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A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in *Mitu-Bell Welfare Society*

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Abstract

Kenyan courts have long grappled with questions surrounding the place of international law in the legal landscape particularly after the promulgation of the 2010 Constitution. Moreover, socio-economic realities have created conditions such as poor and inadequate housing for portions of society, a significant number resultantly having to reside in informal settlements all over the country. Unregulated demolitions of these settlements have left thousands of these already precarious slum dwellers homeless and destitute. In light of these issues, the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae) was expected to bring about clarity on the application of international law to issues such as human rights, as well as provide a definitive interpretation of the right to housing that would help mitigate injustices in this area. This paper analyses the Supreme Court of Kenya's decision in Mitu-Bell Welfare Society, canvassing how the court addressed the applicability of international law and the interpretation of the right to housing.

Keywords: Mitu-Bell Welfare Society, monism, dualism, adequate housing, human rights, Supreme Court of Kenya, international law

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1. Introduction

It was expected to be Kenya's *Irene Grootboom case* both on jurisprudence and significance in society. However, the Supreme Court squandered the opportunity to address the perverse social injustice prevalent in Kenya. In the wake of the senseless demolition of houses in slums,¹ the Supreme Court was given a chance to say what it thinks the right to housing means. In a lukewarm decision, the Supreme Court failed to play its part sufficiently in defining the right to adequate housing. When asked about the applicability of international law in Kenya, the Supreme Court got it wrong, leaving the country in a state of judicial heresy.

Admittedly, it would be disingenuous for this piece to argue that applications of international law and economic, social, and cultural rights are easy issues to navigate.² Even the most acclaimed economic, social, and cultural rights courts have had lapse moments.³ However, the *Mitu-Bell decision* has been celebrated in some quotas as a correct decision,⁴ which this piece highly contests by terming some aspects of the decision as constitutional heresy. The basic argument is that the Supreme Court failed to seize the moment and interpret the Constitution. Had the Court interpreted the Constitution, several themes would have emerged, especially Kenya's approach to economic, social, and cultural rights. There is a tendency of the courts to jump the interpretation stage to the application as if the interpretive question is settled. This piece calls the attention of the Court to the interpretive questions and asks it to boldly express its 'voice' by seriously thinking about the Constitution.

¹ Ella Duncan, 'Justifying and resisting evictions in Kenya: The discourse of demolition during a pandemic', World Peace Foundation, 21 September 2020.

² David Bilchitz, 'Giving socio-economic rights teeth: The minimum core and its importance' 3 *South African Law Journal* (2002) 484-501.

³ Paul O'Connell, 'The death of socio-economic rights' 74(4) *Modern Law Review* (2011) 532-554.

⁴ Emily Kinama, 'Mitu-Bell Welfare Society case: Landmark judgment by Supreme Court' *The Star* 30 January 2021. Also see KELIN KENYA, 'Mitu-Bell Welfare Society Supreme Court decision recognises structural remedies as a means of human rights protection in Petition No 3 of 2018 (decision delivered on 11 January 2021)', 13 January 2021.

This paper reviews the Supreme Court's approach to interpreting the right to housing, and to international law in Kenya. Courts below the Supreme Court have struggled with locating the place of international law and interpretation of economic, social, and cultural rights, and it was expected that the apex court would clear the air by providing a well-reasoned direction. Admittedly, the Supreme Court was correct on the issue of structural interdicts and in setting aside some problematic Court of Appeal findings on defining the general principles of international law. Although the major purpose of this paper is to critique the Supreme Court decision, it makes several normative arguments that have not been previously explored.

In the first part, this piece considers the question of the hierarchy of international law and goes on to propose an approach it calls 'constitutional anchor and value-based approach'. Second, this piece addresses the suggestion that international law applies to fill a gap when there is no domestic law. It also deals with the monism and dualism debate and the definition of 'general rules of international law'. This article argues that the Kenyan Constitution differs from South Africa and other transformative constitutions in dealing with economic, social, and cultural rights. Instead, it contends that Kenya adopted a 'rights priority approach', which shifts the focus from minimum essentials of rights to the maximum levels based on available resources.

The paper argues that this constitutional metamorphosis is not merely rhetorical, but it introduces a game-changer in economic, social, and cultural rights. The third part deals with the finding that the right to housing accrues by being a citizen of Kenya. It also discusses the failure of the Supreme Court to take an approach that gives the right to housing material content and the failure to interpret the meaning of the right to accessible and adequate housing. Additionally, it discusses the finding that 'illegal' occupation of the private land cannot create prescriptive rights. Also, it canvasses the proposition that the right to shelter over public land crystallised by a long period of occupation by people who established homes and raised families. Lastly, the paper deals with the prayers granted by the Supreme Court.

2. Erroneous findings on international law

2.1 Ranking of international law below statutes and final judicial pronouncements

The Supreme Court found that international law is applicable when it is relevant and not in conflict with the Constitution, statutes, or a final judicial pronouncement. While the Supreme Court's finding sounds correct, it has several problems.⁵ The Court was wrong in creating a hierarchy of laws where international law falls below statutes and final judicial pronouncement.⁶ First, this categorisation was made without explanation of how the Court arrived at this hierarchy of laws. For instance, one cannot establish why statutes and judicial opinions supersede international law.

The question of which law is superior between municipal and international law is best answered from two points of view: the international plane, and the domestic plane.⁷ At the international level, domestic law is not a source of law.⁸ It is viewed as facts to either establish customary international law or general principles of law.⁹ This position has been captured in Articles 27 and 46 of the Vienna Convention on the Law of Treaties and Article 2 of the International Law Commission's (ILC) Draft Articles on State Responsibility. Andre Nollkaemper argues that the efficacy of international law would be undermined if domestic law supersedes it. The author goes on to summarise the position of international law in the following words:

⁵ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* Petition 3 of 2018, Judgement of the Supreme Court of 11 January 2021, eKLR, para 132.

⁶ Nicholas Wasonga, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' 13(2) *African Human Rights Law Journal* (2013) 420.

⁷ Gheorghe Popescu and Anca Mihaela Barbu, 'Relationship between international law and domestic law' 2 *Public Security Studies* (2013) 233.

⁸ Peter Malanczuk and Michael Barton, *Akehurst's modern introduction to international law* Routledge, 1997, 64.

⁹ Luljeta Kodra, 'The relationship between international law and national law' 6 *Global Journal of Politics and Law Research* (2017) 1-11.

In general terms, the principle of supremacy of international law seeks to subordinate the sovereignty of states to international law. One of its specific manifestations is that international law is supreme over and takes precedence in the international legal order over national law. In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law. This aspect is at the heart of the law of treaties and the law of international responsibility.¹⁰

The place of international law in the domestic legal system is wholly dependent on the municipal legal system.¹¹ However, one theme largely dominates the discourse by holding that domestic law expresses the sovereignty of the state.¹² As such, international law cannot supersede the entire domestic legal system. Therefore, the place of the constitution in most legal systems is uncontroversial because they are usually the founding documents.¹³ This is ordinarily the case where there is a written constitution. The constitution, therefore, becomes the supreme law, and all other laws, including international law, flow from that stature of the constitution. This position arises from Kelsen's theory of the grundnorm as the basis of the entirely legal system.¹⁴ However, the Dutch Constitution is an exception to the supremacy of the Constitution over international law.¹⁵ The Dutch Constitution provides that international law binds all persons and is supreme to domestic law, including the Constitution.¹⁶ This position has presented some problems which this piece does not intend to delve into.

