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## **The Role and Effectiveness of the Kenyan Institutional Framework in Protection Against Forced Evictions**

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### **Abstract**

*Institutions at national and municipal or county levels have the potential to protect individuals and communities against forced evictions in Kenya. A strong and accountable institutional framework is imperative in protection against forced evictions. Institutions have a critical role protection against forced evictions. The institutional framework includes the national and county governments. It also includes the executive, legislature and the judiciary. The institutional framework also includes quasi-government institutions and constitutional commissions. The main question to be addressed is the role of such institutions in addressing the problem of forced evictions.*

*This paper examines the role of different State institutions in order to ascertain their role and effectiveness in addressing the problem of forced evictions. At the national level, the study will evaluate and discuss the role of existing State agencies that are mandated to manage land and housing. The relevant institutions under the national government include the Ministry of Lands, Public Works (MLPWHUD), Housing and Urban Development, and the National Housing Corporation (NHC). The paper also*

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*discusses the role of county governments and constitutional commissions in protection against forced evictions.*

*The paper evaluates and investigates the role of institutions created by the Constitution and legislation in protection against forced evictions. At the national level of governance, the paper evaluates the role of the judiciary, the legislature and the executive in protection against forced evictions. In particular, it discusses reliefs that courts have granted in selected force eviction cases. The paper also discusses the role of county governments and constitutional commissions in dealing with forced evictions. It proposes institutional reforms that can make these institutions more effective in protecting people against arbitrary evictions.*

## **1.0 Introduction**

Institutions can play a critical role and have the potential in protection against forced evictions. Institutions help in reducing uncertainty, facilitating everyday business and solving problems effectively.<sup>1</sup> They structure human interactions and provide incentives that facilitate structuring of economic, social and political activity.<sup>2</sup> The UN Economic Commission for Europe (UNECE) has described the components of institutions as follows:

...institutions are made up of formal rules, informal constraints and their enforcement characteristics. Formal rules, of course, are very straightforward. They are rules put into place; they are laws, constitutions, regulations, whatever, that have the character of being specific and being defined precisely.<sup>3</sup>

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<sup>1</sup> United Nations Economic Commission for Europe 'The Role of Institutions in Economic Development: Occasional Paper No. 1' (2003) <unpubli@unog.ch> accessed 1 April 2022 [1].

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

The description by UNECE demonstrates that institutions are created with formal rules and regulations to achieve certain goals and objectives. Institutions are organised entities in society with mechanisms and processes that are aimed at meeting specific needs of people.<sup>4</sup>

The institutional framework in Kenya was indicted for not being responsive to the plight of indigenous peoples and failing to protect them from forced evictions by the African Commission on Human and Peoples Rights (the ACHPR).<sup>5</sup> In the *Centre for Minority Rights Development on behalf of the Endorois Community v Kenya* (Endorois case),<sup>6</sup> the ACHPR indicted the Kenyan government for lacking policies or governmental institutions that deal directly with indigenous peoples' issues. The ACHPR stated that:

...the ACHPR notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognised as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.<sup>7</sup>

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<sup>4</sup> Ibid 2.

<sup>5</sup> The ACHPR is established under Article 30 of the African Charter of Human and Peoples' Rights with the mandate of promotion and protection of human rights in Africa. It was officially inaugurated on 2 November 1987.

<sup>6</sup> Communication 276/2003.

<sup>7</sup> Ibid Para 155; K Sing'oei & J Shepherd 'In Land We Trust': The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 16.

The ACHPR ruled that the government had a duty to take positive steps to protect indigenous communities such as the *Endorois* by promoting cultural rights through creation of opportunities, policies and institutions.<sup>8</sup> The ACHPR observed that policies and institutions enhance the development and existence of different cultures and ways of life despite the challenges that face indigenous communities in Kenya.<sup>9</sup> Most importantly, the ACHPR observed that institutions are essential in protection of indigenous peoples who are prone to forced evictions from their land.<sup>10</sup>

The Constitution of Kenya (the Constitution) recognises policy and legislative measures as important components in the realisation of rights under Article 43.<sup>11</sup> The Constitution uses the term ‘other measures’ including the setting of standards that would facilitate realisation of socio-economic rights (SERs), to achieve progressive realisation of the rights under Article 43.<sup>12</sup> The ‘other measures’ contemplated by the Constitution can be construed to include institutional framework that facilitates realisation of the SERs under Article 43. The executive, judiciary and the legislature are critical institutions that can facilitate protection against forced evictions in Kenya.

The executive and the legislature bear the major responsibility in the realisation of SERs.<sup>13</sup> The courts also contribute to the realisation

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<sup>8</sup> The *Endorois case* (note 6 above) Para 256.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Republic of Kenya *The Constitution of Kenya* (2010) Article 21 (2).

<sup>12</sup> *Ibid.*

<sup>13</sup> C Ngang ‘Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to take ‘other measures.’ (2014) 14 *Africa Human Rights Law Journal* 658.

through translating SERs into enforceable legal claims.<sup>14</sup> Enforcement of SERs by court enhances their realisation. Judicial enforcement becomes a key strategy for protecting and empowering individuals and communities, where the channels of realisation of SERs within the executive and legislative arms become unavailable, inefficient, ineffective and insufficient.<sup>15</sup>

The following section addresses the roles of the arms of government namely, the judiciary, the legislature and the executive in protection of forced evictions in Kenya.

## **2.0 The Role of the Judiciary in Protecting against Forced Evictions**

The Constitution establishes superior and subordinate courts.<sup>16</sup> The superior courts consist of the Supreme Court, the Court of Appeal, the High Court and specialised courts include the Employment and Labour Court and the Environment and Land Court (ELC) which have the status of the High Court.<sup>17</sup> The subordinate courts include Magistrates courts, Court Martial, Kadhis' courts and tribunals established by legislation.<sup>18</sup> Courts as established by the Constitution and legislation have the duty of administering justice and adjudicating disputes impartially and have the potential to provide remedy to the problem of forced evictions.<sup>19</sup>

The courts and tribunals are guided by the principles that justice must be done to all, irrespective of status, justice shall not be delayed, nor

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<sup>14</sup> L Stewart 'Adjudicating Socio-Economic Rights Under a Transformative Constitution' 28 (3) *Penn State International Law Review* (2010) 506.

<sup>15</sup> Ngang (note 13 above) 658-659.

<sup>16</sup> Articles 163-170 of the Constitution

<sup>17</sup> Ibid Article 162(1) & (2).

<sup>18</sup> Ibid Article 169.

<sup>19</sup> N Sifuna 'The Role of Courts in Implementation of Environmental Law in Kenya' (2005) 1(2) *Law Society of Kenya Journal* 78.

alternative forms of dispute resolution and administration of justice without undue regard to procedural technicalities.<sup>20</sup> The principles that guide courts and tribunals make court action an avenue for protection of individuals and communities against forced evictions. The Constitution grants the High Court jurisdiction to hear and determine applications for redress of denial, violation threats or infringement rights or fundamental freedoms contained in the Bill of Rights. The Constitution provides that:

*...the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*<sup>21</sup>

The Bill of Rights in Article 43 (1) (b) the Constitution contains the right to adequate housing and to reasonable standards of sanitation. The Bill of Rights does not expressly make reference to protection from forced evictions. However, the general right to housing can be negatively enforced in protection from arbitrary evictions.<sup>22</sup> The right to housing forms an important component of protection against forced evictions. Purposive construction of the Bill of Rights is necessary because it enables courts to broadly interpret rights and takes into account other factors that affect realisation of rights other than addressing mere legal rules.<sup>23</sup>

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<sup>20</sup> Article 159 (2) of the Constitution.

<sup>21</sup> *Ibid* Article 23 (1).

<sup>22</sup> CJ Mashamba *Litigating Human Rights in African Institutions: Law, Procedure and Practice* (Nairobi: LawAfrica Publishing Limited, 2017) 137; I Currie & JD Waal *The Bill of Rights Handbook* (Cape Town: Juta and Company PTY Limited 2018) 586.

<sup>23</sup> SM Mbenenge Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape Public Lecture delivered at the Nelson R. Mandela School of Law, University of Fort Hare on 17 April 2018 3-4.



The Bill of Rights under the Constitution would be of little effect if the courts are not properly equipped to enforce the rights and freedoms and to supervise compliance with the remedies granted.<sup>24</sup> The Constitution obligates the courts to develop the law through broad interpretation of the Bill of Rights and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.<sup>25</sup> For the courts to effectively enforce the rights under the Bill of Rights, the interpretation should be articulated in expansive rather than restrictive language.<sup>26</sup>

Courts and in particular judges play critical roles as custodians of constitutional values such as freedom, human dignity and equality.<sup>27</sup> Courts lay down general principles for adjudication of the right to housing, protection of individuals and communities against arbitrary evictions and developing progressive jurisprudence in that respect.<sup>28</sup> Liebenberg, writing within the South African context but nevertheless applicable to the Kenya, has underscored the role of courts in adjudication of SERs by stating that:

...SERs adjudication has a particular contribution to make in requiring government and powerful private actors to give serious and reasoned consideration to the claims of those who lack access to the economic and social resources. These groups usually resort

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<sup>24</sup> L Juma 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya' (2012) 12 (2) *African Human Rights Law Journal* 501-502.

