

Evictions in Kenya: Which way under The New Constitution and The Land Laws (Amendment) Act 2016?

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Abstract

Previously, Kenya had no legal framework governing eviction of people from certain parcels of land. Evictions then were characterized by inadequate, unreasonable or no eviction notices, violence, force and human rights violations. This led to local, national and international criticism against the way in which forced evictions were carried out leading to loss of lives, loss of property, family break-ups and homelessness calling for the need to enact a legislative framework on evictions. The promulgation of the 2010 Constitution of Kenya (Constitution) is heralded as a great step towards protecting affected persons during evictions. The Constitution not only protects the civil and political rights of the people, but for the first time, recognizes social - economic rights, including the right to adequate housing and the direct application of general rules of international law, treaties and conventions ratified by Kenya as part of Kenyan law. In addition to the Constitution, and in heeding to the call to enact a legislative framework on evictions, the Land Laws (Amendment) Act, 2016 was enacted bringing forth radical changes on the law governing evictions in Kenya. The Land Laws (Amendment) Act, 2016 makes key amendments to the Land Act 2012, Land Registration Act 2012 (LRA) and the National Land Commission Act 2012 (NLC Act). This paper analyses and critically interrogates evictions under the Constitution and the Land Laws (Amendment) Act 2016.

1. Evictions in Kenya: Brief background

Eviction is the act of removing a person from a property on the ground that they have occupied the said land illegally. The Land Laws (Amendment) Act 2016 and Section 2 of the LRA defines eviction as, the 'act of depriving or removing a person from the possession of land or property which they hold unlawfully either executed upon a successful law suit or otherwise'. The evicted person must be an unlawful occupier. The 2012 Evictions and Resettlement Bill defined an unlawful occupier as, 'a person who takes possession of land or structures without the tacit consent of the owner or without any right in law to take possession of such land or structure'.¹

An eviction of unlawful occupier in itself is geared towards protecting the rights of a lawful owner from an unlawful occupier who has no proprietary interest in the subject property. Where the unlawful occupier refuses to willingly vacate a property after being served with an eviction notice, then he can be removed against his will. This is known as forced eviction. Forced eviction is:

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¹ Government of Kenya, *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (Ministry of Land 2010), s 2.

*The permanent or temporary removal against the will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.*²

Forced evictions in Kenya has not only attracted domestic condemnation, the international community has expressed its concern in the manner in which the forced evictions are carried out in an inhumane manner.³ Evictions in Kenya are largely caused by: conflicts over land; non-payment of land and house rents; and urban development or redevelopment.⁴ Forced evictions are normally caused by various and often complex but interconnected factors such as:

- a) Tenure insecurity;
- b) Development and infrastructural projects;
- c) Environmental concerns;
- d) Large international events, e.g. Olympic Games or World Cup or international conferences;
- e) Urban redevelopment and beautification initiatives;
- f) Property market forces and gentrification;
- g) Absence of state support for the poor;
- h) Political conflict, ethnic cleansing and war; or
- i) Planning initiatives; Discovery and extraction of natural resources, amongst others.⁵

The first recorded eviction in Kenya happened in 1904 when the colonial government razed an Indian bazaar in embryonic Nairobi on the grounds that it posed a health hazard. Since then, a number of evictions with adverse effects such as loss of life, property, human rights violations and homelessness has continued to occur in Kenya invoking local, national and international condemnation.⁶ Where eviction is politically motivated, it leads to tribal animosity against the government. Economically, unlawful evictions lead to loss of livelihood and employment.

² UNGA, The Right to Adequate Housing (Article 11.1): Forced Evictions General Comment No. 7 20/5/97

³ Kefa M Otiso, 'Forced Evictions in Kenya's Cities' (2003) Singapore Journal of Tropical Geography 251

⁴ Kenya National Human Rights Commission (KNHRC), *Nowhere to Go: Forced Evictions in Mau Forest, Kenya* (KNHRC 2007).

⁵ Government of Kenya, *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (Ministry of Land 2010).

⁶ Laurence Juma, 'Nothing But a Mass Of Debris: Urban Evictions And The Right Of Access To Adequate Housing In Kenya' Africa Human Rights Journal 470.

Majority of evictions in Kenya have been geared against informal settlements by the government to pave way for public use of the land. Since the 1990s, evictions of people living in informal settlements and demolitions has been on the rise. In 2004, the government announced mass evictions of people living in informal settlements on the ground that they were illegally situated on public land (rail reserves or areas under electrical power lines) or on land reserved for future road-construction'.⁷

Following this directive, 'Raila Village' in Kibera was the first informal settlement to be demolished and residents evicted affecting approximately 200 and 500 people from the neighbouring Soweto slum.⁸ The government demolished schools, churches, clinics and houses without any redress mechanism in place. This attracted local, national and international criticism. Between 2004 and 2006 alone, the government carried out evictions in Majengo slums, Mukuru Ward, Ndundori in Lanet, Kibagare Uthiru Estate, Deep Sea Settlement in Westlands, Tudor Estate in Mombasa and Komora Slum.⁹

These evictions were done without following the established international norms on evictions that obligate governments to provide the affected persons with adequate and reasonable notice, genuine consultation, information on the proposed evictions and adequate housing or resettlement. There was no legislative framework on evictions and the general rules of international laws, treaties and conventions ratified by Kenya did not have a direct application in Kenya then. For instance, during the Komora Slum eviction, without any warning, the police set fire on shelters and bulldozed them.¹⁰ The eviction was to pave way for a private developer who had acquired the land. The over 600 corrugated iron sheets shacks were demolished as early as 6.30 am when the residents were still sleeping. They were only given 10 minutes to vacate. They were not given adequate time to remove their household goods which were burnt during the demolition. Apart from leaving the residents homeless, they could not salvage their property.

Most of the informal settlement dwellers are subject to abject poverty. Forced evictions without giving them alternative accommodation or settlement exacerbates their poor living conditions. In most of the cases, these are persons who have lived on the said land for a long

⁷ 'Forced Evictions 2003-2006' <https://sarpn.org/documents/d0002751/3-Forced_evictions_COHRE_Dec2006.pdf> accessed 16 May 2005.