¹⁰ Andre Nollkaemper, 'Rethinking the supremacy of international law' Amsterdam Center for International Law Working Paper, 2009. < <http://dx.doi.org/10.2139/ssrn.1336946> > on 22 February 2021.

¹¹ Malanczuk and Akehurst, *Akehurst's modern introduction to international law* 65.

¹² William W Burke-White and Anne-Marie Slaughter, 'The future of international law is domestic' *Harvard International Law Journal* (2006) 323.

¹³ Anne Peters, 'Supremacy lost: International law meets domestic constitutional law' 3 *Vienna Online Journal on International Constitutional Law* (2009) 170.

¹⁴ Kwamena Ahwoi, 'Kelsen, the grundnorm and the 1979 Constitution' 15 *University of Ghana Law Journal* (1978) 139.

¹⁵ Joseph Fleuren, 'The application of public international law by Dutch courts' 2 *Netherlands International Law Review* (2010) 245-266.

¹⁶ Jonkheer HF van Panhuys, 'The Netherlands Constitution and international law' 47 *American Journal of International Law* (1953) 537.

The tussle arises whenever international law is pitted against statutes, judicial opinions, regulations, and common law. This struggle is always compounded by the failure of most constitutions to provide for a hierarchy of laws between international law and other domestic laws. In Kenya, the High Court has struggled with this question of the hierarchy of laws since the inception of the Constitution without much coherence. In the *Re The Matter of Zipporah Wambui Mathara*¹⁷ Lady Justice Koome (as she then was) was of the view that the International Covenant on Civil and Political Rights (ICCPR), which prohibits committal to civil jail, supersedes the Civil Procedure Act, which allows for execution through civil jail. In *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*,¹⁸ Justice Njagi argued that treaties rank together with statutes. In *Beatrice Wanjiku & another v Attorney General & another*,¹⁹ Majanja J was not too clear on what is the status of international treaties as against statutes. At some point, he found that the Constitution did not intend international treaties to be superior to local legislation.²⁰ Later he held that the Constitution does not create any hierarchy of laws.²¹ The judge held that the question of applicability of international law should be determined by the nature of the subject matter of the case and whether there is legislation on the issue.²² At the end of Justice Majanja's decision, there is more confusion than clarity.

Despite the confusion on the ranking between international law and statutes, the Supreme Court in *Mitu-Bell* failed to provide a reasoned decision to settle this issue. It opted for an easy way out of concluding without much engagement on the subject. In a contentious issue such as the ranking between international and domestic law, the Supreme Court had a duty to make a reasoned decision. Therefore, the Court

¹⁷ *Re The Matter of Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, Ruling of the High Court at Nairobi (2010) eKLR.

¹⁸ *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*, Civil Case No 70 of 2002, Ruling of the High Court at Nairobi (2010) eKLR.

¹⁹ *Beatrice Wanjiku & another v Attorney General & another*, Petition No 190 of 2011, Judgment of the High Court at Nairobi (2012) eKLR.

²⁰ *Beatrice Wanjiku & another v Attorney General & another*, para 20.

²¹ *Beatrice Wanjiku & another v Attorney General & another*, para 21.

²² *Beatrice Wanjiku & another v Attorney General & another*, para 23.

left the question of the hierarchy of laws to an outdated Judicature Act, which does not take into account the constitutional provisions.

Second, the Constitution only indicates that international law forms part of the law of Kenya *under this Constitution*.²³ The phrase under this Constitution has two meanings: first, that international law is part of the law of Kenya as regulated by the Constitution, and second, that international law is subordinate to the Constitution.²⁴ Neither of the two meanings accords with the hierarchy that the Supreme Court created.

At first, this piece was at pains to understand the origin or rationale of the phrase 'as long as it is not inconsistent with enacted statutes and finally declared decisions of courts and tribunals' until it came across the exact phrase in the Supreme Court citation of *Chung Chi Cheung v The King*,²⁵ a court decision from the United Kingdom. Even more revealing, the Supreme Court underlined the above quotation and put in parenthesis 'emphasis added'.²⁶ Clearly, the categorisation was borrowed hook, line, and sinker from the UK case.

Although it is acceptable for courts to borrow phrases from foreign court decisions, it is unacceptable to borrow a hierarchy of laws from other jurisdictions, especially from an irrelevant jurisdiction on international law. Unlike Kenya, the UK is the outlier because of the doctrine of the sovereignty of parliament, which translates to the superiority of statutes.²⁷ The hierarchy of laws should originate from hard municipal laws such as the Constitution and statutes. Kenya's Constitution does not specify which one is superior between statutes and international law.²⁸ Instead, it gives leeway for judges to read all laws holistically. In case of conflict, the solution is to refer to the principles in the Constitution and examine which between statutes and international law will

²³ Constitution of Kenya (2010), Article 2(5), (6).

²⁴ *Beatrice Wanjiku & another v Attorney General & another*, para 20.

²⁵ *Chung Chi Cheung v The King* (1939) AC, 160.

²⁶ *Mitu-Bell Welfare Society v Kenya Airports Authority*, Supreme Court, para 129.

²⁷ Mark Elliott, 'United Kingdom: Parliamentary sovereignty under pressure' 2 *International Journal of Constitutional Law* (2004) 552.

²⁸ *Beatrice Wanjiku & another v Attorney General & another*, para 21.

advance the constitutional principles in Article 10 and other parts of the Constitution.

2.2 Constitutional anchor and value-based approach: The solution to the question of the ranking between international law and domestic law

It is generally accepted that the Constitution of Kenya is a value-oriented document.²⁹ Even sceptics of the value-laden approach contest the legitimacy of values, not existence.³⁰ It is these values and principles that are supposed to form the bedrock of the society that the Constitution envisions.³¹ The entire Constitution is obsessed with values.

This piece contends that where a question of what is superior between a statute and international law arises, the answer should be on what advances the values and provisions of the Constitution the most.³² The Constitution is the reference point and the anchor in settling the question of the hierarchy. The methodology of reaching the correct decision has two parts. First is the constitutional provision that directly deals with the issue at hand, if any.³³ In case there is no such provision, the second consideration below would suffice. Second, the content and function of relevant values and principles in the Constitution.³⁴ This second analysis encompasses examining the value stated under Article 10 of the Constitution to determine whether upholding either treaty or statute will advance the Constitution. There are three arguments to support this approach of the constitutional anchor.

²⁹ *Pharmaceutical Society of Kenya v National Assembly & 3 others*, Judgement of the High Court at Nairobi (2017) eKLR 96.

³⁰ Kenyatta University, 'Annual public debate on national values and principles of governance', 25 March 2021, <<https://www.youtube.com/watch?v=WePwf40qIuY>>.