<sup>25</sup> Article 20 (3) of the Constitution.

<sup>26</sup> Mbenenge (note 23 above) 3.

<sup>27</sup> *Ibid* 2.

<sup>28</sup> CJT Mbianda 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 *Potchefstroom Electronic Law Journal* 1.



to litigation because their claims have not been recognised or pursued in the formal political processes. If judges are to play this role effectively they will, in appropriate cases, be required to make decisions with significant policy and budgetary implications.<sup>29</sup>

Liebenberg also stated that the courts are the avenues in which ordinary people challenge excesses of public power by State organs or private powers by non-state entities that undermine the rights provided in the Bill of Rights.<sup>30</sup>

Courts have a role in ensuring that procedural requirements in protection against forced evictions are adhered to. Firstly, the court as part of remedial measures should ensure reasonable alternative accommodation is provided or is available before granting an eviction order.<sup>31</sup> Secondly, courts should ensure that meaningful engagement and constructive discussion in the form of mediation has been explored before evictions are carried out.<sup>32</sup> Liebenberg observes that meaningful engagement and mediated solutions are instrumental in assessing the justice and equity of the eviction of people from their homes.<sup>33</sup> This is part of procedural protection from forced evictions as observed by the United Nations (UN) Committee on Economic Social and Cultural Rights (CESCR) in General Comment No. 7.<sup>34</sup>

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<sup>29</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (Cape Town: Juta & Co. Limited 2010) 70.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46 (CC) Paras 29 & 45.

<sup>32</sup> *Ibid.* South African courts have made progressive developments on the aspects of mediation, meaningful engagement and provision of alternative accommodation to address arbitrary evictions.

<sup>33</sup> Liebenberg (note 29 above) 154.

<sup>34</sup> UN CESCR General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions 20 May 1997 UN Doc E/1998/22.

Courts are instrumental in ensuring where eviction is considered to be inevitable, the actors adhere to the relevant provisions of international human rights law and the general principles of reasonableness and proportionality. Courts prompt the legislature and the executive to give effect to SERs through comprehensive, participatory social programmes and legislation.<sup>35</sup> The role of courts is to consistently prompt them to give effect to SERs in the event they fail to fulfil their constitutional responsibilities.

Regarding land rights and forced evictions in Kenya, the Constitution has established the ELC.<sup>36</sup> The ELC is a superior court for the purpose of hearing and determining disputes relating to land and the environment.<sup>37</sup> The enabling legislation is the Environment and Land Court Act, 2011.<sup>38</sup> The ELC has original and appellate jurisdiction in matters relating to the use, occupation and title to land. The power of the court to adjudicate on use and occupation of land is relevant to the protection against forced evictions. The ELC has the potential to interpret the provisions and implications of the treaties and conventions that have been ratified by Kenya.<sup>39</sup>

The ELC has been instrumental in interpreting international law norms on forced evictions and granting remedies to the occupiers.<sup>40</sup>

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<sup>35</sup> Liebenberg (note 29 above) 71.

<sup>36</sup> Article 162 (1) b of the Constitution. The Constitution provides that 'parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.'

<sup>37</sup> Ibid; TO Ojenda *Land Law and Conveyancing: Principles and Practice* (Nairobi: LawAfrica Publishing Limited, 2015) 87-88.

<sup>38</sup> Cap 12A Laws of Kenya.

<sup>39</sup> Kenya National Commission on Human Rights '*Making the Bill of Rights Operational: Policy Legal and Administrative Priorities and Considerations*' (2011) <[www.knchr.org](http://www.knchr.org)> last accessed on 1 November 2021.

<sup>40</sup> Ibid.

The Constitution does not have express provisions for protection from forced evictions.<sup>41</sup> However, the ELC has attempted to negatively enforce the right to housing under the Constitution to proffer protection against arbitrary evictions.<sup>42</sup> Kenya has an inadequate legislative framework that seeks to address the problem of forced evictions.<sup>43</sup> In absence of express provisions for protection against forced evictions in the Constitution and weak legislative framework, the ELC has in few instances considered the best international practices in deciding on cases of forced evictions in Kenya.

The following section addresses the remedial measures by the courts and their effectiveness in protecting against forced evictions.

## **2.1 Remedies available in Unlawful Eviction Cases**

The Constitution grants power to courts to grant effective remedies in litigation under the Bill of Rights by according every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.<sup>44</sup> The Constitution also grants power to the High Court to determine the questions on whether laws and actions are inconsistent with or in contravention of the Constitution.<sup>45</sup> The courts have granted reliefs in the form of declaratory orders and have in

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<sup>41</sup> Chapter 4 of the Constitution provides for a detailed Bill of Rights with elaborate rights and freedoms which include justiciable SERs. However does not make reference to protection of individuals and communities from forced evictions.

<sup>42</sup> *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* High Court of Kenya at Nairobi Petition No. 65 of 2010 and (2013) eKLR Paras 61-66.

<sup>43</sup> *Ibid* Para 79.

<sup>44</sup> Article 22 (1) of the Constitution.

<sup>45</sup> *Ibid* Article 165 (3) (d).

several instances used structural interdicts in forced eviction cases. The two remedies are discussed below.

### **2.1.1 Declaratory Orders**

The courts have granted reliefs in the form of declarations that a right has been violated or that a law is inconsistent with the Constitution, ordering judicial review and in some instances, making orders for compensation.<sup>46</sup> The relief of declaration allows the courts to clarify and declare rights on the one hand while leaving the decision on how best to realise the rights on other branches of the State.<sup>47</sup> The legal basis for the relief is that the court has good grounds for believing that the State understands its obligations and will fulfil the obligations as described in the order.<sup>48</sup>

The *Fatuma Khamis Bilal & 3505 others v Kenya Railways Corporation & 6 others*<sup>49</sup> case concerned eviction notices made by the Kenya Railways Corporation (KRC) to the *Nubian* community living in Kisumu county. The community claimed to have been in possession and occupation of the land since 1937 without any interruptions or eviction threats.<sup>50</sup> The Ministry of Lands, Housing, Public Works and Urban Development had prepared the settlement scheme advisory plan in 2012 and the KRC neither complained nor indicated any interest in the land inhabited by the community.<sup>51</sup>

The KRC issued a seven day notice to the petitioners and thereafter destroyed their homes and other structures thereby evicting them

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<sup>46</sup> Ibid Article 23 (3) b.

<sup>47</sup> Currie & De Waal (note 22 above) 196.

<sup>48</sup> Liebenberg (note 29 above) 382

<sup>49</sup> 2021 eKLR.

<sup>50</sup> Ibid 10.

<sup>51</sup> Ibid 12.

from the land, giving rise to the suit.<sup>52</sup> The KRC argued that the petitioners had not demonstrated that all the procedures in survey, alienation, transfer and registration were duly followed to enable a procedural transition of proprietorship of the suit land from them.<sup>53</sup> The Court found that the disputed land was Crown land that was alienated by the governor in 1937 to the Nubian Community by virtue of Legal Notice no 440 of 1963 issued under the Kenya (Vesting of Land) Regulations of 1963.<sup>54</sup> The Court further found the land occupied by the petitioners was not part of the land vested in the KRC since it had been alienated in 1937 and therefore the eviction, destruction and demolitions of property was an affront to the petitioner's right to property.<sup>55</sup>

The finding by the ELC vindicated the right to property of the community by not only protecting them from forced evictions but also protecting their right to housing by stating that:

...any forcible, violent and brutal eviction through demolition of homes of the petitioners and other residents of the Kibos informal settlement, without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing.<sup>56</sup>

The ELC declared that destruction of property without a court order and without, according to the affected parties, an opportunity to salvage any of their belongings is a violation of the fundamental right

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid 13.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 14.

to protection of property guaranteed by the Constitution.<sup>57</sup> The ELC further vindicated the right to property under Article 40 of the Constitution. The ELC also declared that forced evictions without warning, court orders and reasonable notice in writing was a violation of the petitioner's fundamental right to fair administrative action guaranteed by the Constitution.<sup>58</sup>

The ELC ruled in favour of the petitioners by stating that they were entitled to full compensation for the loss suffered during and after the illegal demolition of their structures.<sup>59</sup> However, the ELC provided guidance to the petitioners by urging them to file a separate civil suit for compensation as the damages incurred could not be ascertained in the petition.<sup>60</sup> In this case the ELC played an important role in restraining the State and non-state actors from participating in arbitrary evictions and declaring the unconstitutionality of such actions. The case demonstrates that courts have remedial powers that attempt to offer solutions to forced evictions. However, there is inadequate guarantee of enforcement of court orders directed to the executive branch of government, especially because of budgetary resource constraints.<sup>61</sup>

The High Court in the *Ibrahim Sangor Osman v The Minister of State for Provincial Administration and Internal Security* case provided a remedy in the form of a declaration. The High Court declared that the forcible, violent and brutal eviction through demolition of homes of the

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<sup>57</sup> Ibid 4, 9 & 14. The relevant provisions in the Constitution as referenced by the ELC are Articles 40 (1), (3) and (4) as read with 21 (3).

