IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 218 OF 2014

BETWEEN

KENYA AIRPORTS AUTHORITY.....APPELLANT

AND

MITU-BELL WELFARE SOCIETY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated 11th April, 2013

in

Petition No. 164 of 2011)

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JUDGMENT OF THE COURT

1. This appeal considers justiciability and enforceability of socio-economic rights under the 2010 Constitution. Of importance is the tension between the right to housing as a socio-economic right and the right to private property. The extent and limitation upon which socio-economic rights can trump and prevail over private property rights is analyzed. A key feature in this appeal is the interpretation of the scope of the power of the High Court to grant appropriate relief as per ***Article 23 of the Constitution*** in cases involving implementation of rights and fundamental freedoms. The extent to which courts can adopt foreign comparative jurisprudence and general rules of international law are examined.

BACKGROUND FACTS

2. The appellant is the registered proprietor of all that parcel of land known as **Nairobi L.R No.**

209/13080. The 1st respondent, ***Mitu-Bell Welfare Society***, is a duly registered Society and it filed a petition before the trial court on behalf of its members and residents of a slum dwelling known as ***Mitumba Village***. At all material times in the suit, the members of the 1st respondent society as squatters erected residential and business structures as well as educational facilities on the property of the appellant.

3. In the petition, the 2nd respondent, the ***Hon. Attorney General*** is sued in his capacity as the legal representative and advisor to the Government of Kenya. The 3rd respondent, the ***Commissioner of Lands***, is sued in his capacity as the person in charge of allocation, alienation, processing and issuance of land titles held by the Government.

4. On or about 1992, the members of ***Mitu-Bell Welfare Society*** were relocated by the Government to occupy and reside on the appellant's property. The residents soon put up their slum dwellings, schools and churches and established their businesses on the property; they thereupon in vain sought indulgence of the 3rd respondent, the Commissioner of Lands, to issue them title documents to the portions of appellant's land that they occupied.

5. On 15th September 2011, the appellant placed a notice in the local daily newspapers giving the occupants and residents of Mitumba Village seven (7) days within which to vacate portions of the suit property that they occupied. The notice expressly stated that upon expiry of the notice period, any buildings, installations, or erections thereon shall be demolished and or removed and any human activities within the area shall be terminated without further reference.

6. Upon citing the notice in the daily newspapers, the 1st respondent on behalf of the residents filed a constitutional petition at the High Court on 21st September 2011 against the appellant and the 2nd and 3rd respondents. Simultaneously, the 1st respondent filed an interlocutory application seeking conservatory orders to restrain the appellant or any State officer or organ from carrying on with the process of evicting and/or demolishing any buildings, installations or erections situated within the suit property. The High Court (Gacheche, J.) issued conservatory orders on 22nd September, 2011 pending the interpartes hearing and determination of the interlocutory application. Despite existence and service of the court order, demolition of structures, houses, churches, schools and other property as well as eviction of the residents of Mitumba village took place. The 1st respondent and the residents of Mitumba village averred in their petition that their household goods and building materials were all destroyed during the demolition and they were left homeless. It was alleged that the demolition and eviction was carried out by the appellant and the State as represented by the 2nd and 3rd respondents.

7. In the petition, the 1st respondent and the residents of Mitumba village allege violation of their fundamental rights and freedoms as guaranteed under the 2010 Constitution. At paragraph 29 of the amended petition, it is alleged that the issuance of a seven day notice period and the threat to demolish and the actual demolition of their residential, educational and commercial structures violated their right to education, human dignity, equality and freedom from discrimination, security of their persons, freedom of movement and residence, protection of right to property, economic and social rights and their right to fair administrative action.

8. At paragraph 32 of the amended petition it is alleged that the action of demolition of their residence and forceful eviction without giving alternative land to relocate the Mitumba village dwellers and or compensate them for losses suffered violated their rights as minorities from having shelter, education and other basic social amenities; that the conduct of the 3rd respondent as Commission of Lands in failing to issue the 1st respondent members with title documents to portions of the suit property violated their right to property and their social and economic rights as envisaged in the Constitution.

9. The appellant in opposing the interlocutory application filed a replying affidavit deposed by ***Ms Joy Nyagah*** dated 25th October 2011. The thrust of the appellant's averment is that the petitioners had failed to appreciate that economic and social rights are progressive; that the enjoyment of rights and fundamental freedoms are limited by the need to ensure that such enjoyment does not prejudice the rights and fundamental freedoms of others; that the right to property does not extend to property that has been unlawfully acquired; that the 1st respondent and dwellers of Mitumba village have no proprietary right or interest in or over the suit property; that the appellant is a statutory body established under the **Kenya Airports Authority Act, (Cap 395 of the Laws of Kenya)**; that the suit property which measures 163.67 hectares is registered in the name of the appellant; that the appellant as a statutory body is under a statutory duty to ensure the safety of all aerodromes in Kenya; that pursuant to ***Section 8 (b)*** and ***(c)*** of the **Kenya Airports Authority Act, (Cap 395 of the Laws of Kenya*)** it is the statutory duty of the appellant, *inter alia,* to administer, control and manage aerodromes and any other property vested in it under the Act and to provide, develop and maintain such services and facilities as are in its opinion necessary or desirable for the efficient operation of aircraft; that the informal settlements and dwellings constructed by the 1st respondent and its members at Mitumba village are on the flight path to Wilson Airport; that the 1st respondent and its members have often been told that their dwellings and structures are on a flight path; that the 1st respondent and its members have often been told that their structures and dwellings are a security risk to the airport; that international standards demand that no settlement should be allowed on a flight path without approval of the Municipal Civil Aviation Authority; that any settlement that leads to unregulated garbage disposal hence attracting birds along a flight path is prohibited; the appellant attached a copy and extract from the International Civil Aviation Organization in support of its submissions; that construction of structures within the airport is prohibited in Kenya vide **Legal Notice No. 59 of 8th May 1998**; that in the interest of the petitioners and the general public, the appellant takes precautionary steps to avoid air disasters; that the appellant has not discriminated the 1st respondent or dwellers of Mitumba village because there are no high rise structures within or adjacent to the suit property and any high rise structures that exist have been erected with the authority and approval of the appellant and such structures are not on the flight path and are not a security risk to the airport; that the demolition of the 1st respondent's residences and structures was not carried out by the appellant but by the State security agents including the police; that the appellant is not liable and answerable for the operations and conduct of state security agents and the police.

10. The 2nd and 3rd respondents filed joint grounds of opposition dated 15th November 2011; they asserted that pursuant to ***Articles 21*** and ***25*** of the Constitution, socio-economic rights are not absolute but are limited and progressive rights; that enjoyment of socio-economic rights should not prejudice the rights and freedoms of others; that the petitioners did not have ownership of the disputed property; that the 3rd respondent as Commissioner of Lands was under duty to protect the interest of property owners and not to allocate land that had already been allocated; that there was no material placed before the trial court to demonstrate that any fundamental rights of the petitioners had been violated.

RELIEF'S SOUGHT IN THE AMENDED PETITION AND ORDERS GRANTED BT THE TRIAL COURT

11. The 1st respondent in its amended Petition sought the following reliefs from the trial court:

"a) A declaration that the demolitions by the 2nd respondent (appellant) were illegal, irregular, unprocedural and contrary to Articles 26, 27(2)(4)&6, 28, 29, 39,40,43, 47 & 56 of the Constitution hence null and void.

b. *A declaration that any forceful eviction and demolition without a relocation option is illegal, oppressive and violates the rights of the petitioners.*

c. *A declaration that the residents of Mitumba Village are legally entitled to plot number 209/12921 under file number 226958 and plot number 209/12908 under file number 176952 and in the alternative they are entitled to compensation and reallocation to another land or alternative shelter with access to education facilities, clean water, health care and food at the state's expense.*

d. *Compensation for the violations of the rights of its members."*

12. At this stage, it is important to indicate whether the reliefs as sought by the 1st respondent in the amended petition were granted by the trial court. The jurisdictional competence of the trial court to issue the reliefs as granted is a ground of appeal. The trial court upon hearing the parties granted prayers (a) and (b) above and gave further orders and directions as per the decree dated 7th April 2014. The following orders and directions were issued:

"i. THAT the demolitions by the 2nd respondent of the Petitioner's houses situated in Mitumba Village near Wilson Airport was illegal, irregular, un-procedural and contrary to Articles 26, 27(2)(4)&6, 28, 29, 39,40,43, 47 & 56 of the Constitution.

2. *THAT any forceful eviction and or demolition without a relocation option is illegal, oppressive and violates the rights of the Petitioners.*

3. *THAT the respondents do provide, by way of affidavit, within 60 days of today, the current state of policies and programs on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.*

4. *THAT the respondents do furnish copies of such policies and programmes to the Petitioners, other relevant state agencies, Pamoja Trust (and such other civil society organizations as the Petitioners and the Respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the Petitioner's grievances) to analyze and comment on the policies and programs provided by the respondents.*

5. *THAT the respondents do engage with the Petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identify an appropriate resolution to the Petitioner's grievances following their eviction from Mitumba Village.*

6. *THAT the parties to report back on the progress made towards a resolution of the Petitioners grievances within 90 days from today."*

13. In compliance with the said directives and orders made by the trial court, the State filed an affidavit indicating the Government's Guidelines on Settlement and Evictions. The learned Judge then gave the parties 45 days to engage with a view of agreeing on an amicable resolution. However, on 5th May, 2014, the trial court directed the proceedings before it to be held in abeyance pending the determination of the instant appeal.

GROUNDS OF APPEAL

14. Aggrieved by the judgment, decree, orders and directions given by the trial court, the appellant has lodged the instant appeal citing 18 grounds which can be compressed as follows: That the learned Judge erred in law and in fact by:

"I. Finding that the appellant had not filed any response to either the petition or the amended petition hence failed to consider the appellant's response thereof.

