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Setting the record straight in socio-economic rights adjudication: The *Mitu-Bell Welfare Society* Supreme Court of Kenya judgment

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Abstract

A leading criticism of the Mitu-Bell Welfare Society decision in the Supreme Court of Kenya is that it fell short of achieving the transformative effects expected similar to South Africa's Irene Grootboom. One such critique has been provided by Ian Mwiti Mathenge in his paper which this article responds to by asserting that the Court addressed relevant issues to Kenya's jurisprudential needs. Specifically, the Court clearly affirmed evictees' rights to seek redress including compensation, adequate notice, dignified treatment and even the provision of alternative land for resettlement. The analysis of the case also acknowledges the Court's interpretation on the place of international law in Kenya, and areas for future research and development.

Keywords: Mitu-Bell, right to housing, socio-economic rights, international law, Constitution of Kenya

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1. Introduction

The *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* Kenyan Supreme Court case concerned the unlawful eviction and demolition of the homes of over 3,000 families residing in an informal settlement on public land known as *Mitumba Village*, located near Wilson Airport in Nairobi city.¹ The informal settlers had lived there for over 19 years. The forced eviction took place without due notice and despite a court order prohibiting government authorities from conducting the evictions pending hearing of an application with respect to the matter. The trial court's decision was positive as it recognised that forced evictions without relocation or compensation negatively affects the equal enjoyment of the right to housing by vulnerable groups.² However, for largely procedural reasons, the Court of Appeal overturned the High Court's entire decision without stating much about the unlawfully evicted informal settlers who were left without an appropriate remedy.³ Aggrieved by the lack of a remedy, despite the Court of Appeal acknowledging their grievances – mainly the illegal forceful eviction and demolition of the informal settlers' homes and other facilities including schools, without compensation or relocation – the claimants appealed to the Supreme Court.

This article gives an analysis of the Supreme Court's decision in *Mitu-Bell*, its ground-breaking aspects, as well as the unclear and problematic standpoints the Court took. The analysis will also include a critique of the lead article by Ian Mwititi Mathenge, particularly his view that the Supreme Court's *Mitu-Bell* judgment was expected to be the

¹ *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). This article will also include excerpts from my book, Victoria Miyandazi, *Equality in Kenya's 2010 Constitution: Understanding the competing and inter-related conceptions* Hart Publishing, 2021, on some of my analysis of the *Mitu-Bell* case at the High Court and Court of Appeal, as well as discussions of applicable principles.

² Victoria Miyandazi, 'Forced evictions and demolition of informal settlements in Kenya' *OxHRH Blog*, 19 November 2015.

³ Alvin Attalo 'Turning back the clock on socio-economic rights: Kenya's Court of Appeal decision in the *Mitu-Bell* Case' *OxHRH Blog*, 13 September 2016.

Kenyan version of the South African Constitutional Court's *Irene Grootboom* decision.⁴ This argument, as will be explained, is misleading as Mrs Grootboom died 8 years after the decision without a house, despite 'winning' the case. The *Grootboom* decision has been lauded and criticised in equal measure. Nevertheless, I agree that the *Grootboom* case raises important questions about the need for an adequate remedy in socio-economic rights cases so that such rights do not end up becoming mere pipedreams. The Supreme Court's *Mitu-Bell* decision is then presented as a step in the right direction in terms of the remedy given. Of course, this author is alive to the fact that the *Mitu-Bell* case was initially filed in 2011, which means that the community has been tied up in litigation for over 10 years. This raises the question of whether such delayed justice is justice at all, especially if the *Mitu-Bell* community never received an interim remedy as the case progressed.

2. Issues the Supreme Court judgment sought to clarify

The Supreme Court's decision focused on three key issues that remained murky and contested after the Court of Appeal's judgment on the matter. The first was on the place of structural interdicts, as a form of relief in human rights litigation, under the Kenyan Constitution. The second issue was on the applicability of international law in Kenya, as Articles 2(5) and 2(6) of the Constitution respectively provide that general rules of international law, and treaties or conventions ratified by Kenya 'shall form part of the law of Kenya'. The final matter is in relation to the right to housing under Article 43(1) of the Constitution.

2.1 Structural interdicts

A structural interdict is simply 'a remedy in terms of which the court orders an organ of state to perform its constitutional obligations

⁴ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) [99].

and to report to the court on its progress in doing so'.⁵ A court can also give a time frame within which the order should be complied with. For this reason, structural interdicts have been argued to be an important approach in the judicial implementation of socio-economic rights, specifically in cases involving 'poor litigants who may not have the resources to institute another suit in case of non-conformity by the defendant [or respondent]'.⁶ While the High Court expressed no doubt as to the applicability of structural interdicts in Kenya, the Court of Appeal took a completely opposite view that such were 'unknown to Kenyan law'.