³¹ Jiri Přibáň, 'Constitutional values as the normalisation of societal power: From a moral transvaluation to a systemic self-valuation' 11 *Hague Journal on the Rule of Law* (2019) 451-459.

³² Constitution of Kenya (2010), Article 10(1)(b).

³³ Walter Murphy, 'Constitutional interpretation: Text, values, and processes' in John Hart Ely, *Reviews in American history*, The John Hopkins University Press, 1981, 8.

³⁴ Murphy 'Constitutional interpretation: text, values, and processes' 10.

First, when it comes to treaties, the wording of Article 2(6) of the Constitution demonstrates a relationship between the Constitution and treaties.³⁵ Article 2(6) of the Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya *under this Constitution*' (emphasis mine). 'Under this Constitution', as used in Article 2(6) of the Constitution, signifies a relationship between the two legal instruments. Apart from showing that treaties are subject to the Constitution, the phrase under this Constitution shows a connection. The word 'under' is both a preposition and an adverb.³⁶ As a preposition, it shows the place of the international treaties as being below the Constitution. As an adverb, it modifies the Constitution by showing the relationship between treaties and the Constitution. This adverbial phrase acts to signify the unity between treaties and the Constitution. Ratified treaties do not belong to a different legal regime that must be transformed into Kenyan law, as is the case in a dualist state. Based on this connection, the interpretation and application of treaties should not be disjointed from the constitutional framework.

Second, the Constitution establishes a constitutional order in which treaties and statutes form part of the norms containing the material Constitution. Yash Ghai describes a constitutional order as 'a fundamental commitment to the principles and procedures of the constitution and therefore, emphasises behaviour, practice, and internalisation of norms.'³⁷ The constitutional order, also referred to as the 'small c constitution,' goes beyond the constitutional text, also referred to as the 'capital C constitution,' to establish a constitutional regime enabled by statutes, case law, practices, and other norms.³⁸ The concept of constitutional order encompasses an aggregate of norms and principles that are key to giving the Constitution its material content. Therefore, most international law

³⁵ *Revital Health (EPZ) Limited v Public Procurement Oversight Authority & 6 others*, Constitutional Petition 75 of 2012, Judgement of the High Court at Mombasa (2015) eKLR para 28.

³⁶ *Oxford Advanced Learner's Dictionary*, Oxford University Press, 2021, 10ed.

³⁷ Yash Ghai, 'Decreeing and establishing a constitutional order: Challenges facing Kenya' Oxford Transitional Justice Research Working Paper Series (2009) 2.

³⁸ William Eskridge, 'America's statutory constitution' 41 *UC Davis Law Review* (2007) 1.

norms are part of the constitutional order. Hence they are directly linked with the Constitution. This arises from the understanding that a constitution only contains a framework that is supposed to be supplemented with enabling legislation and norms.³⁹ Together with the international treaties, especially on human rights, they are part of the constitutional order expressed under chapter four of the Constitution.⁴⁰

Third, the Constitution enjoins all persons to use the national values and principles whenever they are applying any law.⁴¹ The act of deciding which law should rank higher between international law and statutes can be termed an application of the law. This means that whenever such a decision is being made, the anchor and reference point should be the Constitution and, in particular, the national values. To this end, the value-oriented approach seeks to provide harmony on this bedeviling question of the hierarchy of laws between international law and statutes.⁴² The basic question is what advances most of the national values and principles contained in the Constitution.⁴³ This finding aligns with the aims of the national values and principles, which seek to establish a society founded on national values. Admittedly, the meaning and scope of the national values are imprecise and ubiquitous. Despite the nature of the national values, they offer a basis for the resolution of this quagmire of the hierarchy of laws.

While the question of what is superior between local legislation, common law, regulations, and international law is not routine, when it presents itself, it is a difficult one. This piece has offered an approach that centralises the Constitution, in particular national values, in decid-

³⁹ Adam Chilton and Mila Versteeg, 'Small-c constitutional rights' Virginia Public Law and Legal Theory Research Paper No 2019-67, 2020, 20.

⁴⁰ Kuo Ming-Sung, 'Taming governance with legality? Critical reflections upon global administrative law as small-c global constitutionalism' 44 *New York University Journal of International Law and Politics* (2011) 55.

⁴¹ Constitution of Kenya (2010), Article 10(1).

⁴² Francois Venter, 'Utilizing constitutional values in constitutional comparison' 1 *Potchefstroom Electronic Law Journal* (2001) 6.

⁴³ Anton Fagan, 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' 14(2) *South African Journal on Human Rights* (1998) 220.

ing this question. With the advent of value-oriented constitutions, almost all interpretive and application activities must take into account these values. They provide a system of standards of what is a good society according to the Constitution.⁴⁴ These values permeate each level of exercise of public powers.⁴⁵ Therefore, in deciding the question of the hierarchy of laws, the constitutional provisions and values become the anchor.

2.3 Whether international law applies to fill the gap where there is no domestic law

The Supreme Court's expression that '[the Constitution] requires Kenyan courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same is relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement' implies that international law applies only to fill the gap in the municipal legal system.⁴⁶ Even more affirming, the Court goes on to illustrate that international law applies where the elements of a case require the application of international law because there is no domestic law or there is a lacuna in the law. The Supreme Court's holding is problematic because it subordinates international law to municipal law. This negates the constitutional provision that international law forms part of the law of Kenya since international law applies as a secondary source of law to fill the gap. In a true sense, international law then is not applicable in Kenya unless when there is a gap in the law. This raises the question of how a part of Kenya's laws can be merely a gap filler. Does international law form part of Kenya's legal order? If yes, what bars international law from applying in all situations? The Supreme Court holding has no constitutional backing since international law forms part of the laws of Kenya.

⁴⁴ Hiroshi Nishihara, 'The significance of constitutional values' 4(1) *Potchefstroom Electronic Law* (2001) 15.

⁴⁵ Dire Tladi, 'Breathing constitutional values into the law of contract: Freedom of contract and the Constitution' 35 *De Jure* (2002) 306.

⁴⁶ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 132.

2.4 The finding that Article 2(5) and (6) of the Constitution has nothing to do with monism and dualism

While the question of whether Kenya is a dualist or monist state is debatable, Article 2(5) and (6) of the Constitution has weighed on this debate.⁴⁷ However, the Supreme Court fails to see the effect of Articles 2(5) and 2(6) of the Constitution by holding that the provisions have nothing or little to do with monism or dualism. To make matters worse, the Supreme Court goes ahead to make a far-reaching conclusion on the applicability of international law in Kenya. It states that ‘shall form part of the law of Kenya,’ as used in the article, does not transform Kenya from a dualist to a monist state as understood in international discourse.⁴⁸ The Supreme Court fails to justify why Kenya remained a dualist state even after Articles 2(5) and 2(6) of the Constitution.