⁸ Society for Threatened People, 'Campaign Against Forced Evictions in the Informal Settlements in Nairobi' <http://www.gfbv.it/3dossier/africa/nairob-en.html> accessed 16 May 2018.

⁹ Centre on Housing Rights and Evictions (COHRE), 'Listening to the Poor: Housing Rights in Nairobi, Kenya, (COHRE 2005) 38-40.

¹⁰ Fred Mukinda, 'Police Pull Down City Slum' <https://www.nation.co.ke/news/1056-142382-mcyomuz/index.html> accessed 16 May 2018.

period of time without any alternative place to call home.¹¹ Even in cases where lawful evictions are carried out, informed by public interest and public policy, it is a requirement that these evictions be done in a humane manner.

In addition to forced evictions in informal settlements, the government has also carried out evictions of people living in forests for the purpose of conserving and protecting the environment. Forest evictions have occurred in Mau forest,¹² Embobut Forest,¹³ Surura Forest, Mt. Elgon Forest, Karuri Forest etc. These evictions have been characterized with violence, destruction of property and schools and without any adequate resettlement and protection of the rights of the indigenous communities like the Ogiek. In most of the forest evictions, the government officers usually burn homes, schools and destroy property without according the affected persons the opportunity to salvage their property. Even in cases where the government offers alternative settlements, in many cases, the affected persons are not consulted. For instance, in 2003 residents of informal settlements in Karuri Forest were given alternative land in the Sirimon Settlement scheme. However, they refused to leave on the ground that the area was already inhabited and was not fertile. In 2005, they were evicted from Karuri forest anyway and their homes burnt down. In January 2006, despite the government evicting more than 3000 residents from Mt. Elgon Forest, it blocked any attempts by volunteers to provide food to the evictees.¹⁴

1.2 Evictions in The New Constitutional dispensation

The promulgation of the Constitution heralded a new regime in governance and democracy in Kenya. The Constitution entrenches an expansive Bill of Rights, protects land ownership and establishes the NLC with the mandate of managing public land on behalf of the national and county government.¹⁵ In its Preamble, the Constitution provides that it is committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. It is imperative that even when forced evictions occur, the Constitution mandates the government to take into consideration the well-being of those evicted.

Even though the Constitution provides for expansive Bill of Rights, it does not have a provision relating to evictions. Unlike the Kenyan Constitution, the South African

¹¹ Peter Kavavi Mwangangi, *Elections Related Evictions in Urban Slums: The Case of Mukuru Kwa Njenga Nairobi 1991-2013* (Masters Degree Thesis, University of Nairobi 2017)

¹² Matt Brown, 'Thousands of illegal settlers evicted from Kenyan forest' <<https://www.thenational.ae/world/africa/thousands-of-illegal-settlers-evicted-from-kenyan-forest-1.508063?videoId=5602327752001>> accessed 16 May 2018.

¹³ Forest People's Programm, 'Kenya Defies its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from their Ancestral Lands' (22nd January 2014) <https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their> accessed 16 May 2018.

¹⁴ COHRE and Hakijamii Trust, 'Forest Evictions: A Way Forward?' Kenya Housing Rights Update (Aug. 2006).

¹⁵ CoK 2010, Chapter Five.

Constitution under Section 26 explicitly prohibits forced evictions in the absence of a court order after taking into consideration all the relevant circumstances. Article 26 of the South African Constitution in protecting the right to adequate housing to South Africans provides that:

- (1) *Everyone has the right to have access to adequate housing.*
- (2) *The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.*
- (3) **No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. (Emphasis Added.)**

In invoking Section 26(3) of the South African Constitution, the Court in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁶ affirmed that any lawful evictions must be carried out in a humane manner and in accordance with the values of the Constitution. The court held as follows:

The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

To implement the Constitutional provisions on eviction, the South African Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 was enacted. Despite the lack of a constitutional provision on evictions in Kenya, victims of evictions after the promulgation of the Constitution have approached the Court seeking redress and invoking Constitutional provisions on human rights, applications of international principles and implementation of the Constitution. In a number of case law emerging after the promulgation of the Constitution, the Courts have affirmed that any eviction must abide by the rule of law and principles as anchored in the CoK.¹⁷ In so doing, the Courts have invoked the application of the general rules of international law, human rights provisions and the principles enshrined in the Constitution to protect the people who have been evicted or are about to be evicted.

¹⁶ (CCT11/00) [2000] ZACC 19.

¹⁷ *Joseph Letuya & 21 others v Attorney General & 5 others*, Environment and Land Court Civil Suit No. 821 Of 2012 (OS), ELC at Nairobi [2014] eKLR.

a) Article 2(5) and (6) of the Constitution of Kenya

Unlike the 1963 Independence Constitution, the 2010 Constitution under Article 2(5) and (6) recognizes the application of the general rules of international law, treaties and conventions ratified by Kenya to be part of the Kenyan law. In the absence of a legal framework on evictions, the Courts have invoked international treaties, guidelines and conventions ratified by Kenya. In the case of *Kepha Omondi Onjuro & others -v-Attorney General & 5 others*,¹⁸ the High Court held as follows:

“...it is imperative at this juncture to appreciate that there is no legal framework existing in Kenya guiding evictions and demolitions.... However, Article 2 (5) and (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya is part of the law of Kenya...”

Similarly, in the *Mitubell Welfare Society v Attorney General and Others* (Mitubell Case) the Court held that:

*This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of the Constitution make the general rules of international law and any treaty or convention that Kenya has ratified part of the laws of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the **United Nations Guidelines on Evictions as enunciated by The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 “The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments).**¹⁹*

In recognizing the application of international law, the Courts have invoked the application of the UN Covenant on Economic, Social and Cultural Rights (CESCR), General Comment No. 7, ‘The Right to Adequate Housing (Art.11.1): Forced Evictions’.²⁰ This general comment requires that the State must in itself refrain from forced evictions. While the General Comment No. 7 on the right to adequate housing requires the State to refrain from forced evictions, this does not imply that any person can occupy land unlawfully. In this case, where the unlawful occupier refuses to move out, an eviction is necessary and legal.

¹⁸ Petition Number 239 f 2014, High Court at Nairobi (2015) eKLR para 53.

