REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

PETITION NO.2 OF 2018

–BETWEEN–

WILLIAM MUSEMBI.....1ST PETITIONER
FRED NYAMORA.....2ND PETITIONER
VINCENT ONYUNO.....3RD PETITIONER
ELIJAH MEMBA..... .....4TH PETITIONER
JOSHUA KIBE.....5TH PETITIONER
MONICA WANJIRU.....6TH PETITIONER
MWENI KISINGU.....7TH PETITIONER
PAMELA ATIENO.....8TH PETITIONER
PURITY WAIRIMU.....9TH PETITIONER
BEATRICE WANJIRU..... .....10TH PETITIONER
GERTRUDE ANGOTE.....11TH PETITIONER

(*Suing on their own behalf and on behalf of 326 persons formerly residing in City Cotton village and Upendo City Cotton village and their 90 school going children****)***

MARGARET KANINI KELI.....12TH PETITIONER
ROSELINE MISINGO.....13TH PETITIONER
JOSEPH MWAURA KARANJA.....14TH PETITIONER

(Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi)

—AND—

MOI EDUCATIONAL CENTRE CO. LTD.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

CABINET SECRETARY, LANDS, HOUSING &

URBAN DEVELOPMENT.....4TH RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal of Kenya sitting in Nairobi **(Waki, Makhandia & Gatembu, JJA)** delivered on the **15th December, 2017** in **Nairobi Civil Appeal No.363 of 2014)***

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal dated and lodged on 29th January 2018 is brought pursuant to the provisions of Article 163(4)(a) of the Constitution, together with Section 15(2) of the Supreme Court Act and Rule 33 of the Supreme Court Rules, 2012 (repealed). The Petitioners seek to set aside the Judgment of the Court of Appeal *(Waki, Makhandia & Gatembu, JJA)* in **Civil Appeal No.363 of 2014** delivered on 15th December 2017, which partially allowed an appeal against the High Court *(Mumbi Ngugi, J* (as she then was*)* Judgment in **Constitutional Petition No.264 of 2013 as consolidated with Constitutional Petition No.274 of 2013** delivered on 14th October 2014.

[2] The Petition concerns the alleged forceful and illegal eviction of the Petitioners, who were inhabitants of City Cotton and Upendo villages, two informal settlements within the County of Nairobi. The main issue for determination regards the interpretation of the right to accessible and adequate housing provided under Article 43 of the Constitution of Kenya, 2010 (the Constitution). The Petition also seeks to interrogate and contrast the obligations of the State and that of private citizens to observe, respect, protect, promote or fulfil constitutional rights, more specifically the right to dignity under Article 28, the right to adequate housing in Article 43, rights of children pursuant to Article 53 and of older persons under Article 57. It also seeks to address the issue of the interpretation of the constitutional remedy of compensation, provided under Article 23(3) of the Constitution, in instances where a Court has made a pronouncement on violation of rights and fundamental freedoms as enunciated under the Constitution.

B. BACKGROUND

i. Proceedings at the High Court

[3] The Petitioners, on their own behalf and on behalf of other persons, filed two constitutional Petitions before the High Court; **Petition No.264 of 2013** and **Petition No.274 of 2013**, which were subsequently consolidated and heard as **Petition No.264 of 2013**. The Petitioners' claim was that they had settled on the property known as **LR No.209/11207** *(the suit property)* sometimes in 1968, which they contended, was unalienated public land, and that since settlement, they had constructed semi-permanent houses and business structures; had been supplied with social amenities and services such as water and electricity, and had been legally licensed to carry on and operate businesses on the suit property. They also alleged that their children attended nearby public primary schools.

[4] It was also claimed that in 1980 or thereabouts, the 1st Respondent invaded the suit property and, in the process, evicted and displaced about 200 families. These evictees, it was further alleged, were resettled in an informal settlement village known as *Fuata Nyayo* in South B, Nairobi County. In the meantime, it is alleged that the 1st Respondent was issued with a letter of allotment dated 22nd January 1981 by the Commissioner of Lands. The 1st Respondent then subsequently commenced the construction of Moi Educational Centre, a private primary school.

[5] The Petitioners' claim arises out of their alleged forced eviction and the demolition of their property on 10th and 17th May 2013 by groups of persons alleged to have been assisted by officers of the 2nd Respondent. The eviction from the suit property was allegedly carried out following an order issued by the Chief Magistrate's Court at Milimani Commercial Court in **Misc. Civil Application No. 303 in 2013**, in which the 1st Respondent was levying distress for rent against Elijah Memba, the 4th Petitioner herein and one Milcah Wanjiru. The order had been issued to Kangeri Wanjohi T/A Kindest Auctioneers Ltd in favour of the 1st Respondent. It was issued on the basis that the 4th Petitioner and the said Milcah Wanjiru were tenants of the 1st Respondent, and had fallen into rent arrears to the tune of Kshs. 960,000/-.

[6] The 4th Petitioner and the said Milcah Wanjiru denied being tenants of the 1st Respondent, or that they had entered into any lease agreement as alleged in the Court proceedings. They instead claimed that they had settled on the suit property on or about 1973 and 1976, and that any lease agreement purportedly entered into by themselves and the 1st Respondent were forgeries.

[7] The Petitioner's furthermore claimed that the evictions from the suit property on 10th May 2013 and 17th May 2013 were violent and brutal; that the

persons carrying out the eviction not only demolished their houses and business structures, but also burnt down the building material and other possessions belonging to the Petitioners. They also alleged that they were unable to salvage anything during the evictions and that they were never issued with any notice to vacate or the aforesaid order of eviction or distress for rent from the Court.

[8] In its Judgment delivered on 14th October 2014, the Court *Mumbi Ngugi, J* (as she then was) found that the demolition of the Petitioners' houses and their forced eviction from the suit property without providing them and their children with alternative land or shelter was a violation of their fundamental right to inherent human dignity, security of the person and access to adequate housing, a violation of the fundamental rights of children guaranteed by Article 53 of the Constitution and a violation of the rights of elderly persons guaranteed by Article 57. In addition to those declarations, the Court awarded the Petitioners, damages.