The debate on the relationship between international law and municipal law has dominated the reasoning of municipal courts on international law. This debate has been even more relevant with the proliferation of statutes as the dominant mode of creating laws. Monism provides that international law and domestic law are part of one legal order.⁴⁹ Thus, treaties ratified by states form part of the domestic laws. It follows that international law may be applied directly in national courts without domestication through an Act of Parliament. Dualism holds that international law and national law are independent.⁵⁰ Therefore, international law does not apply automatically and must be transformed into domestic law through the domestication process.

The Supreme Court interpreted the words ‘shall form part of the law of Kenya’ in Articles 2(5) and 2(6) of the Constitution in isolation

⁴⁷ Mwangi Makumi, ‘From dualism to monism: The structure of revolution in Kenya’s constitutional treaty practice’ 3(1) *Journal of Language, Technology & Entrepreneurship in Africa* (2011) 144-155.

⁴⁸ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 133.

⁴⁹ Carolyn Dubay, ‘General principles of international law: Monism and dualism winter’ *The International Judicial Academy* (2014).

⁵⁰ Turley Jonathan, ‘Dualistic values in the age of international jurisprudence’ 44 *Hastings Law Journal* (1993) 185.

from the entire sentence and forgot keywords such as 'ratified' as opposed to using 'not domesticated.' Article 2(6) of the Constitution provides that '[a]ny treaty or convention *ratified by* Kenya shall form part of the law of Kenya under this Constitution.' Treaties need not be transformed into statutes for them to form part of the laws of Kenya. Indeed, the only requirement for a treaty to apply is ratification. The Court of Appeal has been more pronounced on the question of monism and dualism. In the case of *Karen Njeri Kandie v Alassane Ba & another*⁵¹ Ouko, Kiage & M'Inoti JJ.A held thus:

There can be no doubt, therefore, that by constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention, once ratified, is adopted or automatically incorporated into our laws without the necessity of a domesticating statute.

Justice Odek in *Dennis Mogambi Mong'are v Attorney General & 3 others*⁵² made a distinction between Article 2(5) and Article 2(6) of the Constitution. The judge argued that Article 2(6) on the application of treaties shows that Kenya is a monist state, and Article 2(5) demonstrates that it is dualist. The Court's conclusion was that Kenya was partly monist and partly dualist. The learned judge failed to justify the distinction, especially because from the text of the Constitution, the difference is not apparent. A different bench of Justices Koome, Mwera, Sichale, Odek, and Kantai in *Mukazitoni Josephine v Attorney General Republic of Kenya*⁵³ concluded that 'Kenya is now a monist state'. This decision appears to have been based on the text of Articles 2(5) and 2(6) of the Constitution.

One of the arguments that are made improperly is that since there is a requirement for parliamentary approval in the ratification process, then Kenya is not purely monist.⁵⁴ The concepts of monism and dual-

⁵¹ *Karen Njeri Kandie v Alassane Ba & another*, Civil Appeal No 20 of 2013, Judgement of the Court of Appeal at Nairobi (2015) eKLR.

⁵² *Dennis Mogambi Mong'are v Attorney General & 3 others*, Civil Appeal 123 of 2012, Judgement of the Court of Appeal at Nairobi (2014) eKLR 23.

⁵³ *Mukazitoni Josephine v Attorney General Republic of Kenya*, Criminal Appeal 128 of 2009, Judgement of the Court of Appeal at Nairobi (2015) eKLR 44.

⁵⁴ David Maraga, 'The legal implications of Article 2(6) of the Constitution of Kenya 2010' LLM Dissertation, University of Nairobi, 2012, 85.

ism are not concerned with the process of ratification.⁵⁵ Instead, they address the applicability of international law after ratification. The Constitution and the Treaty Making and Ratification Act No 45 of 2012 do not demand that for international law to apply, it must be transformed into laws of Kenya.⁵⁶ If Kenya were a dualist state, it would mean that ratification would not be enough for international law to apply. Put differently, the Constitution does not demand the domestication of international law.

Some have argued that while the Constitution provides that Kenya is a monist state, the practice in the legislation points to Kenya being a dualist state.⁵⁷ To cement this argument is the controversy surrounding the Kenya-UK trade agreement 2021 and parliament's insistence that it has the right to amend the agreement.⁵⁸ To answer this question, this piece examines the scope of the Treaty Making and Ratification Act 2012 and argues that the role of parliament is not to domesticate the treaty. Second, in the alternative, the Constitution is the supreme law. Therefore, if parliament provides for a procedure that is contrary to the Constitution, that procedure will subvert the constitutionally decreed practice.⁵⁹

First, the scope and content of the Treaty Making and Ratification Act 2012 do not indicate that it covers the domestication of treaties as described in the long title thus:

[a]n act of parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes⁶⁰

⁵⁵ Maraga 'The legal implications of Article 2(6) of the Constitution of Kenya 2010' 86.

⁵⁶ Duncan Okubasu 'Implementation and interpretation of international human rights norms by Kenyan courts' in Stefan Kadelbach and others (eds) *Judging international human rights*, Springer International Publishing, 2019, 561.

⁵⁷ Maraga, 'The legal implications of Article 2(6) of the Constitution of Kenya 2010' 65.

⁵⁸ Samuel Owino, 'Kenya, UK trade agreement faces approval setback in parliament' *Business Daily*, 9 March 2021.

⁵⁹ *Law Society of Kenya v Attorney General & 2 others*, Constitutional Petition No 3 of 2016, Judgement of the High Court at Nairobi, (2016) eKLR para 63.

⁶⁰ Treaty Making and Ratification Act (No 45 of 2012).

This legislation, therefore, does not deal with the issue of domestication of international law. Its scope is limited to making and ratifying treaties that do not deal with the application of the treaty. Moreover, Section 4 of the Treaty Making and Ratification Act 2012 places the responsibility 'for initiating the treaty-making process, negotiating and ratifying treaties' on the national executive. Under Section 8 of the Treaty Making and Ratification Act 2012, parliament has a role in approving the ratification of treaties. This piece argues that the role of parliament in treaty-making in Kenya does not point to Kenya being a dualist state. All that parliament does is approve ratification by the executive, which does not amount to the domestication of the treaty. As an alternative to the above argument, the treaty practice is contained in the supremacy clause of the Constitution, which means that any practice that contradicts the Constitution is void.

The other argument proffered to show that Kenya is not a monist state is based on Article 21(4) of the Constitution, which provides that [t]he state shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.⁶¹ This argument is based on confusion between applicability and implementation of international law. A distinction must be drawn between the application of international law, which is concerned with monism and dualism and implementation. Failure of a state to enact legislation to fulfil international obligations does not mean that the obligations are not enforceable in domestic courts. Rather, it means that international law is applicable, but for full realisation, more entailments should be provided in the legislation. In any case, Article 21(4) of the Constitution does not make the legislation a precondition for the applicability of international law.

⁶¹ Joseph Maina, 'Do Articles 2(5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?' 30 September 2013, *SSRN*.