¹⁹ Petition No. 164 of 2011, High Court at Nairobi Constitutional and Judicial Review Division [2013] eKL

²⁰ UNGA, The Right to Adequate Housing (Article 11.1): Forced Evictions General Comment No. 7 20/5/97

However, even when a forceful eviction is justified, it must be carried out in strict compliance with the law and in a humane manner.

In the case of *Symon Gatutu Kimamo & 587 others V East African Portland Cement Co. Ltd*²¹ the Court, while relying on the UN General Comment No. 7 on the Right to Adequate Housing affirmed that: 'the prohibition of forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Human Rights Covenants'.²² The UN General Comment No. 7 provides for the procedural protection and due process to be followed during forced evictions which include:

- a) an opportunity for genuine consultation with those affected;
- b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- e) all persons carrying out the eviction to be properly identified;
- f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- g) provision of legal remedies; and
- h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.²³

In invoking Article 2(5) and (6) of the Constitution, victims of forceful evictions have also sought to rely on the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (UN Eviction Guidelines)*.²⁴ The UN Eviction Guidelines require the State to ensure that evictions only occur in exceptional circumstances and any eviction must be:

- (a) Authorized by law;
- (b) Carried out in accordance with international human rights law;
- (c) Undertaken solely for the purpose of promoting the general welfare;
- (d) Reasonable and proportional;

²¹ [2011] eKLR.

²² Ibid Para 52-53.

²³ Ibid Para 15.

²⁴ UNGA, *UN Basic Principles and Guidelines on Development based Eviction and Displacement*, A/HRC/4/18 http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf

- (e) Regulated so as to ensure full and fair compensation and rehabilitation; and
- (f) Carried out in accordance with the present guidelines.²⁵

During evictions, the UN Guidelines on Eviction paragraph 45-51 explicitly provide that:

*The procedural requirements for ensuring respect for human rights standards include the mandatory presence of governmental officials or their representatives on site during evictions. Evictions shall not be carried out in a manner that violates the dignity and human rights to life and security of those affected. States must also take steps to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected. Evictions must not take place in inclement weather, at night, during festivals or religious holidays, prior to elections or during or just prior to school examinations. States and their agents must take steps to ensure that no one is subject to direct or indiscriminate attacks or other acts of violence.*²⁶

In the case of *Susan Waithera Kariuki & 4 Others v The Town Clerk, Nairobi City Council* (*Susan Waithera Case*), the Court noted that the Nairobi City Council carried out evictions at night in contravention with the UN Eviction Guidelines.²⁷ In the *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* (*Satrose Ayuma Case*), the Petitioners alleged that the eviction notice was issued in the middle of a school year and subsequently affected accessibility of school going children to education and increased drop-outs in violation of the right to education as enshrined under Article 43 of the Constitution.²⁸ The Court, while relying on the UN Guidelines on Evictions and General Comment No. 7 on the Right to Adequate Housing found that indeed the demolitions were carried out in the wee hours and in the middle of the school term in contravention of the said laws and the rights of children.²⁹

b. International Human Rights

It is required that in the case of forced evictions, this must not only be done in compliance with the law but also in a humane manner respecting the fundamental human rights of the affected persons.³⁰ The UN HABITAT has categorically stated that:

²⁵ Section 21.

²⁶ Housing and Land Rights Network and Youth for Unity and Voluntary Action, *Handbook on United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement* http://www.hic-sarp.org/documents/Handbook%20on%20UN%20Guidelines_2011.pdf accessed 18 May 2018.

²⁷ Petition No 66 of 2010, High Court at Nairobi [2013] eKLR.

²⁸ *Satrose Ayuma Case* para 20.

²⁹ *Ibid* para 105.

³⁰ MR Salim and Ndungu wa Mungai, 'Forced Eviction in Bangladesh: A Human Rights Issue' (2016) 59(4) *Sage Journals* 1; Sean Romero, 'Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe' (2007) 5(2) *Northwestern Journal of International Human Rights* 275.

The international community has repeatedly stated that forced evictions are a gross violation of human rights, in particular the right to adequate housing. This statement recognizes that human rights are interdependent, indivisible and interrelated. In addition to being a violation of the prohibition on arbitrary or unlawful interference with the home, forced evictions all too often result in other severe human rights violations, particularly when they are accompanied by forced relocation or homelessness. For instance, if no adequate alternative housing is provided, victims of forced evictions are put in life and health threatening situations and often lose access to food, education, health care, employment and other livelihood opportunities. Indeed, forced evictions often result in losing the means to produce or otherwise acquire food or in children's schooling being interrupted or completely stopped.³¹

Kenya has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) that seek to protect the fundamental rights of persons. The Courts have relied on Article 2(5) and (6) of the Constitution in calling upon the State to protect the human rights of those affected during forced evictions. Article 17 of the ICCPR prohibits forced evictions. It provides that:

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

When the Constitution was promulgated many Kenyans approached the Courts to protect and enhance their human rights.³² Initially, Kenyans had lacked confidence in the judiciary.³³ However the promulgation of the Constitution gave them a new hope and expectations. In regard to forced evictions, the affected persons have approached the Court on the ground that their human rights have been violated during the evictions and asked the Courts to make appropriate orders or grant them redress. Indeed, every person has the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated, infringed or threatened.³⁴ If the Court finds that such a right has been infringed then, Article 23(3) of the CoK mandates it to grant appropriate reliefs including a declaration of rights, an injunction, conservatory order, compensation or judicial review.

³¹ UN HABITAT, *Forced Evictions* (Fact Sheet No.

25/Rev.1) <<http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf>> accessed 18 May 2018.

³² Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Inaugural Distinguished Lecture Series, University of Fort Hare 2014).

³³ Government of Kenya, *Final Report of the Taskforce on Judicial Reforms* (Government Printer 2010)106-107.

<http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf> accessed 26 February 2018.

³⁴ CoK 2010, Art 22.