[9] With regard to the evictions, the Court stated that there was an unapologetic admission by the 1st Respondent that it carried out the eviction of the Petitioners from the suit property. It was also observed that the 1st Respondent hired police officers to oversee the eviction and the construction of a wall around the subject property once the Petitioners had been evicted and their houses demolished. The Court thus proceeded to conclude that the eviction of the Petitioners was not sanctioned by the law or authorized through a Court order and in the circumstances, the acts of the Respondents were unlawful and unjustified. The Court, in addition, found that an eviction of the nature undertaken by the Respondents did not just violate the right to housing but also violated the Petitioners' rights guaranteed under Articles 28, 29, 43, 53 and 57 of the Constitution.

ii. Proceedings at the Court of Appeal

[10] Aggrieved by the decision of the High Court, the Respondents filed an appeal, **Nairobi Civil Appeal No.363 of 2014**, where the issues for determination were summarized as follows;

i. Whether the evictees' amended petition was properly drafted to show the rights infringed, the manner of infringement and the remedies sought;

ii. Whether the appellant has any obligation to provide alternative accommodation to the evictees and to ensure the realization of economic and social rights under Article 43 of the Constitution;

iii. Whether the Judge appreciated and considered the appellant's rights over the property under Article 40 of the Constitution;

iv. Whether the appellant was obligated to obtain a court order prior to evicting the evictees;

v. Whether the appellant gave justifiable reasons and sufficient notice to the evictees prior to eviction;

vi. Whether there was sufficient proof of violation of the evictees rights; and

vii. Whether the learned Judge of the High Court was correct in granting the orders that she did and in awarding compensation to the evictees.

[11] On the issue of whether the amended Petition was competent, the Court of Appeal was of the same view as the High Court, that the amended Petition filed at the High Court met the requirements under Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Court added that since the Respondents had admitted the evictions from the property and demolition of structures, and since there was no suggestion in the lower Court that the Respondents did not understand the case put forth or that

they were in any way handicapped from answering the evictees' complaints, then there was no merit in this ground of appeal.

[12] With regards to property rights guaranteed and provided for under Article 40 of the Constitution, the learned Judges found that the Respondents' grievance giving rise to this issue was, to some extent, based on a misapprehension of the impugned judgment. The Court held that the evictees did not claim ownership of the property, but their complaint was that they were already in possession well before the 1st Respondent became the registered proprietor and that the allotment of the property and the registration of the same in the name of the 1st Respondent was irregular and illegal. That they accordingly had sought a declaration that the 1st Respondent had acquired the property unlawfully.

[13] Furthermore, the learned Judges found that the High Court Judge refused to entertain the complaint as to the legality or otherwise of the 1st Respondent's title on the reasoning that the determination of that issue, was best left to the National Land Commission or a Court of law seized of that particular matter which could then call for relevant evidence and examine all such documents pertaining to the allocation of the land to the 1st Respondent.

[14] On the High Court's interpretation of Article 43 of the Constitution as entailing *"a negative obligation not to deprive citizens of … shelter"* and that *"the Bill of Rights applies both vertically-as against the State, and horizontally-against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual",* the learned Judges differed with the High Court's holding and instead held that the Judge misdirected herself in extending the obligation for provision of alternative land or shelter to the 1st Respondent. The Judges also faulted the High Court for lumping

the 1st Respondent together with the State, as having or bearing the responsibility or obligation to provide the evictees with housing.

[15] The Court in that context stated that under Article 21(2) of the Constitution, it was the duty of the State to take measures, *"legislative, policy and other measures"* to achieve the progressive realization of the rights guaranteed under Article 43. That whereas the 1st Respondent was on its part under an obligation not to violate the evictees' rights in that regard, it was not under a "positive" obligation to provide the evictees with housing.

[16] On whether the High Court correctly and properly awarded damages to the Respondents, the appellate Court found that the High Court ought to have taken into consideration the provisions of Article 21(2) of the Constitution when granting such reliefs, and proceeded to find that in declaring, in effect, that the 1st Respondent and the State had violated the Respondents' rights to accessible and adequate housing, it was not apparent that the Court had regard to Article 21(2). The Court thus proceeded to find that there was no evidence placed before the trial Court to enable it assess damages, and further, that in the circumstances of the case, it was incumbent upon the present Petitioners to place material before the Court on the basis of which the Court would undertake an enquiry to ascertain the extent of loss so as to arrive at a reasonable amount.

[17] In its final holding, the appellate Court set aside parts of the decision of the High Court, and the appeal was rendered partially successful. The appellate Court thus substituted the Judgment with a declaration that the forced evictions and demolition of the Respondents houses without a valid Court order was a violation of their right to inherent human dignity and security of the person. In reaching this holding, the appellate Court stated;

"To our mind; the only relief that should have commended itself to the trial Court was a declaration that the forced eviction and demolition of their houses without a Court order is a violation of their right to human dignity and security of the person. The rest of the prayers would fall by the wayside." **[Para. 74]**

iii. Proceedings before the Supreme Court

[18] Aggrieved by the Judgment and orders of the appellate Court, the Petitioners have filed this Petition arguing that the learned Judges of the Court of Appeal erred in law and in fact in:

i. Holding that it was not clear from the High Court's judgment what informed the awards or how the amounts of the award were arrived at yet the Judge had stated the proportional objective was deterrence and vindication;

ii. Upsetting the Judge's discretionary award of compensation for pleaded violations when the 1st Respondent admitted to carrying out the evictions;

iii. In unduly interfering with the constitutional jurisdiction of the High Court under Article 23 to award any appropriate relief including an order for compensation for violation of the Petitioners' rights and freedoms;

iv. Imposing the need to conduct a separate hearing for the assessment of damages where the same was not pleaded and in reliance of a foreign case from a jurisdiction with no constitutional provisions that are equivalent to Article 23 of the Constitution;

v. Requiring the Petitioners to strictly prove or quantify damages for violation of constitutional rights without taking into consideration

that a request for general damages was pleaded which need not be proved through evidence of material loss;

vi. *Failing to find that under international law, forced and illegal evictions are prima facie violations of the right to adequate housing similarly protected under Article 43 of the Constitution;*

vii. *Failing to find that the 1st Respondent violated its negative obligation under Article 21(1) to observe and respect the Petitioners' right to adequate housing under Article 43 of the Constitution;*

viii. *Failing to find that the 2nd to 4th Respondents failed in their obligations to observe, respect, protect and fulfil the Appellants' right to adequate housing under Article 43 of the Constitution;*