2.5 Defining 'general rules of international law' without including the general principles of law recognised by civilised nations

The Supreme Court was wrong in defining general rules of international law to mean customary international law rules, including *jus cogens*. Such a definition leaves out other sources of international law, in particular, general principles of law.⁶² The phrase 'general rules of international law' is foreign to international law parlance. What comes close to the use of the phrase 'general rules of international law' is general principles of law.⁶³ Article 38(1)(c) of the Statute of the International Court of Justice provides for 'the general principles of law recognised by civilised nations.' According to the International Law Commission (ILC) report on general principles of law, they have two potential sources.⁶⁴ First, the general principles are delivered from national legal systems. Second, the general principles of law are formed within the international legal system.

The general principles of law are distinct from customary international law and *jus cogens*.⁶⁵ As a category of the source of international law, they have their own elements. The ILC Special Rapporteur identifies the right of passage over the territory of another state, good faith obligation, clean hands doctrine, and the obligation to make full reparation as some of the general principles of law recognised by states.⁶⁶

Going by the Supreme Court's reasoning on what general rules of international law means, Kenya has fewer sources of international law than the generally available ones. There is no constitutional justification

⁶² Friedmann Wolfgang, 'The uses of "general principles" in the development of international law' 57(2) *American Journal of International Law* (1973) 279-299.

⁶³ Rudolf Schlesinger, 'Research on the general principles of law recognized by civilized nations' 51(4) *The American Journal of International Law* (1957) 734-753.

⁶⁴ International Law Commission, 'Seventy-first Session Geneva, 29 April-7 June and 8 July-9 August 2019 First report on general principles of law' 2019.

⁶⁵ Gerald Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' 92 *Collected Courses of the Hague Academy of International Law* (1957) 3.

⁶⁶ Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' 5.

why the general principles of law as a source of international law are not included as part of general principles of international law under Article 2(5) of the Constitution of Kenya. If the Constitution wished to only provide for customary international law as a source of law, it would not have used an encompassing phrase such as 'general principles of international law'. Therefore, the Supreme Court erred in restricting general principles of law to customary international law and *jus cogens*.

3. The interpretation of economic, social, and cultural rights

This case was the first Supreme Court decision to grapple with the interpretation of economic, social, and cultural rights. While it will not be the last, it has established several findings that are antithetical to human rights. Although some of these findings were less explicit and intentional, nevertheless, they remain the findings of the Supreme Court. These findings are likely to be applied by lower courts in the hierarchy because Article 163(7) of the Constitution provides that the decisions of the Supreme Court are binding on all other courts. For instance, it is unclear whether the Supreme Court wanted to hold that the economic, social, and cultural rights belong to citizens or whether this was an inadvertent mistake. This part will analyse the finding on economic, social, and cultural rights.

3.1 The finding that the right to housing accrues by being a citizen of Kenya

As a general rule, human rights apply to all persons, both citizens, and non-citizens. However, the Supreme Court upset this longstanding understanding by holding that the right to housing accrues only to citizens. The Court was of the view that:

[f]rom the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realisation. The right accrues to every individual or family by virtue of being a citizen of this country.⁶⁷

⁶⁷ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 149.

What about refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking? Can they be subjected to undignified living that violates economic, social, and cultural rights? Even more disturbing is that the Supreme Court did not justify its statement.

Despite Article 43 of the Constitution guaranteeing the economic, social, and cultural rights 'to everyone,' the Supreme Court conflated this with citizens. The Supreme Court's holding is contrary to the text of the Constitution, which is cautious about making a difference. In rare cases where a constitutional right is granted to a citizen, the Constitution expressly refers to citizenship as an object of the right. This is the case in Article 35 on the right to information and Article 38 on political rights.

The Constitutional Court of South Africa has grappled with this distinction in the case of *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*.⁶⁸ This case concerned the accessibility of social security since Section 59 of the Social Assistance Act of 1992 limited social security only to South Africans. Upon judicial interrogation, the legislation failed the constitutional muster of Section 27(1) of the Constitution, which provides 'that everyone has the right to have access to - (c) social security. The Court was of the view that:

in the absence of any indication that Section 27(1) of the constitutional right is to be restricted to citizens as in other provisions in the Bill of Rights, the word 'everyone' in this section cannot be construed as referring only to 'citizens'.

A similar stance was adopted by the Kenyan Court of Appeal in the case *Attorney General v Kituo Cha Sheria & 7 others*,⁶⁹ which affirmed that the freedom of movement applies to everyone, including non-citizens.

Similarly, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) grants the right to housing to everyone within the jurisdiction of the state party. Beyond the text, the entire outlook of IC-

⁶⁸ (CCT 13/03, CCT 12/03) [2004] ZACC 11.

⁶⁹ *Attorney General v Kituo Cha Sheria & 7 others*, Civil Appeal 108 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR.

ESCR is extraterritorial.⁷⁰ Article 2 of ICESCR provides for international cooperation in realising the rights in the covenant.⁷¹ This position has been clarified by the UN Committee on Economic, Social, and Cultural Rights (CESCR) which has interpreted the obligation of states to include international cooperation and assistance of other countries.⁷²

Moreover, the ICESCR provides that the rights contained in the covenant should be fulfilled without discrimination on the basis of race, nationality, or social origin, among others.⁷³ Non-nationals such as the refugees are even entitled to more protection because they are in a vulnerable position.⁷⁴ For instance, a refugee would be in more need of housing. Similarly, minimum core fulfilment of the economic, social, and cultural rights of the refugees requires the provision of basic rights.⁷⁵

The CESR Committee has articulated the obligations of the state in the following terms:

[t]he ground of nationality should not bar access to Covenant rights, eg, all children within a State, including those with undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone, including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.⁷⁶

The Supreme Court finding was at odds with the international hu-

⁷⁰ Thomas Pogge, 'Severe poverty as a human rights violation,' in Thomas Pogge (ed) *Freedom from poverty as a human right*, Oxford University Press and UNESCO, 2007, 11.

⁷¹ Wouter Vandenhoe, 'Beyond territoriality: The Maastricht principles on extraterritorial obligations in the area of economic, social and cultural rights' *Netherlands Quarterly of Human Rights* (2011) 429-433.

⁷² CESCR, General Comment No 3: Article 2 on the nature of states parties' obligations, 14 December 1990, E/199/123, para 13.

⁷³ International Covenant on Economic, Social, and Cultural Rights, 3 January 1976, UN/TS/993, Article 2.

⁷⁴ Nathalia Berkowitz, 'Refugees and ESC rights using module 7 in a training program' *Economic, Social & Cultural Rights Activism: A Training Resource*, 2000.

⁷⁵ Fatma Marouf and Deborah Anker, 'Socio-economic rights and refugee status: deepening the dialogue between human rights and refugee law' *The American Journal of International Law* (2009) 793.

⁷⁶ CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights, 2 July 2009, E/C.12/GC/20, para 30.

man rights law norm of non-discrimination in the enjoyment of human rights.⁷⁷ Although this piece appreciates that the question before the Court did not directly deal with the issue of nationality, it argues the Supreme Court made a far-reaching and potentially dangerous finding.