<sup>58</sup> The *Fatuma Khamis Bilal* case (note 49 above) 14. The right to fair administrative action is provided under Article 47 of the Constitution.

<sup>59</sup> Ibid 15.

<sup>60</sup> Ibid.

<sup>61</sup> L Franceschi & PLO Lumumba *The Constitution of Kenya: A Commentary* (Nairobi: Strathmore University Press, 2019) 202-203.

petitioners was in violation of their fundamental rights guaranteed in the Constitution.<sup>62</sup> The High Court further gave a mandatory injunction to the Minister of State for Provincial Administration and State Security to cease any further evictions and facilitate the return of the petitioners to the land from which they were evicted.<sup>63</sup> The High Court underscored that in essence, injunctions restrain future arbitrary evictions and demolitions without legal substantive and procedural protection of the occupiers.<sup>64</sup>

The remedy in the form of declaratory orders allows the executive to exercise its discretion on a range of complex policy choices for giving effect to protection from arbitrary evictions. The remedy further allows governments to adopt the necessary policies and legislation. However, the remedy is only appropriate if the State understands its obligations and is willing to take the necessary steps to fulfil the obligations described in the order. The remedy further leaves the implementation solely in the hands of the State. The following section discusses the remedy of structural interdict which allows the courts to supervise orders.

### **2.1.2 Structural Interdicts**

Courts in Kenya have applied structural interdicts as remedies in forced eviction cases with minimal impact. Structural interdicts are remedies that involve the continuous involvement of the courts in implementation of their orders. They entail orders that require the parties in a case to negotiate a plan which will give effect to the relevant right and report back to the court on a regular basis.<sup>65</sup> The court issues a set of directions that regulate further engagement with

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<sup>62</sup> Constitutional Petition No. 2 of 2011 (eKLR) 7.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Liebenberg (note 29 above) 424.



the parties and implementation of the plans until the court is satisfied that the infringement of rights is satisfactorily remedied.<sup>66</sup> Structural interdicts enable courts to monitor compliance of court orders and facilitate engagement between the parties concerning the specific measures required to give effect to the normative standards set in the court orders.<sup>67</sup>

Structural interdicts help eliminate systemic violations of human rights that exist within organisational and institutional settings.<sup>68</sup> They do not seek to offer compensation to past wrongs but rather to adjust future behaviour through the court's active participation in the implementation of its orders.<sup>69</sup> They respond to the systemic violations of a complex organisational nature by addressing gaps left by the traditional remedies which are inadequate in eliminating systemic violations of human rights.<sup>70</sup> System violations establish themselves and endure in a sustained manner as part of an institutional behaviour and require a systemic approach to tackle.<sup>71</sup> The systemic approach embodies effective and participatory remedies. Van Der Berg has supported this fact by stating that:

...the structural interdict potentially embodies an effective and participatory remedy that can overcome traditional concerns that courts lack the constitutional and institutional competence required to adjudicate complex resource allocation decisions. By

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> C Mbazira 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa' (2008) 24 *South African Journal of Human Rights* 4.

<sup>69</sup> Ibid 5.

<sup>70</sup> Ibid.

<sup>71</sup> C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 110-111.

accommodating these concerns at the remedial stage of adjudication, the need for deference in applying a capabilities-based standard of review to allocative decisions is obviated.<sup>72</sup>

Currie and De Waal observe that structural interdict is arguably the most effective remedy in forced eviction matters.<sup>73</sup> They have provided five elements that are contained in structural interdicts. The first element is the declaration by the court that conduct by the government falls short of its constitutional obligation and the second element is the order to the government to comply with the obligation.<sup>74</sup> The third element is the order by the court to the government to produce a report within a specified time setting out the steps it has taken and anticipates to take under the prevailing circumstances. The fourth element is the opportunity by the applicant to respond to the report and the fifth element is the hearing and upon satisfaction by the court, the report is made an order of the court.<sup>75</sup>

### 3.0 Application of Structural Interdicts by the Courts

#### 3.1 *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others case*

The High Court in the *Satrose Ayuma case*,<sup>76</sup> determined the rights of the petitioners to adequate housing and sanitation as well as the right to human dignity and protection against forced evictions. The High Court stated that the right to adequate housing of the petitioners would have been violated by the manner in which the evictions were

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<sup>72</sup> S Van Der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19 *African Human Rights Law Journal* 300.

<sup>73</sup> Currie & De Waal (note 22 above) 199.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> The *Satrose Ayuma case* (note 42 above).

to be carried out.<sup>77</sup> The High Court observed that if the evictions were to be carried out without a proper plan and adequate notices, then the petitioners would be rendered homeless and vulnerable.

The High Court in granting a structural interdict, ordered the Attorney General to file an affidavit within 90 days after the judgement detailing out the existing or planned State policies and legal framework on forced evictions and demolitions and if the policies or legal framework adhere to acceptable international standards.<sup>78</sup> The High Court also ordered the Attorney General to provide information regarding measures that the government had put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in accordance with the Constitution.<sup>79</sup>

The High Court granted an injunction stopping the trustees from evicting the petitioners until the case was finally determined. Additionally, the Court offered guidance that neutral observers should be present during evictions including a mandatory presence of governmental officials or county officials, adherence to the rights to human dignity, life and security of the evictees.<sup>80</sup> The High Court also guided that evictions should not be carried out at night, during bad weather seasons and during times that could affect learning in schools.<sup>81</sup>

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<sup>77</sup> Ibid Para 89.

<sup>78</sup> Ibid Para 111(b).

<sup>79</sup> Ibid Para 111(c).

<sup>80</sup> Ibid Para 111 (e).

<sup>81</sup> Ibid.

### **3.2 Mitu-Bell Welfare Society v Attorney General & 2 Others Case**

The *Mitu-Bell Welfare Society* case<sup>82</sup> was first heard and determined by the ELC. The ELC declared that demolitions and forceful evictions were illegal, irregular and violated the rights of the occupiers.<sup>83</sup> The ELC held that the respondents who included the Commissioner of Lands, the Kenya Airports Authority (KAA) and the Attorney General had violated the right to housing and other SERs provided in Articles 43 and 21 of the Constitution.<sup>84</sup> The ELC ruled that demolition of the homes of poor people without providing an alternative accommodation violated the right to housing of the applicants provided in Article 43 on the positive obligation to ensure access to SERs.

The ELC did not grant the relief of compensation to *Mitu-Bell Welfare Society* (the Society) but requested for more information from the respondents before giving further orders on the relief of compensation to the occupiers. The ELC, in issuing a structural interdict ordered the respondents to provide information on the current State policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.<sup>85</sup> The ELC further directed the respondents to engage with the petitioners, other relevant state agencies and civil society organisations with a view to identifying an appropriate resolution to the grievances of the occupiers following their eviction.<sup>86</sup> The declaration and orders by the court can be termed as progressive in protection against forced evictions.

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<sup>82</sup> *Mitu-Bell Welfare Society v Attorney General & 2 others* (2013) eKLR.

<sup>83</sup> *Ibid* Para 75.

<sup>84</sup> *Ibid* Para 77. Article 43 of the Constitution of Kenya provides for protection of economic and social rights and Article 21 provides for the implementation of rights and fundamental freedoms.

<sup>85</sup> *Ibid* Para 79 (i).

<sup>86</sup> *Ibid* Para 79 (iii).

The case was later determined by the Court of Appeal (the Court).<sup>87</sup> The Court stated that even though the Kenyan legal framework is inadequate in addressing the right to housing in Kenya, the courts do not have any role in granting prescriptive rights to land in the name of enforcement of SERs.<sup>88</sup> The Court found that the High Court erred in law in issuing orders and directions compelling KAA and other government agencies to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements.<sup>89</sup> In doing so, the Court opposed the application of structural interdicts in forced eviction cases. The Court observed that the High Court erred in using structural interdicts by stating that:

... by allowing parties to file affidavits and reports after judgement, the trial Court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings. That such a procedure was not provided for in the Civil Procedure Act and Rules and perpetuated and introduced secondary and side litigation; and that it was impermissible to allow parties to file pleadings after judgement.<sup>90</sup>

The Court found that the High Court erred in law in issuing orders and directions on un-pleaded issues and faulted the judge's directions that required third parties to comment on the policies and guidelines which the Court found was not a prayer in the petition.<sup>91</sup> The Court faulted directions to the effect that the parties engage civil society organisations as *amici curiae* for purposes of identifying

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<sup>87</sup> *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* (2016) eKLR.

<sup>88</sup> *Ibid* Para 136.

<sup>89</sup> *Ibid* Para 141 (h).

<sup>90</sup> *Ibid* Para 73.

<sup>91</sup> *Ibid* Paras 94-96.

appropriate remedies.<sup>92</sup> In faulting the directions, the Court contradicted itself by observing that the Constitution provides that courts may invite persons with expertise on a particular issue to participate as *amicus curiae* in matters involving general public interest.