ix. *Conflating the negative immediately-realizable obligation (to observe and respect) and the positive progressively-realizable obligation (to promote and fulfil) the right to housing;*

x. *Failing to develop the law to the extent that it did not give effect to the right to housing or adoption of the interpretation most favorable to the enforcement of the Petitioners' right to housing;*

xi. *Improperly invoking the concept of progressive realization of the right to adequate housing where the State had not pleaded resource unavailability under Article 20(5)(a) and (b);*

xii. *Failing to find that owing to the interrelationship and interdependency of human rights, the evictions conducted by the Respondents were in violation of the Petitioners' rights to housing, security, dignity and of children and elderly persons;*

xiii. *Failing to find the Respondents had not in reasonable time given the Petitioners an opportunity for consultations, adequate and reasonable notice, information on the proposed evictions and opportunity for public hearings of the proposed plans and alternatives to evictions; and*

xiv. Failing to find that the Petitioners were not given information on the reasons and procedures for their displacement, non-compensation or relocation.

C. PARTIES SUBMISSIONS

(a)The Petitioners' submissions

[19] The Petitioners filed their submissions on 18th February, 2020. Therein, they have outlined five issues for determination;

(a) Whether the alleged forced evictions violated the Petitioners' rights to adequate and accessible housing, right to dignity, security to persons, rights of children and elderly persons under Articles 28, 29, 43, 53 and 57 of the Constitution;

(b) Whether the Petitioners were accorded adequate and reasonable time and notice, genuine consultations, or opportunities for hearing or information of the evictions or reasons for their displacement, non-compensation or relocation;

(c) Whether the Court of Appeal misinterpreted Article 21 of the Constitution with regard to the positive and negative obligations of the Respondents;

(d) Whether the Court of Appeal erred by misapplying the progressive realization doctrine in the realization of the rights under Article 21 as read together with Articles 20(5) (a) and (b) of the Constitution; and

(e) Whether the Court of Appeal erred in interpreting Article 23 of the Constitution specifically the available remedies in the

form of compensation in damages once a Court has determined that there were violations of rights.

[20] With regards to the forced evictions being a violation of their rights and fundamental freedoms, the Petitioners submit that the appellate Court erred in law when it failed to make a finding that their right to accessible and adequate housing was infringed as a result of the said illegal evictions, despite stating that the evictions were indeed a violation of their right to human dignity and security. The Petitioners thus urge that illegal evictions are recognized as a *prima facie* violation of the right to adequate housing.

[21] Additionally, they argue that the appellate Court's judgment failed to construe the right to adequate housing in Article 43(1) in a liberal manner, and submit that the Court's interpretation was not in consonance with the provisions of Article 20(2). On this submission, they rely on the decisions in ***Satrose Ayuma & 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Constitutional Petition No.65 of 2010*** and ***Ibrahim Sangor Osman v. Minster of State for Provincial Administration and Internal Security & 3 Others*** [2011] eKLR, where the High Court found that the alleged forced evictions affected several other rights of forcibly evicted persons, including children's rights under Article 53(1) (b) & (c), right to free and compulsory basic education, nutrition, shelter and health care and the rights of elderly persons under Article 57 of the Constitution.

[22] On the issue of reasonable and adequate notice, genuine consultations, provisions of a hearing, information, reasons for displacement and relocation, the Petitioners submit that the appellate Court erred in failing to find that there were no genuine consultations nor was information granted to the Petitioners prior to the evictions. That the 1st Respondent's failure to consult with the Petitioners, and

the State's failure to provide information to the Petitioners was thus contrary to the law. They further submit that under Article 10 of the Constitution, the 1st Respondent and the State are required to facilitate participation of affected persons through consultations prior to conducting any planned evictions. Furthermore, that the State has a duty under Article 21 of the Constitution to ensure that there are relocation or resettlement provisions as well as adequate and reasonable compensation for those that are evicted. They have in that regard cited the decision in ***Kepha Omondi Onjuro & Others v. Attorney General & 5 Others*** [2015] eKLR where the High Court upheld the legal requirement of continuous public participation and consultations in line with the World Bank Project Affected Persons.

[23] With regards to the issue whether the appellate Court's interpretation of Article 21 of the Constitution was misguided, it was the Petitioners' contention that the appellate Court misinterpreted and misconstrued the Respondents' obligations under the said provisions. They urge that the Court failed to hold that, in the prevailing circumstances of the case, the 1st Respondent violated their negative obligation while the 2nd to 4th Respondents violated both their positive and negative obligations.

[24] The Petitioners furthermore submit that where a private person violates the rights of other private persons, the latter can seek remedies in court for these violations. They rely on the Court of Appeal decisions in ***Baobab Beach Resort and Spa Limited v. Duncan Muriuki Kaguuru & another*** Civil Appeal No. 296 of 2014; [2017] eKLR and ***B A & Another v. Standard Group Limited & 2 Others*** [2016] eKLR. They also cited the High Court decisions in ***Jemimah Wambui Ikere v. Standard Group Limited & Another*** [2013] eKLR as well as ***Mike Rubia & Another v. Moses Mwangi & 2 Others*** [2014] eKLR**.** They add that the appellate Court failed to hold that the State failed to meet both its

positive and negative obligations under the Constitution by carrying out the evictions and failing to prevent the 1st Respondent from interfering with the Petitioners' enjoyment of their rights.

[25] They also fault the Appellate Court's interpretation of the progressive realization principle under Article 20(5) of the Constitution especially in relation to the right to adequate housing, on the grounds that the State had not pleaded the principle as a defense. In that context, they highlighted the four main components of the progressive realization doctrine under Article 21(2) namely; (i) an obligation to take positive and necessary steps, (ii) the use of the maximum available resources, (iii) prohibition against retrogressive measures and (iv) international cooperation and assistance. They also cite the provisions of the United Nation's Committee on Economic, Social & Cultural Rights, (**CESCR),** prohibiting retrogressive measures, and urge that this can only be justified following a consideration of the reasonableness of the act, examination of alternatives to progressive action, genuine participation, long term impacts of the action and whether it deprives access to the minimum essential levels of rights.