3.2 Failing to take an approach that gives the right to housing material content and a case for rights priority approach

One of the roles of an apex court is to develop the law by shaping the jurisprudence of the country on crucial matters.⁷⁸ This function is strongest in Kenya because of Article 259 of the Constitution and Section 3 of the Supreme Court Act. Despite the legal foundations, the Supreme Court abdicated its function by interpreting socio-economic and cultural rights without jurisprudential progress. The biggest problem started with framing the issue as follows '[t]he crucial question we must consider is; when does the right to accessible and adequate housing accrue?'⁷⁹ First, the Court did not use the language of human rights; instead, it opted for rather a strange language such as 'accrual of the right to housing.' Second, the Court approached the right to housing from only an individualistic right as opposed to a structural point of view. The framing of this issue was unhelpful to the case because deciding the question of when the right to housing accrues is irrelevant. Everyone has the right to housing all the time in one form or another.

⁷⁷ Magdalena Sepúlveda and María Magdalena, 'The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights', School of Human Rights Research Series, 2003, 274.

⁷⁸ Oscar Vilhena Vieira 'Descriptive overview of the Brazilian Constitution and Supreme Court' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, Pretoria University Law Press, 2013, 95-98.

⁷⁹ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 146.

3.2.1 *Failing to discern an interpretive approach from rights language*

The scope of the obligation of states to realise economic, social, and cultural rights is a daunting question in human rights discourse. Some of the terms that have emerged to understand the obligation of states are 'respect, protect, and fulfil'.⁸⁰ The Supreme Court failed to interpret the right to housing using the prism of Article 21 of the Constitution, which enshrines the state's obligation to respect, protect, and fulfil human rights. The obligation to respect requires states not to take actions that would interfere with the enjoyment of human rights.⁸¹ While the obligation to protect enjoins states to ensure that third parties do not interfere with the enjoyment of human rights.⁸² Lastly, the obligation to fulfil requires the state to take positive measures to ensure that human rights are realised. This language of human rights would have assisted courts in approaching economic, social, and cultural rights from a solid doctrinal point of view.

Even if the Court was not willing to do the hard work of discerning the Kenyan approach to economic and social rights, the Supreme Court would have copied from other courts which have developed coherent doctrines. The Constitutional Court of South Africa has come up with a 'reasonableness doctrine'.⁸³ While the United Nations Committee on Economic, Social, and Cultural Rights has articulated the 'minimum core obligation doctrine'.⁸⁴ These two doctrines represent the leading legal thoughts on the realisation of economic, social, and cultural rights.

⁸⁰ Inga Winkler, 'Respect, protect, fulfil: The implementation of the human right to water in South Africa' Workshop on legal aspects of water sector reforms, International Environmental Law Research Centre, Geneva, 2007.

⁸¹ Christof Heyns and Danie Brand, 'Introduction to socio-economic rights in the South African Constitution' 2(2) *Law, Democracy and Development* (1998) 158.

⁸² Heyns and Brand, 'Introduction to socio-economic rights in the South African Constitution' 158.

⁸³ Trilsch Mirja, 'What's the use of socio-economic rights in a constitution? Taking a look at the South African experience' *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia, and Latin America* (2009) 552-575.

⁸⁴ CESCR, General Comment No 3, para 13.

The South African Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*⁸⁵ developed the 'reasonableness doctrine', which requires the state to adopt reasonable programmes to realise social-economic rights. For a programme to be reasonable, it must:

allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. (b) The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. (c) The programme must also be reasonably implemented. (d) The programme must be balanced and flexible. (f) It must make appropriate provisions for attention to housing crises and to short, medium, and long-term needs. (g) A programme must not exclude a segment of society. (h) It must address the degree and extent of the denial of the right they endeavour to realise. (i) It must cater to those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril.⁸⁶

Unlike the Supreme Court of Kenya, the Constitutional Court of South Africa gave material content to the right to housing. Through the interpretation of the constitutional standard of 'reasonable measures,' the South African Constitutional Court set concrete goals of the appropriateness of a programme, equality, and non-discrimination.⁸⁷ The Court addressed the structural way of solving the housing menace while taking into account the emergencies such as eviction.

Although the minimum core obligation doctrine has its weaknesses, it represents a concrete approach to realising economic, social, and cultural rights. The minimum core obligation provides that states have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.'⁸⁸ The state must use all available resources to realise

⁸⁵ (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46.

⁸⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 39-44.

⁸⁷ David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' 3 *International Journal of Constitutional Law* (2014) 710-739.

⁸⁸ Katharine Young, 'The minimum core of economic and social rights: A concept in search of content' 33 *The Yale International Law Journal* (2008) 113.

the minimum obligation. This obligation is realisable immediately as a matter of priority. This has some semblance with the approach articulated in Article 20(5) of the Constitution. Yet, the Supreme Court did not consider the minimum core of the right to housing. It also failed to develop a coherent approach based on constitutional provisions. The Supreme Court did not even interpret what is meant by the words 'accessible and adequate housing'. In effect, the Court's decision lacked a solid jurisprudential foundation on what the realisation of the right to housing means in concrete terms in Kenya.

3.2.2 Rights priority approach; the Kenyan approach to economic, social, and cultural rights

Kenya embraced a drastic shift from the existing human rights language on economic, social, and cultural rights. At the core of this language is Article 20(5) of the Constitution, which establishes the 'rights priority approach'. This constitutional provision articulates the obligation of the state in allocating resources to give priority to ensuring the widest enjoyment of rights. Additionally, Article 20(2) of the Constitution provides that everyone shall enjoy rights to the greatest extent.

Several themes emerge from the constitutional text on economic, social, and cultural rights. First, the state is required to prioritise economic, social, and cultural rights in its policy conceptualisation and realisation. Second, the goal of prioritising is to ensure the widest enjoyment of human rights. Of course, this maximalist orientation is subject to available resources. Third, everyone has the right to enjoy economic, social, and cultural rights to the greatest extent possible.

While the Constitution takes a naively idealistic approach to economic, social, and cultural rights, this provision has rhetorical power to shape how state officials think about human rights. However, it is not surprising for the Constitution to take such an idealistic approach, especially because of the premium it gives to human rights to the point of embodying them as national values.

Therefore, in assessing whether the government has violated economic, social, and cultural rights, the test is two-pronged. First, the test examines whether the state has allocated resources to ensure the widest enjoyment of rights. This has to be balanced with other competing states' obligations. Second, the test examines whether the state has given priority to economic, social, and cultural rights. Importantly, this has structural and ad hoc dimensions. For instance, the structural dimension looks at the programmes to implement these rights, while the ad hoc dimension deals with individual cases such as emergency situations. Kenya's provision is more progressive than the minimum core obligation doctrine.

3.2.3 Failure to interpret the meaning of the right to accessible and adequate housing

Despite the ubiquity of the phrase 'adequate housing', the Supreme Court failed to engage with it. In fact, although the Supreme Court was invited to interpret Article 43(1)(c) of the Constitution, it did not elucidate the text, even tangentially. What then remained was an interpretation of the constitutional right to housing without referring to the constitutional text. How can the Court apply the right to housing without interpreting it?