2. *Delegating her judicial functions and powers to Pamoja Trust, other unnamed state agencies and civil society organizations and by directing that the parties should engage with those third parties in identifying appropriate remedies.*

3. *Making findings and issuing orders not sought or contemplated by law.*

IV. Failing to appreciate that the appellant had issued earlier notices to the residents to vacate the suit property and holding that the notice issued was short.

5. *By holding that the appellant had a constitutional and legal obligation to make policies and programmes on provision of shelter and access to housing for marginalized groups and further failing to consider that the appellant had a specific statutory mandate that does not include settlement of landless Kenyans.*

VI. Issuing contradictory orders incapable of compliance.

VII. Issuing composite orders applying to the appellant, the 2nd and 3rd respondents jointly whereas their actions and obligations differ.

VIII. Failing to appreciate that the 1st respondent had not demonstrated the entitlement to the reliefs sought and shifting the burden to the appellant, 2nd and 3rd respondents contrary to the law.

IX. Failing to appreciate the progressive nature of social economic rights under the Constitution.

10. *Entertaining the petition filed by the 1st respondent which was not a legal entity hence lacking the requisite locus to represent the residents of Mitumba Village.*

XI. Finding that the eviction in question was carried out by the appellant.

XII. Making findings which were not supported by the evidence before the Court."

15. At the hearing of this appeal, Senior Counsel, Mr. Waweru Gatonye teaming with learned counsel Mr. Eric Mutua appeared for the appellant. Learned counsel Mr. S.M. Kinyanjui appeared for the 1st respondent while State Counsel Mr. Kepha Onyiso appeared for the 2nd and 3rd respondents. Parties filed written submissions and made highlights of the salient issues of fact and points of law. Local and persuasive foreign authorities were cited by the parties.

APPELLANT'S SUBMSSIONS

16. For the appellant, it was submitted that the first two grounds of appeal are that the learned judge erred in holding that the appellant had not filed any response to the petition or amended petition; that in making this erroneous finding, the trial court did not consider the appellant's reply and if the same were considered, the court would have arrived at different findings and conclusions. Counsel submitted that by an affidavit deposed on 25th October 2011, the appellant's acting company secretary ***Mrs. Joy Nyagah***, swore an affidavit in response to both the petition and the 1st respondent's interlocutory application.

17. It was further urged that the trial court erred and abdicated its judicial function when it directed the

parties to engage with 3rd parties with a view to identifying an appropriate resolution to the petitioners grievances; that the third parties who were not party to the suit are "Pamoja Trust, other relevant state agencies and unknown and unidentified civil society organizations." In support of the submission, the appellant cited dicta by Lord Parker in **R -vs- Governor of Brixton Prison, ex parte Enahoro (1963) 2 QB** where his Lordship expressed that "it is well settled that certainly no person made responsible for a judicial decision can delegate his responsibility." Counsel further cited dicta from the case of **Telkom Kenya Limited -vs- John Ochwada(2014) eKLR** where this Court expressed that:

"It would be a serious abdication of the judicial function was the same to be delegated to the parties who come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned judge's ruling on that score is well-founded and upheld."

18. The trial court was also faulted in finding that the appellant as a statutory body had a constitutional and legal obligation to make policies and programmes for provision of shelter and access to housing. This ground of appeal is founded on the order by the trial court to the effect that the appellant and the 2nd and 3rd respondents do provide, by way of affidavit, within 60 days, the current state of policies and programs on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements. It was submitted that the appellant as a statutory body has no mandate to provide policies and programs for provision of shelter and access to housing.

19. To augment the submission, it was urged that the appellant, the ***Kenya Airports Authority***, is a creature of statute, which sets out its functions and duties; that the trial court erred and failed to note that the appellant had no power or obligation to provide or make policies and programmes on the provision of shelter and housing to marginalized groups; that the appellant's statutory mandate is specific and does not include settlement of the landless. It was submitted that the trial court erred to the extent that the orders and directions given were tantamount to compelling the appellant to act beyond its statutory mandate. Counsel cited dicta from the case of **Ashbury Railway Carriage and Iron Company Limited -v- Riche (1874-1880) All ER Ext 2219** in which the decision in **Hawkes -v- Eastern Railways Company (1885) 5HL 331** was upheld affirming the principle that "a statutory corporation, created by an Act of Parliament, for a particular purpose, is limited as to all powers by the purpose of its incorporation as defined in that Act." The case of **Mayor of Westminster -v- London and North Western Railway Company (1905) AC 426** was cited to support the principle that "it is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it…"

20. In its submissions, the appellant stated that the trial court erred in issuing orders and directives that were never sought nor prayed for in the petition and that the learned judge erred in issuing orders requiring parties to engage with a view to coming up with appropriate resolution of the petitioners grievances and directing the appellant, 2nd and 3rd respondents to provide policies and programmes on provision of shelter and housing for marginalized groups. It was submitted that these orders, directions and reliefs were neither prayed for nor claimed nor contained in the pleadings of any party to the suit. The appellant cited dicta from the Nigerian case of **Odukwe -vs- Ogunbiyi (1998) 6SCNJ 113,** where it was stated that "a court is without power to grant a party that which he has not claimed or which is more than that claimed."

21. The appellant also faulted the trial court for failure to properly re-evaluate the evidence on record in relation to the issue of notice for eviction. The appellant maintained that it was clear from the notice that the notice was a reminder notice to vacate the suit property. Counsel emphasized that on its face, the notice expressly stated ***"further to previous notices issued by the Kenya Airports Authority (KAA),***

on the above matter, the Authority notes with concern that all previous notices have gone unheeded." It was the appellant's submission that the learned judge misdirected herself by holding that the notice period was for seven 7 days and disregarded the earlier notices that had been issued.

22. In concluding its submissions, the appellant maintained that the trial court erred in finding that the demolitions and eviction of the 1st respondent's members had been carried out by the appellant in total disregard to the affidavit sworn by the appellant's company secretary on 9th December, 2011 which categorically stated that the appellant was not responsible for the demolition and evictions. The appellant further faulted the trial court in directing that an alternative land should be found for the residents. In so ordering, it was submitted the trial court erred as there was no list of the so called residents making it very ambiguous as to whose house was demolished or who was to be resettled.

2nd AND 3rd RESPONDENTS' SUBMISSIONS

23. The 2nd and 3rd respondents made submissions in support of the appeal. State Counsel Mr. Onyiso reminded this Court that the 1st respondent and the residents of Mitumba village did not have title to the suit property; that once it was established that a claimant was on land illegally, a claim for violation of his/her right to housing was not maintainable; that in the instant case, there is conflict between public and private interests and that the suit property belongs to the appellant which is a public body and therefore public interest must outweigh the private interest of the 1st respondent and the residents of Mitumba village. It was submitted that the trial court's reliance on the United Nations Guidelines on eviction was irregular as the court's decision was not based on specific Articles of a Convention ratified by Kenya but was based on general comments on the Convention.

1st RESPONDENT'S SUBMISSION

24. The 1st respondent opposed the appeal and urged us to uphold the judgment, directions and orders of the trial court. It is the 1st respondent's case that since the relocation in 1992 of the Mitumba slum residents to the suit property, they have known no other home; that their total population is 15,325 consisting of 3,065 households. It was submitted that whereas the trial court was categorical that the appellant had not filed any document in reply to either the petition or the amended petition; the court did not err as it acknowledged and considered the appellant's submissions and its affidavits sworn on 25th October 2011 and 9th February 2012.

25. On the issue of culpability of the 3rd respondent as Commissioner for Lands, the 1st respondent submitted that over time, on behalf of the Mitumba slum residents, the 1st respondent sought indulgence with the 3rd respondent with a view to them being issued with title documents to the portions or plots in suit property in vain; that the appellant and the Government have been aware of the existence, occupation and habitation of the suit property by the 1st respondent and its members; that being aware of their occupation, the appellant neither consulted the 1st respondent and its members nor gave adequate notice nor reasons to vacate the suit property.

26. The 1st respondent submitted that the directions and orders given by the trial court were proper and correct in law; that the directions acted to fully realize the rules of natural justice; that in any event, the appellant and the other respondents have never complied with the directions and orders of the trial court. It was submitted that the learned judge did not err in holding that the 2nd respondent had to a go a step further to assist the court by showing if and how the State was intending to address the rights of the citizens to attain and realize social economic rights; the court did not err in directing the appellant to show what policies, if any, the State had put in place to ensure the rights of the members of the 1st respondent had been realized. It was submitted that although the appellant and the 2nd respondent

(Attorney General) are separate entities, there is a direct relationship between the two hence the obligation of one is the obligation of another, more so, because the 2nd respondent as the Attorney General is the legal advisor to the appellant and 3rd respondent.

27. On the issue that the trial court erred in evaluating the evidence on record and failed to find that the 7 day notice was a reminder notice and that previous notices had been issued; the 1st respondent submitted that there was no error on record as the appellant had failed to produce any documentary evidence to support its contention that previous notices had been issued and served upon the residents of Mitumba village; that failure to produce such earlier notices implied that the trial court was correct in holding that there wasn't sufficient notice to vacate and that the notice given was 7 days notice.

28. The 1st respondent denied that the trial court issued orders that were neither prayed for nor sought in the amended petition. It was submitted that the directions and orders granted were sought and prayed for in the amended petition. Conceding that the realization of social economic rights was progressive in nature, the 1st respondent maintained that the appellant as well as the 2nd and 3rd respondents could not take refuge under progressive realization as they had taken away the Mitumba village residents right to housing and shelter through demolitions of their houses.