[26] On whether the Court of Appeal in its interpretation of Article 23 of the Constitution, and more particularly on the award of damages as a remedy available for violation of rights, the Petitioners submit that the appellate Court erred in faulting the High Court Judge's award of damages on the purported ground that it was not clear what informed the award nor the Judge's quantification of the award. They thus submit that the Judgment of the High Court was unambiguous in its finding that the Respondents had violated the Petitioners' rights, and damages were subsequently awarded based on the principles of deterrence and vindication. They also submitted that the appellate Court erred in faulting the trial Judge's discretionary power to award damages as compensation for pleaded violations and

a remedy set out under Article 23 of the Constitution as pronounced in ***Bashir Ahmed Butt v. Uwais Ahmed Khan*** [1981] KLR 297.

[27] They furthermore submit that the appellate Court erred in requiring them to strictly prove or quantify damages for violation of their rights and freedoms without taking into consideration that the Petitioners had not prayed for special, but general damages, which do not require to be proved strictly nor quantified. They further argue that the Court of Appeal was wrong in contradictorily holding that although the evictions were illegal, that there was nonetheless, no violation of the right to adequate housing. They add that a declaration of violation of rights alone was not an appropriate remedy and the trial Court was correct in granting award of damages and that the calculation of damages for constitutional violations does not lend itself to a process of calculation or precise quantification. They rely on the High Court case of ***Jamlik Muchangi Miano v. Attorney General*** [2017] eKLR, ***Georgia v. Russia, European Court of Human Rights,*** Application No. 13255/07 and ***Coussens v. AG*** [1990] 1 EA 40 to buttress this argument.

[28] In conclusion, the Petitioners fault the appellate Court for holding that there was a requirement to conduct a separate hearing for assessment of damages. They urge that the Appellate court relied on foreign jurisprudence in ***Romauld Jame v. Attorney General for Trinidad & Tobago*** [2010] UKPC 23 Privy Council Appeal No. 0112 of 2009 from Trinidad and Tobago, which has no constitutional equivalence of Article 23 of the Constitution.

(b) 1st Respondent's submissions

[29] The 1st Respondent's written submissions dated 30th June, 2020 were filed on even date. In their submissions, they submit and respond to two issues; (a) *whether the forced eviction violated the Petitioners' rights under Articles 28, 29,*

49, 53 and 57 of the Constitution; and *(b) whether the Court of Appeal misinterpreted Article 21 of the Constitution with regards to the positive and negative obligations on the right to accessible and adequate housing*.

[30] In the above context, they submit that the appellate Court did not fault the trial Court in its finding in respect to the nature of the right to accessible and adequate housing or the positive and negative obligations of the State. They however, argue that the trial Court's holding on the duty bearers in respect of the right to accessible and adequate housing, and more specifically, for enjoining them with the State as duty bearers in respect to the right to adequate and accessible housing, was erroneous.

[31] They furthermore argue that it was erroneous of the trial Court to extend the State's obligation to ensure and provide alternative land or shelter to the 1st Respondent, a private entity. They therefore submit that Article 21(1) of the Constitution imposes a fundamental obligation on the State and every State organ to promote, respect and fulfil fundamental rights and freedoms, but most importantly, that Article 21(2) compels the State to take legislative, policy and other measures including the setting of standards to achieve progressive realization of rights guaranteed under Article 43.

[32] They in addition, argue that the provision of accessible and adequate housing is not the responsibility or obligation of any private citizen(s), but that of the State. On this point they rely on the decision by the Constitutional Court of South Africa in ***Government of the Republic of South Africa and Others v. Grootboom and Others*** [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 ***(Grootboom)*** where the Court emphasized on the obligation by the State to actualize the right to housing as pronounced under Section 26 of the South African Constitution.

[33] They further rely on the decisions in ***Kepha Omondi Onjuro & others v. AG & 5 Others,*** *(Odunga J)* (supra)*;* ***Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others*** [2016] eKLR and urge that it was wrong for the trial Court to find that they had violated the rights of the Petitioners to have access to adequate housing, the rights of children and older persons by failing to provide alternative land or housing as that obligation is imposed upon the State.

[34] As to whether the Appellants were accorded reasonable time, genuine consultations, adequate and reasonable notice prior to the evictions, they submit that the trial Court's finding that the eviction of the Petitioners was carried out with no lawful order and no notice to them was erroneous. It was thus argued that the evictions were necessary for the reasons enunciated in the 1st Respondent's Replying Affidavit. They further submit that the negative effects of the rapidly expanding and sprawling slums including increased insecurity, rape, abduction and fights, increased theft, increased cases of illicit brews, drug abuse and trafficking, were likely to adversely affect the school children, more so their learning activities and security.

[35] They further submit that the finding by the trial Court that the 1st Respondent did not issue a notice to the Petitioners prior to the eviction was incorrect, and submit that it issued notices to the Petitioners to vacate the suit property, to *wit*, on 21st May 2009, on 14th March 2013 and an Enforcement Notice was issued by the City Council of Nairobi on 16th May, 2012 requiring the illegal occupants of the land to leave and have the land returned to its original position. They contend therefore that the Petitioners were aware as early as 2009 that they were illegally in occupation of the suit property, and that they were required to vacate the same.

[36] With regards to progressive realization of the State's obligation to provide accessible and adequate housing under Article 43 of the Constitution, it is submitted that the Court of Appeal did not misdirect itself, but correctly faulted the trial Court for not considering the progressive realization of the State's obligations under Article 43 with respect to the right to access to adequate housing. It is thus urged that the Petitioners misunderstood the Court of Appeal's judgment on the negative obligations of the State, and that the appellate Court distinguished the State's from a private citizen's duties in respect to positive obligations *vis a vis* negative obligation in so far as the right to housing is concerned.

[37] On the contention as regards the final orders issued by the trial Court, the 1st Respondent submits that the nature of the Petitioners' claims before the trial Court in relation to the loss of houses, business structures, household items, goods and other items were in the nature of losses that were quantifiable and could be assessed and settled notwithstanding that the instant matter originated as a Constitutional Petition. They therefore submit that the trial Court failed to provide a basis for the award of damages, and further, that the compensation of a sum of Kshs.150,000 to each of the Petitioners was in error.