The Court argued that the orders of the High Court were contrary to the statutory mandate of the KAA, the appellant in the case.<sup>93</sup> The Court also argued that the High Court had erred in finding that KAA should have provided Mitu-bell Welfare Society with alternative accommodation or a relocation plan.<sup>94</sup> The Court observed that KAA and other government agencies in the case were not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the grievance raised by the Society.<sup>95</sup>

The Court set aside in entirety the judgement given by the High Court without providing a solution to the unlawfully evicted occupants who were left without a remedy. The Court ruled that concept of structural interdicts were not part of the Kenyan legal system and ruled that the High Court erred in delivering a judgement that was not a final judgement determining the rights and liability of parties. The Court fundamentally misconstrued the role of structural interdicts which aim at supervising the implementation of orders granted by the courts.<sup>96</sup>

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<sup>92</sup> Ibid Para 94.

<sup>93</sup> Ibid Paras 90-92.

<sup>94</sup> Ibid Para 119.

<sup>95</sup> Ibid Para 141 (b).

<sup>96</sup> V Miyandazi 'Setting the Record Straight in Socio-Economic Rights Adjudication: The Mitu-Bell Welfare Society Supreme Court of Kenya Judgment' (2022) 6 *Kabarak Journal of Law and Ethics* 38.

By setting aside the judgement by the High Court, the Court was retrogressive and its decision affront to protection against forced evictions in informal settlements in Kenya. Khakula argues that the Court should have focused on ensuring that the petitioners get justice for violation of their rights and not shoot down the structural interdicts as an appropriate remedy by the High Court.<sup>97</sup> Khakula observes that the finding by the Court denied the applicability of structural interdicts in Kenyan law but contradicted itself by suggesting that courts can use structural interdicts as long as they are precise and specific to avoid vagueness which can easily result in breach of the doctrine of separation of powers where the judiciary finds itself making policy instead of interpreting the law.<sup>98</sup>

The Society appealed to the Supreme Court (SC). The SC ruled that protection from forced evictions is not necessarily in the form of an order restraining the State agency from evicting the occupants but courts can be innovative in crafting adequate reliefs such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction and the provision of alternative land for settlement.<sup>99</sup> The SC upheld the use of structural interdicts by virtue of Article 23(3) of the Constitution as an appropriate relief that a court may grant in forced eviction cases.<sup>100</sup> The SC disagreed with the decision by the Court of Appeal by stating that where a court of law issues an order whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to

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<sup>97</sup> A Khakula 'Embracing Structural Interdicts in the Enforcement of Socio-Economic Rights in Kenya: Analysis of the Court of Appeal Decision in the *Mitubell Case*' (2018) 2 *Jomo Kenyatta University of Agriculture and Technology Law Journal* 181.

<sup>98</sup> *Ibid* 179.

<sup>99</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR.

<sup>100</sup> *Ibid* Para 121.



have abdicated its judicial function as long as the said orders are carefully and judicially crafted.<sup>101</sup>

The SC observed that courts can be innovative in granting structural interdicts. Though the SC upheld the use of structural interdicts as had been applied by the High Court, it observed that the most effective relief open to the occupiers under the prevailing circumstances was a claim for compensation since they had already been evicted from the land.<sup>102</sup> The SC observed that the orders by the High Court requiring the respondents to furnish the court with the current state policies and programmes on provision of shelter and access to housing did not have any remedial benefits to the occupiers. Courts can issue orders other than those listed as they deem fit on a case-by-case basis.<sup>103</sup>

The SC observed that orders aimed at enforcing rights or providing redress to the violation of such a right should be carefully and judicially crafted.<sup>104</sup> Interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.<sup>105</sup> The SC ruled that such structural interdicts must be realistic to avoid the temptation of judicial overreach, especially in matters of policy. Additionally, the orders should be addressed to parties who bear the constitutional or statutory mandate to enforce them and where necessary, a court of

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid Paras 154 & 155.

<sup>103</sup> Ibid Para 121.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

law may indicate that the orders are of an interim nature and that the final judgement shall await the crystallisation of certain actions.<sup>106</sup>

The SC further recognised the remedies contained in international legal instruments such as the UN Guidelines, General Comments and foreign case law which can be applied by the courts as long as it is consistent with the Constitution to vindicate the right to housing for those living in informal settlements. The SC observed that the most effective relief open to the occupiers was a claim for compensation since they had already been evicted from the land.<sup>107</sup> The SC observed that the orders by the High Court requiring the respondents to furnish the court with the current State policies and programmes on provision of shelter and access to housing did not have any remedial benefits to the occupiers.

The decision by the SC in the *Mitu-Bell Welfare* case demonstrates that structural interdicts are appropriate remedies in forced eviction cases. However, the success of structural interdicts depends on the willingness of the executive to respect court orders. If the executive fails to comply with court orders, the aggrieved parties may not realise the reliefs through structural interdicts.

The following section evaluates the role of the legislature in protection against forced evictions.

#### **4.0 The Role of the Legislature in Protecting against Forced Evictions**

The Constitution establishes the legislature comprising the national assembly which represents the people of the constituencies and special interests, and the senate which presents the counties by

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<sup>106</sup> Ibid Para 122.

<sup>107</sup> Ibid Paras 154 & 155.

serving to protect the interests of the counties and county governments.<sup>108</sup> The legislature through the national assembly and the senate perform a constitutional duty of protecting, promoting and fulfilling fundamental rights and freedoms.<sup>109</sup>

The legislature is supposed to ensure the widest possible enjoyment of rights and fundamental freedoms while allocating resources.<sup>110</sup> In doing so, the legislature should have regard for prevailing circumstances which include the vulnerability of individuals or groups.<sup>111</sup> The actions by the legislature enhance enjoyment of fundamental rights and freedoms. Conversely, omission by the legislature to exonerate the mandate is a violation of the fundamental rights and freedoms.

The role of the legislature in respect of forced evictions is to enact enabling legislation by responding to what the courts have pronounced in respect of protecting individuals and communities from forced evictions. In particular, the High Court in the *Satrose Ayuma* case<sup>112</sup> urged the legislature to enact legislation that offers protection from forced evictions in the following manner:

...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

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<sup>108</sup> Articles 95 & 96 of the Constitution.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid Article 20 (5) (b).

<sup>111</sup> Ibid.

<sup>112</sup> The *Satrose Ayuma* case (note 42 above).

evictions, security of tenure, legalisation of informal settlements and slum upgrading.<sup>113</sup>

The High Court in this case underscored the need for a legislative framework to protect against evictions and to guide evictions in the event they are inevitable. The High Court observed that Kenya lacked appropriate legislation to provide guidelines on forced evictions.<sup>114</sup> The High Court in urging the legislature to enact appropriate legislation on forced eviction breathed life into Article 43 (1) b of the Constitution by formulating remedies that facilitate the executive and the legislature to take the necessary steps and measures that ensure adequate and effective legal framework.

The High Court in the case of *Susan Waithera Kariuki & 4 Others v Town Clerk Nairobi City Council & 2 Others*<sup>115</sup> made the same observation by stating that Kenya should develop appropriate legal guidelines on forced eviction and displacement of people from informal settlements.<sup>116</sup> The High Court further stated that legal guidelines would be imperative in mitigating extreme suffering and indignity to the people in the event that forced eviction is inevitable.<sup>117</sup> The High Court noted that the requirements set out by the CESCR in General Comment No. 7<sup>118</sup> had not been put in practice in Kenya.<sup>119</sup> The *Satrose Ayuma* and *Susan Waithera* cases provided appropriate guidance to the legislature to enact an appropriate and effective legal framework to regulate evictions.

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<sup>113</sup> Ibid Para 109.

<sup>114</sup> Ibid Para 108.

<sup>115</sup> (2011) eKLR.

<sup>116</sup> Ibid 9.

<sup>117</sup> Ibid 9-11.

<sup>118</sup> General Comment No. 7 (note 34 above).

<sup>119</sup> The *Susan Waithera* case (note 115 above) 9.

The legislature is supposed to ensure that all the Bills brought before it comply with human rights obligations before being enacted into law.<sup>120</sup> The legislature should ensure compliance with human rights obligations contained in treaties ratified by the State and scrutinise new treaties with human rights implications prior to their ratification.<sup>121</sup> By ensuring that legislation complies with international human rights standards, the legislature should refrain from passing legislation that unjustifiably interfere with human rights or legislation that may fail to deter actions by State or non-state actors who are likely to violate human rights.<sup>122</sup>

Kenya has ratified international law instruments that protect against forced evictions and is bound to implement the commitments under international law including general rules of international law, international agreements, conventions and treaties.<sup>123</sup> The legislature has a role in ensuring compliance with the obligations in the international law instruments that Kenya has ratified. That entails enactment of legislation that protects against forced evictions in compliance with international human rights standards.