29. At paragraph 16 of the 1st respondent's written submission, it is stated "In summary, we submit that the honourable judge discharged her duties, though a turd unconventional, the same was not beyond her mandate as outlined in ***Article 23 (2)*** of the Constitution and ***Article 8*** of the **United Nations Universal Declaration of Human Rights** to grant appropriate relief…" (sic).

30. Counsel for the 1st respondent further urged this Court to find that the instant appeal was premature because the suit before the High Court was pending and the trial court had held in abeyance its proceedings pending determination of the instant appeal. It was further submitted that the learned judge did not err in her findings because the appellant had failed to follow the recommended procedures and processes with regard to forceful evictions. In support of its submission, the 1st respondent cited dicta from the case of **Kepha Omondi Onjuro & others -v-Attorney General & 5 others (2015) eKLR** where the High Court expressed itself thus:

"…it is imperative at this juncture to appreciate that there is no legal framework existent in Kenya guiding evictions and demolitions…. However, Article 2 (5) and (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya is part of the law of Kenya. Based on Article 2 (5) and (6) the 1st respondent submitted that the trial court did not err in placing reliance upon the United Nations Declaration of Human Rights. Counsel submitted that the trial court did not err when it expressed that "where the State allows people to occupy land be it government or private for a considerable period of time so that the people consider the said land to be their homes, it would be inhuman for the State to suddenly evict them forcefully therefrom without affording them an opportunity to seek alternative mode of accommodation…"

31. In concluding its submissions, the 1st respondent urged this Court to dismiss the appeal; we were urged to bear in mind that the appellant and the 2nd and 3rd respondent's demolished the residential structures of Mitumba village dwellers in total disregard of an existing court order; that this Court should send a strong message that the State and all State organs and individuals must obey court orders.

ANALYSIS

32. We have evaluated the rival written submissions by learned counsel, examined the record of appeal

and considered the authorities cited. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** thus:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. 270)."

33. In our consideration and determination of this appeal, we remind ourselves that there are issues of fact and points of law that have been urged before us. This Court, as an appellate court, will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judge has misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he/she should have taken into consideration and in doing so arrived at a wrong conclusion.

34. Foremost, we reaffirm the commitment of this Court to the realization, justiciability and enforcement of socio-economic rights. The importance of socio-economic rights cannot be underestimated as they relate to human development. To continue to afford socio-economic rights less judicial protection and enforcement is erroneous because by their very nature socio-economic rights are crucial to a state's development; they cannot be mere "aspirations" and must be afforded the protection they rightly deserve. We opine that the traditional classification of fundamental rights into separate, watertight compartments is no longer feasible given the fact that fundamental rights are often inextricably interwoven. It is time to move away from the notion that it is acceptable to afford socio-economic rights less judicial enforcement. We note that ***Article 20 (5) of the Constitution*** echo the progressive realization of socio-economic rights and ***Article 20 (5) (c)*** enjoins courts not to interfere with the decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.

35. With the foregoing affirmation and taking into account the grounds of appeal and submissions by counsel, we analyze and evaluate the merits of the appeal as hereunder.

LOCUS STANDI OF THE 1st RESPONDENT TO INSTITUTE THE PETITITION BEFORE THE TRIAL COURT

36. Ground 15 of the memorandum of appeal states that the learned judge erred in law and fact in entertaining a petition filed and prosecuted by a non-legal entity that lacked the requisite locus to represent the petitioners. The 1st respondent submitted that pursuant to ***Article 22 (2) (d)*** of the Constitution, it has locus to present and prosecute the petition before the trial court. We note that in paragraph 1 of the amended petition, the 1st respondent is described as a society duly registered under the Society Rules of 1968 and that the petition was filed for and on behalf of members of the 1st respondent society and residents of Mitumba village. At page 46 of the Record, a Certificate of Registration No. 32509 dated 27th July 2010 certifies that Mitu-Bell Welfare Society is duly registered under ***Section 10*** of the **Societies Act**. The file of the Society is indicated as SOC/57756.

37. We have considered the appellant's submission on the locus of the 1st respondent in light of the Certificate of Registration and ***Article 22 (2) (d)*** of the Constitution. The Supreme Court while considering the issue of *locus* in **Mumo Matemu -vs-Trusted Society of Human Rights Alliance & 5 others [2014] eKLR** held that by virtue of ***Articles 22 & 258*** of the ***Constitution*** every person has the right to institute proceedings claiming that the ***Constitution*** has been contravened; that a person in that regard, includes one who acts in the public interest and further, pursuant to ***Article 260*** it also includes a company, an association, or other body of persons whether incorporated or unincorporated.

38. In the instant case, the 1st respondent instituted the suit on behalf of its members whose rights it claimed were violated on account of the evictions and demolitions.

Guided by the provisions of ***Article 22 & 258*** of the Constitution and the dicta by the Supreme Court aforestated, we find that the 1st respondent had locus to institute and maintain the petition before the trial court.

DID THE TRIAL COURT CONSIDER THE APPELLANT'S ANSWER TO THE PETITION AND OR AMENDED PETITION"

39. Grounds 1 and 2 of the memorandum of appeal are to the effect that the trial court erred in finding that the appellant did not file any documents in answer to the amended petition. At paragraph 20 of the judgment, the trial court expressed that the appellant did not file any documents directly in answer to either the petition or the amended petition. Nonetheless, the trial court in its judgment states that it considered the affidavits deposed by the appellant's acting Corporation Secretary Ms Joy Nyaga on 25th October 2011 and a further affidavit deposed by the appellant's Managing Director Eng. Stephen Gichuki on 9th February 2012 to constitute the appellant's answer to the petition.

40. It is manifest from paragraph 20 of the judgment that the trial court considered the affidavits as well as submissions filed on behalf of the appellant. In our view, all issues and grounds in opposition to the petition that were raised and urged by the appellant were considered. The appellant has not demonstrated to our satisfaction that it suffered any prejudice or that a miscarriage of justice occurred from the statement by the trial court that it did not file a direct response to the petition. The statement by the trial court does not amount to abuse of court process and it did not occasion failure of justice. In the absence of abuse of court process, prejudice or miscarriage of justice, we are satisfied that the trial court considered all relevant facts and points of law urged by the appellant as disclosed in the replying affidavits and the written submission filed. The contention that the learned Judge failed to take into account the appellant's response and submission lack merit.

LIABILITY OF THE 2nd and 3rd RESPONDENTS

41. In this appeal, the 2nd respondent is the Attorney General while the 3rd respondent is the Commissioner of Lands. Ground 9 in the memorandum of appeal states that the learned judge erred in law and fact by issuing composite orders which apply to all respondents jointly whereas the actions and obligations of the appellant were and are not the same as those of the 2nd and 3rd respondents.

42. The 2nd respondent as the Attorney General was sued as the legal representative of the government in court in civil proceedings and as the principal legal advisor to the government pursuant to ***Article 156 (4)*** of the Constitution. The 3rd respondent as the Commissioner of Lands was enjoined in the suit on the premise that he is in charge of the allocation, alienation, processing and issuance of land titles for all lands held by the Government and individuals in the Republic of Kenya.

43. On behalf of the 2nd appellant, it was submitted that the trial court erred in holding the Attorney General liable to the petitioners and issuing directives and orders against the Attorney General; that the relationship between the Attorney General and the Government or other State organs is akin to advocate-client relationship; that being advocate-client relationship, an aggrieved party should sue the client not the advocate; that in the present case, the 1st respondent sued the advocate instead of filing suit against the client. Based on the advocate-client analogy, it was submitted that the trial court erred in entering judgment and giving orders against the Attorney General.

44. On behalf of the 3rd respondent as the Commissioner of Lands, it was submitted that there is no evidence on record implicating the 3rd respondent with any eviction or demolition or violation of any of the 1st respondent or petitioners' rights and fundamental freedoms.

45. In the decree as extracted, the trial court *inter alia* made the following orders that apply to the 2nd and 3rd respondents:

"a. THAT the respondents do provide, by way of affidavit, within 60 days of today, the current state of policies and programs on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.

b. ***THAT the respondents do furnish copies of such policies and programmes to the Petitioners, other relevant state agencies, Pamoja Trust (and such other civil society organizations as the Petitioners and the Respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the Petitioner's grievances) to analyze and comment on the policies and programs provided by the respondents.***

c. ***THAT the respondents do engage with the Petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identify an appropriate resolution to the Petitioner's grievances following their eviction from Mitumba Village."***

46. In quest to make the 3rd respondent as the Commissioner of Lands culpable and liable to the petitioners, the 1st respondent in its amended petition at paragraph 25 stated that the 3rd respondent failed to issue title documents to the petitioners and as such the petitioners feel that their fundamental rights and freedoms were and are threatened.

47. The trial court in its evaluation of this item of evidence at paragraph 18 of the judgment surmised that the petitioners' case is that the 3rd respondent has acted in accordance with the law by protecting the interests of property owners and not allocating to the petitioners what has already been allocated to another party. At paragraph 25 of the judgment, the trial court makes a finding that the appellant and the Attorney General are responsible for the eviction and demolition of Mitumba village. At paragraph 36 of the judgment, the trial court finds that the petitioners have adduced in evidence letters which they wrote to the 3rd respondent seeking allocation of the land to them; that there was no response from the 3rd respondent to the letters; that title to the suit property is vested in the appellant. At paragraph 73 of the judgment, the trial court expresses that the "inescapable conclusion is that, whether alone or with other state agents…the State and the appellant are, in my view, jointly and severally liable for the violation of the petitioner's rights in the demolition of the petitioner's houses."