[38] In the alternative and while relying on the High Court decision in ***Simon M. Ethangatta v. Eddah Wanjiru Mbiyi & Another*** [2007] eKLR, the 1st Respondent submits that given that the Petitioners were illegal occupiers and trespassers onto the 1st Respondent's property, they were not entitled to benefit from their illegality by getting compensation from the 1st Respondent. In relying on the High Court decision in ***Susan Waithera Kariuki & 4 Others v. Town Clerk Nairobi City Council & 3 Others*** (2013) eKLR, they submit that the trial Court erred and ought not have issued a blanket award of damages to the Petitioners, including to persons who were never before the High Court in person

or whose existence, residency and/or occupancy in the two villages was and remains in contention.

(c) 2nd, 3rd & 4th Respondents' submissions

[39] The 2nd, 3rd and 4th Respondents' written submissions are dated 29th June, 2020 and were filed on even date. They address three (3) issues, namely; (a) *the jurisdiction of the Court to entertain this Appeal; (b) the State's obligation in relation to Article 43 of the Constitution; and (c) the remedies for the alleged breach of Constitutional rights and fundamental freedoms.*

[40] On the jurisdictional question, they urge that, the issue to be addressed is whether the question of compensation is properly before this Court for its determination. They argue in that regard that although this Court has the jurisdiction to deal with matters of general public importance and cases involving the interpretation and application of the Constitution, the issue of compensation, however, is one that should be dealt with in other fora as it involves adducing evidence and cross-examining witnesses. They thus agree with the appellate Court's decision that no material evidence had been placed before the trial Court to enable it make a reasoned and informed determination in assessing the award for damages. They submit further that the damages awarded could only be so awarded in a civil claim before the Environment and Land Court or in a constitutional Petition where parties are obligated to produce, present and question evidence in accordance to Rule 22 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, 2013.

[41] With regards to the State's obligation in relation to Article 43 of the Constitution, the 3rd Respondent submits that Article 43 of the Constitution guarantees the enjoyment of socio-economic rights, including the right to

accessible and adequate housing and to reasonable standards of sanitation. It further submits that it is the State that has a duty and obligation to provide accessible and adequate housing to its citizenry. That while this is the case, this comes with a *proviso* under Article 21(2), which obligates the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43, and relies on this Court's holding in ***Re the Matter of Kenya National Human Rights Commission*** SC Advisory Opinion Reference. No.1 of 2012 for that submission. While also relying on the decision in ***Grootboom***, they submit further that the prevailing economic circumstances do not allow for the immediate realization of the socio-economic right to housing.

[42] On the issue of the remedies available for the alleged breach of constitutional rights and fundamental freedoms, the 2nd to 4th Respondents rely on the decisions in ***Gitobu Imanyara & 2 others v. Attorney General*** (2016) eKLR, ***Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another & Gathogo Kanini v. A.M Lubia & another*** (1982 –88) 1 KAR 727, **Johnston Evan *Gicheru v. Andrew Morton and Another*** (2005) 2 KLR 333 and ***Major General Peter M. Kariuki v. Attorney General*** Civil Appeal No.79 of 2012 and submit that the Court of Appeal's decision to disturb the trial Court's compensation award was proper and justified. They also cite the South African case of ***Dendy v. University of Witwatersrand, Johannesburg & Others*** - [2006] 1 LRC 291 and argue that in some cases, a declaration of the breach or violation is sufficient to ensure justice, as a declaration is a powerful statement which can go a long way in effecting reparation of the breach.

[43] They furthermore submit that it is of critical importance that the Courts' discretion in making an award of damages be exercised with rationality, proportionality and on the basis of the compensation being just and appropriate

dependent on the facts of the case. As to what entails a just and appropriate remedy in a constitutional violation, they urge the Court to find guidance in the Supreme Court of Canada decision in ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62 as cited with approval by the Court of Appeal in ***COI & another v. Chief Magistrate Ukunda Law Courts & 4 others*** (2018) eKLR where it was held that just and appropriate remedy must "*meaningfully vindicate the rights and freedoms of the claimants; employ means that are legitimate within the framework of our constitutional democracy; be a judicial remedy which vindicates the right while invoking the function and powers of a court; and be fair to the party against whom the order is made*." They therefore urge, in the circumstances, that this is not a case that requires that a declaration of violation of rights be accompanied by compensation.

D. ANALYSIS AND DETERMINATION

[44] Having considered the respective parties' pleadings and submissions in the instant Petition, this Court is of the considered view that the issues arising for determination are;

(a) Whether the forced evictions violated the Petitioners' rights under Articles 28, 29, 43, 53 and 57 of the Constitution;

(b) Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 21 of the Constitution on the doctrine of progressive realization of rights; and

(c) Whether the Court of Appeal erred in interpreting Article 23 of the Constitution specifically on the available remedies once a Court has determined that there were violations of rights.

[45] We shall determine each issue separately as here below;

(a) Whether the forced evictions violated the Petitioners' rights under Articles 28, 29, 43, 53 and 57 of the Constitution

[46] With regard to the claims instituted by the Petitioner against the Respondents, and particularly on the violation of their rights as pronounced under Articles 28, 29, 43, 53 and 57 of the Constitution, the constitutional rights they allege to have been violated are founded on the right to property ownership and entitlement, which is provided for under Article 40(1)(a) & (b) of the Constitution, and which reads;

> ***"Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –***
>
> ***(a) of any description; and***
>
> ***(b) in any part of Kenya".***

[47] In ensuring that the right to property ownership is not violated, it is provided at Article 40(2)(a) that;

> ***"Parliament shall not enact a law that permits the State or any person –***
>
> ***(b) to arbitrarily deprive a person of property of any description, or of any interest in, or right over, any property of any description; or***
>
> ***(c) to limit, or in any way restrict the enjoyment of any right under this Article, on the basis of any of the grounds specified or contemplated under Article 27(4)".***

[48] These constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to

property that has been unlawfully acquired. In that regard, Article 40(6) of the Constitution is instructive and provides that;

> ***"The rights under this Article do not extend to any property that has been found to have been <u>unlawfully acquired</u>".*** [Emphasis added].

[49] The Petitioners' claim in the above context was that the 1st Respondent had entered into and forcefully evicted them from the suit property which they had resided in since the 1960s, thereby depriving them of their right to own property under Article 40(1), as well as a violation of their social and economic rights under Article 43. They decried that after they were evicted from the suit property, the 1st Respondent was then issued with a letter of allotment to the property by the 3rd Respondent.