The phrase 'adequate housing' is borrowed from the international human rights instruments. For example, the ICESCR provides that state parties 'recognise the right of everyone to an adequate standard of living for himself and his family, including housing, and to the continuous improvement of living conditions.'⁸⁹ The CESCR has extensively interpreted Article 11 of ICESCR.⁹⁰ At the core of the interpretation is the phrase 'adequate housing'. The Constitution of Kenya uses two qualifying words 'adequate and accessible'.⁹¹ housing while the CESCR incor-

⁸⁹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, Article 11.

⁹⁰ International Covenant on Economic, Social and Cultural Rights, Article 11.

⁹¹ Constitution of Kenya (2010), Article 43(1)(c).

porates the concept of accessible housing into adequate housing.⁹² The General Comment on the right to housing has warned against interpreting the right to housing narrowly to mean only shelter.⁹³

The task of giving meaning to 'adequate housing' is not an easy one. However, the CESCR has come up with certain non-exhaustive aspects that entail adequate housing. These aspects are:⁹⁴

- (i) Legal security of tenure – this requires states to give some degree of protection which will guarantee peaceful possession against forced evictions and harassment. The General Comment is progressive since it includes informal settlements as a form of security of tenure.⁹⁵ This is because, especially in Kenya, there is the temptation of seeing tenure from the point of view of title only.⁹⁶
- (ii) Availability of services, materials, facilities, and infrastructure – again, here, the CESCR considered the right to housing holistically together with other social aspects supporting housing. Therefore, adequate housing must contain core facilities such as 'health, security, comfort, and nutrition'.⁹⁷ More specifically, water, energy, lighting, disposals, drainage, and emergency services such as the availability of an ambulance.⁹⁸
- (iii) Affordability – the prices of housing should not threaten the realisation of other basic needs. The state has two-fold obligations to ensure affordability of housing; (i) regulation of the market to ensure fair processes, that is, to regulate rent increase and amounts, and (ii) provision of subsidies.⁹⁹

⁹² CESCR General Comment No 4.

⁹³ CESCR General Comment 4, para 7.

⁹⁴ CESCR General Comment 4, para 8.

⁹⁵ CESCR General Comment 4, para 8.

⁹⁶ CESCR General Comment 4, para 8.

⁹⁷ CESCR General Comment 4, para 8.

⁹⁸ CESCR General Comment 4, para 8.

⁹⁹ CESCR General Comment 4, para 8.

- (iv) Habitability – the houses should have enough space and ‘protect [users] from cold, damp, heat, rain, wind or other threats to health, structural hazards, disease vectors, and physical insecurities.’¹⁰⁰
- (v) Accessibility – barriers to adequate housing must be removed by the state. In particular, houses must be readily available to all persons, including disadvantaged groups. The CESCR has stated that the elderly, physically disabled, and other vulnerable groups should be given priority.¹⁰¹ States have an obligation to craft policies that will ensure increased access to land for the poor and landless. The policy should also ensure that houses are readily available and fairly distributed across the country.¹⁰²
- (vi) Location – there is an obligation to ensure housing is near social facilities.¹⁰³ The location should be near to employment places and healthcare, among others. Additionally, housing should not be located near pollution sources. The environment must be clean.¹⁰⁴
- (vii) Cultural adequacy – housing should express cultural identity and diversity. Policies seeking modernisation or uniform design should respect the cultural preferences of residents.¹⁰⁵

The Supreme Court could have assessed whether Kenya had violated its constitutional obligation under the prism of adequate and accessible housing, which has received extensive interpretation. This way, the Court could have developed the content of the right to housing. The Court missed an opportunity to reaffirm economic, social, and cultural rights, which are often viewed as lofty aspirations.¹⁰⁶

¹⁰⁰ CESCR General Comment 4, para 8.

¹⁰¹ CESCR General Comment 4, para 8.

¹⁰² CESCR General Comment 4, para 8.

¹⁰³ CESCR General Comment 4, para 8.

¹⁰⁴ CESCR General Comment 4, para 8.

¹⁰⁵ CESCR General Comment 4, para 8.

¹⁰⁶ Jackbeth Mapulanga, ‘Examining the justiciability of economic, social and cultural rights’ 6(4) *The International Journal of Human Rights* (2002) 29-48.

3.3 The finding that 'illegal' occupation of the private land cannot create prescriptive rights

The Supreme Court held that 'an illegal occupation of private land cannot create prescriptive rights over that land in favour of the occupants.'¹⁰⁷ First, the case before the Court was not dealing with prescriptive rights. Prescriptive rights are distinct from human rights, such as the right to housing – the former deals with rights enjoyed over the land of another for a long time.¹⁰⁸ They originate from common law and, in some cases, statutes, for example, easements and adverse possession.¹⁰⁹ These rights arise from the need to align the actual rights with legal rights, that is, people who enjoy a right over land, as a matter of fact, will get legal protection.¹¹⁰ The Supreme Court was wrong in conflating these two rights because human rights are not pegged on the years that a person has occupied land.

Moreover, the Supreme Court was wrong in elevating the property rights of private landowners over those of settlers. While it might be difficult to make a case for a positive obligation of private landowners, there exists a negative obligation not to interfere with the right to housing. This was articulated by the Constitutional Court of South Africa in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*.¹¹¹ As follows:

of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances, an owner may have to be *patient and accept that the right to occupation may be temporarily restricted*.

¹⁰⁷ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151.

¹⁰⁸ *Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege - deceased)* Environment and Land Case 422 of 2017, Judgement of the Environment and Land Court at Murang'a (2019) eKLR para 38.

¹⁰⁹ *Winterburn v Bennett* [2016] EWCA Civ 482.

¹¹⁰ Lina Mattsson, 'Who has to prove what? Prescriptive rights and evidential presumptions', *Property Litigation Association*, August 2017.

¹¹¹ (CC) [2011] ZACC 33.

Ultimately, the obligation to provide housing rests with the state. However, settlers should be allowed to occupy the land pending the provision of alternative housing by the government.¹¹² In return, the government should either compulsorily acquire the private land or, in some cases, relocate the landless. The Court failed to consider and nuance the issue of owners of large bare pieces of land and ranches in light of equitable access to land.¹¹³

The tension between the right to property and the right to housing has occupied the land rights discourse.¹¹⁴ The Constitution of Kenya recognises both rights as part of the bill of rights. What would be the solution in cases of conflict between these two rights? The CESCRC has clarified this tension by providing that the right to housing should be distinguished from the right to property.¹¹⁵ Indeed, the right to housing is a much broader right that is not limited to legal titles. This right enjoins the state to not only focus on property rights but also to balance competing claims. While the CESCRC solution offers a direct answer, the question is much broader and more complex. The notion of private property has taken centre stage as a core obligation of the state. For instance, John Locke argues that the primary role of the state is to protect property, life, and liberties.¹¹⁶ This understanding runs deep in the liberal and neoliberal conception of society. The neoliberals argue that the state should not interfere with markets and private property.¹¹⁷ Therefore, under the neoliberal view, the right to housing can be considered as being in direct conflict with property rights.

¹¹² Jacqueline Cole and Philip Lynch, 'Homelessness and human rights: Regarding and responding to homelessness as a human rights violation' 4(1) *Melbourne Journal of International Law* (2003) 139-176.