48. Considering the factual basis upon which the petitioners enjoined the Commissioner of Lands to the present dispute and the trial courts findings in relation to the 3rd respondent, we pose the question on what legal basis did the trial court make orders and issue directions applicable and enforceable against

the Commissioner of Lands. Did the Commissioner of Lands violate any of the rights and fundamental freedoms of the 1st respondent and residents of Mitumba village"

49. From the evidence on record, the trial court did not find any wrongdoing on the part of the Commissioner for Lands; there is no finding that the Commissioner demolished the petitioners' residential structures or that he forcefully evicted the residents of Mitumba village. The 1st respondent at paragraph 31 of the amended petition allege that the 3rd respondent violated their right to property and their socio-economic rights by failing to issue them with title documents to the suit property. We pose the question did the 1st respondent and residents of Mitumba village have a right to be issued title documents over the suit property by the Commissioner of Lands"

50. The 1st respondent and the petitioners assert that having occupied the suit property for over 19 years, they had a legitimate expectation to be issued with title documents. At paragraph 35 of the judgment, the trial court correctly held that the 1st respondent and residents of Mitumba village could not maintain a claim in law against the Commissioner or Attorney General over the suit property as there can be no claim for adverse possession against government land or land otherwise enjoyed by the Government. ***(See Section 41 (1) (i)*** of the **Limitation of Actions Act, Cap 22 of the Laws of Kenya).** At paragraph 37 of the judgment the trial court again correctly observed that there is no evidence on record to support the petitioner's claim that they had a legal basis or legitimate claim to the suit property; the court correctly held that the petitioners cannot maintain a claim for violation of their right to property under Article 40 of the Constitution in respect of the suit property.

51. In the case of **South African Veterinary Council v. Szymanski 2003(4) S.A. 42 (SCA)** at [paragraph 28] it was held the law does not protect every expectation but only those which are 'legitimate. Legal scholar Mr. P. Cane in his book expresses himself thus:

"a legitimate expectation will arise only if the court thinks that there is no good reason of public policy why it should not. This is why the word 'legitimate' is used rather than the word 'reasonable': the matter is not to be judged just from the claimant's point of view. The interest of the claimant in being treated in the way expected has to be balanced against the public interest in the unfettered exercise of the decision-maker's discretion; and it is the court which must ultimately do this balancing." [Emphasis added] (See: P. Caine, Administrative Law, 4th Edn (OUP, 2004), pp. 205-206 and Chris Hilson, Policies, the Non-Fetter Principle and The Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place" 11 Judicial Review 289 2006 at p. 290).

52. The trial court having made all the correct findings in relation to the 3rd respondent as depicted above, on what legal foundation did the court make orders binding the 3rd respondent" Our re-evaluation of the evidence on record and appraisal of the judgment of the trial court leads us to conclude that the trial court made correct findings as regards non-culpability and non-liability of the 3rd respondent but erred in law in making final orders that were applicable and enforceable against the 3rd respondent. The 3rd respondent as Commissioner of Lands is under no legal obligation to allocate or alienate land that is already alienated and registered in the name of a third party. We concur with the trial courts finding that there was no violation of the 1st respondent's constitutional right to property under ***Article 40*** of the Constitution. We further concur with the trial courts finding that the 3rd respondent neither demolished nor evicted the 1st respondent or residents of Mitumba village from the suit property. Based on these findings, we come to the conclusion that the trial court erred in law in making a composite order and issuing directives applicable and enforceable against the 3rd respondent. We hereby set aside in entirety the trial court's judgment and decree and any and all consequential orders and directions applicable and enforceable against the 3rd respondent.

53. On the issue of liability of the 2nd respondent (Attorney General) we have considered the provisions of ***Article 156 (4) (a)*** and ***(b)*** of the Constitution. Under the provisions, the Attorney General is the legal advisor to the Government and is empowered (other than in criminal proceedings) to represent the Government in court or in any other legal proceedings to which the national government is a party. In the instant case, the 2nd respondent was enjoined in the suit as the legal advisor and representative of the Government in court in civil proceedings. Subject to the final orders in this appeal, it is our finding that the orders made by the trial court in this matter apply and are enforceable against the State and not the Attorney General *qua* Attorney General. The trial court aptly appreciated this at paragraph 73 of the judgment where it is stated that it is the "State" that is jointly and severally liable for violation of the petitioner's rights. In this context, the Attorney General is not the State. We find that the trial court did not err in making orders applicable to the Attorney General as a respondent in the suit. However, we add a caveat that it is good practice to file suit and enjoin the specific government department or the Ministry responsible for the acts of commission or omission complained of. Technically, the Attorney General is an advocate and titular head of the bar; his relationship with the State or Government is one of advocate-client relationship.

DID THE TRIAL COURT ABDICATE OR DELEGATE JUDICIAL FUNCTION

54. Grounds 3 and 4 of appeal are that the trial court erred in law and abdicated its role by delegating judicial functions and powers to "Pamoja Trust" and other unnamed state agencies and civil society organizations. This ground is premised on the order and direction by the trial court that the appellant is to engage with the petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the petitioner's grievances following their eviction from Mitumba village*.* It is the appellant's contention that this specific order and direction by the trial court is tantamount to abdication and delegation of judicial function and is unconstitutional, null and void.

55. In opposing the submission, the 1st respondent urged that the order and directions by the trial court was constitutional, correct and proper in law; that the trial court acted within the mandate given under ***Article 23 (3)*** of the Constitution and ***Article 8*** of the **United Nations Universal Declaration of Human Rights** to grant appropriate relief that is intended to promote *inter alia* the values of human dignity, equity, social justice, inclusiveness, and protection of the marginalized is spelt out in ***Article 10 (2) (b)*** of the Constitution.

56. We note that at paragraph 16 of its written submissions, the 1st respondent states that the trial judge *"discharged her duties, though a turd (sic) unconventional…that instead of issuing a blanket judgment, the court choose to issue recommendations that would shed more light into the situation on the ground; that the matter at the High Court is yet to be concluded."*

57. In considering whether the trial court abdicated its judicial functions, we are reminded of the orders and directions given by the Kenya Supreme Court in **Communications Commission Of Kenya & 5 Others -v- Royal Media Services Limited & 5 Others, Sc Petition No. 14 Of 2014** as consolidated with **Petition Nos. 14 A, 14 B And 14 C Of 2014.**

58. The orders and directions issued by the Supreme Court were as follows:

"**[415] With regard to the claims of the parties in this case, the Court makes the following Orders:**

a. *……*

b. ***…….***

c. ***…….***

d. ***The 1st Appellant shall, in exercise of its statutory powers,and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.***

e. ***The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th appellant herein, is duly aligned to constitutional and statutory imperatives.***

f. ***The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set the time-lines for the digital migration, pending the international Analogue Switch-off Date of 17th June, 2015.***

g. ***Upon the course of action directed in the foregoing Orders (d & e) being concluded, the 1st appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention, on the basis of priority, before a full Bench.***

h. ***…….***

i. ***……. ”***

59. On our part, we are cognizant that the High Court has in several recent decisions issued orders and directions pursuant to ***Article 23 (3)*** of the Constitution as appropriate relief in relation to implementation and enforcement of the Bill of Rights. Some of the orders and directions issued are similar to the orders and directions made by the trial court in this matter.

60. For instance, in **Satrose Ayuma & 11th Others - v- The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others, Nairobi HC Petition No. 65 of 2010**, Lenaola, J. issued orders and directions *inter alia* that the 3rd respondent does file within 90 days of the judgment an affidavit in court detailing out existing or planned State policies and Legal Framework on Forced Evictions and Demolitions in Kenya and that within 21 days of the judgment, a meeting be convened by the Managing Trustees of Kenya Railways Staff Retirement Benefit Scheme together with the petitioners where a programme of eviction of the petitioners shall be designed; that the agreed programme shall be filed in court within 60 days of the judgment and that each party shall have liberty to apply.

61. In **Kepha Omondi Onjuro & others -v- Attorney General & 5 others, Nairobi HCC Petition No. 239 of 2014**, Odunga, J. issued among others orders and directions that eviction of the petitioners in the suit shall be undertaken *inter alia* with full participation of stakeholders including segment committees,

Pamoja Trust, the Social Economics and Geo-Spatial Engineers, Muugano wa Wanavijiji as well as Commissioners from the Kenya National Commission on Human Rights Commission; the respondents were to file quarterly reports in court on the progress of the project until further orders of the court; that each party shall have liberty to apply.

62. In the ***Matter of Illegal Demolition of Residential Houses and Business Premises Erected on Ngara Open Air Market Nairobi and in the Matter of Francis N. Kiboro & 198 Others, Nairobi Misc. Application No. 130 of 2014***, Odunga, J. held that eviction of the petitioners shall be undertaken in the presence of representatives from the Kenya National Commission on Human Rights.

63. In considering the issue of abdication of judicial functions, we remind ourselves the provisions of ***Articles 23 (3) and 159 (2) (c)*** of the Constitution. ***Article 23 (3)*** allows the High Court in any proceedings brought under ***Article 22*** to grant appropriate relief. ***Article 159 (2) (c)*** enjoins courts in Kenya to promote alternative dispute resolution.

64. In the instant case, the trial court at paragraphs 74 to 79 of the judgment expressed that the court was granting appropriate relief to the petitioners pursuant to ***Article 23 (3) of the Constitution***. In the case of **Satrose Ayuma & 11th Others -v- The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others, Nairobi HC Petition No. 65 of 2010,** the Lenaola, J. at paragraph 109 of his judgment in granting the appropriate remedies cited ***Articles 9 and 10 of the Constitution*** that require public participation and to this end, the learned judge gave directions for consultation with various interested stakeholders.

65. A common thread that runs through from the judgment of the Supreme Court in ***Communications Commission Of Kenya (supra)*** to the High Court decisions is that orders and directions have been given with power reserved by the specific court for mention of the matter or reports or affidavits to be filed.

