that ‘the right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.³⁷⁴ It further relied on the Indian case of Vishala Koch Kudivella Samarshana Samithi v State of Kerala 2006 (10) KLT 919, which affirmed the importance of the right to water as follows:³⁷⁵

We have no hesitation to hold that failure of the State to provide safe drinking water to citizens in adequate quantities would amount to a violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every government, which has it priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency.

Noting this importance of water, the Court was, however, constrained from making a positive finding of the violation of the water rights of the Petitioners, contending that the Petitioners had not made their case on this issue.³⁷⁶ The Court, however, noted that the legislative framework for water services in Kenya, the Kenya Water Act, was out-dated as it was enacted 8 years before the promulgation of the Constitution, and did not thus sufficiently provide for the right to water.³⁷⁷ The Court encouraged the State to adopt a more rights-based approach to water services, suggesting that the State should borrow from progressive jurisdictions, such as South Africa, which have enacted legislation requiring the procedural protection in instances of discontinuation of water services due to non-payment.³⁷⁸

There are disturbing inconsistencies in this case in relation to the obligations accruing to the State as a result of the entrenchment of the right to water. The Court fails to find that the Nairobi Water and Sewerage Company is a public body, it having monopoly for the provision of water services in Nairobi, as per the criteria enumerated in the Indian case of R.D Shetty v The International Airport Authority of Indian & Others (1979) 1 S.C.R. 1042, which the Court had relied on earlier to find the first and second Respondents as public bodies with constitutional obligations for the realisation of economic and social rights. The Court enumerated the Shetty criteria as follows:³⁷⁹

health in communications such as Free Legal Assistance Group and Others v Zaire Communications 25189; Centre for Rousing Rights and Evictions (COHRE) v Sudan Communication 296 of 2005; Centre for Minority Rights and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya Communication No.276 of 2003.

³⁷⁰CESCR General Comment No. 15, para 3.

³⁷¹Muthurwa ruling on merits, para 96.

³⁷²Muthurwa ruling on merits, para 97.

³⁷³As above.

³⁷⁴Muthurwa ruling on merits, para 98.

³⁷⁵As above.

³⁷⁶Muthurwa ruling on merits, para 99.

³⁷⁷Muthurwa ruling on merits, para 103.

³⁷⁸Muthurwa ruling on merits, para 102.

³⁷⁹Muthurwa ruling on merits, para 52.

³⁸⁰As above.

- A consideration of whether the share capital of the entity in question is held by the government;
- A consideration whether the entity relies on financial assistance from the government to meet almost its entire expenditure;
- Whether the entity enjoys monopoly status conferred by the State;
- Whether the entity has a deep and pervasive State control;
- Whether the functions of the entity are of public importance and are closely related to governmental functions;
- Whether the functions transferred to the entity were services previously provided by a department of government.

The Shetty Court held that, should an entity be found to be a public body using the above criteria, which are to be applied disjunctively, then that entity should be deemed as a State Agency subject to the constitutional obligations of the State to respect, protect, promote and fulfil human rights.³⁸⁰ The Muthurwa Court further relied on Section 3(1) of the Interpretation and General Provisions Act, (Cap 2), which defines a public body as follows:

[A]ny authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature.

Taking the above into account, it would have been more logical and more consistent for the Court, to hold the Nairobi Water and Sewerage Company as a public body as it exercised a function of public nature and public importance that had previously been provided by a government department, had a monopoly status conferred by the State through the Water Act and had a pervasive State control of its functions. Should the Court have found that the Water company was an agent of the State, it would have held that it was under an obligation to observe, respect, protect, promote and fulfil the rights entrenched in the Constitution as per Articles 2(1), 19(3), 20(1) and 21(1) of the Constitution.³⁸¹

Instead of adopting its own progressive reasoning as documented above, the Court instead reverted to neo-liberal thinking which glorifies commodification, commercialisation and privatisation of water, leading to the undermining of the substantive entitlements to water for the poor and vulnerable groups, contrary to the content of the right to water as detailed in the case. This is apparent in the Court's reading of the Water Act, section 57(5)(d) requiring municipalities to operate water services on business and corporate lines embracing the recovery of full costs and the making of profits, and that the failure of the Petitioners to pay thus necessarily called for disconnection.³⁸² The Court went ahead to argue as follows:³⁸³

[T]he water supply system as I understand it, demands for payment of a fee to access water. The Petitioners cannot fail to pay for that supply and now be heard to complain about their denial of water when somehow they accepted for the years that they have been tenants that it is their contractual obligation to pay for consumption of water. This is the system in place and much as I am sympathetic of the Petitioners' situation generally this Courts' hands are tied.