The legislature should also reform the housing legislation that incorporates security of tenure, availability, affordability, accessibility, habitability and cultural adequacy<sup>124</sup> as a measure to curb forced evictions. Though the legislature has the role in ensuring

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<sup>120</sup> M Hunt, H Hooper & P Yowell *Parliaments and Human Rights: Redressing the Democratic Deficit* (2012) <<http://ahrc.ukri.org>> last accessed 30 November 2021 [13].

<sup>121</sup> Ibid 13-14.

<sup>122</sup> Ibid.

<sup>123</sup> M Mbondenyei & J Ambani *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Nairobi: Claripress Limited, 2012) 24-26.

<sup>124</sup> UN CESCR General Comment No. 4 'The Right to Adequate Housing' (1991) UN Doc No. E/1992/23 [Para 8].

compliance with international law obligations, it has not passed a legislation that provides substantive and procedural protection to individuals and communities against forced evictions.

The following section evaluates the role of institutions governed by the executive arm of government in protection against forced evictions.

## **5.0 The Role of Institutions under the Executive Arm in Protection against Forced Evictions**

### **5.1 Ministry of Lands, Public Works, Housing and Urban Development (MLPWHUD)**

MLPWHUD is currently constituted pursuant to an Executive Order No. 1 of 2023.<sup>125</sup> The functions of MLPWHUD relevant to this study include land policy management, physical planning, land transactions, survey and mapping, land adjudication, settlement matters, rural settlement planning, land reclamation, national spatial data infrastructure, land registration, land and property valuation services, and administration of public land as designated by the Constitution.<sup>126</sup> MLPWHUD is the key policy making body on matters relating to land.

MLPWHUD through the State department of lands and physical planning developed the Eviction and Settlement Guidelines in 2009<sup>127</sup> and was instrumental in formulating the Evictions and Resettlement Procedures Bill (ERP) in 2012.<sup>128</sup> However, the substantive law on

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<sup>125</sup> Republic of Kenya *Executive Order No. 1: Organisation of the Government of the Republic of Kenya* (2023) 23.

<sup>126</sup> Ibid.

<sup>127</sup> Republic of Kenya *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (2009).

<sup>128</sup> Republic of Kenya *The Evictions and Resettlement Procedures Bill* (2012).

eviction has not been enacted by the legislature to date. The ERPB had envisaged the procedures that were to guide the court proceedings during and after evictions. These elaborate procedures were not included in the 2016 amendments to the Land Act on protection against forced evictions.<sup>129</sup> The guidelines can provide a framework on evictions that align with internationally accepted standards, which would enhance protection from forced evictions.

## **5.2 The National Housing Corporation**

The State Department of Housing under MLPWHUD oversees the National Housing Corporation (NHC).<sup>130</sup> The main role of the NHC is to give loans for the purposes of purchasing or constructing approved dwellings or to carry out approved housing schemes.<sup>131</sup> The NHC is established as a body corporate with perpetual succession and a common seal, and performs the duties and have the powers conferred on it by the Housing Act.<sup>132</sup>

The NHC consists of public officials including the principal secretary in charge of the State Department of Housing and not more than eight members appointed by the minister in charge of housing who should have knowledge of housing development or housing finance.<sup>133</sup> The NHC is also empowered to undertake research in housing related matters, dissemination of information concerning housing and related matters and to operate a housing finance institution with powers to borrow funds from the government, overseas agencies,

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<sup>129</sup> Land Laws (Amendment) Act 28 of 2016.

<sup>130</sup> The NHC is established under Section 3 of the Housing Act Cap 117 Laws of Kenya.

<sup>131</sup> Ibid Section 7A.

<sup>132</sup> Ibid Section 3.

<sup>133</sup> Ibid Section 4.



pension and trust funds and any other institution or persons to finance residential housing development.<sup>134</sup>

The Housing Act establishes the housing fund under the control of the NHC.<sup>135</sup> The NHC considers the financial position of any company, building society or individual person and the ability of repayment before granting loans to build houses.<sup>136</sup> The loans attract interest that is determined by the NHC from time to time. The housing fund has not been designed to address the housing problem in Kenya. The fund is modelled to assist the people who have the capacity to take loans and repay them within prescribed timelines with the interests determined by the NHC.<sup>137</sup> The NHC addresses the housing needs of the working segment of the Kenyan population.<sup>138</sup>

The architecture and design of the NHC were not modelled to address the housing problem of the vulnerable and marginalised segments of Kenyan population.<sup>139</sup> The NHC and the housing fund do not align to the constitutional guarantee of the right to housing. This contributes to vulnerability to arbitrary evictions. Odongo observes that the mortgage market and housing finance in Kenya has targeted the high and upper middle income citizens and leaves out the rest of the populace.<sup>140</sup> He also observes that there is inequality and disparity in the housing sector in Kenya with the high and upper

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<sup>134</sup> Ibid Section 7B.

<sup>135</sup> Ibid Section 6.

<sup>136</sup> Ibid Section 7 (3).

<sup>137</sup> Ibid Sections 7A, 7B

<sup>138</sup> Ibid see the Civil servants (Housing Scheme Fund) Regulations, 2004 in the schedule to the Act.

<sup>139</sup> Ibid.

<sup>140</sup> OM Benard 'The Right to Housing in Kenya: From Law to Practice' (2015) 2 (11) *Law Society of Kenya Journal* 38-39.

middle income Kenyans living in well serviced and planned houses and the low income Kenyans living in informal settlements.<sup>141</sup>

NHC has not been significant in protection against forced evictions. However, its role could be enhanced to play a greater part in provision of housing in conjunction with the devolved county governments. The role of the NHC, if enhanced, would play a critical role in addressing the problem of evictions and provision of emergency and alternative housing. The NHC should be strengthened through legislation to collaborate with county governments to address the problem of evictions and provision for emergency and alternative housing.

### **5.3 The National Land Commission**

The National Land Commission (the NLC) is established under Article 67(2) of the Constitution with the mandate of managing public land on behalf of the national and county governments, recommending a national land policy to the national government and advising the national government on a comprehensive registration of land titles program in the country.<sup>142</sup> The NLC is further mandated to carry out research and recommendations to relevant authorities on land and the use of natural resources, and to investigate and recommend remedies to present or historical land injustices and encourage the use of traditional dispute resolution mechanisms in land conflict resolution.<sup>143</sup>

The NLC performs functions prescribed by its enabling legislation, the National Land Commission Act (NLCA).<sup>144</sup> NLCA provides for

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<sup>141</sup> Ibid 39.

<sup>142</sup> Article 67 (2) (c) of the Constitution.

<sup>143</sup> Ibid.

<sup>144</sup> Act 5 of 2012.

the objects and principles of devolved governments in the management and administration of land. NLCA mandates the NLC to alienate public land on behalf and with the consent of both levels of government, monitor the registration of all rights and interests in land and ensure sustainable management of public land, including land held by State agencies.<sup>145</sup> NLCA further mandates the NLC to manage and administer all unregistered community land on behalf of the county governments and develop mechanisms for the use of alternative dispute resolution in resolving land disputes.<sup>146</sup>

The Land Laws (Amendment) Act (LLAA)<sup>147</sup> grants the NLC mandate to deal with forced evictions of illegal occupation of public land as follows:

...the NLC shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate at least three months before the eviction.<sup>148</sup>

The mandate provided to the NLC by LLAA does not have sufficient substantive and procedural protection to occupiers of public land. The LLAA does not consider the essence of the Court process before evictions. The LLAA does not create an avenue of mediation with occupiers in the event of being rendered homeless.

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<sup>145</sup> Ibid Section 5 (2) (c).

<sup>146</sup> Ibid Section 5(2) (f).

<sup>147</sup> LLAA (note 129 above).

<sup>148</sup> Ibid Section 152C.

Angote observes that evictions from public land are common and are motivated by public good or political influences.<sup>149</sup> However, the SC has created protectable rights to housing occupation of public land as follows:

...where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same.<sup>150</sup>

The SC justified creation of the protectable right to housing to deter State and non-state agents from carrying out arbitrary evictions without seeking remedies for the occupiers of land. The SC stated that the Constitution has radically transformed land tenure in Kenya by declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, communities and individuals.<sup>151</sup> The SC ruled that since the Constitution has created the category of public land, any Kenyan has an interest whether indescribable, unrecognisable or transient on public land.<sup>152</sup> This decision by the SC makes an important development in the attempt to offer protection to occupiers of informal settlements. The decision is critical in informing enactment of legislation that offers adequate and effective protection to occupiers from forced evictions.

The following section addresses the role of devolved county governments in protection against forced evictions.

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<sup>149</sup> OA Angote 'Evictions in Kenya: Which Way under the New Constitution and the Land Laws (Amendment) Act 2016?' (2018) 2(2) *Journalofcmsd* 77.