66. In furthering its submissions in the instant case, the 1st respondent submitted that the instant appeal was premature as proceedings before the trial court were still pending; that the trial court had held in abeyance its proceedings. The High Court in ***Satrose Ayuma (supra)*** and in ***Kepha Omondi Onjuro (supra)*** reserved powers for either an affidavit or quarterly reports to be filed. The Supreme Court in ***Communications Commission of Kenya (supra***) reserved the power to mention the case for further orders. Indeed, the Supreme Court upon mention of the case issued final orders on 13th February, 2015.

67. In the instant case, on the issue of reserving powers to make further orders, the 1st respondent submitted that the judgment by the trial court should be considered an “interim judgment or partial judgment” with “a partial or interim decree” awaiting the final judgment and decree by the trial court. This response from the 1st respondent prompts us to consider the issue whether a partial judgment is known to the Kenyan law; it begs the question what is a judgment and whether a judgment can be interim or must be final and dispositive of the issues and dispute between the parties. Can a court in the name of granting appropriate remedies or relief under the provisions of ***Article 23 (3)*** of the Constitution deliver a partial judgment and reserve powers to receive additional pleadings, reports or affidavits and thereby make further orders"

68. The Civil Procedure Act recognizes preliminary and final decrees. Likewise, ***Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*** recognizes that the High Court can issue interim orders. Under ***Rule 29,*** parties may with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case. ***Section 25*** of the **Civil Procedure Act** provides that the court, after the case has been heard,

shall pronounce judgment, and on such judgment a decree shall follow. ***Order 21 Rule 4*** stipulates that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. ***Order 21 Rule 5*** states that in suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefore, upon each separate decision on each issue. ***Order 21 Rule 7 (1)*** stipulates that the decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

69. Black's Law Dictionary 970 (10th ed. 2014 states that in law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. A judgment is the final court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the court's final and official pronouncement of the law on action that was pending before it. A judgment has the effect of terminating the jurisdiction of the court that delivered the judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the court *functus officio* and transfers jurisdiction to an appellate court if appeal is allowed. It marks the end of litigation before the court that pronounced the judgment. When used in relation to a court, *functus officio* means that once a court has passed a judgment after a lawful hearing, it cannot reopen the case. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.

Functus officio is not simply an administrative law concept confined to civil law - it is wide and permeates the realm of public law and encompasses judicial decision making process. (See Administrative Law by Wade and Forsyth at 192; see also "The Origin of the *functus officio* doctrine with specific reference to its application in Administrative Law" 2005 SALJ Vol **122 PAGE 83**).

70. In the instant case, the trial court delivered a judgment dated 11th April 2013. The court gave directions that parties are to report back on the progress made towards resolution of the petitioners' grievances; an affidavit on State policies and programs was to be filed within 60 days. The record shows that on 21 February 2014, the trial court made an order that it shall proceed to deal with the outstanding issues in the matter. On 5th May 2014, the trial court held in abeyance the proceedings before it. The legal question is can there be outstanding issues to be dealt with by a court after it has delivered a judgment"

71. We have stated that a judgment brings to an end the jurisdiction of the court that delivers the same. In our considered view, the concept of partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law. A court of law in delivering its judgment must determine the rights and liabilities of parties. Save for the limited exceptions provided for in law, delivery of judgment marks the end of litigation and marks the end of jurisdictional competence of the court. If a court is inclined to grant or make interim orders, it is within its powers to do so. However, a court cannot deliver judgment and invite further pleadings to be filed or reserve contested matters for its consideration and determination.

72. In the instant case, the trial court erred in delivering a judgment and then reserving outstanding matters to be dealt with by the court. Save as authorized by law, upon delivery of judgment, a court becomes *functus officio.* It is not surprising that the 1st respondent in its written submissions observed that the trial court adopted an unconventional approach. The error in law committed by the trial court is aptly demonstrated by posing the question what would happen if contestations and dispute arise from the affidavits and reports filed in court" Would the trial court after judgment re-litigate the issues arising from the affidavit and reports" Which pleadings would form the basis of the re-litigation"

73. In the instant case, by allowing parties to file affidavits and reports after judgment, the trial court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings before the court. Such a procedure is not provided for in the Civil Procedure Act and Rules and it perpetuates and introduces secondary and side litigation. It is impermissible to allow parties to file pleadings after judgment.

74. The appellant further faulted the trial court's judgment on the basis that direction and orders given allowed third parties to engage in identifying an appropriate resolution to the petitioners' grievances. This is the premise upon which the allegation of abdication of judicial function is grounded. As per the trial court, the legal basis for involving third parties is ***Article 23 (3)*** of the Constitution that allows the court to grant appropriate relief. In the ***Satrose Ayuma & 11th Others,*** it was stated that the legal basis for stakeholder involvement is ***Articles 9*** and ***10*** of the Constitution on public participation.

75. We have considered the provisions of Articles ***9, 10*** and ***23 (3)*** of the Constitution as read with the jurisdictional mandate and functions of the court as provided for in ***Article 159 (1)*** of the Constitution. In ***Article 159 (1),*** the judicial authority in Kenya is exercised by the courts. The concept of public participation and the provisions of ***Article 23 (3)*** that allow the High Court to come up with an appropriate relief do not authorize members of the public and other stake holders to participate in the hearing, determination and crafting of appropriate reliefs and resolutions to disputes. The power to grant relief or to determine what constitutes an appropriate relief is an exercise of judicial function. Public participation does not mean the public is to engage in crafting and determining appropriate reliefs for disputes before the court. If parties to a dispute desire to amicably resolve the dispute, they are at liberty to do so and record a consent judgment; the consent judgment can then be endorsed and recorded as the judgment of the court.

76. In **R -vs- Governor of Brixton Prison, ex parte Enahoro (1963) 2 QB** it was expressed "it is well settled that certainly no person made responsible for a judicial decision can delegate his responsibility." In **Telkom Kenya Ltd. -vs- John Ochwada(2014) eKLR** this Court expressed itself as follows:

"It would be a serious abdication of the judicial function was the same to be delegated to the parties who come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned judge's ruling on that score is well-founded and upheld."

77. We remind ourselves that all judges perform their official duties in person and that they themselves conduct the trial and pronounce judgment in accordance with the terms of the oath which they have taken. It is fundamental to the independence, impartiality and integrity of the judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges. Whereas ministerial or administrative functions may be delegated, the judicial power and the jurisdiction conferred upon a judge can neither be transferred nor delegated. Judicial decision making is non-delegable; no office, function or jurisdiction of a court can be delegated. (For analogous discussion, See **Moses Masika Wetangula -v- Musikari Nazi Kombo & 2 others, Supreme Court Petition No. 12 of 2014 at paragraphs 150-151).**

78. On our part, we are certain about non-delegation of judicial functions and we affirm the dicta by this Court in **Telkom Kenya Ltd. -vs- John Ochwada (2014) eKLR** as stated above and make a finding that the trial court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the constitutional mandate to identify appropriate relief and resolve disputes between parties.

DID TRIAL COURT PROPERLY EVALUATE THE EVIDENCE ON RECORD

79. Ground 18 in the memorandum of appeal is to the effect that the trial court erred in law and fact by making findings which were not supported by the evidence on record. We have considered this ground in our re-evaluation of the evidence on record. A fundamental issue raised in the pleadings by the appellant and 1st respondent is the flight path to Wilson Airport. The appellant submitted that the residential and commercial structures by the 1st respondents and residents of Mitumba village were along the flight path to Wilson Airport. This is expressly stated at paragraph 8.1 of the Replying Affidavit deposed by Ms Joy Nyagah and dated 25th October 2011. In the said paragraph, it is deposed that the petitioners had been told over time that the informal settlement they occupy was on the flight path. At paragraph 8 of the affidavit, it is deposed that the reason for wanting the petitioners to vacate the suit property was due to security concerns for both the petitioners and other airport users. At paragraph 8.2 it is deposed that any settlement that leads to unregulated garbage disposal hence attracting birds is prohibited along a flight path. At paragraph 11 it is deposed that there were no high rise structures along the flight path within the suit property and any such high rise structures that are there are approved and do not pose security threat along the flight path.

80. The 1st respondent through a Further Affidavit dated 21st February 2012 deposed by Mr. Benjamin Kaunda Gishemba contested the averments relating to the flight path. At paragraph 7 he deposed that the allegation the petitioners had settled on the flight path to Wilson Airport was disputed and incorrect for there were other high-rise structures adjacent to and around the land occupied by the petitioners.

81. The rationale given by the appellant for eviction of the 1st respondent and residents of Mitumba village rests is that the village was on the flight path to Wilson

Airport; that there was security risk posed by unregulated garbage disposal that attract birds along the flight path; and that there is greater public interest in maintaining the safety and security of aerodromes in Kenya. We pose the following question: did the trial court consider and evaluate these critical allegations relating to the flight path to Wilson Airport that was contested and disputed by the parties"

82. It is the duty of a trial court to evaluate all the evidence on record, draw relevant inferences and arrive at conclusions and determinations. On the issue of flight path to Wilson Airport, the trial court expressed as follows at paragraphs 67 and 68 of the judgment:

“67: Which begs the question: if the demolition of Mitumba village was for security reasons, either because it posed a risk due to its proximity to Wilson Airport’s flight path, or because of the security threat that resulted from the war in Somalia, can the 2nd respondent convincingly argue that such a threat was posed only by the indigent, marginalized, denizens of Mitumba Village" Did not apartments which surrounded the village pose as much of a risk because of being on the flight path" Is it assumed that terror only reside in the downtrodden informal settlements of our cities"

68: What the demolition of this village for allegedly being on the airport’s flight path or posing a security threat, while leaving multi-storied buildings which surrounded it intact demonstrates, in my view, in the absence of any other explanation, is that it was occupied by citizens whom the Sate and its agents did not deem deserving of consideration, who could be uprooted without explanation or consultation….”

