**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**PETITION CASE NO. 66 OF 2010**

1. **SUSAN WAITHERA KARIUKI**
2. **FRANCIS MUSUNGU**
3. **JOSEPH NJOROGE**
4. **ALPHONCE MUSYOKA**
5. **FRANCIS KABIRO.................................................PETITIONERS**

**VERSUS**

1. **THE TOWN CLERK, NAIROBI CITY COUNCIL**
2. **THE COMMISSIONER OF POLICE**
3. **MINISTER FOR LANDS........................................RESPONDENTS**

**RULING**

The petitioners sought a conservatory order to restrain the respondents, their servants and/or agents from evicting them or any of the residents in the areas known as Kaptagat village along Kaptagat road within Kitsuru location, Dam Village at Kabete Veterinary Research within Kitsuru location, Ndumbuini village along Kapenguria/Fortsmith Roads within Kitsuru location, Maasai Village, Consolata on Kurema road off 2nd Parklands Avenue, Highridge within Parklands location, Kabete Native Industrial Training and Development (NITD) in Kabete, all being informal settlements, pending determination of their petition filed on 1st November, 2010. In the said petition, the petitioners stated that they were bringing these proceedings on their own behalf and on behalf of thousands of poor villagers living in the said areas. On 29th October, 2010 officers of the 1st respondent delivered notices to the petitioners requiring them to vacate the premises within 24 hours of the notice. They argued that the respondents owe them a duty of respect, protection and fulfillment of their right not to be deprived of their means of livelihood, access to reasonable sanitation, adequate housing,

freedom from cruelty, inhuman and degrading treatment and the right to uphold and respect of their dignity.

The petitioners stated that among the structures that they are required to remove is a community toilet that was built with the gracious assistance of a non-governmental organization known as **"Maji na Ufanisi"** with the full knowledge and approval of the 1st respondent. They further contended that the notices issued to them fall far short of the Constitutional benchmark of being reasonable as they are being given hours to vacate from premises where they have lived for over four decades.

In the petition, the petitioners are seeking the following prayers:

**"1. A declaration that the notices served on the petitioners and other residents of the named villages are unconstitutional.**

**2. A declaration that if indeed the lands occupied by the petitioners and other residents are road reserves they are therefore public land and fall within the Constitutional definition of public land hence the petitioners are protected against arbitrary removal and treatment.**

**3. An order restraining the respondents by themselves, agents or assigns from evicting the petitioners and other residents without prior mutually agreed alternative and suitable location within or on the outskirts of Nairobi.**

**4. A declaration that the respondents' duty to respect, promote and fulfil the rights of the petitioners and other residents is perpetual and cannot be abrogated and is perpetual. (sic)**

**5. A declaration that the respondents have a duty to formulate, with the citizens participation regulations and standards of eviction so as to avoid undue declaration and violation of any person within the jurisdiction.**

**6. An order of payment of general, exemplary and punitive damages by the respondents to the petitioners assessed by this court."**

The application in support of the conservatory orders was supported by an affidavit sworn by **Alphonce Musyoka**. He stated that on 21st October, 2010 they were served with 12 hours' notice to vacate their homes and businesses in the villages where they live without any alternative location being offered to them. The notices were served on a Thursday afternoon and on the following Friday night their structures were demolished by an armed group of people from the City Council of Nairobi together with Administration Police. Since they had nowhere else to go they were forced to put up other temporary shelters on the same land. Mr. Musyoka supported the depositions contained in the affidavit of **Susan Waithera Thuo** sworn in support of the aforesaid petition. That affidavit reveals that all the petitioners living in the aforesaid informal settlements eke out their livelihoods through petty trade of selling vegetables, water and other food stuffs. Others are employed as househelps and watchmen in the neighbouring upmarket Kitsuru residential area.

The petitioners' contention is that the respondents are violating their Constitutional rights as aforesaid and they are entitled to this court's protection by way of a conservatory order pending hearing and determination of the petition.

None of the respondents filed any affidavit in opposition to the application for conservatory orders. However, the 1st respondent filed an affidavit in reply to the petition. The affidavit was sworn by **Rose K. Muema**, the Acting Director, City Planning Department. She basically denied all the averments contained in the petition. She stated that the 1st respondent served notices upon the developers and owners of structures that are along Kaptagat Road requiring them to remove the same as they were developed on a road reserve without the Council's permission. She further stated that the 1st respondent upholds the Constitution and respects the dignity of the petitioners but it has no mandate and capacity to allocate land to the homeless or to settle them.