[50] Whether the 1st Respondent was issued with a letter of allotment is one issue; what was more important from the outset however was the determination of the question whether the letter of allotment was issued lawfully or legally. That question was not an issue that was conclusively determined at the High Court or the Court of Appeal. We note in that regard that the Petitioners had sought a declaration that the acquisition of the suit property was illegal and unlawful. The learned Judge of the High Court in her rendition on the issue held, *inter alia*;

> ***"I am, however, not in a position to issue orders in relation to the legality or otherwise of the 1st respondent's title. <u>The determination of that issue is, I believe, best left to the National Land Commission or a court of law seized of that particular matter which can call for the relevant evidence and examine all such documents pertaining to the</u>***

allocation of the land to the 1st respondent as it deems necessary for it to establish the validity or otherwise of the title." [Emphasis added, Para. 86]

[51] The learned Judge had thus, on her part, correctly held that the issue would be better determined by the National Land Commission as provided under Section 152C of the Land Act, and which provision further allows for the procedure to be followed in the event of an eviction(s). At the said Section 152C of the Act, it is provided that;

> ***"The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction".***

It should be noted, however, that the procedures enacted in the amendments to the Land Act, through the Land Laws (Amendments) Act No. 28 of 2016, amended the provisions of the Land Act to include the powers of the National Land Commission in land eviction matters, and were only enacted in September, 2016, when the instant matter had already been instituted and determined by the High Court. On our part, we note that the learned Judge also correctly held that the relevant Court seized of jurisdiction over land matters – the Environment and the Land Court – should have determined that question. We see no reason to say more on that issue as it is moot.

[52] Having so stated and since the title held by the 1st Respondent remains unimpeached, what ought to be determined is the question whether, in evicting the Petitioners, the Respondents violated the Petitioners' rights to human dignity and

security, as well as the rights to housing and health under Article 43, read with Articles 28, 29, 53 and 57 of the Constitution.

[53] In that regard, it is an undeniable fact that forced evictions generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under Article 43 of the Constitution, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and education. The onus of ensuring that these rights and freedoms are attained and provided for falls squarely under the ambit of the State; and that it is the obligation of the State to ensure that these rights and freedoms are not limited without reasonable justification in an open and democratic society based on human dignity, equality and freedom as provided for under Article 24(1) of the Constitution.

[54] Further, in ensuring that these social and economic rights are protected, the State has to strike a delicate balance between the rights of those that are most vulnerable in the society and those that are in economic advantage. The State thus has to ensure that in the protection of the rights of an individual or group of persons, it does not inadvertently abuse the rights of other individuals or other groups of persons. Such is the position that this Court finds itself in the instant Petition; we are tasked with the making of a determination on the rights of the Petitioners against those of the 1st Respondent; to determine whether the State took an active positive role in ensuring that the fundamental rights and freedoms of all the parties concerned in this instant matter were protected and that in so doing, there was no abuse of the rights of the parties and thus, that the State's negative obligation not to abuse or violate these rights and fundamental freedoms was carried out.

[55] In the above context, like the High Court, we are certain that the following facts are uncontested:

i) The Petitioners were forcefully evicted from the suit property by the 1st Respondent with the assistance of police officers from Langata Police Station and alongside M/s Kindest Auctioneers.

ii) While the eviction was purportedly carried out using distress for rent orders issued in Milimani Chief Magistrate's Court Misc. Application No.303 of 2013 directed at the 4th Petitioner and one, Milcah Wanjiru, the 1st Respondent denied knowledge of such orders and in any event, distress for rent orders are not akin to eviction orders. In effect, the eviction was carried out without a lawful Court order.

iii) Whereas the 1st Respondent indicated in evidence that it had made prior attempts to remove the Petitioners from the suit property, no evidence was tabled to show that prior to the eviction in issue, any notice or adequate notice was given to the Petitioners.

iv) Whereas the ten (10) named Petitioners in their Petition before the High Court clearly indicated that they were suing on behalf of 326 other adult persons plus 90 children and their names and other details annexed to the affidavit in support of the Petition, no serious contestation was made of that fact and the issue hardly attracted the attention of both Courts below, the same must be said of the list of elderly persons similarly annexed.

[56] With the above facts in mind and noting our findings above, like the High Court, we are of the firm view that the eviction of the Petitioners was violent and did not accord with the expected constitutional obligation of the State to ensure that those in informal settlements are treated with the dignity that is conferred on Article 28 of the Constitution. Granted, the Petitioners were evicted when the 1st Respondent had already acquired certain private rights over the suit property but they entered the land well aware of the presence of the Petitioners who occupied

the land when it was still public land. Even without prescriptive rights, we stated in ***Mitubell Welfare Society v. Kenya Airports Authority,*** SC Petition No.3 of 2018 (**Mitubell**) only recently, that *"where the landless occupy public land and establish houses thereon, they acquire not title to the land, but a protectable right to housing over the same".* In the present case, the participation of State agents in violent evictions only points to the fact that the 1st Respondent ultimately acquired favoured status outside the law in acquiring ultimate and total control of the suit property at the cost of violation of the rights of the Petitioners including the elderly and children.

[57] In ***Satrose Ayuma*** (supra), the High Court laid out certain principles that an evicting party must comply with. The Court, in doing so, applied international principles of law later clarified by this Court in ***Mitubell*** and which were crystallised as law in Section 152(A) – (H) of the Land Act. We reiterate that these principles were applicable to the eviction of the Petitioners as a matter of obligation by the State under international law as provided for in Articles 2(5) and 2(6) of the Constitution.

[58] The principles include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. These principles flow from U. N. Guidelines on Evictions: General Comment No.7 which in ***Mitubell***, we stated, are *"intended to breathe life into the Right to Dignity and Right to Housing under the ICCPR and ICESCR respectively".*

[59] It is our finding in that context that the learned Judge was correct in finding that *"it is redundant to ask whether the eviction of the Petitioners resulted in a*

violation of their rights under the Constitution. Even the ordinary man in the street, confronted with the facts before [her], would answer the question in the affirmative". We so affirm.

(b) Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 21 of the Constitution on the doctrine of progressive realization of rights.