83. The foregoing two paragraphs embody the trial court’s evaluation of the evidence and contestations relating to the flight path to Wilson Airport. There is no finding of fact whether Mitumba village and the structures thereon were on the flight path to Wilson Airport; there is no factual determination as to what constitutes the flight path to Wilson Airport; there is no determination whether there is unregulated garbage disposal at the Mitumba village that attract birds along Wilson Airport’s flight path thereby posing security risk to the aerodrome; there is no evaluation of presence of Mitumba village *vis a vis*

public interest in maintaining the safety and security of the aerodromes in Kenya; there is no evaluation of the evidence to determine if the adjacent high rise buildings are on the flight path; there is no consideration of the **Legal Notice No. 59** of 8th May 1998 which prohibits constructions of structures near airports or aerodromes. These critical aspects of the pleadings before the court were not evaluated by the trial court.

84. The trial court correctly observed at paragraph 61 of the judgment that there are instances when eviction of people may be necessary and that considerations of national security may be one reason for such evictions. In the Indian case of **Chameli Singh -v- State of Utar Pradesh (1996) 2 SCC 549,** it was expressed that so long as the exercise of Government's eminent domain is for public purposes, the individual's right must yield to the larger public purpose. In **Ahemdabad Municipal Corporation -v- Nawab Khan Gulab Khan (1997) 11 *S.C.C. 123***, an Indian case involving petition by pavement dwellers who had constructed hutments on public footpaths, the State removed the structures and the court expressed that the Government took reasonable action to remove the hutments stating that the footpaths are designed for public safety and security. In **Narmada Bachao Andolan -v- Union of India, A.I.R. 2000 S.C. 3751,** the Indian court rejected the notion that forced relocation of thousands of people would be a violation of the Constitution. The case concerned a dam project that was expected to develop the Gujarat region by providing electricity and irrigation from the Narmada River. The court concluded there would be no victim of displacement as the displacement of persons would not per se result in violation of their fundamental rights as the overall effect would lead to betterment and progress of the society and the project was in national interest. In **Dharampal Singh -v- GNCT of Dehli WP (C) 1978/2011,** seventy slum dwellers sought relief after their hutments were demolished for a planned hospital expansion. The court opined that the hospital expansion would benefit a large population and allowed eviction on public policy reasons.

85. We have cited the comparative judicial authorities to demonstrate that public interest, public policy and national interest or national security may justify eviction and demolition of structures.

86. In the instant case, the trial court did not evaluate the evidence on the issue whether the Mitumba village and the structures thereon were on Wilson's Airport flight path and whether the safety and security of the aerodrome was threatened. The mandate of the appellant includes maintaining facilities for the efficient operation of aircraft. It is also an international standard that no settlement should be allowed on a flight path and unregulated garbage disposal that attract birds on a flight path should not be permitted.

87. In our considered view, subject to approvals and limitations authorized by law, the security and safety of flight paths is not negotiable. ***Article 24*** of the Constitution recognizes that a right or fundamental freedom shall not be limited except by law and such limitation must be reasonable and justifiable in an open and democratic society. In our view, the security and safety of flight paths is a limitation on enjoyment of the right and freedoms in the Bill of Rights; such a limitation is permitted by law and is reasonable and justifiable in an open and democratic society.

88. It is often stated that an appellate court will rarely interfere with findings of fact by the trial court unless it can be demonstrated that the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. In the instant case, the trial court failed to take into account the critical aspects of evidence relating to the flight path and failed to determine if Mitumba Village was on a flight path; the court failed to evaluate the security and safety of the flight path *vis a vis* the structures in Mitumba village; the court failed to evaluate the allegation of unregulated garbage attracting birds along Wilson Airport's flight path. Due to these failures, we are compelled to

interfere with the findings and conclusions made by the trial court and come to a determination that the trial court erred in fact and law in failing to properly evaluate the evidence on record.

89. We note that the trial court correctly observed that there is no legislation in Kenya dealing with forcible eviction and resettlement of persons occupying public or private land. It is noteworthy that an **Evictions and Resettlement Procedures Bill of 2012** was published in the Kenya Gazette of 27th August 2012. The objectives of the Bill is to provide for an Act of Parliament to set out appropriate procedures applicable to forced evictions; to provide protection, prevention and redress against forced eviction for all persons occupying land including squatters and unlawful occupiers; and to provide for matters incidental and connected thereto. The Bill despite being published in 2012 has not been enacted into law. Incidentally, the Bill contains provisions similar to the orders and directions issued by the High Court in this case and in the case of ***Satrose Ayuma (supra).*** It is within the competence of the legislative to enact a law that governs evictions and resettlement and until that is done; court must interpret and apply the law as it stands.

STATUTORY MANDATE OF THE APPELLANT

90. Grounds 11 and 12 in the memorandum of appeal faults the trial court for making orders and issuing directions applicable and enforceable against the appellant while ignoring the statutory mandate of the appellant as a statutory body; that the court did not direct its mind to the fact that the appellant as a statutory body has a specific mandate that does not include settlement of landless Kenyans; that the judge erred in law and fact by directing the appellant to provide current State policies and programs on provision of shelter and access to housing for marginalized groups such as residents of informal and slum settlements when the appellant has no such mandate.

91. The 1st respondent in addressing this ground of appeal submitted that the appellant as a state agency that had taken away the petitioners rights and fundamental freedoms is duty bound to fulfill the court orders and directions; that it is illogical and immoral to take away rights and freedoms and them assert that the rights are progressive.

92. The issue raised in this ground of appeal is not whether the appellant was responsible for demolition of structures and residences at Mitumba Village but whether the trial court was correct in law in making an order and issuing directions that the appellant with the 2nd and 3rd do provide current State policies and programs on provision of shelter and access to housing. The pertinent question is does the appellant have a mandate to formulate and provide policies and programs on provision of shelter and access to housing for marginalized groups" The answer is to be found by examining the mandate of the appellant as provided for in its enabling legislation the Kenya Airports Authority Act. We have examined the Act and are satisfied that the appellant does not have the mandate to deal with policies and programs for provision of shelter to marginalized groups and slum dwellers. The dicta in **Hawkes -v- Eastern Railways Company (1885) 5HL 331** that a statutory corporation, created by an Act of Parliament is limited to the functions and mandate granted by its enabling statute is good law. We adopt the same and make a finding that the trial court erred in issuing orders and directions applicable to the appellant while ignoring the appellant's express statutory mandate.

DID THE TRIAL COURT ISSUE ORDERS NEITHER SOUGHT NOR PRAYED FOR IN THE AMENDED PETITION"

93. Ground 5 in the memorandum of appeal is to the effect that the trial court erred in law and fact by making findings and issuing orders that were neither sought by any of the parties nor contemplated by law. The 1st respondent submitted that the orders and directions given by the trial court were prayed for

in the amended petition. We have examined the prayers in the amended petition as reproduced at the beginning of this judgment. It is trite that a court is required to base its decision on the pleadings before it. The Malawi Supreme Court in **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** quoting an article by Sir Jack Jacob entitled "***The Present Importance of Pleadings." published in [1960] Current Legal problems, at page174*** stated:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

94. In our considered view, the directions by the learned judge for third parties to comment on the policies and guidelines to be provided by the appellant as well as by the 2nd and 3rd respondent was not a prayer that was sought by any of the parties and is not a prayer sought in the amended Petition. We also find that the directions by the learned judge to the effect that the parties engage Pamoja Trust and other civil societies for purposes of identifying appropriate resolution to the petitioners grievances is not a payer sought in the amended petition. We are cognizant that some cases involving matters of general public interest may occasion a court inviting certain persons with expertise in a particular issue before the court to participate in proceedings as *amicus curiae* or as a friend to the court. In such cases ***Rule 6*** of the **Constitution of Kenya (Protection of Rights and fundamental Freedoms) Pratice and Procedure Rules, 2013** provides for the joinder of such persons with leave of the court either on application or on the court's own motion. We take note that Pamoja Trust and the civil societies alluded to by the trial court were not parties to the suit neither were they joined as friends to the court. Pamoja Trust is mentioned *inter alia* at paragraphs 66 and 71 of the judgment. Several questions arise, what is the basis of the selection of these third parties" By filing an affidavit in support of the petition, can Pamoja Trust become a party who can legally engage as a stakeholder in identifying an appropriate resolution to the petitioner's grievances" What were the criteria used by the trial court in identifying appropriate civil societies to engage" In our view, the directions given by the trial court was based on unpleaded issues and this was tantamount to throwing back the parties into the arena of litigating and contesting issues over which they came for determination by the trial court.

95. In **Telkom Kenya Ltd -vs- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd.)(2104) eKLR** this Court expressed itself as follows:

"We respectfully reject the notion that Article 159(2) (d) of the Constitution and the overriding objectives of the Civil Procedure Act and Rules could be invoked to justify the departure from

well used procedure for perfecting declaratory judgments by inviting parties to compute entitlements and filing affidavits as happened in this case. We reiterate that it would be a serious abdication of the judicial function was the same to be delegated to the parties who come to courts for that very determination."

96. Guided by our evaluation of the prayers sought in the amended petition, we make a finding that the trial court erred in law in issuing orders and directions on unpleaded issues.

POST-JUDEMENT SUPERVISION OF IMPLEMENTATION OF JUDGMENTS and THE POLITICAL QUESTION DOCTRINE

97. We have examined the judgment, directions and orders made by the trial court. One of the directions is that the appellant and the 2nd and 3rd respondents were to file by way of affidavit State policies and programs on the provision of shelter and access to housing for marginalized groups such as residents of informal and slum settlements; the parties were to report back to the trial court on the progress made toward resolution of the petitioners' grievances. The directions given by the trial court lead us to consider the role of courts in post judgment supervision of implementation of the judgments.