The structural interdict applied by the High Court required a report to be filed in the form of an affidavit in relation to current State policies and guidelines on how shelter and housing is to be provided to marginalised groups within 60 days.⁷ The Court also made an order for meaningful engagement between the parties and relevant stakeholders towards an agreed resolution of the applicant's grievance within 90 days.⁸ By this, the High Court applied a 'report back to court' structural interdict model whereby, according to Mbazira, 'the defendant [or respondent] is required to report back to the court with a plan on how he or she intends to remedy the violation' and a fixed date is given to that effect.⁹ This is a better way of holding the State accountable without intruding into polycentric issues of policymaking and resource allocation that lie within the proper mandate of the executive and legislature, as the structural interdict deferred to government the policy and resource-allocation duties. It gave the State flexibility in deciding how it would meet the claimants' housing needs while also enabling the High Court to keep a watchful eye over the protection of the informal settlers' right to housing. This was meant to ensure that former residents of Mi-

⁵ RJ de Beer and S Vettori, 'The enforcement of socio-economic rights' 10(3) *Potchefstroom Electronic Law Journal* 1 (2007) 10.

⁶ Christopher Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*, PULP, 2009, 182-183.

⁷ *Mitu-Bell Welfare Society v Attorney General & 2 others*, Petition 164 of 2011, Ruling of the High Court in Nairobi, 13 June 2012, eKLR, para 79.

⁸ *Mitu-Bell Welfare Society v Attorney General & 2 others*, Ruling of the High Court, para 79.

⁹ Mbazira, *Litigating socio-economic rights in South Africa*, 189.

tumba village did not end up with a nominal remedy without actual enforcement. Such an approach both respects the separation of powers and 'shields the court from accusations that it has usurped functions reserved for the other organs of state'.¹⁰

Roach and Budlender rightly note that structural interdicts are particularly effective in tackling governmental non-compliance in situations where it exudes 'incompetence, inattentiveness and intransigence'.¹¹ In *Mitu-Bell*, the State had already shown its intransigence by defying an earlier court order restraining it from evicting the informal settlers.¹² Also, the government only indicated the applicable Guidelines on Settlement and Evictions in an affidavit to the High Court, when seeking to comply with Mumbi Ngugi J's orders in the *Mitu-Bell* High Court decision requiring it to do so within 60 days from the day of the judgment.¹³ This shows the positive impact the structural interdict applied by the High Court had in bringing to the government's attention the urgent need for such guidelines.

Moving on to the Court of Appeal's position, the judges of appeal rejected the application of structural interdicts and retention of supervisory jurisdiction and held that, once a case is closed, no further orders can be given (*functus officio* doctrine). However, even in this holding, the Court seemed to have contradicted itself. This contradiction can be seen in three key rulings and observations made in the judgment. First, the Court of Appeal made contradictory statements as to the meaning and applicability of structural interdicts. A reading of the Court of Appeal's reasoning reveals that, in one breath, the Court rejects the application of structural interdicts in Kenya as well as the retention of supervisory jurisdiction by a court over its orders. In this regard, the Court held that

¹⁰ Mbazira, *Litigating socio-economic rights in South Africa* 189.

¹¹ Kent Roach and Geoff Budlender, 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' 122 *South African Law Journal* (2005) 325, 345.

¹² *Mitu-Bell Welfare Society v Attorney General & 2 others*, Ruling of the High Court; and *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal 218 of 2014, Court of Appeal (2016) eKLR para. 6.

¹³ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 12 and 13.

'In the instant case, the trial court erred in delivering a judgment and then reserving outstanding matters to be dealt with by the court. Save as authorised by law, upon delivery of judgment, a court becomes *functus officio*'.¹⁴ It then proceeded to hold that the application of supervisory orders is 'unknown to Kenyan law'.¹⁵

Simultaneously, the Court, in contradiction with the position it had taken earlier and the eventual determination, held that, 'a supervisory order can be made pursuant to the provisions of Article 23 (3) of the 2010 Kenya Constitution'.¹⁶ This provision gives courts wide discretion to grant appropriate relief. The resulting judgment failed to recognise that the uniqueness of supervisory orders, like structural interdicts, is the capacity of the court to retain jurisdiction to compel the State or a State organ to fulfil its obligations to a successful litigant. Such orders particularly compel the State 'to engage with the plaintiffs in meaningful dialogue because of the knowledge that the doors of the court are open to the plaintiffs'.¹⁷

The Court of Appeal thus fundamentally misconstrued what a structural interdict, and supervisory orders in general, do – they are not meant to vary the court's judgment but to supervise the implementation of the court's orders.

Second, the Court of Appeal's rejection of the applicability of structural interdicts was contradictory because it ignored their use by the Supreme Court. As the Court of Appeal noted, the Kenyan Supreme Court had previously applied structural interdicts, for example in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*.¹⁸ In the case, the Supreme Court ordered the first appellant to consider the respondents' application for licences and to notify the

¹⁴ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 72 and 142.

¹⁵ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 71.

¹⁶ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 112, 141 (c) and (d).

¹⁷ Mbazira, *Litigating socio-economic rights in South Africa*, 182.

¹⁸ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition 14 of 2014, Ruling of the Supreme Court (2014) eKLR.

Court's registry within 90 days on the fulfilment of the Court's orders.¹⁹ The rejection of courts' retention of supervisory jurisdiction by the Court of Appeal thus seemed to be an attempt to overrule the practice of the Supreme Court whose judgments hold the overall precedential value. Hence, the Court arguably overstepped its mandate. Such confusion in the handling of socio-economic rights cases that have an impact on vulnerable groups has the effect of reinforcing inequality and marginalisation.