<sup>150</sup> The SC *Mitu-Bell Welfare* case (note 99 above) Para 151.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

## **6.0 The Role of County Governments in Protection against Forced Evictions**

Kenyan county governments are devolved governments created by the Constitution. The Kenyan territory is divided into 47 counties.<sup>153</sup> Devolution involves the transfer of power of governance to lower level units that assume responsibility for their own governance.<sup>154</sup> Muia posits that devolution is an approach that is increasingly seen as a model of making government accountable to the people.<sup>155</sup> Additionally, Muia defines devolution as the transfer of executive and legislative power and creation of two distinct and interdependent levels of government, the national and county governments.<sup>156</sup> The two levels of government are supposed to operate in an environment of mutual relations in a consultative and cooperative manner. The effect of devolution has been demonstrated as follows:

...devolution under the new constitution will, in all probability, result in a major shift in the power configuration: as the various counties have urgent developmental priorities, and with their elected leadership committed to local issues, they are unlikely to render themselves amenable to undue control by the central government. The county set-ups are destined to generate contentious matters for judicial determination, in view of the

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<sup>153</sup> Article 63(4) of the Constitution.

<sup>154</sup> D Muia 'Devolution of Governance to Districts in Kenya' in T Kibua & G Mwabu (eds) *Decentralization and Devolution in Kenya: New Approaches* (Nairobi: University of Nairobi Press, 2008) 77; Mbondenyi & Ambani (note 124 above) 100.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

competing interests therein, and also in relation to possible conflicts with national authorities.<sup>157</sup>

Devolution creates lower level units of government which elect their leaders, raise revenue and make decisions independently. The devolved units have legally defined geographical boundaries within which they exercise authority and perform public functions. The devolved units are not under obligation to seek authority from the central government before making and implementing decisions that fall within their jurisdiction.<sup>158</sup>

The Constitution outlines the objects of devolution and provides that devolution related disputes may be resolved through advisory opinions to county governments by the Supreme Court.<sup>159</sup> Several legislations have been enacted to govern the operations of county governments. They include the County Government Act,<sup>160</sup> the

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<sup>157</sup> JB Ojwang *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Nairobi: Strathmore University Press, 2013) 54.

<sup>158</sup> M Odero 'Devolved Government' in PLO Lumumba, MK Mbonyeni and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (Nairobi: Strathmore University Press, 2011) 203-208. Devolution exercises political, administrative and fiscal powers within the devolved unit.

<sup>159</sup> Article 163 (6) of the Constitution. The objects of devolution are provided for in Article 174 of the Constitution. Relevant to this study, the objects of devolution include recognition of the right of communities to manage their own affairs and to further their development and to protect and promote the interests and rights of minorities and marginalised communities.

<sup>160</sup> Act 17 of 2012. The Preamble to the Act states that the legislation aims at giving effect to chapter eleven of the Constitution on devolution and to provide for the powers, functions and responsibilities of county governments.

Intergovernmental Relations Act,<sup>161</sup> the Transition to Devolved Government Act<sup>162</sup> and the Urban Areas and Cities Act.<sup>163</sup> The State Department of Devolution (the department) within the Office of the Deputy President is responsible for the co-ordination and implementation of devolution policies.<sup>164</sup> The department works with county governments to implement devolution.

Regarding land rights, the Constitution has elaborated on one of the objects of devolution to include recognition of the right by communities to manage their own affairs and protect and promote the interests and rights of minorities and marginalised communities.<sup>165</sup> The governments at county level are responsible for matters concerning land and more particularly community land.<sup>166</sup> The Constitution further provides that any dealings with community land and the extent of land rights of community members is to be determined through legislation.<sup>167</sup> The use of 'legislation' by the Constitution connotes that legislation could be either national or county legislation.<sup>168</sup> The Constitution, in making the provision

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<sup>161</sup> Act 2 of 2012. The legislation establishes a framework for consultation, cooperation and a mechanism for dispute resolution between the national and county governments.

<sup>162</sup> Act 1 of 2012. The legislation provides the framework for the transition to devolved governments pursuant to the Constitution.

<sup>163</sup> Act 13 of 2011. The legislation gives effect to Article 184 of the Constitution and provides for the classification, governance and management of urban areas and cities and to provide for the principles of governance and public participation in establishment of urban areas.

<sup>164</sup> Republic of Kenya *Executive Order No. 1 on the Organisation of the Government of the Republic of Kenya* (2023) 5.

<sup>165</sup> Article 174 of the Constitution.

<sup>166</sup> M Kangu *Constitutional Law of Kenya on Devolution* (Nairobi: Strathmore University Press, 2015) 210.

<sup>167</sup> Article 63(4) of the Constitution.

<sup>168</sup> *Ibid.*



grants power to parliament to enact legislation to enable county governments to deal with community land.

The Land Laws (Amendment) Act (LLAA)<sup>169</sup> which amended the Land Act<sup>170</sup> assigned county governments a nominal role in protecting communities from forced evictions from unregistered community land. The role assigned to county governments does not in any way relate to evictions from public and private land. The LLAA assigns the County Executive Committee Member (CECM) responsibility for making decisions relating to eviction from unregistered community land. The LLAA provides as follows:

...the CECM responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons, in writing, by notice in the Kenya Gazette and a newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.<sup>171</sup>

The provisions in the LLAA relating evictions and the limited role of county governments demonstrate that legislation in Kenya has not created a framework within which county governments should react to and deal with forced evictions.<sup>172</sup> The LLAA also does not outline the roles and responsibilities of municipalities as important components for guarding against forced evictions.<sup>173</sup> Even though communities living on unregistered land are vulnerable, the LLAA does not accord communities adequate protection against forced

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<sup>169</sup> LLAA (note 129 above).

<sup>170</sup> Act 6 of 2012.

<sup>171</sup> LLAA (note 129 above) Section 152C.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

evictions. The LLAA does not state with clarity what constitutes illegal occupation of unregistered community land or who could be termed as an illegal occupier of such community land.<sup>174</sup>

The LLAA assigns a nominal role to county governments which deals with community land and fails to assign any role in respect of public and private land.<sup>175</sup> The LLAA does not render county governments as active participants in eviction proceedings. County governments, if sufficiently empowered by legislation, can play an important role in eviction proceedings in Courts ensuring that evictions do not result in homelessness.<sup>176</sup>

The ELC in the *Satrose Ayuma* case ordered that there must be a mandatory presence of governmental officials or representatives including Nairobi county government officials and security officers during evictions.<sup>177</sup> The court construed that the county governments had a critical role in eviction proceedings. However, parliament has not legislated the aspect of joinder of county governments in the process of lawful evictions.

The Constitution and the Community Land Act (CLA) mandates county governments to hold all unregistered community land on behalf of the communities.<sup>178</sup> The CLA mandates county

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<sup>174</sup> Ibid Section 152A.

<sup>175</sup> Ibid Section 152D.

<sup>176</sup> Ibid.

<sup>177</sup> The *Satrose Ayuma* case (note 42 above) Para 111 (e).

<sup>178</sup> Article 64 (3) of the Constitution. The Article provides that 'any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.' See also the Section 6 (1) Community Land Act 27 of 2016 which provides that 'county governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.'

governments to hold any monies payable as compensation for compulsory acquisition of any unregistered community land, in trust for a community.<sup>179</sup> The monies obtained after compulsory acquisition are supposed to be released to the community upon registration of the community land. The respective county governments shall cease to manage community land upon registration in the name of the particular community.<sup>180</sup> County governments are precluded from selling, disposing, transferring or converting any unregistered community land that they hold in trust on behalf of the communities, for private purposes.<sup>181</sup>

The case of *Mohammed Hussein Yakub & 5 others v County Government of Mandera & 5 others*<sup>182</sup> concerned the role of county governments in protecting unregistered community land. The applicants sought conservatory orders restraining the respondents from acquiring, alienating, disposing and in any way dealing with community land, except in accordance with Article 63(4) of the Constitution and provisions of CLA.<sup>183</sup>

The applicants represented the communities living within Karo Town of Mandera county.<sup>184</sup> They sought redress from the High Court after the county government of Mandera, NLC, KAA and four other government agencies wanted to acquire, alienate and use the land for

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<sup>179</sup> Ibid Section 6 (3).

<sup>180</sup> Ibid Section 6 (7).

<sup>181</sup> Ibid Section 6 (8).

<sup>182</sup> (2020) eKLR.

<sup>183</sup> Ibid Para 2. Article 63 (4) of the Constitution provides that 'community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.'

<sup>184</sup> Ibid Paras 2 & 3.

the construction of an air strip.<sup>185</sup> The applicants further sought a declaration that the land they inhabited was community land and alienation by the county government for construction of an airstrip was contrary to the Constitution and the CLA.<sup>186</sup>

The county government indicated that the land in issue had been set aside for public use, in particular construction of an airstrip.<sup>187</sup> The county government indicated that the land did not constitute community land under the Constitution.<sup>188</sup> The county government further argued that the applicants were not members of a registered community as required under Section 7 (2) of the CLA, since in the opinion of the county government; registration is a requisite condition precedent to the recognition, protection and registration of community land rights.<sup>189</sup>

The High Court concurred with the applicants that the subject parcel of land was community land and that the process of compulsory acquisition as enshrined under the law had not been followed in alienating the land for use as a public utility.<sup>190</sup> The High Court observed that it was incumbent upon the county government and the other respondents to demonstrate that the statutory legal process as laid down under the Constitution and the legislation, had been adhered to in alienating the subject land for the purpose of construction of the said airstrip.<sup>191</sup>

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<sup>185</sup> Ibid Paras 3 & 4.