98. In considering the issue, we are alive to the provisions of ***Article 159 (2) (c)*** of the Constitution which enjoins courts to promote alternative dispute resolutions mechanism inter *alia* through reconciliation, mediation or arbitration. We emphasize that these alternative dispute resolution mechanisms must be adopted and effectuated prior to judgment by the trial court. With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In **Marbury -vs- Madison – 5 US. 137** it was stated that:

"The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion."

99. In **Peter Njoroge Mwangi & 2 others -v- The Attorney General & Another, Nairobi Petition No. 73 of 2010**, it was aptly expressed that the legislature determines the legislative policy through the statute it enacts. In **Speaker of the Senate & another -v- Hon. Attorney General & 3 others (2013) eKLR**, the Supreme Court expressed itself as follows:

"…courts ought not to indiscriminately take up all matters that come before them but must exercise caution to avoid interfering with operations of the other arms of government save for where they are constitutionally mandated…."

100. In **Ndora Stephen -v- Minister for Education & 2 Others**, **Nairobi High Court Petition NO. 464 of 2012,** Mumbi Ngugi, J. correctly observed that the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled" Would the court interfere or evaluate the soundness of the policy" A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to ***Article 43 (1)*** of the Constitution, the provisions of ***Article 20 (5) (c)*** of the Constitution must be borne in mind. ***Article 20 (5) (c)*** stipulates that the court 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. We opine that it is advisable for courts to

practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts. Limited to the facts of this case, post-judgment supervision of implementation of judgments is not a function of a trial court. Implementation and execution of judgments is governed by specific rules and it is to these rules that resort must be made.

COMPARATIVE JURISPRUDENCE ON POST-JUDGEMENT SUPERVISION

101. Post-judgment supervision of implementation of judgment is a recent development in comparative jurisprudence. Such post-judgment supervision is at times referred to as supervisory orders or structural interdicts and they arise out of the situations created by a new and transformative constitutional order. India, Canada and South Africa are some of the states that embrace post-judgment supervisory orders.

102. The South African Constitutional Court in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)** paragraphs **19 and 69** where Ackermann J, writing for the majority expressed:

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights. ... Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.”

103. In the case of **Treatment Action Campaign v Minister for Health 2002 (4) BCLR 356 (T)** , the South African High Court made a mandatory order which was linked to a structural interdict or supervisory order. On appeal to the Constitutional Court, the government contended that the High Court had erred in making a mandatory supervisory order and in not limiting itself to a declaratory order. The Constitutional Court referred to various occasions on which it had made mandatory orders, analysed the practice in other countries, and held that there is no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. The court similarly had no difficulty with the principle of ordering a structural interdict. Referring to its own decision in **Pretoria City Council v Walker 1998 (2) SA 363 (CC),** that South African courts have that power; the court stated that ‘in appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. (See **TAC No. 2 2002 (5) SA 721 (CC).**

104. In South Africa, the use of supervisory orders has arisen in the context of the right to housing and the right to property. In the case of **Madderklip Baerdery (Edms) Bpk v President van die RSA 2003 (6) BCLR 638 (T),** homeless people took up occupation of part of a piece of privately owned land. The landowner successfully applied to court for an eviction order. By this time, some 40,000 homeless people were living on the land. The cost to the landowner of carrying out the eviction order had become prohibitive. The landowner then went back to court, this time asking for an order that the government carry out the eviction order. The upshot was a declaration by the High Court that the government was in breach of its constitutional duty to the landowner to protect its property rights, and its constitutional duty to the occupiers to provide access to adequate housing. The court ordered the government to remedy both breaches, and made a supervisory order requiring the government to place before the court a plan on how it proposed to do so. The government appealed to the Supreme Court of Appeal (SCA). The

SCA referred to the problems which structural interdicts can create, and found that this particular structural interdict suffered from many of those defects. It rejected the use of a structural interdict in this case, and set aside the High Court order. Instead, it declared that the occupiers were entitled to occupy the land until alternative accommodation had been made available to them, and that the landowner was entitled to the payment by government of compensation, as constitutional damages, for loss which it suffered through being deprived of the use of its land. The government then appealed further, to the Constitutional Court. That court also held against the government, but this time the basis of the decision was that the state had infringed the landowner's right to the rule of law and to access to justice in terms of ***Section 34*** of the South African Constitution, by failing to provide an appropriate mechanism to give effect to the eviction order of the High Court. The Constitutional Court rejected the submission on behalf of the government that only a declaratory order should be made. It held that having regard to the long history of the landowner's attempts to relieve its property from unlawful occupation, something more effective was required than the clarification of rights which would be achieved by a declaratory order. The Constitutional Court referred to the SCA's discussion of the advantages of various forms of relief, and held that the relief ordered by the SCA had been the most appropriate in the circumstances. (See **Moddeifontein Squatters, Greater Benoni City Council v Modder/dip Boerdery (Pty) Ltd (Agri SA and Legal Resoun:es Centre, Amid Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resoun:es Centre, Amid Curiae) 2004 (6) SA 40 (SCA) paras 39-40;** *see also* **Resident of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Constitutional Court) Case CCT 20/04, unreported** judgment delivered 13 May 2005. The question of appropriate relief is discussed at paras 53 to 66).

105. In **Sibiya v Director if Public Prosecutions (Johannesburg High Gourt**), ***(Constitutional Court) Case CCT 45/04,*** the use of supervisory orders was upheld. In this case, when the Constitutional Court about ten years ago declared the death penalty inconsistent with the Constitution, a number of prisoners were on death row awaiting execution. There had been a considerable delay in implementation of the statutory procedure for substituting the death sentences. The court held that the process had been unsatisfactory, and had taken far too long. It was important that all outstanding death sentences be substituted as soon as possible. The court pointed out that it had 'the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order'. The court accordingly ordered that the necessary steps to achieve the substitution of the death sentences must be taken 'as soon as possible', and that the respondents were to report to the court within the following twelve weeks concerning all the steps taken to comply with that order, and setting out in full the reasons why any death sentence had not yet been set aside by that date. Detailed reporting requirements were spelt out in the order of the court.

106. Both the Constitutional Court of South Africa and the Supreme Court of Canada have affirmed the ability of judges to issue complex and mandatory relief and to retain supervisory jurisdiction in constitutional cases. In **Minister of Health v Treatment Action Campaign *(No 2)* 2002 (5) SA 721 (CC)** (See **also Pretoria City Council v Walker 1998 (2) SA 36)** the South African Constitutional Court indicated that 'a mandamus and the exercise of supervisory jurisdiction' may be necessary to ensure an effective remedy for a breach of any constitutional right, including a socio-economic right. The convergence of South African and Canadian law on this issue is significant given the influence of the Canadian Charter on the drafting of the South African Bill of Rights. Both constitutions contemplate wide remedial powers for Courts. ***Section 24(1)*** of the ***Canadian Charter of Rights and Freedoms*** contemplates that courts of competent jurisdiction can grant whatever remedy is appropriate and just in the circumstances. The analogues to s ***24(1)*** are ***Sections 38*** and ***172(l) (b)*** of the **Constitution of the Republic of South Africa Act 108 of 1996** which contemplate the award of appropriate, just and equitable relief.

107. The Supreme Court of Canada in **Doucet-Boudreau v Nova Scotia (Minister of Education) [2003]3 SCR 3** held that a trial judge could, after ordering that a government build minority-language schools, retain jurisdiction over the case and require the government to report back to the judge with affidavits on its progress in complying with the order. These two important decisions make clear that both South African and Canadian judges are not limited to declaratory or one-shot remedies.

108. In **Minister of Health v Treatment Action Campaign (No 1) 2002 (5) SA 703 *(CC)***, the South African Court rejected submissions that an order to provide a drug where medically indicated was impermissibly vague and violated the principles of the separation of powers. The Supreme Court of Canada was divided over post-judgment supervision in the case of ***Doucet-Boudreau (supra).*** Five of the nine judges rejected allegations that the trial judge had issued an impermissibly vague and procedurally unfair order that the government makes 'best efforts' to build the schools in set periods and report back to the judge on its progress. The five judges in the majority relied upon appellate court deference to the trial judge's exercise of remedial discretion while expressing the view that the remedy was not perfect. The four judges in the minority issued a strongly worded dissent arguing that the trial judge's order was impermissibly vague and procedurally unfair, and violated the separation of powers. They even went so far as to characterize it as a 'political' remedy that was inappropriate for a judge to make. In Canada, although it is now clear that judges can issue structural injunctions and retain supervisory jurisdiction, it is not clear when it will be appropriate and just for judges to do so and how such relief should be fashioned.

109. American courts, stressing their traditional equitable powers, have issued detailed injunctions and retained jurisdiction in order to desegregate school systems through busing and other remedies and to reform prison conditions. The American courts have stressed that 'remedial judicial authority does not put judges automatically in the shoes of school authorities ... judicial authority enters only when local authority defaults', and that courts should not order remedies that exceed the violations and that they should balance the competing interests (See **Swann v Charlotte-Mecklenberg Board of Education 402 US 1 (1971) at 16**).

110. The Supreme Court of India has embraced a similar approach and explained: 'As the relief is positive and implies affirmative action, the decisions are not "one-shot" determinations but have on-going implications.' (See **Sheela Barse v Union of India (1988) AIR 2211 (SC) at 221).** The courts in both USA and India have required specific reports on compliance back to the court or to a court-appointed assistant.

111. In India, the concept of continuing mandamus enables a trial court to monitor implementation of its orders. Continuing mandamus has been discussed and dealt with in cases such as **Vineet Narain v. Union of India, AIR 1996 SC 3386** and **Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.** These Indian cases were premised on interpretation of ***Articles 32*** and ***Article 226*** of the Constitution of India of which the equivalent is not found in the Kenyan Constitution.