Taking into account the development clause in Article 20(3) of the Constitution, which calls on the courts to develop the law to the extent that it does not give effect to a right or fundamental freedom, the helpless approach adopted by the Muthurwa Court is lamentable. It is felt that, as the guardians of the Constitution and the main protectors of fundamental rights, the Muthurwa Court should have adopted a more firmer approach to the right to water, taking into account the values of human dignity, equality and freedom that animate the entire constitutional project to injunct the government to, reform its laws in relation to water so as to ensure the realisation of the right for the poor, vulnerable and marginalised individuals, groups and communities in Kenya. The request to the State to 'consider amendments to the Water Services Act of 2002 to bring it in line with the expectations of Article 43(1) (d) of the Constitution 2010'³⁸⁴ is felt to be too soft and too lenient a remedy considering the important function that water plays in the realisation of other fundamental rights such as the right to life, human dignity, health and food.

³⁸¹See Muthurwa ruling on merits, paras 55-59.

³⁸²Muthurwa ruling on merits, para 100.

³⁸³As above.

³⁸⁴Muthurwa ruling on merits, para 111(b).

4. Conclusion

The promulgation of a new Constitution in 2010 and the entrenchment therein of justiciable economic and social rights, together with the prominent place of the Courts in the protection and promotion of human rights in the new constitutional dispensation, elicited hopes that Kenya was finally taking a root towards egalitarian transformation and the realisation of substantive equality. Almost five years since the promulgation of the Constitution, progress is apparent in the economic and social rights jurisprudence emanating from the Kenyan Courts, especially at the level of the High Court. This study undertook a brief analysis of some of the cases that have been decided by the Kenyan Courts on economic and social rights entrenched in Article 43 of the Constitution of Kenya, 2010. The jurisprudence indicates a slow but a sure progression towards the protection of economic and social rights, with some specific courts showing more propensity towards an enhanced realisation of economic and social rights as fundamental rights despite the, challenges of the standard of progressive realisation, while other more conservative courts struggling to accept that economic and social rights are rights. Progress is especially apparent in relation to housing rights, in relation to the protection from forced evictions. Despite the difficult start in the Charo case, the jurisprudence has steadily developed through the Waithera judgment, the Songor Osman case, the Mitu-Bell case and culminating in the merits ruling of the Satrose Ayuma (Muthurwa) case. Progression in the development of the jurisprudence in eviction cases, and the propensity of the courts to rely on international and comparative law, can be predicated on the reality of the high number of illegal and forced evictions being undertaken in Kenya and the adverse impact these evictions have on the lives, properties and well-being of those affected by the evictions. Due to the reality that evictions lead to the violation of several fundamental rights of evicted persons, the courts have been more ready to balance housing rights vis-à-vis property rights to ensure that, procedural protection is provided to squatters or people living in informal settlements in instances where evictions cannot be avoided. In their decision in these evictions cases, the courts have been consistent in calling for the enactment of a legislative framework and the development of guidelines on evictions, as well as the development of a legislative, policy and programmatic framework for the provision of housing rights to all Kenyans.

The other economic and social rights have not been subjected to a continuous litigation and the courts have thus not had an opportunity to develop a clear jurisprudence on the same. In few instances where petitions have been filed in court, the litigators have not litigated the cases with due seriousness, leading to those cases being thrown out of court, with adverse consequences for the specific persons whose rights had been violated as well as other similarly placed individuals. It is recommended that economic and social rights litigators undertake cooperative and coordinated litigation on economic and social rights cases, especially at this nascent stage when the courts are still developing the basic jurisprudential framework for the judicial protection of economic and social rights, to ensure that sufficient research and preparation is undertaken, and adequate litigational rigour is applied in the litigation of such cases.