In protecting affected persons during evictions, the following human rights have been considered as fundamental:

- a) The right to inherent human dignity, Article 28;
- b) The security of the person guaranteed by articles 29 (c), (d) and f;
- c) Access to information, Article 35;
- d) Equality and freedom from discrimination, Article 27;
- e) Privacy, Article 31;
- f) Protection of right to property, Article 40;
- g) Right to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean safe water under Article 43;
- h) Fair administrative action, Article 47;
- i) Rights to physical and mental health, and the fundamental right to physical and moral health of the family under articles 16 and 18 of the ACHPR read with article 2 (6) of the Constitution of Kenya 2010;
- j) rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53 (1) (b), (c), (d) and (2) read together with article 21 (3) of the Constitution of Kenya 2010 and article 28 of the ACHPR; and
- k) respect and freedom from abuse and to receive reasonable care and assistance from the State guaranteed by article 57 (b) and (c).

The Courts have relied on the above provisions of the Constitution in ensuring that evictions are carried out in a humane manner and protect the fundamental rights of those affected by evictions. In this regard, the recognition and protection of socio-economic rights and in particular the right to housing, has been invoked by those affected by evictions requesting the Courts to protect their rights to housing. In the *Satrose Ayuma case*, while the Court recognized the need to develop guidelines on evictions in Kenya, it affirmed the need to protect the right to adequate housing during forced evictions: The court held as follows:

At some particular point in time the tenants will have to move out of the estate but when that time comes, that ought to be done in a humane manner. The challenge of providing accessible and adequate housing as required under Article 43(b) of the Constitution is all evident. The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto.³⁵

³⁵ Ibid para 86.

The need to protect and enhance the right to adequate housing has been recognized as fundamental during forced evictions in South Africa. In the case of *Tswelopele Non-Profit Organization & Others v City of Tshwane Metropolitan Municipality*,³⁶ the Court held that forced eviction is a violation of the right to have access to adequate housing as enshrined in article 26 (1) of the Constitution of the Republic of South Africa. The Court went further to state that in such a case, the proper remedy was the resolution of the *status quo ante* and ordered that the occupiers must get their shelters back and that the Respondents should, jointly and severally, be ordered to reconstruct them.

The Constitution further protects the rights of the indigenous communities during forced evictions. Article 56 of the Constitution requires the State to put in place affirmative action programmes to protect the rights of the minorities and marginalized groups. Article 63(d) of the Constitution further recognizes ancestral lands and lands traditionally occupied by the hunter-gatherer community as community land. However, despite the recognition of community held land in the Constitution, we have witnessed a number of forced evictions of indigenous communities from their ancestral land in contravention with the law. In an endeavor to protect and conserve the environment, the government has undertaken a number of forced evictions in designated and protected areas. However, human rights organizations have since the promulgation of the Constitution criticized the government's forced evictions of indigenous communities as an ineffective approach to bio-diversity.³⁷

In 2014, the KFS carried out forced evictions of the Sengwer community from the Embobut forest despite a Court injunction from the Eldoret High Court in the case of *David Kiptum Yaror & 2 others v Attorney General & 4 others*,³⁸ prohibiting the Kenya Forest Service from carrying out forced evictions and burning homes of the Sengwer people. The Sengwer is an indigenous and marginalized ethnic group of hunter-gatherers. They have lived in the Cherangany Hills for centuries, and Embobut forest is their ancestral and communal land. In January 2014, the KFS and police officers forcefully evicted the community from Embobut forest using force, including the use of live bullets, and burnt houses of the members of the Sengwer community despite a court order restraining such an eviction. The eviction led to a violation of socio-economic rights,³⁹ rights of children,⁴⁰ cultural rights,⁴¹ ancestral land,

³⁶ 2007 SCA 70 (RSA).

³⁷ KNHRC, 'The Truth About Embobut Forest Evictions and A Way Forward' (Press Release 21 February 2014) <<https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/395-the-truth-about-embobut-forest-evictions-and-a-way-forward.html>> accessed 16 May 2018.

³⁸ Environment and Land Court Petition 15 of 2013(Formerly Petition 6 of 2013), ELC at Eldoret [2015] eKLR.

³⁹ This included the right to adequate housing, health, food and water.

⁴⁰ The right to shelter, education and freedom from violence.

⁴¹ The Embobut forest does not only provide a source of livelihood to the Sengwer community, it also contains their shrines and is integral to the community life.

personal security,⁴² property rights,⁴³ and human dignity⁴⁴ of the Sengwer community. In its defence, the government argued that it had granted the members of the Sengwer community KShs. 400,000 as compensation to vacate the forest. However, to the majority of the Sengwer community members, they were not ready to vacate their ancestral land and argued that the government had not consulted. In this regard, the need for the government in carrying out forced evictions of indigenous community can only be effective if they engage the said communities and abide by the Constitution and the legal framework in place. The government, in ignoring court orders as was the case in the eviction of the Sengwer community, exacerbates the situation and should be held liable for violating the community's fundamental rights.

Despite the constitutional provisions, evictions in Kenya continued to be characterized with human rights violations. On the other hand, courts continued to implore Parliament to enact a law on evictions. This was informed by the widespread evictions coupled with lack of compensation and inadequate notice. In the *Satrose Ayuma* case, the court stated as follows:

*I must lament the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands. Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. I believe time is now ripe for the development of eviction laws.*⁴⁵

Lenaola J (as he was then) therefore directed the government in consultation with other stakeholders to formulate laws on eviction. He stated as follows:

It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions may be carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in

⁴² Article 29 of the Constitution grants every person the freedom and security of person which includes the right not to be subjected to any form of violence, torture, treated or punished in a cruel, inhuman and degrading manner.

⁴³ CoK 2010, Art 40.

⁴⁴ CoK 2010, Art 28.

⁴⁵ Para 109.

*close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution.*⁴⁶

The UN Economic and Social Council expressed concerns over forced evictions in Kenya.⁴⁷ On 6th April 2016, the United Nation Economic and Social Council made an observation that:

The Committee reiterates its concerns that pastoralist communities and persons living in informal settlements are under constant threat of eviction due to the **lack of legal security of tenure** and that **forced evictions** continue **without prior notice** and **provision of adequate alternative housing or compensation**. It is also concerned that the State party **has not yet enacted a legislative framework** to recognize and protect communities' right to land and **to explicitly prohibit forced evictions and define the circumstances and safeguards subject to which evictions may be carried out**, despite the decisions of its own domestic courts.⁴⁸ (Emphasis added).