¹¹³ Kenya Human Rights Commission 'Redress for historical land injustices in Kenya: A brief on proposed legislation for historical land injustices' 2018, 7.

¹¹⁴ Nicholas Blomley, 'Homelessness, rights, and the delusions of property' 30(6) *Urban Geography* (2009) 580.

¹¹⁵ CESCRC General Comment 4, para 8.

¹¹⁶ Henry John, 'John Locke, property rights, and economic theory' 33(3) *Journal of Economic Issues* (1999) 609-624.

¹¹⁷ Becky Mansfield, 'Neoliberalism in the oceans: "Rationalization," property rights, and the commons question' 35(3) *Geoforum* (2004) 313.

What happens when settlers occupy the land of a private person? On the one hand, the private person has the right to property protected by the Constitution and guaranteed by the state through legal protections such as titles.¹¹⁸ At the same time, the settlers have a right to housing, which is also protected by the Constitution. This tension between the two rights was not properly addressed by the Supreme Court. As argued elsewhere in this paper, even the private individual landowner has human rights obligations regarding housing. The Bill of Rights applies vertically and horizontally.¹¹⁹ The extent of the obligation is what is up for debate. This piece argues that the obligation depends on the circumstances of the case. At the core of this obligation is that no person should be rendered homeless.¹²⁰ Therefore, the state should develop a policy on how to compensate the private owner or relocate the settlers.¹²¹

Lastly, the framing of the issues where the settlers' occupation of the land is called 'illegal occupation' is not in alignment with human rights language. This amounts to branding and condemning victims of human rights violations.

3.4 The right to housing over public land crystallised during a long period of occupation by people who established homes and raised families

The finding that the right to housing only crystallises through long periods of occupation is an affront to human rights. Does this mean a

¹¹⁸ Wahi Namita, 'The tension between property rights and social and economic rights: a case study of India' in Helena Alviar and others (eds) *Social and economic rights in theory and practice*, Routledge, 2014, 140.

¹¹⁹ Chirwa Danwood Mzikenge, 'The horizontal application of constitutional rights in a comparative perspective' 10(2) *Law, Democracy & Development* (2006). For the Kenyan case, see Brian YK Sang, 'Horizontal application of constitutional rights in Kenya' 26(1) *African Journal of International and Comparative Law* (2018) 1-27; and Walter Khobe 'The horizontal application of the bill of rights and the development of the law to give effect to rights and fundamental freedoms' 1 *Journal of Law and Ethics* (2014) 77-90.

¹²⁰ United Nations General Assembly, 'Guidelines for the implementation of the right to adequate housing' 26 December 2019, A/HRC/43/43.

¹²¹ CESCR General Comment 4, para 15.

person who has not occupied public land for a long period does not have the right to housing? Who decides what a long period of occupation is? This interpretation of the right to housing is restrictive and does not advance human rights.¹²² Under Article 20(3)(b) of the Constitution, courts are under an obligation to adopt the interpretation that most favours the enforcement of human rights. The Supreme Court also failed to consider that crystallisation of rights is an issue to be determined based on the circumstances of the case. The Court's interpretation does not account for other factors such as emergency cases.¹²³ For example, if there is displacement as a result of floods, the victims' right to housing accrues immediately.

3.5 Faulting the High Court for issuing conservatory orders since the settlers had been evicted

Admittedly, crafting appropriate remedies in economic, social, and cultural rights cases is a difficult task.¹²⁴ In this case, the Supreme Court faulted High Court on what would be an appropriate remedy where settlers had been evicted.¹²⁵ According to the Supreme Court, the appropriate remedy ought to have been compensated. Although the High Court remedies did not adequately address the plight of homeless people, the reason the Supreme Court faulted the High Court was inappropriate. Going by the Supreme Court reasoning, for a person to defeat the housing right, all that is needed is to evict people, and then the case will drag in court on issues of compensation. Meanwhile, while the case drags in court, the homeless people suffer without alternative housing.

¹²² Jessie Hohmann, 'The right to housing' in Marcus Moos (ed) *A research agenda for housing*, Edward Elgar Publishing, 2019.

¹²³ Rebecca Barber, 'Protecting the right to housing in the aftermath of natural disaster: Standards in international human rights law' 20(3) *International Journal of Refugee Law* (2008) 432.

¹²⁴ Kent Roach, 'The challenges of crafting remedies for violations of socio-economic rights' 89 *Harvard Law Review* (1989) 1281-1316.

¹²⁵ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 155.

This paper suggests that even if an eviction has happened if the homeless have no alternative housing, they should stay on the land pending the provision of alternative housing by the government.¹²⁶ In making its determination, the Court failed to take into account the difficulty in getting compensation from the government; hence compensation alone is an ineffective remedy.

Under Article 23 of the Constitution, the Court has the discretion to issue appropriate remedies. These remedies are not limited in scope and nature; hence eviction is not a bar to issuing the conservatory orders or any other appropriate remedies.¹²⁷ The major consideration is the preservation of the constitutional values through the remedies.¹²⁸ In this case, the remedy that would be appropriate is the one that will avert settlers being rendered homeless pending the hearing and determination of the case.¹²⁹

4. Conclusion

Traditionally, economic, social, and cultural rights have faced two major difficulties to wit implementation and justiciability. Luckily for Kenya, these rights have been enshrined in the 2010 Constitution; therefore, the question of justiciability does not arise. While the right to housing is enshrined in the Constitution, its meaning and scope remain unclear. Broadly, it is this question of the meaning and scope of the right to housing that was posed in this case, together with international

¹²⁶ Lilian Chen, 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and others v City of Johannesburg and others*' 2 *Constitutional Court Review* (2009) 371.

¹²⁷ *David Ndii & others v Attorney General & others*, Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & Petition 2 of 2021, Judgement of the Supreme Court (2022) eKLR, para 545.

¹²⁸ *Gatineau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Petition No 2 of 2014, Judgement of the Supreme Court (2014) eKLR, para 86.

¹²⁹ Thomas Byrne and Dennis Culhane, 'The right to housing: An effective means for addressing homelessness' 14 *University of Pennsylvania Journal of Law and Social Change* (2011) 379.

law-related questions. In an inconclusive and erroneous judgment, the Supreme Court missed an opportunity to pronounce itself strongly on these twin questions of international law and economic, social, and cultural rights.

This piece has discussed some of the major errors that the Supreme Court made, and they include failure to interpret what is adequate housing, among others. In turn, it has offered solutions on how the Supreme Court ought to have interpreted the right to housing and international law questions. Mainly, this piece has offered two approaches and theories to deal with some of the crucial questions facing the Supreme Court. To start, it has argued for a constitutionally-anchored approach to resolving the hierarchy between international law and statutes. It has also argued for the 'rights priority doctrine' in assessing whether economic, social, and cultural rights have been violated. This doctrine is a departure from the minimum core obligation approach. In sum, the judgment of the Supreme Court is inconclusive because it does not resolve major questions such as what adequate housing is. Indeed, it does not even engage with the primary provision of Article 43(1)(c) of the Constitution that it was supposed to interpret.