[60] The 2nd – 4th Respondents have intimated that the rights of the Petitioners, applied generally, are rights that fall under the ambit of the progressive realization principle under 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 realization of the rights guaranteed under Article 43".*** [Emphasis added]

[61] In General Comment No. 3 of the **CESCR**, the term progressive realization is defined thus;

> *The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties*

> *involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.* [Emphasis ours]

[62] The Court of Appeal, whose Judgment embodied the generalities of the doctrine of progressive realization as pronounced in General Comment No. 4 of the CESCR, correctly held that it was the responsibility of the State to ensure that the rights guaranteed in Article 43 of the Constitution are realized progressively. The obligation to ensure the rights of Petitioners under Article 43 thus fell on the State, and that the State is imbued with the duty to ensure that these rights were realized, in consideration of prevailing circumstances such as the availability of resources, or the implementation of policy and structural programs to ensure that the rights are realized.

[63] This Court has previously addressed its mind to the principle of progressive realization of rights when in ***Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** SC Advisory Opinion No.2 of 2012; [2012] eKLR, and in making a distinction between progressive and immediately realizable rights, we emphasized on the context in which the rights are pronounced within the Constitution. We stated thus, *inter alia*;

> ***"This leads us to the inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; ...it depends on the nature of the right in question ..."*** [Para. 59]

[64] From the foregoing, it is manifestly evident in the present context that the mandate to ensure the realization and protection of social and economic rights does not extend to the 1st Respondent, a private entity. Even though the 1st Respondent has a negative obligation to ensure that it does not violate the rights of the Petitioners, it is not under any obligation to ensure that those rights are realized, either progressively or immediately. The Court of Appeal thus correctly held that the progressive realization of Article 43 rights was the mandate of the State, and that obligation does not extend horizontally to private entities. We hasten to add however, that private entities have the obligation, under Article 20(1) not to violate Article 43 rights as non-violation of all rights in the Bill of Rights applies both horizontally and vertically and binds both the State and all persons. We so find.

(d) Whether the Court of Appeal erred in interpreting Article 23 of the Constitution specifically on the available remedies once a Court has determined that there were violations of rights.

[65] The Petitioners argued that the Court of Appeal erred in reversing the judgment of the High Court in which they had been awarded damages in addition to the declarations that had been issued. They contend that the award of damages in constitutional issues was correctly made by the High Court, relying on the provisions of Article 23 of the Constitution. In arriving at its determination on the

question of damages, the learned Judge of the High Court rendered herself as follows:

> ***"The Petitioners have also sought general and exemplary damages for violations of their fundamental rights. In light of my findings above, I believe that they are entitled to damages for the said violations. An award of damages will not make up entirely for the violation of the Petitioners' rights, nor for the disruption of their lives and the affront to their dignity that the acts of the Respondents occasioned. However, it will hopefully serve as a reminder to the 1st Respondent that it is not so privileged as to have an unfettered right to violate the rights of the poor.***
>
> ***With regard to the State, it is important for its officers to remember that its cardinal duty and the duty of all its officers is to safeguard the rights of all, without discrimination, but particularly so, the rights of the vulnerable in society, the poor, children, the elderly and persons with disability. Its officers should never be used to carry out the unlawful acts of any citizen, however powerful.***
>
> ***The 1st Respondent is the author of the unlawful acts that led to the violation of the Petitioners' rights. The State, through the National Police Service, chose to aid the 1st Respondent against the interests of the Petitioners, poor marginalized residents of the two informal settlements. In the circumstances, I believe that they should bear liability for the violation of the Petitioners' rights."*** [Paras. 88-90]

[66] The Court of Appeal, on its part, overturned this decision holding that there wasn't sufficient evidence that was presented before the Court to enable it evaluate the damages that would adequately compensate the Petitioners. The Court went on to hold that;

> ***"Whereas the High Court, whilst granting relief, was exercising its constitutional jurisdiction to uphold or vindicate a constitutional right that it found had been contravened, in awarding compensation for the specific damage that the evictees claimed they had suffered, the court should have inquired into the nature of such loss. If necessary, the evictees should have been granted an opportunity to prove the damage and for the appellant and the State to test the evictees claims."*** [Para. 68, emphasis added]

[67] The Court of Appeal rationalized the disturbing of the award of damages by the High Court as follows;

> ***"There was clearly no evidence before the Judge to assist the court in assessing the amount of appropriate compensation. We hold that, in the circumstances of this case, it was incumbent upon the evictees to place material before the court on the basis of which the court would undertake an enquiry to ascertain the extent of loss so as to arrive at a reasonable amount."*** [Para. 72]

[68] The justification by the Court of Appeal for disturbing the award was therefore, that the Petitioners did not present to the trial Court sufficient evidence of the loss incurred and suffered for the Court to make a fair assessment and determination on the quantum of damages to award. The Court relied on the

decision in ***Butt***, where the Court had held that an appellate Court could disturb an award of damages if it was established that a trial Judge proceeded on a wrong principle, or misapprehended the evidence in some material manner to arrive at a figure which was inordinately low or high.

[69] Although the Court of Appeal concedes that it was within the mandate of the trial Court to make an order for the award of damages for constitutional violations against the Petitioners by the Respondents, it did not however, show how the award, as issued, went against the provisions of Article 23(3) of the Constitution. In ***Butt,*** decision which formed the basis for their decision to disturb the award of damages, the rationale that was enunciated therein was that it had to be shown or established that the Judge proceeded on the wrong principle or misapprehension of the evidence to arrive at a disproportionate award.

[70] In our considered view, there was sufficient evidence that was presented before the trial Court which enabled it to arrive at the decision that it did. With regard to the 1st Respondent, they admittedly stated that they had participated in, and engaged with the 2nd Respondent in the unlawful and illegal demolition of property belonging to and eviction of the Petitioners from the suit property. The evidence presented before the trial Court was that the demolition and evictions were carried out without lawful Court orders, that the evictions and demolition were carried out in a manner that violated the Petitioners' right to human dignity and security, and that there was a violation of their rights to exercise and enjoy social and economic rights pronounced under Article 43, as read together with Articles 53 and 57 of the Constitution.

[71] The Court of Appeal in disturbing the award of damages issued by the trial Court did not also show how the Court abused its discretionary powers to award

damages, or that the Court exercised its discretion whimsically or capriciously. In ***Gitobu Imanyara***, the Court of Appeal had earlier held that;

> ***"In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

In the same matter, the appellate Court also held that an appellate Court should not disturb an award of damages on the mere notion that if it had tried the matter in the first instance, it would have awarded differently. The question therefore should not have been what it would have awarded, but rather whether the trial Court had proceeded on the wrong principle. (See generally ***Loice Wanjiku Kagunda v. Julius Gachau Mwangi*** Civil Appeal No. 142 of 2003).