<sup>186</sup> Ibid Para 3.

<sup>187</sup> Ibid Para 9.

<sup>188</sup> Ibid Paras 17-19.

<sup>189</sup> Ibid Para 20.

<sup>190</sup> Ibid Para 77.

<sup>191</sup> Ibid Para 73.

The High Court further observed that local or resident communities were entitled to compensation where such land was to be alienated for public use.<sup>192</sup> The High Court declared that alienation of community land and conversion to public land without due process of compulsory acquisition was contrary to the community land legislation.<sup>193</sup> The case is critical since it demonstrates the role of county governments in protecting unregistered community land where communities, which would be vulnerable to arbitrary evictions reside.

The Constitution does not impose duties on county governments such as respecting, protecting and fulfilling those rights that are important in protection against evictions such as housing, among others.<sup>194</sup> Since county governments are important elements in the protection against forced evictions, the law should be reformed to enhance the role of county governments in protecting against forced evictions by making them parties to eviction proceedings in court. This reform would ensure that county governments play a central role in facilitating the determination of whether or not the courts will grant eviction orders. The law can also be reformed to grant county governments to provide alternative housing in instances where evictions are inevitable.

The subsequent section discusses the role independent commissions created by the Constitution and statutes in protection against forced evictions.

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<sup>192</sup> Ibid Para 75.

<sup>193</sup> Ibid Para 74.

<sup>194</sup> See Chapter 4 of the Constitution on the Bill of Rights.

## **7.0 The Role of Independent Commissions in Protection against Forced Evictions**

The Constitution establishes independent commissions and independent offices whose objectives are to protect the sovereignty of the people, to secure the observance by all State organs of democratic values and principles and to promote constitutionalism.<sup>195</sup> The commissions and independent offices operate independently from each other and from the executive, legislative and judicial arms and constitute the fourth estate of constitutional governance.<sup>196</sup> They are only subject to the Constitution and are not subject to the direction or control of any person or authority.<sup>197</sup>

Independent commissions provide accountability and monitoring mechanisms that can be essential in protection against forced evictions. Akech observes that accountability and monitoring mechanisms serve certain primary purposes. Firstly, the mechanisms make it possible for the members of the public to hold public officers accountable for their actions and secondly, the mechanisms help prevent abuse of power and illegitimate unjust exercise of governmental power.<sup>198</sup> Thirdly, the mechanisms enhance acceptance and confidence of government authority by the citizenry. Akech elaborates on the importance of monitoring and accountability mechanisms as follows:

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<sup>195</sup> Article 249 (1) of the Constitution.

<sup>196</sup> E Opiyo & E Wabwoto 'Limits on State Power: Examining the Role of Independent Commissions and Offices under the Constitution of Kenya' (2015) 11(2) *Law Society of Kenya Journal* 130.

<sup>197</sup> Ibid.

<sup>198</sup> M Akech 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18(1) *Indiana Journal of Global Legal Studies* 345-346.

...accountability mechanisms serve the purpose of keeping the agents of the people on their toes, by constantly keeping the agents aware of the fact that they will be called upon to account for their actions, thereby helping the people to prevent abuses of power and corruption. The mechanisms also serve the important goal of legitimising government in the perception of the citizenry by promoting acceptance of government authority and confidence in the government.<sup>199</sup>

Some independent commissions are established pursuant to the Principles relating to the Status of National Institutions (Paris Principles).<sup>200</sup> The Paris Principles provide for the minimum standards for development and operation of national human rights institutions (NHRIs) and require that the institutions be given a broad mandate to protect and promote human rights.<sup>201</sup>

The Constitution establishes national human rights institutions. The Constitution establishes the Kenya National Human Rights and Equality Commission (KNHREC).<sup>202</sup> KNHREC is responsible for advising and monitoring progress on the realisation of all rights

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<sup>199</sup> Ibid.

<sup>200</sup> UN Doc E/CN.4/1992/43 9 October 1991. The Paris Principles were adopted by the UN General Assembly Resolution 48/134 of 20 December 1993.

<sup>201</sup> Ibid Article 1; CJ Peterson 'The Paris Principles And Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?' (2003) 33 *Hong Kong Law Journal* 514; M Akech *Privatization and Democracy in East Africa: The Promise of Administrative Law* (2009)124-125.

<sup>202</sup> Article 59 of the Constitution. The Article establishes the Kenya National Human Rights and Equality Commission. Sub-article 4 provides that parliament shall enact legislation to restructure the Commission into two or more separate commissions. The study will also review their enabling legislation.

enshrined in the Constitution.<sup>203</sup> It is mandated to promote, protect and ensure observance of human rights in public and private institutions by ensuring compliance with obligations under ratified international treaties and conventions relating to human rights.<sup>204</sup> Pursuant to the establishment of the KNHREC by the Constitution, parliament has established the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice (Ombudsman).

The following section evaluates the roles of the institutions created under the KNHREC in protection against forced evictions.

### **7.1 Kenya National Commission on Human Rights (KNCHR)**

The KNCHR is established by the Kenya National Commission on Human Rights Act to promote and protect human rights and for associated purposes.<sup>205</sup> Relevant to the discussion regarding forced evictions, the KNCHR is mandated to act as the chief agent in compliance with obligations under international treaties and conventions on human rights and recommend to parliament effective measures to promote human rights.<sup>206</sup> KNCHR advises parliament on enactment of legislation to promote human rights. The KNCHR complements the efforts of other institutions working in the field of human rights and cooperates with such other institutions for the purpose of promoting and protecting human rights in Kenya.<sup>207</sup>

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<sup>203</sup> Ibid Article 59 (g).

<sup>204</sup> Ibid Article 59 (c).

<sup>205</sup> Act 14 of 2011. See the Preamble.

<sup>206</sup> Ibid Section 16 (1) f.

<sup>207</sup> Ibid Section 8 (h). KNCHR works with the NGEK and the CAJ to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.



The KNCHR continuously monitors and documents cases of forced evictions in Kenya.<sup>208</sup> The KNCHR documented forced evictions of indigenous peoples and communities living in forests.<sup>209</sup> The KNCHR observed that forced evictions were carried out by the government in forest areas of Kenya rendering communities homeless and causing destruction of property.<sup>210</sup> The KNCHR observed that the government had forcibly evicted communities comprising poor families from forest land and subsequently allocated some parcels to political actors.<sup>211</sup>

The KNCHR recommended that the government formulate the national guidelines on evictions to guide plans and legislation with regard to evictions and more particularly in forest areas.<sup>212</sup> It recommended that the government should put in place a comprehensive relocation and compensation plan for any proposed evictions including forest areas and establish policy and legislation that offers alternatives to evictions and community participation before any intended eviction takes place particularly in forest areas.<sup>213</sup>

In 2018, the KNCHR wrote an alternative report with the aim of implementation of both legislative and administrative measures geared towards the protection of rights of indigenous peoples.<sup>214</sup>

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<sup>208</sup> KNCHR *Handbook on Forced Evictions in Kenya: Roles and Responsibilities of the Government (National and County) and Private Developers* (2014). See also <[www.knchr.org](http://www.knchr.org)> accessed 30 July 2022.

<sup>209</sup> KNCHR, Amnesty International, the Centre on Housing Rights and Evictions (COHRE), Hakijamii and the Kenya Land Alliance *Nowhere to go Forced evictions in Mau Forest, Kenya* (2007).

<sup>210</sup> Ibid 7.

<sup>211</sup> Ibid 20.

<sup>212</sup> Ibid 21.

<sup>213</sup> Ibid.

<sup>214</sup> KNCHR *'Submissions to the United Nations Permanent Forum on Indigenous Issues on Actions Taken or Planned Related to the Recommendations of the*

KNCHR observed that indigenous peoples suffered violence as a result of and forced evictions conducted by the State and recommended that the State should take measures to protect indigenous peoples and ensure their security by taking action on cases of harassment, assault, violence and forced evictions.<sup>215</sup> The KNCHR further observed that forced evictions of indigenous peoples from their ancestral lands were carried out in the face of court orders stopping the eviction.<sup>216</sup>

The KNCHR made far reaching recommendations which include ratification of the International Labor Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples,<sup>217</sup> implementation of the UN Declaration on the Rights of Indigenous Peoples and enactment of the Eviction and Resettlement Procedure Bill by parliament.<sup>218</sup> It further recommended the full implementation of the *Endorois* decision handed down by the ACHPR which recognises indigenous peoples' rights on ancestral land.

The KNCHR enhances the realisation of economic, cultural and social rights through ensuring enactment and implementation of laws and policies.<sup>219</sup> KNCHR is vested with the power to investigate

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*Permanent Forum, Implementation of UN Declaration on Indigenous Peoples and the Outcome Document of the World Conference on Indigenous Peoples* (2018).

<sup>215</sup> Ibid 2.

<sup>216</sup> Ibid 3.