Setting the record straight, the Supreme Court upheld the applicability of structural interdicts in Kenya by restating its holding in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* that Article 23(3) of the Constitution, listing the appropriate reliefs a court may grant, uses the word 'including', which means that the reliefs listed therein are non-exhaustive.²⁰ Therefore, a court can issue orders other than those listed as it deemed fit. The Supreme Court judges observed that the Court of Appeal's position on the matter disregarded its signal in cases like the *Communications Commission of Kenya* on interim reliefs a Court can give in human rights and other constitutional litigation to redress violations of fundamental rights. The bench held that despite the continued validity of the *functus officio* doctrine in the majority of cases, a court can issue orders other than those listed as it deems fit, to be decided on a case-by-case basis.²¹

Indeed, as earlier argued, in socio-economic rights adjudication, structural interdicts are a good way of navigating the distinction between illegitimate intrusion into the work of State organs and holding them accountable. They also respect the provisions of Article 20(5)(c) of the Constitution which sets out the need for courts not to 'interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different con-

¹⁹ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, para 415.

²⁰ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, para 415.

²¹ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 120-122.

clusion'. This is because a structural interdict does not prescribe to the State what it needs to do but mainly requires it to draw up a plan which the court would then be responsible for to ensure that it accords with the constitutional requirements and is implemented.

This analysis rebuts the stance taken in Ian Mathenge's article casting doubt on the usefulness of the Supreme Court's *Mitu-Bell* decision in affirming the place of structural interdicts in Kenya. As discussed, the Supreme Court acknowledged that it had used structural interdicts before in cases like *Communications Commission of Kenya*, which decision was made two years prior to the Court of Appeal's decision in *Mitu-Bell*. That the Supreme Court reprimanded the Court of Appeal for failing to recognise this precedent setting decision is, in itself, a strong indication of the Supreme Court's affirmation of the applicability of structural interdicts in Kenya.

In addition to the confirmation of the applicability of structural interdicts in Kenya, the Supreme Court importantly observed that, where necessary, structural interdicts should be given as interim orders, with a court signalling to the parties that 'the final judgment shall await the crystallisation of certain actions'.²² I agree with this observation as in this way, courts can better supervise State organs' compliance or deal with their intransigence in doing what they are mandated to do.

2.2 Applicability of international law in Kenya

The second issue the Supreme Court addressed is on the applicability of international law in Kenya under Articles 2(5) and 2(6) of the Constitution, stating that general rules of international law, and treaties or conventions ratified by Kenya 'shall form part of the law of Kenya'. This was based on the trial Court's reliance on the UN Guidelines on evictions,²³ which the Court of Appeal had taken issue with stating that

²² *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

²³ CESCR, General Comment No 7: Article 11.1 On the right to adequate housing, forced evictions, 20 May 1997, E/1998/22. Mumbi Ngugi J had relied on paragraphs 15 and 16 of the Guidelines on evictions. Paragraph 15 effectively provides for meaningful

only 'customary international law and peremptory norms (*jus cogens*)' are applicable.²⁴ The Supreme Court clarified that the general rules of international law, strictly viewed, refer to customary international law. This clarifies the long-standing confusion brought about by the words 'general principles of international law' as used in Article 2(5) of the 2010 Constitution. Various commentators on the place of international law in Kenya, such as Maurice Oduor, found the wording unclear because it is rarely used, if at all, in global discussions about the hierarchy of international law norms.²⁵ According to Oduor, the often used phraseology in international law that is closest to it is 'general principles of law recognised by civilised nations'.²⁶ However, it would seem baffling that the drafters of the 2010 Constitution would skip the recognition of customary international law and instead recognise the general principles of law recognised by civilised nations, the former being way higher in the hierarchy of the binding and authoritative nature of international law norms than the latter. This is as according to the list of sources of international law set out in Article 38 of the Statute of the International Court of Justice that puts international customary law above the general principles recognised by civilised nations, hierarchically.²⁷ The Supreme Court's clarification that 'general principles of international law' refer to customary international law thus finally settles the perennial debates on the matter.

Further the Supreme Court held that Kenyan courts, when determining disputes before them, should apply relevant international law

engagement between the state and those to be evicted, the giving of adequate notice and the following of proper procedures for evictions. Paragraph 16 then provides that 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights'.

²⁴ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 116.

²⁵ Maurice Oduor, 'The status of international law in Kenya' 2(2) *Africa Nazarene University Law Journal* (2014) 97-98; Morris Mbondenyei and J Osogo Ambani, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica Publishing, 2012, 24; *Kituo cha Sheria and 8 others v Attorney General*, Petition 19 and 115 of 2013, Ruling of the High Court at Nairobi (2013) eKLR.

²⁶ Oduor, 'The status of international law in Kenya', 98.

²⁷ United Nations, Statute of the International Court of Justice, 18 April 1946.

(both customary and treaty law) that are not in conflict with the Constitution, local statutes, or a final judicial pronouncement. This latter holding, however, conflicts with the Court's observation that Kenya is bound by its obligations under customary international law and its undertakings under treaties and conventions, and 'it may not invoke provisions of its Constitution, or its laws as an excuse for failure to performing this duty'.²⁸ This left open the much-needed inquiry on whether the 2010 Constitution creates a hierarchy of laws and clarification on what happens when a local statute, final judicial pronouncement or even a provision in the Constitution is at odds with binding international obligations. This is particularly in relation to cases where a clear injustice would be occasioned to a litigant where, for instance, a local statutory provision is applied as opposed to an international treaty the country has ratified, which takes a different viewpoint on a matter at issue. How should such a choice be made? What should be the guiding principles? The Supreme Court's decision on the applicability of international law offers us little guidance on this.

To this extent, I agree with the criticisms of the Supreme Court's failure to appreciate the effects of Article 2(5) and 2(6) of the Constitution in Ian Mathenge's article. Particularly noteworthy is Mathenge's discussion of the phrase 'under this Constitution' which he argues suggests the subordination of international law to the Constitution, similarly highlighting a need for further guidance on the matter.

The questions raised here cannot be addressed without going into a discussion of the monist and dualist theories in international law that have been developed to explain the relationship between international and municipal laws. Yet, the Supreme Court in *Mitu-Bell* short-sightedly held that 'Article 2(5) and 2(6) of the Constitution has nothing or little of significance to do with the *monist-dualist* categorisation' and that 'the expression *'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

²⁸ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 126-133. See also, Vienna Convention on the Law of Treaties, 23 May 1969, Article 27; International Law Commission's Declaration of Rights and Duties of States, 1949, Article 13.

international discourse'.²⁹ The decision therefore leaves open the question whether international customary law and treaties and conventions that Kenya has ratified on the one hand, and the Constitution, local statutes and judicial pronouncements, at the other end of the spectrum, are one in the same (monist approach) or separate legal orders (dualist approach). The former only taking primacy in international courts and tribunals, and the latter reigning supreme in domestic decision-making.

Such a finding – that international customary law and treaties and conventions the country has ratified can only be applicable when they do not conflict with existing municipal laws – was mostly made in cases considering the applicability of international law in Kenya before the coming into force of the 2010 Constitution.³⁰ At the time, the predominant view was that, under the previous Constitution, Kenya was a dualist state whereby, international treaties and conventions the country was a party to had to be specifically incorporated into national laws, either by a new legislation or vide an amendment of an existing legislation for them to be considered part of national law – what is termed as the process of domestication.

However, as observed in the apt decision of the Court of Appeal in *Karen Njeri Kandie v Alassane Ba & Another*, this position changed with the promulgation of the 2010 Constitution.³¹ The learned judges of appeal held that the 2010 Constitution converted Kenya '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', a position which I agree with.³² The Court of Appeal continued to observe that 'the listing of the laws in Article 2 of the Constitution does not denote prioritisation'. That the fact that Article

²⁹ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 133.

³⁰ *Rono v Rono*, Civil Appeal 66 of 2002, Ruling of the Court of Appeal at Eldoret (2005) eKLR; *Rose Moraa & Another v Attorney General*, Civil Case No 1351 of 2002, Ruling of the High Court (2006) eKLR; *Re Estate of Lerionka Ole Ntutu (Deceased) Succession Cause 1263 of 2000*, Ruling of the High Court at Nairobi, (2008) eKLR.

³¹ *Karen Njeri Kandie v Alassane Ba & another*, Civil Appeal 20 of 2013, Judgement of the Court of Appeal of 13 February 2015, eKLR.

³² *Karen Njeri Kandie v Alassane Ba & another*, Court of Appeal.

2(6) provides that treaties and conventions the country has ratified are part of the laws of Kenya means that they 'are at least at par with other laws enacted by Parliament'.³³ It is hoped that, in the likely event that the Supreme Court has another opportunity to consider the applicability of international law in Kenya, it would be guided by this Court of Appeal decision and clarify the pending questions highlighted here.

As much as a door has been left open for the further development of guidelines on the applicability of international law in the country, it is important to note that the Supreme Court has previously affirmed reference to international human rights instruments ratified by Kenya in interpretation of the 2010 Constitution which it notes, generously adopts the language of these instruments.³⁴ Other courts adjudicating on socio-economic rights claims have also made a similar affirmation.³⁵ Indeed, most of the values, principles and rights guaranteed in the 2010 Constitution are essentially cut from the international human rights cloth. The extensive use of international human rights principles in the Constitution can, therefore, offer a path out of the thicket of confusion in avoiding injustices in cases where local statutes and international treaties and conventions that Kenya has ratified conflict. In such scenarios, focusing on relevant constitutional norms as the guiding light can be an effective temporary band-aid.

On a more positive note, the Supreme Court added that where there's a lacuna in domestic law on a matter that can be filled by reference to international law (customary or treaty law), the Court should apply such as, according to Articles 2(5) and 2(6) of the Constitution, these form '*part of the laws of Kenya*'. The same was held to apply in aiding the interpretation or clarification of a constitutional provision.³⁶

³³ *Karen Njeri Kandie v Alassane Ba & another*, Court of Appeal.

³⁴ *In the matter of the principle of gender representation in the National Assembly and the Senate*, Advisory Opinion No 2 of 2012, Ruling of the Supreme Court, para 52.

³⁵ *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others*, Petition 15 of 2011, Judgement of the High Court at Nairobi (2011) eKLR and *Mitu-Bell Welfare Society v Attorney General & 2 others*, Petition 164 of 2011, Judgement of the High Court at Nairobi, 11 April 2013, eKLR, para 15.

³⁶ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 130-132.

On the role of UN Guidelines in the interpretation and clarification of the Bill of rights, the Supreme Court held that these constitute international jurisprudence or *soft law*. Thus, they are only of persuasive value, and not of binding force, as interpretive tools aimed at breathing life to constitutional provisions like Article 43 on socio-economic rights in the determination of a case. However, the Court importantly noted that such Declarations or Resolutions could in time ripen into norms of customary international law like the Universal Declaration of Human Rights. The ripening process mostly involves two processes: the consistent and general State practice of a norm, and the acceptance by States of such a practice being binding in law (*opinio juris*).³⁷ Having clarified this, the Supreme Court then proceeded to consider the trial Court's reference to the UN Guidelines on evictions, which the Court of Appeal had taken issue with. It held that the trial judge was right to refer to the Guidelines 'as an aid in fashioning appropriate reliefs during the eviction of the appellants'. This was because the Guidelines filled a lacuna in the law on how the government is to conduct evictions and do not offend the Constitution, such being non-binding aids providing directions to State Parties to a treaty to help them implement the treaty or fulfil the obligations thereunder.³⁸

2.3 The right to housing under Article 43(1)(b) of the Constitution

Before delving into the Supreme Court's observations and holding on the right to housing in its *Mitu-Bell* decision, particularly in the context of forced evictions, this article will first give a legal and contextual background of the right to housing and forced evictions in Kenya. This will provide the necessary context to my analysis of the Supreme Court's determination on the right to housing in *Mitu-Bell*.

³⁷ *Military and paramilitary activities in and against Nicaragua (Nicaragua v USA)*, ICJ Rep. 1986, 180-190; *Lotus case (France v Turkey)*, PCIJ Reports, Series. A, No 10 (1927); *The North Sea Continental Shelf cases (Federal Republic of Germany (FRG) v Denmark; FRG v The Netherlands)*, ICJ Rep. 1969, 3.

³⁸ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 141-143.

2.3.1 *Legal and contextual background of the right to housing and forced evictions in Kenya*

Article 43(1)(b) of the Constitution guarantees every person in Kenya the right 'to accessible and adequate housing'. However, the right to housing is not absolute and is subject to limitations. The main limitation we will discuss here is the one found in Article 21(2) of the Constitution which provides that: 'the State shall take legislative, policy and other measures, including the setting of standards, to achieve the *progressive realisation* of the rights guaranteed under Article 43'.³⁹ This standard of progressive realisation is relatively new to Kenyan jurisprudence. Hence, attempts to give it meaning and develop it further have mostly referred to the understandings of it given by the Committee on Economic Social and Cultural Rights (CESCR) in relation to the similarly worded but non-identical provisions in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This requires each state party to the Covenant to take steps 'to the *maximum of its available resources, with a view to achieving progressively the full realisation of the rights* recognised in the present Covenant'.⁴⁰

Basing on the earlier discussion on the applicability of international law in Kenya, the ICESCR, being an international covenant that Kenya has ratified, complements provisions on socio-economic rights entrenched in the Constitution. Further, the CESCR's General Comments amount to *soft law* that are of persuasive value 'as interpretive tools aimed at breathing life to constitutional provisions like Article 43 on socio-economic rights'.⁴¹ Hence, because constitutionally entrenched socio-economic rights are new in Kenyan legal discourse, the aforesaid international laws have been and continue to be instrumental in fleshing out the content of these rights.

On the inclusion of progressive realisation in Article 2(1) of the ICESCR, the CESCR explains that this standard was adopted in recog-

³⁹ Emphasis added.

⁴⁰ Emphasis added.

⁴¹ Victoria Miyandazi, 'Setting the record straight on socio-economic rights adjudication: Kenya Supreme Court's judgment in the Mitu-Bell Case' *OxHRH Blog*, 1 February 2021.

inition of the fact that full realisation of socio-economic rights cannot be achieved within a short period of time due to resource constraints in many countries that are parties to the Covenant.⁴² However, progressive realisation has come to be seen as an excuse by States for the non-implementation of indeterminate rights, in particular socio-economic rights. These rights, which mostly give rise to positive duties, are usually viewed as requiring progressive realisation, stagnating their implementation because of the recognition that the state might not have all the available resources to immediately realise the right in full.

It is important to note that, like most socio-economic rights, the right to housing imposes both negative and positive duties.⁴³ Negative duties 'protect individuals against intrusion by the State' and are said to be 'determinate, immediately realisable, and resource free'.⁴⁴ They are thus relatively easier to enforce. On the other hand, positive duties require 'protection by the State from want or need' and are regarded as being 'indeterminate, programmatic, and resource intensive'.⁴⁵ Due to their indeterminate nature and resource implications, positive duties are more difficult to enforce, and this is why they are said to require progressive realisation.⁴⁶

Nevertheless, the CESCR has noted that the standard of progressive realisation does not leave a socio-economic right devoid of any meaningful content.⁴⁷ As such, the whole obligation is not postponed. First, the state has the immediate obligation to take deliberate, concrete and targeted steps towards the realisation of socio-economic rights and not to take any retrogressive measures.⁴⁸ The duty not to take retrogressive measures means that the right to housing also consists of the

⁴² CESCR, General Comment No 3: Article 2 on the nature of States parties' obligations, 1990, E/1991/23 para 9.

⁴³ Sandra Fredman, *Human rights transformed: Positive rights and positive duties*, Oxford University Press, 2008, 68.

⁴⁴ Fredman, *Human rights transformed*, 66 and 70.

⁴⁵ Fredman, *Human rights transformed*, 66 and 70.

⁴⁶ Fredman, *Human rights transformed*, 70.

⁴⁷ CESCR, General Comment No 3, para 9.

⁴⁸ CESCR, General Comment No 3, para 2.

negative duty not to unjustly deprive people of their right to housing through illegal evictions, leaving them homeless and without alternative housing or compensation. This is an immediate negative obligation.

Second, there is an immediate obligation of non-discrimination, meaning that the provision of socio-economic rights like housing should not be done in a discriminatory manner.⁴⁹ An equality element is included in Article 43 through the use of the term 'every person' in stipulating who should benefit from socio-economic rights. This means the State should extend these rights to those who are unjustly excluded where they are provided to some and not others who are similarly situated. It also obliges the State to make reasonable accommodation, say in provision of housing, to ensure that all persons, including those with disabilities have equitable access to such a right. For example, through the construction of ramps to ensure that physically disabled persons on wheelchairs can access public housing structures.

Third, the CESCR has stated that within the standard of progressive realisation, there is a minimum core obligation placed upon every state party 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' in the ICESCR. It further recognises the essential nature of this obligation by stating that: 'if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*'.⁵⁰

These three points flowing from the standard of progressive realisation under Article 2(1) of the ICESCR can thus be said to also apply to the progressive realisation standard for the implementation of socio-economic rights like housing in Article 21(2) of the Kenyan Constitution.

The ICESCR's Article 2(1) 'maximum available resources' requirement acknowledges that resources may be limited at various stages of

⁴⁹ CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para 7 provides that 'Non-discrimination is an immediate and cross-cutting obligation in the Covenant'.

⁵⁰ CESCR, General Comment No 3, para 10.

implementing socio-economic rights, and hence the more reason these rights should be progressively realised. In close relation to this requirement, the Kenyan Constitution similarly recognises that resources for implementing socio-economic rights may be limited. However, it goes further than the ICESCR in providing express guidelines that the State should follow in supporting a claim that it has limited resources to implement a socio-economic right at a given point. These guidelines are encapsulated in Article 20(5). This provision explicitly includes a status-based equality element to how socio-economic rights are implemented. Article 20(5) requires that:

In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –

- (a) it is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; *and*
- (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion (emphasis added).

By requiring the State to give priority to vulnerable groups and individuals, Article 20(5)(b) adds an equality component to the implementation of socio-economic rights. This point is also emphasised in Article 21(3) of the Constitution providing that all State organs and public officers have a duty to address the needs of vulnerable groups.⁵¹ It lists vulnerable groups in Kenya as including, but not limited to, ‘women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities’. The word ‘vulnerable’ is understood here to stand for the effects of

⁵¹ This is in relation to the application of all rights and fundamental freedoms in the Bill of Rights and not just SERs.

discrimination and the resultant disadvantage occasioned to a group because of possession of a particular status.

Arguably, prioritisation of the socio-economic needs of vulnerable groups in Article 20(5)(b) coincides with the minimum core obligation which the CESCR has argued attaches to the standard of progressive realisation. This is particularly evident when we consider the understanding of the minimum core obligation as requiring reasonable priority setting in provision of basic essential levels of each socio-economic right to the most vulnerable and in desperate need.⁵²

What amounts to a minimum core obligation for various socio-economic rights is a contentious issue that remains unresolved. Nevertheless, by Article 20(5)(b) of the Constitution explicitly requiring the prioritisation of vulnerable individuals and groups in implementation of socio-economic rights, it is clear that the State is to be held to account for failing to cater for the urgent needs of the most disadvantaged. The Kenyan Constitution thus extinguishes the need to dwell on a discussion of the contentious nature of a minimum core obligation. This is because a tangible provision already exists which performs the essential task of requiring priority setting for those in urgent need – the key point from the minimum core obligation discussion this article aims to highlight.

The need for priority-setting argument brings us to the question of why this is important in scenarios similar to that in *Mitu-Bell*. Like *Mitu-Bell*, in most, if not all, instances of unlawful evictions of informal settlers in Kenya, the rights to equality and non-discrimination are implicated as many of those afflicted and to be left homeless are poor and from vulnerable groups. Notably, the involvement of the right to equality and non-discrimination in eviction cases gives rise to an immediate positive obligation not to discriminate by providing the right to housing to vulnerable informal settlers who would be left homeless when evicted. We find this argument in the Supreme Court's acknowledgement in *Mitu-Bell* of the plight, in terms of land rights and access

⁵² David Bilchitz, *Poverty and fundamental rights: The justification and enforcement of socio-economic rights*, Oxford University Press, 2007, 208.

to housing, faced by informal settlers, a particularly vulnerable group in Kenya. According to the Supreme Court, for such informal settlers, 'however decrepit' their accommodation may be, living precariously has become their lived reality and such settlements 'home to their existence, their aspirations, and their very humanity'.⁵³ Such precarious living is further compounded by the ever-increasing unlawful forced evictions of informal settlers, and the fact that most residents of informal settlements are poor (most of them being daily wage earners⁵⁴), women, children, persons with disabilities and the elderly. Such unlawful and inhumane evictions exacerbate the dire conditions of these groups and further pushes them to the margins of society.

The Supreme Court in *Mitu-Bell* rightly observed that such a state of affairs is perpetuated by 'the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, [such that] the right to accessible and adequate housing remains a pipe-dream for many'.⁵⁵ The Court points out that one of the causes of landlessness in the country is the inability of many Kenyans to 'own' land and have title deeds that would give them an outright right to safeguard their right to housing on the said land. The situation is further worsened by the failure of successive governments to effectively provide access to housing for the more than 40 per cent of Kenyans who are considered poor under the defence of lack of resources.⁵⁶

Poverty, landlessness and lack of adequate State intervention to ensure accessible and adequate housing for Kenyans, especially those who are poor, does not do away with the fact that individuals and families need a roof over their heads to 'eke their daily living'.⁵⁷ This conse-

⁵³ Bilchitz, *Poverty and fundamental rights*, 144.

⁵⁴ Nita Bhalla, 'Forced evictions leave 5,000 Kenyan slum dwellers at risk of coronavirus' *Reuters* 6 May 2020.

⁵⁵ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 149-150.

⁵⁶ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 149. See also Kenya National Bureau of Statistics, *Basic report on well-being in Kenya: Based on the 2015/2016 Kenya Integrated Household Budget Survey (KIHBS)* (2018) 44-45.

⁵⁷ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 150.

quently leads to the mushrooming of informal settlements to house the landless and those who move to big cities and towns for work to earn a wage and sustain their various needs. This point reiterates the Indian Supreme Court's holding in *Olga Tellis & Others v Bombay Municipal Corporation & Others* on the eviction of pavement dwellers, which linked the right to housing with the right to life and to a livelihood.⁵⁸ The Court agreed with the petitioners that the eviction of pavement dwellers from their habitat amounts to deprivation of their right to livelihood as comprehended in the right to life. On this, it rightly held that the right to livelihood is an important facet of the right to life as 'no person can live without the means of living' and 'the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood'.⁵⁹

That the Kenyan Supreme Court's *Mitu-Bell* decision takes cognisance of these issues is an indication of its implicit awareness of the obligation set in Article 20(5)(b) and 21(3) to prioritise the need to address the needs of vulnerable groups. This is coupled with an appreciation of the rights to accessible and adequate housing, right to equality and a right to life coupled with its resultant right, the right to livelihood. It is from this background that I now turn to an analysis of the various aspects of the Supreme Court's judgment on the right to housing in *Mitu-Bell*.

2.3.2 *The Supreme Court's decision on the right to housing in Mitu-Bell*

Having first recognised the access to housing challenges faced by informal settlers like the Mitu-Bell community, the Supreme Court held that the land tenure system in the country has radically been transformed by the 2010 Constitution due to its declaration that '*all land in Kenya belongs [to] the people of Kenya collectively as a nation, communities and individuals*'. This was said to mean that 'every individual as part of the collectivity of the Kenyan nation has an interest ... in *public land*'.⁶⁰

⁵⁸ *Olga Tellis & Others v Bombay Municipal Corporation & others*, 1986 AIR 180, 1985 SCR Supl. (2) 51.

⁵⁹ *Olga Tellis & Others v Bombay Municipal Corporation & others*, para 71-80.

⁶⁰ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151.

Based on this observation, the Court proceeded to hold that a long period of occupation by a group of people crystallises their right to housing over *public land*. This holding is ground-breaking in that under the long-existing corpus of land laws in Kenya, it was unclear and difficult to claim prescriptive rights over public land by virtue of a long period of occupation. That long-term occupation of a parcel of land could lead to rights over the same, has only been clear in the context of adverse possession of private land. This is whereby, a non-owner of land gains title to the land by operation of law when he or she has been in exclusive possession of another's private land for an open and uninterrupted period of over 12 years without the owner or his or her agents' opposition.⁶¹

However, the Supreme Court held that, in contrast to public land, 'illegal occupation of private land cannot create prescriptive rights over land in favour of occupants'.⁶² This position on private land is unclear owing to the existence of the doctrine of adverse possession of private land, which as stated above, is applicable in Kenya. My take is that adverse possession of another's private land is akin to the creation of prescriptive rights over another's private land through long-term uninterrupted exclusive possession of the same for over 12 years. Hence the reason why I find the Supreme Court's differentiation of private and public land in creation of prescriptive rights over land ambiguous. The Supreme Court's position on private land is also criticised by Gautam Bhatia who avers that, 'if indeed there is a democratic principle that all land belongs to the people, then the Court's distinction between "public land" (where these principles apply) and "private land" (where they do not) is unsustainable'.⁶³

Crucially, the Court held that when 'Faced with an eviction on grounds of public interest, such potential evictees have a right to pe-

⁶¹ See Sections 7, 13, 17, 37 and 38(1) and (2) of the Limitation of Actions Act, Chapter 22, Laws of Kenya; *Wilson Njoroje Kamau v Nganga Muceru Kamau* (2020) eKLR.

⁶² *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151.

⁶³ Gautam Bhatia, 'Notes from a foreign field: The Kenyan Supreme Court on housing evictions, and the right to land', available at <<https://indconlawphil.wordpress.com/2021/01/14/notes-from-a-foreign-field-the-kenyan-supreme-court-on-housing-evictions-and-the-right-to-land/>> accessed on 15 January 2021.

tion the Court for protection' and, if an eviction is warranted in the public interest, by virtue of Article 23(3) of the Constitution, the Court can craft orders such as compensation, requirement of adequate notice, observance of humane conditions during eviction and the provision of alternative land for settlement, to protect the evictees' right to housing.⁶⁴ The Court also acknowledged that the evictions of the appellants took place in contravention of a court order and led to the destruction of homes, property and even schools, entitling the appellants to relief.⁶⁵ The Supreme Court then proceeded to remit the case back to the Trial Court for the crafting and granting of appropriate remedies in accordance with its judgment and appellants' pleadings at the High Court.

In coming up with appropriate remedies in the case, the High Court will certainly be guided by the Supreme Court's observations on the orders that can be granted, as well as the losses suffered by the appellants that the Court stated would require a remedy. Thus, the Supreme Court did not leave the appellants' claim unremedied. This is the reason why I disagree with Ian Mathenge's view that the Supreme Court's *Mitu-Bell* decision was a missed opportunity to be Kenya's *Irene Grootboom* case. Notably, in *Government of the Republic of South Africa v Grootboom*, the South African Constitutional Court only gave a declaratory order that the State should devise and implement within its available resources, a comprehensive housing programme that included reasonable measures to ensure that the rights of the poor and especially those in desperate need are guaranteed.⁶⁶

The *Grootboom* judgment has fittingly been lauded as being the first time that the South African Court enforced the constitutionality of a socio-economic right. However, the declaratory order that the State should take appropriate steps to cater for the rights of *all* those without adequate access to housing left Mrs Grootboom and those in the same urgent situation as her, without an immediate relief and she died homeless eight

⁶⁴ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 151-153.

⁶⁵ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 156.

⁶⁶ *Government of the Republic of South Africa v Grootboom*, para 99.

years later. It is for this reason that Davis argues that '[a] failure by successful litigants to benefit from constitutional litigation of this kind can only contribute to the long-term illegitimacy of the very constitutional enterprise'. This is because the lack of a tangible benefit for successful litigants in desperate need renders such rights illusory.⁶⁷ Indeed, an all-inclusive contextual approach that considers *all* those deprived of their right to housing is a good approach in guaranteeing fairness and avoiding 'queue jumping' by those who can access court as opposed to those who do not have the means or capability to litigate. However, such an approach should not be applied to defeat a valid and urgently needed individual socio-economic rights claim, especially since –using the example of *Grootboom* – despite 'winning' the case, Mrs Grootboom and thousands of other South Africans died without a home. The best description of this danger is elucidated in Talib Kweli's apt statement that, 'if we say our house is on fire and you say "all houses matter," well that may be true, but all houses aren't on fire now, my house is'.⁶⁸ As much as there is still an injustice in the fact that the Mitu-Bell community had to wait for over 10 years for their grievance to be resolved, it is laudable at least that the Supreme Court judgment, however imperfect, does not leave them without a remedy.

3. Conclusion

This article has shown that, the *Mitu-Bell* Supreme Court decision, though imperfect, has made it clear that, even when an eviction is legitimate and warranted, this is to be conducted in accordance with the law. It has clarified some of the confusing points on the application of international law in Kenya under Article 2(5) and Article 2(6) of the Constitution. This is particularly with regards to the meaning of 'general rules of international law' and the persuasive nature of international juris-

⁶⁷ Dennis Davis, 'Socio-economic rights in South Africa: The record after ten years' (2004) 2 *New Zealand Journal of Public and International Law*, 56.

⁶⁸ Interview with Talib Kweli on the Black Lives Matter movement, *MTVNews* on Twitter 9 July 2016.

prudence as guiding aids when there is a lacuna in the law. The Court has proclaimed in ringing terms that evictees have a right to approach the court to seek compensation, enforcement of the requirement of adequate notice and observance of humane conditions during eviction, and the provision of alternative land for settlement. The judgment will thus be instrumental and a positive guiding light in right to housing and eviction cases as unlawful evictions continue to be conducted in total disregard of the law.⁶⁹ Landlessness is also an issue of perennial debate, and it will be interesting to see how the Court's pronouncement that long-term occupation of public land can lead to prescriptive rights plays out in future litigation.

⁶⁹ See OHCHR, 'COVID-19 crisis: Kenya urged to stop all evictions and protect housing rights defenders' Press Release 2020/05, 22 May 2022, Siago Cece, 'Kariobangi demolition victims sue State, want CSs fired' *The Nation*, Nairobi, 8 June 2020; 'Court stops State from evicting 8000 families' *People Daily*, 4 May 2020



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