The Committee then recommended that:

...the State party **take concrete steps to guarantee security of tenure** for all, including residents of informal settlements. It also recommends that the State party **prioritize the enactment of the Community Land Bill and the Evictions and Resettlement Bill**. The Committee further recommends that the State party **implement judicial orders that provide remedies to victims of forced evictions** as a matter of priority and **adopt a moratorium on mass evictions at the national level** until adequate legal and procedural safeguards are in place.⁴⁹ (Emphasis added).

Following the call for a legislative framework on evictions, in 2016, the Land Laws (Amendment) Act was enacted.

1.3 Evictions under the Land Laws (Amendment) Act 2016

On 21st September 2016, the Land Laws (Amendment) Act 2016, came into force following the presidential assent of the Act on 31st August 2016. The Land Laws (Amendment) Act 2016 brings forth radical changes to the eviction regime in Kenya as it makes key amendments to the Land Act 2012, the Land Registration Act 2012 and the National Land Commission Act 2012. Before the enactment of the Land Laws (Amendment) Act 2016 and the promulgation of the Constitution of Kenya (Constitution), there was no legal framework

⁴⁶Ibid.

⁴⁷ United Nations Economic and Social Council, *Concluding Observations on the Combined Second to Fifth Periodic Reports of Kenya* E/C.12/KEN/CO/2-5 6th April 2016.

⁴⁸ Ibid Para 47.

⁴⁹ Ibid Para 48.

governing evictions in Kenya. Before the Land Laws (Amendment) came into force, there was a Bill titled “The Evictions and Resettlement Bill 2012” that was pending in Parliament.

1.3.1 The Evictions and Resettlement Bill 2012: Brief Overview

The Evictions and Resettlement Bill, 2012 sought to set out appropriate procedures applicable to forced evictions; to provide protection, prevention and redress against forced eviction for all persons occupying land including squatters and unlawful occupiers. It defined forced eviction as:

...the permanent or temporary removal of persons, squatters or unlawful occupiers of land from their home or land which they occupy against their will without the provision of access to appropriate forms of legal or other protection.⁵⁰

The Bill further defined unlawful occupier as a person who takes possession of land or structures without the tacit consent of the owner or without any right in law to take possession of such land or structure.⁵¹ A squatter was defined as: a person who has occupied land without the express or tacit consent of the owner or person in charge for a continuous period of at least six years without any right in law to occupy such land and that person does not have sufficient income to purchase or lease alternative land.⁵² The Bill was not expected to apply to squatters as defined in the Bill or to any dispute relating to the occupation of landlord and tenant agreement, notwithstanding that such agreement are written or unwritten.⁵³ However, the Bill had explicit provisions on the procedure to be followed prior to evictions and during evictions.

a) Procedure prior to eviction

The Bill prohibited forced eviction unless a court order had been granted authorizing such an eviction and in accordance with the procedures as set out in Section 8 of the Bill.⁵⁴ If a person evicted another person without a court order, this would be a criminal offence liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding two years, or both.⁵⁵ The Bill further envisaged the procedure to be taken prior to the eviction. These included consultation; adequate and reasonable notice of not less than three months; an environment assessment test; and legal redress.

The eviction notice contemplated in the Bill was to be in writing, and contain adequate information on the reasons for occupation and alternative purpose for which the suit

⁵⁰ Government of Kenya, *The Evictions and Resettlement Bill 2012* (Government Printers 2012) s 2.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid* s 3.

⁵⁴ *Ibid* s 3 and 8.

⁵⁵ *Ibid* s 5.

property in question is to be used and advertised in the local media or public Barazas.⁵⁶ The essence of this provision was to curb forced evictions on short or no notices and without giving the affected persons the chance to look for alternative land.

To enhance public participation, the Bill called for the need for reasonable consultations through public hearings with affected persons or duly appointed representatives.⁵⁷ The Human Rights Committee on its concluding observations on forced evictions in Kenya has recognized the need to have meaningful consultations with affected persons prior to any evictions.⁵⁸ During such consultations, the affected persons must be provided with adequate information on the said evictions and any alternative recourse discussed. The UN Guidelines on Eviction requires that prior to evictions and 'during the planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and the vulnerable and marginalized groups, and, when necessary, through the adoption of special measures or procedures'.⁵⁹ Prior to carrying out the evictions, the Bill also required that special attention be given to special interest groups including people with disabilities, the elderly, youth, women and children and persons living with HIV/ AIDS.

b) Procedure during eviction

The Bill contemplated that the eviction must be undertaken in strict compliance with the law. It provided for the following procedure:

- a) twenty-one days' notice shall be given to the affected persons and the notice shall clearly state the modalities, day and time of the forced eviction;
- b) full details of the proposed alternative, if any, shall be given to the occupiers of the land;
- c) where no alternatives exist, a detailed explanation of all measures taken to minimize the adverse effects of evictions shall be given;
- d) holding of public hearing with affected persons and other stakeholders to provide an opportunity to discuss alternative proposals for resettlement shall be done.

Where there is a stalemate or dispute, the Bill required that a person proposing to carry out the forced eviction must provide an opportunity to all the affected persons to seek legal address. The decision for the eviction was to be in a language understood by the affected persons.

⁵⁶ Ibid S 6.

⁵⁷ Ibid.

⁵⁸ Human Rights Committee, concluding observations on the second periodic report of Kenya, CCPR/CO/83/KEN, para. 22.

⁵⁹ UN Eviction Guidelines Para 38.

c) The mandatory requirements during the evictions

Section 11 of the Eviction and Resettlement Bill further set out the mandatory requirements that were to be followed during the evictions which included that all evictions:

- (a) be done in the presence of county government officials or their representatives;*
- (b) be preceded by the proper identification of those taking part in the eviction or demolitions;*
- (c) be preceded by the presentation of the formal authorizations for the action;*
- (d) be done transparently, openly and with full compliance with international human rights principles;*
- (e) not take place in bad weather, at night, during festivals or religious holidays, prior to an election or prior to or during national examinations;*
- (f) be carried out in a manner that respects the dignity, right to life and security of those affected;*
- (g) include special measures to ensure that women are not subjected to gender-based violence or any other forms of discrimination in the course of evictions, and that the human rights of children are fully protected;*
- (h) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; include mechanisms to protect property and possessions left behind involuntarily from destruction, arbitrary and illegal appropriation, occupation or use;*
- (j) respect the principles of necessity and proportionality during the use of force, and any national or local code of conduct consistent with international law enforcement and human rights standards; and*
- (k) give the affected persons the first priority to demolish and salvage their property.*

These mandatory procedures are a replica of the UN Eviction Guidelines and whose objective is to ensure that evictions are carried out in a humane manner respecting the fundamental rights of the affected persons.