<sup>217</sup> ILO Convention 169 on Indigenous and Tribal Peoples is the only legally binding instrument that addresses the plight of indigenous peoples. See the *ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) (Adopted by the International Labour Conference on 27 June 1989 and entered into force on 5 September 1991).

<sup>218</sup> UNGA 'United Nations Declaration on the Rights of Indigenous Peoples (2011) UN Doc A/RES/66/142. See also the Eviction and Resettlement Procedure Bill (note 128 above).

<sup>219</sup> Article 59 of the Constitution.

complaints of all human rights abuses including SERs, seek appropriate redress for the violations and fundamentally advise the government on their human rights obligations and to ensure State compliance with regional and international human rights treaty obligations.<sup>220</sup> KNCHR as a quasi-judicial may summon witnesses during investigations.

The role of the KNCHR is significant in the protection against evictions. KNCHR has demonstrated competence in utilising its constitutional and legislative mandate to protect human rights, including forced evictions. However, the role of the KNCHR can be enhanced to better protect against forced evictions. This can be done through increased capacity building to ensure compliance with international and regional human rights obligations on evictions through rigorous advocating for ratification, domestication and reporting on the instruments. Enhancing the role of KNCHR can help mitigate systemic forced evictions.

## **7.2 Commission on Administrative Justice (CAJ)/Ombudsman**

CAJ is established under the Commission on Administrative Justice Act.<sup>221</sup> CAJ, also known as the office of the ombudsman, is mandated to enforce administrative justice and promote constitutional values in the public sector by addressing maladministration through effective complaints handling and dispute resolution.<sup>222</sup> The CAJ makes inquiries into maladministration in public offices within the national and county governments. Upon making inquiries, CAJ issues advisory opinions on review of legislation, processes and procedures in public administration.<sup>223</sup> It further participates in strategic public

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<sup>220</sup> The KNCHR Act (note 205 above) Section 28.

<sup>221</sup> Act 102A of 2011.

<sup>222</sup> Ibid Section 8 (e).

<sup>223</sup> Ibid Section 8 (a).

interest litigation on matters of national importance before courts as a way of promoting public administration.<sup>224</sup>

CAJ receives complaints from aggrieved citizens against government officials or agencies, investigates the complaints and recommends corrective measures in order to remedy the grievances and issue reports.<sup>225</sup> Even though the ombudsman recommends remedial measures, the recommendations are not binding on the administration but compliance is based on a voluntary basis upon the support of other governmental structures.<sup>226</sup> The role of the ombudsman in protection of human rights is limited by the fact that it makes decisions that are not binding and implemented on the mercy of other government structures.

Relevant to the study on protection against forced evictions and the right to housing the CAJ is mandated to 'take appropriate steps in conjunction with other State organs and commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration'.<sup>227</sup> Conceptually, the CAJ is mandated to protect the right to housing as part of human rights. It is envisaged that by protecting the right to housing, CAJ has the potential to protect against forced evictions. The CAJ limits its jurisdiction to public institutions and does not have jurisdiction over matters pending before courts or judicial tribunals.<sup>228</sup> The CAJ is given power to monitor the performance of ministries, departments

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<sup>224</sup> CAJ *Righting Administrative Wrongs: A Compendium of Advisories, Determinations and Case Law by the Kenyan Ombudsman* (2016) iii.

<sup>225</sup> Mbianda (note 28 above) 14.

<sup>226</sup> Ibid 11.

<sup>227</sup> M Akech *Administrative Law* (Nairobi: Strathmore University Press, 2016) 404.

<sup>228</sup> CAJ Act (note 221 above) Section 30.

and agencies and implements the government performance contracting programme.<sup>229</sup>

CAJ can be strengthened to make it more effective by giving legislative mandate that ensures enforcement of its findings and recommendations. CAJ does not have adequate powers to ensure enforcement of its decisions beyond making recommendations to the relevant State agencies. Parliament should extend the mandate of the CAJ to include court action to seek appropriate remedy for the enforcement of its decisions.

## **8.0 Conclusion**

This paper evaluated the institutional initiatives for the protection against forced evictions in Kenya. The paper discussed the roles of the national and devolved county governments as well as the roles of the executive, the legislature and the judiciary in protection against forced evictions. The paper also discussed the role of quasi-government institutions and constitutional commissions in protecting against forced evictions. It demonstrated that institutions can play a significant role in protection from forced evictions.

Institutions established by the Constitution and legislation have not always acted in the public interest. Apart from the courts that have demonstrated progressive jurisprudence that they protect against forced evictions, other institutions such as the legislature have not enacted relevant legislation that are in tandem with international human rights standards. Even though the legislature made amendments to the Land Act through the LLAA to incorporate aspects of forced evictions, the legislature failed to enact the ERPB into law. The executive has not taken steps through the relevant

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<sup>229</sup> Ibid Section 8.

government agencies to ensure that the legislature passes the Bill into law.

The legal framework that created county governments and constitutional commissions has not specifically mandated the institutions to protect against forced evictions. The legal framework that establishes county governments does not create a framework within which the institutions can address the problem of forced evictions. The study established that the institutional framework dealing with land and housing is not effective in addressing the issue of forced evictions. The institutions do not adequately protect communities and individuals from forced evictions.

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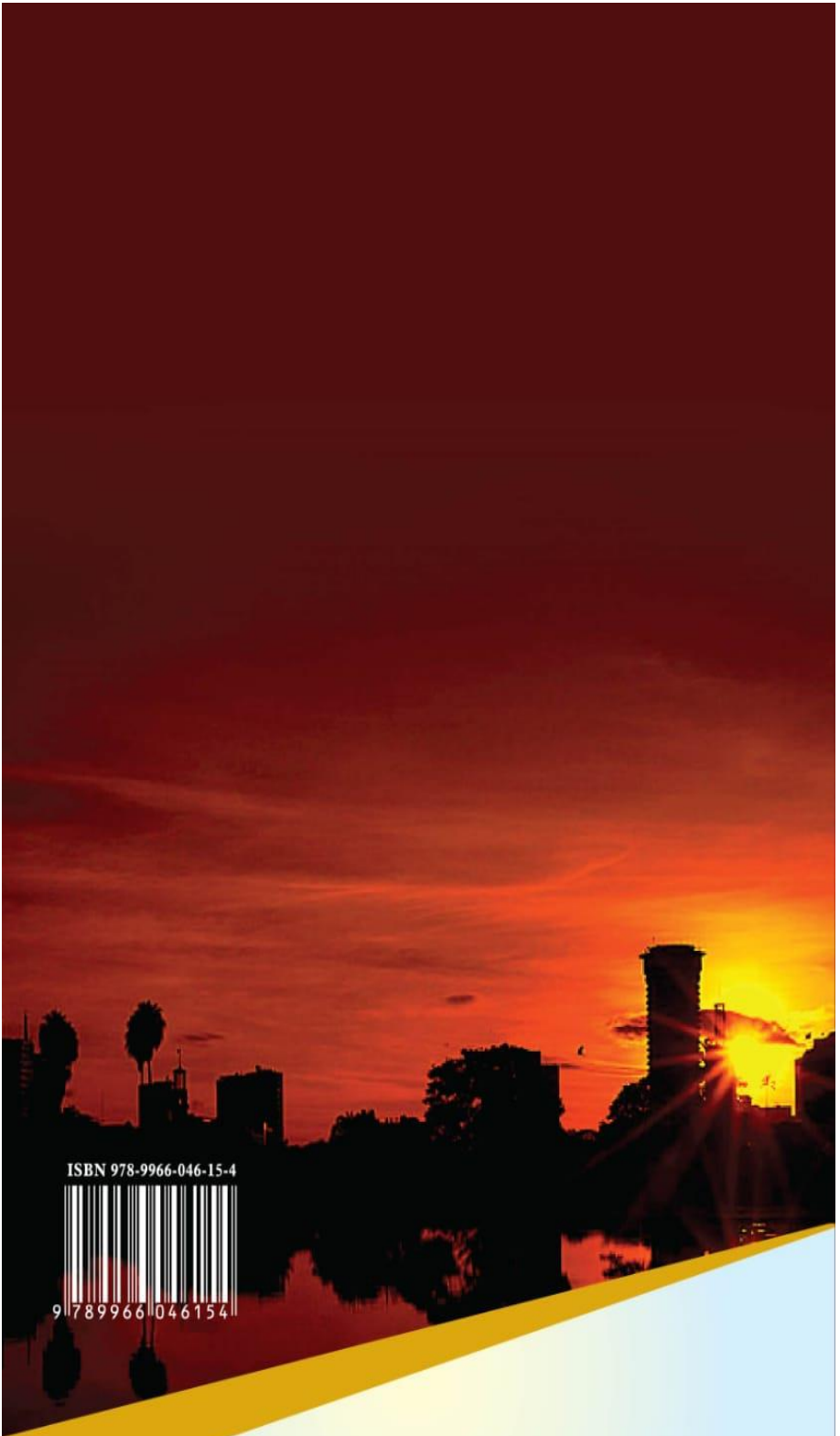
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