The 1st respondent further contended that it is charged with the responsibility of planning the City of Nairobi and it had not violated the petitioners' Constitutional rights in any way. In its view, the petition has no merits and ought to be dismissed.

Mr. Ndubi for the petitioners and Mr. Ogolla for the 1st respondent made brief submissions in respect of their respective clients' cases. The 2nd and 3rd respondents, though served with the petition and the application, did not file any papers or participate in the proceedings.

The petitioners have alleged breach of several economic and social rights. **Article 43** of the Constitution of Kenya, 2010 states as hereunder:

**"Every person has the right-**

**(a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare;**

**(b) to accessible and adequate housing and to reasonable standards of sanitation;**

**(c) to be free from hunger, and to have adequate food of acceptable quality;**

**(d) to clean and safe water in adequate quantities;**

**(e) to social security; and**

**(f) to education"**

**Article 24(1)** of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

**"(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

The petitioners are living in informal settlements within the city of Nairobi. Some of them have been living in the said areas for over forty years. They were given twelve hours to move out of their homes. **Article 47(2)** of the Constitution states as follows:

**"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."**

No reasons were given in the notices that were served on the petitioners.

There can be no dispute that each of the petitioners has constitutional right to adequate housing and reasonable standards of sanitation. The Constitution does not define what constitutes **"adequate housing".** In the absence of such a definition, resort may be had to international law for guidance. **Article 2(5) & (6)** of the Constitution states that:

**"5. The general rules of international law shall form part of the law of Kenya .**

**6. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."**

The United Nations Office of the High Commissioner for Human Rights in **"The Right to Adequate Housing" (Article 11.1); Forced Evictions,** stated as follows:

**"15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of rights recognized in both the international**

**covenant on human rights. The committee considers that the procedural protections which should be applied in relation to forced evictions include:**

**(a) an opportunity for genuine consultation with those affected;**

**(b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;**

**(c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected,**

**(d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;**

**(e) all persons carrying out the eviction to be properly identified;**

**(f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;**

**(g) provision of legal remedies; and**

**(h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.**

**16. Eviction should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be is available."**

Some of the national values and principles embodied in our Constitution include human dignity, equity, social justice and protection of the marginalized. See **Article 10. Article 28** states that:

**"Every person has inherent dignity and the right to have that dignity respected and protected."**

In interpreting the Bill of Rights the court should promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit, purport and objects of the Bill of Rights. See **Article 20(4)**. It is also mandatory that the Constitution be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law, human rights and fundamental freedoms. See **Article 259(1).**

While I agree that the 1st respondent has a duty to control developments in the City of Nairobi as required under the Local Government Act as well as the Physical Planning Act, the protection of the petitioners' fundamental rights as guaranteed under the Constitution overrides the aforesaid duty and responsibility of the 1st respondent. The petitioners have resided on the properties where they are being evicted from for many years. It is unreasonable and indeed unconstitutional for the respondents to give the petitioners one or two days' notice to move out of their respective homes even without giving them any reason thereof and immediately upon expiry of the short notice embark on forceful eviction and demolition of their homes. The petitioners ought to be treated with dignity as required by our Constitution. It is unconstitutional to forcefully evict such a large number of people from dwellings where they have lived for more than forty years and render them homeless overnight. The government has a constitutional obligation to provide them alternative housing. In all instances where forceful eviction has to be executed it has to be done humanely.

In matters of this nature there is almost always a clash between property rights and housing rights. There is need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others. In **MODDERKLIP BOERDERY vs. PRESIDENT VAN DIE RSA en ENDERE 2003 (6) BC LR 638(T),** the Supreme Court of Appeal in South Africa delivered a ground breaking

judgment on the clash between property rights and housing rights. The brief facts that gave rise to that appeal were as follows:

Modderklip Boerdery (Pty) Ltd was a private landowner of agricultural land in the Benoni area. In May 2000, its land was occupied by a few hundred people evicted from the Chris Hani informal settlement at the edge of Daveyton. Originally, the settlement was no more than 50 shacks. However, by October 2000, the settlement had swelled to well over 4000 shacks and 18000 people. At that point Modderklip applied for and was granted an eviction order. By the time the eviction order became executable the number of people on the land had swelled to 40000 and the cost of executing the order had grown to R1.8 million, which was more than the occupied land was worth. Modderklip then brought a further application in the Transvaal Provincial Division of the High Court held that the state was in breach of its constitutional obligations by failing to give effect to the eviction order.

Both the eviction and the enforcement order were then appealed to the Supreme Court of Appeal and dealt with together.

Harms JA held as follows:

**"The occupiers have a right of access to housing under section 26(1). That it exists is not in issue. Nor is the extent of the right at stake in this case – it is limited to the most basic. But the real issue is not the existence of the right; it is whether State has taken steps in relation to those who, on all accounts, fall into the category of those in "desperate need". The answer appears to be fairly obvious; it did not. Does the State have any plan for the 'immediate amelioration of the circumstances of those in crisis'? the State, at all three levels, central provincial and local, gave the answer and it is also no. the medium and long term at present also present no apparent solution."**

Harms JA went on:

**"There is another angle. To the extent that we are concerned with the execution of the court order, *Grootboom* made it clear that the government has the obligation to ensure, at the very least, that evictions are executed humanely. As must be abundantly clear by**

**now, the order cannot be executed – humanely or otherwise – until the State provides some land.”**

The learned judge concluded that the State was in breach of its obligation to the occupiers of the land in question and simultaneously breached **Section 25(1)** of the Bill of Rights which provides that **“no one may be deprived of property except in terms of a law of general application”** as far as the rights of Modderklip were concerned. The court ruled that the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available to them by the State and to require the State to pay compensational damages to Modderklip for the violation of its constitutionally entrenched rights.

The affidavit of Rose Muema shows that the petitioners are living on a road reserve. But from the affidavits sworn by the petitioners it appears to the court that the petitioners are occupying an extensive area and/or different parcels of land. Some are living along Kaptagat Road within Kitsuru, others are at Dam village near Kabete Veterinary Research, Maasai village, Consolata area along Kurema Road off 2nd Parklands Avenue, the details whereof are shown on paragraph 1 of the petition. If indeed the petitioners have lived in those places for close to four decades it would be unjust and unconstitutional to evict them from the only homes they have known without providing alternative housing. It is therefore necessary that the petitioner’s complaints be given serious consideration.

Kenya should develop appropriate legal guidelines on forced eviction and displacement of people from informal settlements so that if people have to be evicted from such settlements the act is done without violating people’s constitutional rights and without causing extreme suffering and indignity to them. It is apparent that the requirements set by the United Nations of the High Commissioner for Human Rights relating to forced evictions as quoted hereinabove have not been put in practice in this country. These are sound legal principles which, in my view, ought to be applied in our constitutional interpretation in respect of people’s right to adequate housing. The State has a positive obligation under **Article 43(b)** of the Constitution to adopt and implement a reasonable policy, within its available resources, which would ensure access to adequate housing over time.

In **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA vs. GROOTBOOM AND OTHERS 2001 (1) SA 46 CC,** the Constitutional Court of South Africa required the Government to have a housing policy which responds reasonably to the needs of the most desperate and provides at least temporary shelter for those with no access to land. The court held that, to qualify as 'reasonable', State housing policy must:

· **be comprehensive, coherent and effective;**

· **have sufficient regard for the social economic and historical context of widespread deprivation;**

· **have sufficient regard for the availability of the State's resources;**

· **make short, medium and long term provision for housing needs;**

· **give special attention to the needs of the poorest and most vulnerable;**

· **be aimed at lowering administrative, operational and financial barriers over time;**

· **allocate responsibilities reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations;**

· **respond with care and concern to the needs of the most desperate;**

· **achieve more than a mere statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most vulnerable catered for.**

I strongly recommend formulation of such a policy in this country.

What I have stated hereinabove is sufficient to demonstrate that even though it is important that the first respondent plans the City of Nairobi properly, and that may entail having to evict some people from informal settlements on road reserves for purposes of road expansion

and/or beautification, the Constitutional rights of those people must be respected and given due consideration.

The conservatory orders sought herein are well deserved. The petitioners shall remain in occupation of their informal settlements pending hearing and determination of their petition. The respondents shall bear the costs of this application.

In conclusion, I acknowledge the scholarly work of **Stuart Wilson**, visiting Senior Research Fellow, Wits Law School, in his article – **"BREAKING THE TIE: EVICTIONS FROM PRIVATE LAND, HOMELESSNESS AND A NEW NORMALITY"** published in **THE SOUTH AFRICAN LAW JOURNAL**.

I am also grateful to Mr. Aaron Ndubi, the petitioner's counsel, for his input and industry in arguing this application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**
**Nazi – court clerk**
**Mr. Ndubi for the petitioners**
**No appearance for the respondents**