The Bill further envisaged that: the evictions and settlement procedures,⁶⁰remedies,⁶¹ resettlement,⁶²was to be monitored and evaluated by the NLC and the KNHRC.⁶³ The Bill was therefore not only detailed but borrowed heavily from the UN Eviction Guidelines and General Comment No. 7 on the Right to Adequate Housing.

Whereas the Bill was a great step towards providing a legal framework on evictions, it was criticized on the ground that it sought to protect people who illegally encroached into private, public and community land. The Bill was not enacted into law. Instead, it was the 2016 Land Laws (Amendment) Act that was enacted.

⁶⁰ Eviction and Resettlement Bill 2012, s 12

⁶¹ Ibid s 13.

⁶² Ibid s 14.

⁶³ Ibid s 15.

1.3.2 The Land Laws (Amendment) Act 2016

One of the novel features of the Land Laws (Amendment) Act 2016 is the introduction of the procedure that governs evictions in Kenya which was lacking under the previous regime. It makes key amendments to the NLC Act and Land Act 2012.

a) National Land Commission Act

The Land Laws (Amendment) Act 2016, amended the NLC Act by recognizing forced evictions as a form of historical injustices. Politically motivated and conflict based eviction is now recognized as a claim for historical land injustice.⁶⁴ Other historical injustices include; colonial occupation; independence struggle; pre-independence treaty or agreement between a community and the government; development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land; inequitable land adjudication process or resettlement scheme; corruption or other form of illegality; natural disaster; or other cause approved by the Commission.

The recognition of evictions as a historical land injustice in itself grants those affected by eviction, whether lawful or otherwise, an avenue to seek redress as entrenched in the Constitution. The NLC has the mandate pursuant to Article 67 (3) of the Constitution to receive, admit and investigate all historical land injustices complaints and recommend appropriate redress. Once the NLC has carried out its investigation on political or conflict evictions, it can recommend a number of remedies. These remedies are stipulated under Section 15(9) of the NLC Act and include:

- (a) restitution;
- (b) Compensation, if it is impossible to restore the land;
- (c) Resettlement on an alternative land;
- (d) Rehabilitation through provision of social infrastructure;
- (e) Affirmative action programmes for marginalized groups and communities;
- (f) Creation of way leaves and easements;
- (g) Order for revocation and reallocation of the land;
- (h) Order for revocation of an official declaration in respect of any public land and reallocation;
- (i) Sale and sharing of the proceeds;
- (j) Refund to bona fide third party purchasers after valuation; or

b) The Land Act No. 6 of 2012

The definition of terms is very fundamental as it provides a legal basis upon which a suit can be instituted. The Land Act does not define the term 'eviction'. The definition of the

⁶⁴ Government of Kenya, National Land Commission Act (NLA Act) No. 5 of 2012 (Government of Kenya 2012) s 15; Land Laws (amendment) Act s 38.

term “eviction” is captured under Section 2 of the Land Registration Act (LRA) which defines eviction as, the ‘act of depriving or removing a person from the possession of land or property which they hold unlawfully either executed upon a successful law suit or otherwise’. Though the LRA defines what amounts to eviction, the Eviction Bill 2012, had provided for what would amount to forced eviction. It defined forced eviction as:

*...the permanent or temporary removal of persons, squatters or unlawful occupiers of land from their home or land which they occupy against their will without the provision of access to appropriate forms of legal or other protection.*⁶⁵

It should be noted that the problem ailing Kenya is the way forced evictions are carried out and this is what led to the justifications of having a legislative framework. Therefore, the need to define forced evictions is very paramount. In the above definition, forced evictions will arise where unlawful occupiers or squatters are removed against their will without access to legal redress or any other protection.

Before the 2016 Amendments to the Land Act, the Act only provided for unlawful eviction in regard to eviction from a leased property under Section 77 which provides that:

- (1) *A lessee who is evicted from the whole or a part of the leased land or buildings, contrary to the express or implied terms and conditions of a lease, shall be **immediately** relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted.*

The Land Laws (Amendment) Act 2016 amended the Land Act by introducing sections 152A to 152H which deals with the issue unlawful occupation of land and eviction.

i) Unlawful occupation of land prohibited

At the onset, only those who have ownership of land or property can claim rights over the said property. The right to protection of property as anchored under Article 40 of the Constitution can only be invoked where the person claiming deprivation has acquired an interest in the property in question. Any person in Kenya, either individually or in association with others, has the right to acquire and own property of any description and in any part of Kenya.⁶⁶ Evictions arise when a person unlawfully occupies private, public or community land. Section 152A explicitly prohibits unlawful occupation of land. In the case

⁶⁵ Eviction Bill 2012 s 2.

⁶⁶ CoK 2010, Art 40(1).

of *Veronica Njeri Waweru & 4 others v The City Council of Nairobi & others*,⁶⁷ Mumbi J held as follows:

*The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land and they therefore cannot be deprived of that which they have no rights over.*⁶⁸

Though the Land Act does not define what will amount to unlawful occupier as was envisaged in the 2012 Eviction and Resettlement Bill, it was expected that the issue would be addressed in the Eviction Guidelines that were to be enacted by the Cabinet Secretary responsible for land matters. However, the 2017 Regulations⁶⁹ did not address that issue all.

ii) *All evictions must be done in accordance with the law*

Section 152(B) of the Land Act as amended by the Land Laws (Amendment) Act of 2016 prohibits unlawful occupation of private, community or public land. However, the section provides that any person who seeks to carry out any eviction must do so in strict compliance with the law, including complying with the Constitution; the treaties and conventions which Kenya has ratified and the general rules [principles] of international law.⁷⁰ This provision is very fundamental as it seeks to ensure that all evictions are carried out in a humane manner taking into consideration the rule of law.

iii) *Eviction notice which is adequate and reasonable must be served to the affected persons*

The first step in an eviction, is for the lawful owner to serve a notice of eviction in accordance with the law. Section 152B, 152C, 152D and 152E of the Land Act address the issue of eviction notice to unlawfully occupied land. Land in Kenya can either be owned as private,⁷¹ public⁷² or community.⁷³ The law provides for the procedure of serving eviction notice to occupiers of public, private or community land.