[72] Furthermore, in ***Kemfro Africa*** Kneller J.A. held that;

> "***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, <u>in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must</u>***

<u>be a wholly erroneous estimate of the damage</u>.” [Emphasis added]

[73] We agree with the learned Judge and would add that, what the Court of Appeal failed to consider, in our opinion, was that the questions and issues that a Court has to consider in order to make an award of damages with regards to constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries. In this regard, the Court of Appeal was unclear of what other material that the Petitioners needed to present before the trial Court to establish that there was a violation of their constitutional rights by the Respondents, and that the Court therefore abused its discretionary powers in issuing the award of damages. In the event and following our reasoning in ***Martin Wanderi & 106 Others v Engineers Registration Board & 10 others,*** SC Petition No.19 of 2015 [2018] eKLR we must overturn the appellate Court’s decision on this issue.

(d) A brief commentary on the state of affairs with regard to realization of Article 43 rights

[74] Before we render our final determination in the instant matter, we must revisit the pronouncement made by *Mutunga, CJ* (as he then was) in ***Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** SC Advisory Opinion No. 2 of 2012; [2012] eKLR where he stated that;

> ***"It is true the Constitution will present the Courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects contested terrains, vested interested that are sought to be harmonized, and a status quo to be mitigated. These features in our constitution should not surprise anybody, not the bench, or the bar or the academia. <u>What cannot be denied, however, is we have a working formula, approach and guidelines to unravel these problems as we interpret the Constitution. We owe that interpretative framework of its interpretation to the Constitution itself</u>."***
> [Para. 9.2, dissenting opinion, emphasis added]

[75] We completely agree and it is indeed a sad state of affairs that ten (10) years into the promulgation of the Constitution in 2010, the State still seeks to rid itself of its mandate and obligations by hiding behind the perceived inconsistencies sometimes presented in the Constitution, and in the present context, the provisions of Article 21(2) of the Constitution, and to abdicate its role in ensuring that Article 43 rights are realized. Article 21(2) does not protect the State from realizing these rights, but rather seeks to ensure that even though these rights are not immediately achieved, there is at least some modicum of effort by the State to realize those rights. There should be continued concerted efforts by the State in the progressive realization of these rights and therefore, the State should take

deliberate steps, both immediately and in the future, towards the full realization of the rights.

[76] Policy and legislative formulation and lack of adequate resources have been the reasons given by the State in the realization of Article 43 rights. It is evidenced as such; in October 2009, the Ministry of Lands formulated the ***Eviction and Resettlement Guidelines***, which provided that forced evictions were not only illegal and unjust, but also counterproductive to economic growth and development. The guidelines also provided for insights and procedures on how to deal with the issue of evictions and resettlement by the State, noting that the State was under an obligation to provide alternative resettlement to those that had been evicted.

[77] Further on in 2012, a Bill was presented in the National Assembly titled the **Evictions and Resettlement Procedures Bill No.44 of 2012**. The Bill has never gone past the 1st Reading – on 12th September, 2012. The Senate also introduced the **Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill No.27 of 2018**. The Bill proposes that each County should have an integrated development plan and to establish mechanisms to monitor and promote adherence to Article 43 of the Constitution. It has not gone past the 1st Reading – on 25th September, 2018. These may be just some of the few, if not only, legislative and policy structures that the State has sought to come up with in the past few years.

[78] The above notwithstanding, few amendments have been made to land laws, and in particular the Land Act, through the Land Laws (Amendments) Act No. 28 of 2016, which amended Sections 152 of the Land Act, to include provisions for the procedures of eviction of illegal settlers in both public and private land. Those amendments were made following the decision of the High Court in ***Satrose***

Ayuma and indeed the language of the amendments to Section 152(A)-(G) is borrowed directly from that decision. Although the State may therefore seem to be at the forefront in the realization of Article 43 rights, more is yet to be done, especially in the realization aspect. As for the enforcement of these rights, nothing much can be achieved if the legislative and policy processes are still at the nascent stage.

[79] These acts by the State may be regarded and considered by some, as acts of regression, which end up depriving the people of the rights that they should be enjoying. They are a contradiction to the progressive realization principle and constitute a violation of those rights. These acts, unless they are limitations to the realization of those rights which are justifiable and reasonable in accordance with Article 24(1) of the Constitution, are counter-intuitive to the realization of social economic rights under Article 43 of the Constitution. The State has to take a more drastic and purposive approach to its mandate and obligations in ensuring that the rights to the people of Kenya are not violated, or in the very least, that these rights are not deprived or denied. We say no more.

E. DETERMINATION

[80] In consideration of the foregoing, it is our considered view that there was a violation of the Petitioners' rights by the Respondents in the manner expressed above and issue orders are follows;

i) ***A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 1st and 2nd Respondents without a valid Court order is a violation of their fundamental right to inherent human dignity and security of the person guaranteed under Articles 28 and 29(c) of the Constitution;***

ii) A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 2nd and 3rd Respondents is a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing guaranteed under Article 43 of the Constitution;

iii) A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 2nd and 3rd Respondent is a violation of the fundamental rights of children guaranteed under Article 53 of the Constitution; and

iv) A declaration that the demolition of the Petitioners' houses and property and their forced eviction by the 2nd and 3rd Respondent is a violation of the fundamental rights of elderly persons guaranteed under Article 57 of the Constitution.

[81] We furthermore affirm the orders issued by *Mumbi Ngugi, J* (as she then was) at the High Court on the award of damages, and set aside the Judgment of the Court of Appeal in that regard. For the avoidance of doubt, we order that;

v) The 1st Respondent shall pay a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000) to each of the Petitioners;

vi) The State shall pay a sum of Kenya shillings One Hundred Thousand (Kshs.100,0000) to each of the Petitioners;

vii) The Petitioners shall also have costs thereof.

[82] It is so ordered.

DATED and **DELIVERED** AT **NAIROBI** this **16th day** of July, **2021.**

.....	.....
P. M. MWILU	**M. K. IBRAHIM**
DEPUTY CHIEF JUSTICE &	**JUSTICE OF THE SUPREME COURT**
VICE PRESIDENT OF THE SUPREME COURT	

.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA