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# *Mitu-Bell Welfare Society* redux: A note on the strengths and weaknesses of the Supreme Court judgement

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## Abstract

*This note reviews the case of Mitu-Bell Welfare Society in view of the concerns raised over the Supreme Court judgment, as well as points raised in its support. It argues that on one hand, the court laid down foundations for future interpretation that will help courts better address violations of socio-economic rights in Kenya. Importantly, the court addressed the rights of persons facing evictions in informal settlements and the 'bare minimum' standards that should be applied in such situations. On the other hand, the note agrees with those who have found issue with how the court canvassed the place of international law in Kenya.*

**Keywords:** international law; 'bare minimum' standards; socio-economic rights; hierarchy of laws in Kenya; illegal/informal settlements; public land

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## 1. Introduction

This note argues that the Supreme Court's decision in *Mitu-Bell Welfare Society*<sup>1</sup> which overturned the Court of Appeal's decision<sup>2</sup> in the same matter not only salvages the jurisprudence on structural interdicts but also offers some light on two other broader issues: the place of international law in Kenya's constitutional structure; and the practical implications of socio-economic rights, in this case, the right to housing, in the face of competing (property) claims. Contrary to the assertions by Ian Mwiti Mathenge in his lead paper in this debate that the Supreme Court failed to give effect to the transformative vision of the Constitution of Kenya 2010, this note argues that to a large extent the Court's reasoning is in line with the ethos and spirit of the Constitution save for some isolated statements that will be alluded to. The note begins by analysing the Court's ruling on structural interdicts, followed by the application of international law in Kenya and finally on the right to housing as is guaranteed by the Constitution.

## 2. On structural interdicts

The Court of Appeal had set off on a completely misinformed tangent when it held that the remedy of structural interdicts was unknown to Kenyan law. The Supreme Court held that the Court of Appeal had simply chosen to disregard the Supreme Court's own view of the matter where the Supreme Court had itself ordered interim reliefs similar to what was being challenged at the Court of Appeal. The Court of Appeal had also chosen to not engage in analysis of previous High Court jurisprudence on the use of structural interdicts. In affirming the applicability of structural interdicts in Kenya's constitutional framework, the Supreme Court rendered itself thus:

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<sup>1</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*, Petition No 3 of 2018, Judgement of the Supreme Court, 11 January 2021 (eKLR).

<sup>2</sup> *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal No 218 of 2014, Judgement of the Court of Appeal at Nairobi, 1 July 2016 (eKLR).

‘...Article 23 (3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right.’<sup>3</sup>

Effectively, the Supreme Court has put to rest the question as to whether interim remedies such as structural interdicts are available in Kenya’s constitutional rights redress mechanisms.<sup>4</sup> The justification proffered by the Supreme Court included the need to spur the development of court-sanctioned enforcement of human rights.

The Supreme Court qualified its position in a number of ways. First, the remedy must be ‘carefully and judicially crafted’.<sup>5</sup> Secondly, interim reliefs, structural interdicts, supervisory orders or any other orders of similar nature ‘...have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other state agency vested with a constitutional or statutory mandate to enforce the order.’<sup>6</sup> Thirdly, and according to the Court, most importantly, ‘the Court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy.’<sup>7</sup> Fourthly, the ‘orders should not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them.’<sup>8</sup>

Finally, ‘where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallisation of certain actions.’<sup>9</sup> While the exact implications of these requirements will only be seen in future litigation, one sees that the Supreme Court goes beyond merely affirming the propriety of interim reliefs in constitutional litigation but also delineates some guidelines for the lower courts to follow when considering the remedies. This is one of the strongest points of the Supreme Court decision in this case.

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<sup>3</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 121.

<sup>4</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 121.

<sup>5</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 121.

<sup>6</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

<sup>7</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

<sup>8</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

<sup>9</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

One hopes that lower courts will expound and expand on this list to make interim reliefs more robust remedies in constitutional matters in Kenya.

### **3. On applicability of international law under Articles 2(5) and 2(6) of the Constitution**

The Supreme Court also had the opportunity to provide clarity on the vexing question of the place of international law in Kenya today. Article 2(5) of the Constitution allows that: 'the general rules of international law shall form part of the law of Kenya,' while Article 2(6) states that: 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'<sup>10</sup> So far, jurisprudence on these two provisions has been far from clear.

On the one hand there are judges who have suggested that international law trumps contradicting municipal laws, for instance in the *Zipporah Wambui Mathara* case.<sup>11</sup> The case involved a debtor who was committed to serve jail term for failing to pay back what was owed to the receiver. The right in contention was of the International Covenant on Civil and Political rights that provides that an individual should not be imprisoned merely because of failure to fulfil a contractual obligation.<sup>12</sup> The civil procedure in contrast provides that in the event the debtor fails to execute a decree than they may be arrested and detained in Prison.<sup>13</sup> In this case Lady Justice Koome (as she was then) held that holding a debtor in prison goes against the provisions of the ICCPR.<sup>14</sup>

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<sup>10</sup> Constitution of Kenya (2010), Article 2(5) and 2(6).

<sup>11</sup> *Re The Matter of Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, Ruling of the High Court (2010) eKLR.

<sup>12</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 11.

<sup>13</sup> Civil Procedure Act (No 21 of 2010), Section 38.

<sup>14</sup> *Re Zipporah Wambui Mathara*, para 10.

On the other hand, there are judges who have deemed the problem as not being one of interpretation rather than of hierarchy. Justice Maanja held in the case of *Beatrice Wanjiku and Another v Attorney General and 2 others*<sup>15</sup> that international legal provisions are first of all 'subordinate to and ought to be in compliance with the Constitution',<sup>16</sup> and secondly, such international conventions did not trump local statute.<sup>17</sup> As such, Article 2(5) and 2(6) did not necessarily call upon courts to rank international law against either the Constitution or Acts of Parliament but to determine which amongst those laws is applicable at any given moment, an exercise that is an act of interpretation. In the circumstances the judge took the view that since international law did not trump the Constitution, the latter would always control the application of the former. In the case of contradictions between local statute and international law, then the fact that both ranked the same would require the differences to be resolved through ordinary rules of statutory interpretation.<sup>18</sup>

The foregoing debate on the true place of international law in Kenya is merely a distilled form of the argument on whether Kenya has abandoned her dualist ideals and embraced monism in the application of international law. This is a question that has not benefitted from clear path-making jurisprudence by the courts that have handled it. While the *Mathara case* certainly seems to suggest that international law has a direct effect in Kenyan jurisprudence, the *Beatrice Wanjiku case* seems to suggest otherwise. While engaging with this issue in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, the Court of Appeal signalled its concurrence with the Maanja view by stating that 'the supreme law in Kenya is the Constitution and if any general rule of international law or treaty ratified by Kenya is inconsistent with the Constitution, the Constitution prevails.'<sup>19</sup>

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<sup>15</sup> *Beatrice Wanjiku & another v Attorney General and others*, Petition 190 of 2012, Judgement of the High Court (2012) eKLR, para 20.

<sup>16</sup> *Beatrice Wanjiku & another v Attorney General and others*, para 20.

<sup>17</sup> *Beatrice Wanjiku & another v Attorney General and others*, para 20.

<sup>18</sup> *Beatrice Wanjiku & another v Attorney General and others*, para 21-23.

<sup>19</sup> *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 115.

The Court of Appeal canvassed the concept of 'general rules of international law' and concluded that general rules of international law amounted to customary international law, *jus cogens*, and therefore are binding without room for derogation.<sup>20</sup> This decision – that international law, even of a peremptory nature, such as general rules of international law (which the Court equated to customary international law), would be subservient to contrary local norms – is one that ran against the flow of the Court's own reasoning. That finding created a lot of conceptual and practical difficulties which the Supreme Court ought to have clarified.

The Supreme Court failed to pick up that responsibility and took a simplistic way out of it. On ranking, the Supreme Court affirms the Maanja position that international law only applies as a gap-filler, where no local guidance exists, that is, international law kicks in if no constitutional, statutory, or judicial pronouncement exists on the issue.<sup>21</sup> In other words, international law is subservient to all contrary local law. However, in the event the discord exists with reference to statute then a court has to apply maxims of judicial interpretation to determine the applicable law.<sup>22</sup>

The Supreme Court sees the monist/dualist dichotomy as being of no use, terming it as increasingly sterile, in a manner to suggest that a norm-elimination game is more useful than a value-based analysis of international law.<sup>23</sup> One would have expected the Supreme Court to engage more robustly with the import of the inelegantly drafted Articles 2(5) and 2(6) with a view to smoothing out the jurisprudential pitfalls those provisions have so far engendered. As it stands, the place of international law in Kenya's legal system is infirm and prone to judicial headwinds, some of which may blow it far away from what Kenyans had intended when they included it in their normative framework.

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<sup>20</sup> *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 116.

<sup>21</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 132.

<sup>22</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 132.

<sup>23</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 133.