⁶⁷ Nairobi Petition No. 58 of 2011.

⁶⁸ Ibid para 29.

⁶⁹ The Land Regulations, 2017: Legal Notice No. 280 of 24th November, 2017

⁷⁰ It has been said that general principles of international law are norms recognised by the international community, whether the norm is derived from municipal law or not. However, they remain an ambiguous source of international law

⁷¹ CoK 2010, Article 64.

⁷² CoK 2010, Article 62.

⁷³ CoK 2010, Article 63.

aa. Public land

Article 62 of the Constitution stipulates what public land constitutes.⁷⁴ Section 152C of the Land Act 2012 as amended requires that where unlawful occupiers occupy public land, the NLC shall ensure that a decision for eviction of such occupiers is notified to all affected persons in writing by notice in the Gazette.⁷⁵ The eviction notice must be published in a one newspaper of nationwide circulation. To ensure that the eviction notice reaches everyone who might be affected by the said eviction, the Land Act stipulates that the NLC must ensure that the eviction notice is also announced on a radio in the local language where appropriate.⁷⁶ The duration of these notice should be at least three months before the eviction. Evictions from public land are the most common and are usually motivated either politics or public good.

bb) Community land⁷⁷

Community land is governed by the Constitution and the Community Land Act.⁷⁸ Community land is vested in and held by communities identified on the basis of ethnicity, culture or similar community interest.⁷⁹ Unregistered community land is held in trust by the County government on behalf of the community. The body entrusted with eviction of unlawful occupiers of community land is the County Executive Committee Member responsible for land matters. The CEC member is required by section 152 D of the Act to ensure that a decision to evict unlawful occupiers from unregistered community land is notified to all affected persons in writing and by notice in the Gazette. In addition, the unlawful occupiers should be notified of the impending eviction in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.⁸⁰ This only applies to unregistered community land. Where registered community land is involved, Section 152E of the Land Act of 2012 applies. Such land is treated as a private poverty.

⁷⁴ Public land is land: which at the effective date was unalienated government land; lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under the Private lease; transferred to the State by way of sale, reversion or surrender; which no individual or community ownership can be established by any legal process; and land which no heir can be identified by any legal process. Further, all minerals and mineral oils, forests, roads and thoroughfares, rivers, lakes and other water bodies, territorial sea, exclusive economic zone and the sea bed; continental shelf; all land between the high and low water marks etc are public land. Most of the government evictions in Kenya have been as a result of unlawful occupation of public land.

⁷⁵ Land Act, s 152C.

⁷⁶ Ibid.

⁷⁷ Land Act 2012, s 152D.

⁷⁸ Government of Kenya, *Community Land Act No. 27 of 2016* (Government Printers 2016).

⁷⁹ CoK 2010, Article 63.

⁸⁰ Ibid.

cc) Private land⁸¹

Private land is registered land held by any person under any freehold tenure; land held by any person under leasehold tenure; and any other land declared private land under an Act of Parliament.⁸² In cases where private ownership of land is proved, if the owner or the person in charge is of the opinion that '*a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction*'.⁸³ As earlier noted, where community land is registered, Section 152E of the Land Act is applied. Whereas eviction notice for public and unregistered community land should be published in the Gazette; in a newspaper of national circulation; and announced on radio in a local language, when it comes to private land and registered community land, the notice must be served on the persons affected. Eviction notices for private land and registered community land requires that:⁸⁴

- a) The eviction notice is in writing and in a national and official language. In Kenya, the national language is Kiswahili while the official language is English.⁸⁵ Whilst the Land Act does not stipulate the language to be used in the eviction notice for public and unregistered community land, it is reasonable that the eviction notice be in a language that the affected persons understand;
- b) Where a large group of persons are affected, the eviction notice must be published in at least two daily newspapers of nationwide circulation;
- c) The eviction notice must be displayed in not less than five strategic locations within the occupied land in the case of large group of persons;
- d) To ensure that property of the unlawful occupants is protected, the Land Act stipulates that the eviction notice must specify the terms and conditions as to the removal of buildings, the reaping of growing crops and other matters as the case may require; and
- e) The eviction notice must be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

The law requires the eviction notices to be in writing. Secondly the eviction notice must be reasonable and adequate. The Eviction and Resettlement Bill 2012 had envisaged a 21 day notice. However, the Land Act now envisages that an eviction notice should not be less than three months (90 days). The reasons for an adequate and reasonable eviction notice is to grant the affected persons an opportunity to look for alternative land, invoke consultation or spur engagement. The UN Eviction Guidelines further require that the eviction notice

⁸¹ Land Act 2012, s 152E.

⁸² CoK 2010, Art 64.

⁸³ Ibid.

⁸⁴ Land Act 2012, s 152E (2).

⁸⁵ CoK 2010, Art 7.

should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions. In the *Mitubell Case*, the petitioners were given a seven day notice to vacate the suit property without any reasons given to them. In *Mitubell Case* paragraph 44, Mumbi J noted that,

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

Apart from the eviction notice, the Land Act does not provide for the procedures to be followed prior to an eviction such as consultations as was envisaged under the Evictions and Resettlement Bill 2012.

iv) Persons affected by the eviction notice to seek court relief

The essence of serving an adequate and reasonable eviction notice is to give the persons affected an opportunity to seek relief in court. If any person or persons has received an eviction notice, they can apply to the Court for relief against the notice. The Court, after considering the eviction notice may:⁸⁶

- a. confirm the notice and order the person to vacate;
- b. cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
- c. suspend the operation of the notice for any period which the court shall determine; or
- d. Order for compensation.

v) Any eviction must adhere to the mandatory procedures envisaged under Section 152G of the Land Act

These mandatory procedures are very important as they are the most violated during forced evictions. Any eviction must strictly adhere to the following procedures which are mandatory:

- a) Be preceded by the proper identification of those taking part in the eviction or demolitions;
- b) Be preceded by the presentation of the formal authorizations for the action;
- c) where groups of people are involved, government officials or their representatives to be present during an eviction;

⁸⁶ Land Act 2012, s 152F.

- d) be carried out in a manner that respects the dignity, right to life and security of those affected;
- e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
- f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
- g) include mechanisms to protect property and possessions left behind involuntarily from destruction;
- h) respect the principles of necessity and proportionality during the use of force; and
- i) Give the affected persons the first priority to demolish and salvage their property.⁸⁷

This mandatory procedure seeks to ensure that the eviction is undertaken in compliance with the law and in a humane manner. The Land Act as amended seeks to protect the right to property of victims of forced evictions. The law therefore seeks to protect their property by requiring that mechanisms be put in place to ensure that the property and possessions left after forced evictions are protected. Most of the evictions that have occurred in Kenya have been characterized by violence and force.

The legal framework on eviction require that the affected persons must be given the first priority to demolish and salvage their property. However, this has not been the case in most of the evictions carried out. In the recent case of *John Mageto Nyachieo v John Kinyu*⁸⁸ the Court in granting an order for eviction held that the eviction must be done in accordance with the provisions of Section 152G of the Land Act 2012.

vi) Disposal of property left after eviction

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land is required at least **seven days** from the date of the eviction, to remove or cause to be removed or disposed by public auction, any unclaimed property that is left behind after an eviction from private, community or public land.⁸⁹

vii) Demolition of unauthorized structures

Where the erection of any building or execution of any works has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building or works, within such period as may be specified in the order.⁹⁰

⁸⁷ Land Act 2012, s 152G.

⁸⁸ ELC Case No. 236 of 2016, ELC at Nakuru [2017] eKLR.

⁸⁹ Land Act 2012, Section 152H.

⁹⁰ Land Act 2012, Section 152I.

viii) Relief to persons affected by evictions

The Land Act only provides for the reliefs that the court can grant in regard to an eviction notice. The Act does not address the reliefs that the court can grant after the eviction has taken place. This means that persons affected by forced evictions can only rely on the Constitution for redress under Article 23(3).

The 2012 Eviction and Resettlement Bill envisaged the following remedies for forced evictions:

- a) **Declaration of rights, compensation, injunction or any other relief the court may deem;**
- b) **Where an eviction is unavoidable and necessary for the promotion of the general welfare and the public interest, the Government must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interest in property and transport to the relocation site;**
- c) **Where private or community land has been taken, the evicted persons should be compensated promptly, fairly and fully;**
- d) **Consideration of the circumstances of each case shall allow provision of compensation for losses related to informal property such as slum dwellings;**
- e) **Joint spousal compensation packages must be ensured;**
- f) **Single women, widows and orphans shall be entitled to their own compensation.**

Victims of forced evictions must be provided with relief. Article 8 of the **Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law**,⁹¹ states that a proper remedy for forced evictions is to return the victims as close as possible to the status quo ante.

c) The Land Act Regulations, 2017⁹²

The Land Act specifically provides that the Cabinet Secretary shall prescribe regulations to give effect to Section 152G. The regulations were meant to give further details on the manner in which forced evictions should be carried and how the people who were to be evicted should be treated and settled, if at all.

⁹¹ UNGA, *Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Resolution 60/147 of 21/3/2005.

⁹² *Supra*, n. 70

Instead of issuing stand-alone Regulations under Section 152G of the Act, the Minister issued the 2017 Regulations⁹³ pursuant to Section 160 which gives him general powers to make Regulations under the Act. Under those Regulations, only a few clauses addressed the issue of evictions. The Regulations prescribed the notices that should be issued to the evictees in respect to public, unregistered community land and private land (Form LA 57) and provided the manner in which the people who are to carry out the eviction should identify themselves. Regulation 66 provides that the people participating in an eviction should produce: the original national identification cards; the official or staff identification cards; a letter of authorization from the owner; or a letter from the Commission in case of public land.

Regulation 67(2) provides that the letters of authorization to carry out evictions must be copied to the national government administration in the county and to the Officer Commanding Police Division of the area in which the land is situated. Regulation 68 stipulates that eviction should be carried out between 6 am and 6pm while Regulation 70 provides the manner in which the notices should be served on the evictees.

1.4 Conclusion

The 2012 Evictions and Resettlement Bill had envisaged the procedures that were to guide the court proceedings during evictions. These elaborate procedures were not included in the Land Laws (Amendment) Act 2016. The Court plays a fundamental role in the implementation of the Constitution and the legal framework on eviction. As a guardian of the Constitution, Kenyans have high expectations in the Court as an avenue to justice. Judicial officers must rise to the occasion when eviction matters come before them for adjudication, and consider whether the said evictions comply with the Constitution, the Treaties that the country has ratified and the international principles of international law. The Court must continue to assert its role in ensuring that forced evictions are carried out in compliance with the law.

There is need to amend the law and provide that an eviction notice should be issued only after the court has granted an order. This requirement forestalls a situation where people might be evicted on the pretext that they were served with notices. It is on that basis that the Constitution of South Africa specifically provides that evictions can only be carried out upon issuance of a court order.⁹⁴ This constitutional provision is supported by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Indeed, that what had been provided for under section 4 of the Evictions and Resettlement Procedures Bill, 2012 which states as follows:

⁹³ Ibid

⁹⁴ Section 26 of The Constitution of South Africa, 1996

“A person shall not be forcibly evicted from their home or have their property demolished without a court order authorizing the eviction or demolition.”

That seems to have changed with the 2016 amendments to the Land Act. Indeed, the amendments ignored completely to provide for the constitutional safeguards that should be put in place to facilitate forceful evictions in a humane manner that had been contemplated under the Bill⁹⁵, and which are recognised in international legal instruments like the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (UN Eviction Guidelines)*.⁹⁶

⁹⁵ The Eviction and Resettlement Bill, 2012 at section 6(1) (c) provides that before eviction, an environmental, economic and social impact assessment shall be done and there should be put in place adequate resettlement plans etc.

⁹⁶ UNGA, *UN Basic Principles and Guidelines on Development based Eviction and Displacement*, A/HRC/4/18 http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf

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