The Supreme Court failed to reconcile its decision on the one hand that 'general rules of international law' refer to customary international law, with its view that international law is a secondary source of law, on the other hand. The Supreme Court rendered itself thus:<sup>24</sup>

where it has been used, as in the judicial pronouncements above, the expression "*part of our law*" means that domestic courts of law, in determining a dispute before them, have to take cognisance of rules of international law, *to the extent that the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement*. The phrase *rules of international law*, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refer to customary international law. It is already clear that in our context, *Article 2(5) and (6) of the Constitution embraces both international custom and treaty law*. This provision can be said to be both outward, and inward looking. The Article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the Article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party. Yet, reference to international law by a domestic Constitution is evidence of its progressive nature. On the other hand, Article 2(5) and 2(6) is inward looking in that, it requires Kenyan courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, *as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement*. Where for example, a court of law is faced with a dispute, the elements of which, require the application of a rule of international law, *due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply the latter, because, it forms part of the law of Kenya*. In other words, Article 2(5) and 2(6) of the Constitution, recognises international law (both customary and treaty law) as a *source of law* in Kenya. By the same token, a court of law is at liberty, to refer to a norm of international law, as an aid in interpreting or clarifying a constitutional provision (see for example, *In the matter of the principle of gender representation in the National Assembly and the Senate*; SC Advisory Opinion No 2 of 2012, [2012] eKLR

While considering the meaning of the term 'general rules of international law', the Supreme Court held that it refers to the 'whole corpus of customary international norms', including *jus cogens*.<sup>25</sup> There appears

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<sup>24</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 130-132.

<sup>25</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 140.

to be an attempt to categorise customary international law into those that are peremptory (*jus cogens*) and those that are not. Is this classification useful? Are there rules of customary international law that are not binding? Can a court choose which customary international law rule binds and which one does not? Can domestic law be a basis for holding that a rule of customary international law is inapplicable in Kenya? May a court uphold a statute overturning the rules of diplomatic immunity that have evolved into custom? May the customary rules defining crimes under international law be modified by local law, including the Constitution and statute and if so, is a court in Kenya at liberty to enforce that law? The 'free will theory' that the Supreme Court affirmed with respect to international law generally and international custom in particular is not supported by law.

Perplexingly, the Supreme Court holds that general guidelines and declarations such as soft law may 'ripen into a norm or norms of customary international law, depending on their nature and history leading to their adoption.' In such cases they become *binding* as general customary international law/general rule of international law.<sup>26</sup> But despite their binding nature, and following the court's logic above, courts can only apply them if there is no local constitutional or statutory rule governing the issue in dispute. Nothing could be more contradictory.

#### **4. On Article 43 (socioeconomic) rights**

One criticism courts in Kenya have faced is that they have been unable to conceptualise and contextualise Article 43 rights. Courts have exhibited the tendency to determine disputes over social and economic rights without following the imperatives under Article 20(5) of the Constitution. That Article provides as that:<sup>27</sup>

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<sup>26</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 142 and 143.

<sup>27</sup> Constitution of Kenya (2010), Article 20(5).

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.

In effect, Article 43 rights require a closer ‘stepwise’ analysis that involves an examination of several factors set out in the Constitution and subject to meeting the core obligations, the law provides an opportunity for courts to clarify the obligations involved in the context of socio-economic rights. Indeed, the Supreme Court is alive to this role that a court is required to play when it states that: ‘Article 20(5) clearly empowers a court or tribunal, presiding over a dispute, in which the petitioners are claiming that the State, has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability.’<sup>28</sup> This understanding of a court’s obligation under Article 43 has been less appreciated in many decisions and the fact that the Supreme Court picks it out must be taken as a positive development.

## **5. On the right to housing**

The Supreme Court must be commended for its acute appreciation of the context of the problem of illegal evictions in Kenya particularly with respect to informal settlements erected on public land. However, the Court’s mention of prescriptive rights over private property appears to be tangential and little ought to be made out of it. Instead, the breadth of the Supreme Court’s pronouncement is limited to the realm of non-authorised (illegal) occupation of public lands by the landless. While such occupants do not necessarily acquire an interest that is anal-

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<sup>28</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 148.

ogous to ownership, they acquire a procedural right to be notified of intended eviction and provision of alternative accommodation, at the very least. It does not seem that the Supreme Court was suggesting that the State has an obligation to provide shelter, and even if the Court does not develop the argument in the context of the obligation to respect and the obligation to protect the right to housing, the Court cannot be faulted for requiring authorities to be orderly and respectful when dealing with occupants of informal settlements particularly in a society characterised by grinding poverty and inequality. Perhaps the Supreme Court would have gone out on a limb and defined the concept of adequate housing, perhaps this was not the case for undertaking such task. It is hoped that the foundation blocks laid down by the Supreme Court will now afford an opportunity for latter High Court decisions to build the jurisprudence on the particular aspect of the right to housing.

## 6. Conclusion

While the Supreme Court failed to provide clear pathways for application of international law in Kenya, the decision is a critical affirmation of the powers of the High Court to fashion constitutional remedies to suit disputes. The Supreme Court also listed criteria that should help courts in responding to claims of rights violations. The Supreme Court laid out what appears to be bare minimums of the right to housing/shelter in the context of unauthorised/illegal informal settlements on public land, which include the right to be involved in the process of eviction either through notification and/or the decision on alternatives. There is always an opportunity to develop substantive prescriptions on the right to housing, perhaps the *Mitu-Bell* case was not one of those. Besides, the decision allows room for evolution of jurisprudence from the ground up.



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