112. Noting the comparative jurisprudence and trends in issuing supervisory orders, the directions given by the trial court in this case and the directions made in ***Satrose Ayuma (supra)*** borrow from the Indian concept of continuing mandamus. Whereas in the instant case there was no prayer for an order of mandamus let alone continuing mandamus we also note that the Kenya Constitution does not have a provision similar to ***Articles 32*** and ***226*** of the Indian Constitution. It is our considered view that ***Article 23 (3)*** of the Kenya Constitution that permits the High Court to grant an appropriate relief should not be construed to be provision that permits the High Court to borrow legislations from other countries and through judicial interpretation embed them into the laws of Kenya. ***Article 23 (3)*** is not a legislative instrument for the courts. In our considered view, ***Article 23 (3)*** permits the High Court to be innovative

and creative in crafting appropriate relief on a case by case basis. It is our considered view that under the political question doctrine, a court has no jurisdiction to make orders relating to policy formulation or give guidelines on who should participate in the formulation of government policy. As regards the specific facts of this case, the orders and directions given by the trial court are policy related and did not take into account the issue of flight path to Wilson Airport and threat to the security of aerodromes. It is our view that if properly crafted to avoid vagueness; a supervisory order can be made pursuant to the provisions of ***Article 23 (3)*** of the 2010 Kenya Constitution. It is noteworthy that in ***Ndoria Stephen (supra),*** the trial court observed 'that ordering the respondent to produce before court policies and quotas that has to be used to ensure that the students from marginalized areas were not discriminated was unnecessary as the respondents did produce the policies and measures aimed to ensuring access to education."

RELIANCE ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

GUIDELINES ON EVICTIONS

113. The trial judge (Mumbi, J.) at paragraph 40 of her judgment relied upon the UN Guidelines on Evictions as enunciated by the United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 titled "The Right to Adequate Housing (Article 11.1): Forced Evictions: (20/5/97). In the case of ***Kepha Omondi Onjuro (supra)*** Odunga, J. at paragraph 109 of his judgment likewise cited and relied upon the United Nations Basic Principles and Guidelines and stated that the same were part of Kenyan law by virtue of ***Articles 2 (5)*** and ***(6) of the Constitution***. Lenaola, J. in ***Satrose Ayuma (supra)*** at paragraphs 80 to 85 of his judgment similarly cited and relied upon the aforestated UN Guidelines.

114. The aforestated UN Guidelines lay down the conditions to be undertaken during evictions. For instance, there must be mandatory presence of government officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks. The UN Guidelines further provide that the person responsible for eviction must provide just compensation for any damage incurred during eviction and sufficient alternative accommodation and must do so immediately upon evictions. At the very least, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities.

115. In the High Court decisions referred to above, reliance upon the UN Guidelines is premised on ***Article 2 (5)*** and ***(6)*** of the Constitution. The Articles stipulate that general rules of international law and any Treaty or Convention ratified by Kenya is part of the laws of Kenya. Whereas we do not fault the High Court for citing the UN Guidelines, it is imperative to bear in mind the hierarchy of laws in Kenya. 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.

116. Further, it must be noted that ***Article 2 (5)*** of the Constitution makes general rules of international law to be part of the laws of Kenya. It is the general rules that form part of the laws of Kenya and not all rules of international law. In this context, rules of international law are not part of the laws of Kenya unless they are part of the general rules of international law. The general rules of international law are those rules that are peremptory principles and are norms of international law; they are the customary rules of international law or *jus cogens* in international law, they are those rules from which no

derogation is permitted; they are globally accepted standards of behavior; they are rules and principles that are applicable to a large number of states on the basis of either customary international law or multilateral treaties; the general rules of international law are not based on the consent of the State but are obligatory upon state and non-state actors on the basis of customary international law and peremptory norms (*jus cogens).*

117. We are cognizant of dicta in **Peter Anyang Nyongo -v- The Attorney General of the Republic of Kenya (EACJ Reference No. 1 of 2006)** where the East African Court of Justice held that a State may not invoke the provisions of its internal law as justification for its failure to perform obligations under a Treaty; that it cannot be lawful for a State which has voluntarily entered into a Treaty with other states by which rights and obligations are vested not only on the State parties but also on their people, to plead that it is unable to perform its obligations because its laws do not permit it to do so; that this principle is embodied in ***Article 27*** of the **Vienna Convention on the Law of Treaties.**

118. Guided by the foregoing analysis, it is our considered view that before a court can invoke ***Article 2 (5)*** of the Constitution, the court must be satisfied that the rule of international law being invoked is a general rule of international law and not simply a rule of international law. The court must demonstrate that the rule is a general rule of international law. Further, it must be borne in mind that the United Nations and any other international or multilateral organization is neither a supplementary nor complementary legislature for Kenya. The external sovereignty of Kenya is not only political but legal and legislative and such sovereignty is internally subject to the Constitution of Kenya. Neither the UN nor any international organization legislates for Kenya and it is impermissible to use ***Article 2 (5)*** of the Constitution as a basis to justify any and all rules and principles of international law as part of the laws of Kenya. It is only the general rules of international law that are part of the laws of Kenya.

RIGHT TO PRIVATE PROPERTY AND SOCIO-ECONOMIC RIGHTS

119. In this appeal, the appellant urged that the trial court erred and failed to take into account that the 1st respondent and the petitioners had no claim or right to the suit property. It was submitted that the court rightly held that the petitioners had no legitimate right over the suit property but erred in holding that the appellant should have provided alternative accommodation to the 1st respondent; that the trial court erred in making an order that the appellant had to provide a relocation option to the petitioners.

120. It is manifest that the trial court in making its orders and issuing directions cited and was influenced by the orders and directions given in the Indian case of **Olga Telis & Others -v- Bombay Municipal Corporation (1985) Supp. SCR 51** (See paragraph 61 of the judgment). The trial court was also influenced by the orders and directions issued by the South African Constitutional Court in the case of **Irene Grootboom & others -v- The Government of the Republic of South Africa & others (2001) (1) SA 46**. It is noteworthy that these cases involved interpretation of constitutional provisions of the respective countries and simular provisions are not found in the Kenyan Constitution.

121. In the South African ***Irene Grootboom case (supra),*** Section 26 of the South African Constitution which provides the right of accessing to housing is not in ***pari materia*** to Kenya's ***Article 43 (1) of the Constitution***. Of critical importance is that Kenya's Article 43 (1) (b) does not have a provision similar to ***Section 26***

(3) of the South African Constitution.

"***Section 26*** of the South African Constitution provides:

26: (1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3)No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

Section 8 of the South African Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (1998) provides:

8(1) No person may evict an unlawful occupier except on the authority of an order of a competent court.

122. Kenya's Article 43 (1) which is the basis of the right of access to housing provides:

43 (1): Every person has the right:

(a) …….

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

(c)…..

(d) ……..

(e)……

(f)…….

123. The ***Irene Grootboom*** case indicates that in the South African constitutional context, there is enabling legislation as contemplated by ***Section 26 (2)*** of the Constitution to actualize the right to housing. The South African enabling legislations include the **Housing Act No. 107 of 1997**; the **Housing Consumers Protection Measures Act No. 95 of 1998 and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No. 19 of 1998**. As of the date of this judgment, despite ***Article 21 (3) and (4) of the Kenyan Constitution***, such enabling legislations do not exist in Kenya. Prima facie, the difference between the South African and Kenyan Constitutions on the right of accessing to housing and the absence of enabling legislations in Kenya is a lesson that Kenyan court's should not lock stock and barrel adopt foreign jurisprudence without ensuring the context and relevance of the foreign statute that is subject of interpretation by the foreign court.

124. Whereas citation and reliance on persuasive foreign jurisprudence is valuable, foreign experiences, values and aspirations of other countries should rarely be invoked in interpreting the Kenyan Constitution. The progressive needs of the Kenyan Constitution are different from those of other countries. The Supreme Court in **Jasbir Singh Rai & 3 others -v- Estate of Tarlochan Singh Rai & 4 others (2013) eKLR**, aptly captured this when it stated as follows:

"In the development and growth of our jurisprudence, commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the US yet another, just because they seem

to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country."

125. In the instant case, the 1st respondent and the petitioners allege that they had acquired the suit property by adverse possession having occupied the same for over 19 years; that the forcible, violent and brutal eviction through demolition of their homes without according their children alternative shelter or accommodation was a violation of the children rights under ***Article 21 (3)*** and ***53*** **of the Constitution**.

126. The trial court in considering the contestations between the parties correctly decided on the issue of adverse possession and determined that the petitioners did not have any legitimate claim to the suit property. However, in its determination, the trial court did not consider the tension between socio-economic rights and the right to private property in the Kenyan context. It is this tension that we consider hereunder.

127. Enforcement of private property rights has the potential to impose restrictions on the fulfillment of socioeconomic rights. Realization of progressive social economic rights involve social redistribution programmes that seek to improve access to resources amongst the beneficiaries and this may involve alteration of existing property arrangements, which might be seen as violating justiciable constitutional property rights.

128. Like in the instant case, the issues of eviction of slum dwellers or occupiers from property that they do not own exemplify the tension between private property and realization of socio-economic rights. Article 40 of the Constitution protects the right to property. No person is to be deprived of property of any description or interest or right over property unless the same is in public interest and for a public purpose and subject to prompt and just compensation. In the case of **Susan Waithera Kariuki & 4 others -v- Town Clerk Nairobi City Council & 2 others Petition No. 66 of 2011**, Musinga, J. (as he then was) on the issue of eviction of residents of an informal settlement from property that they did not own expressed that "the petitioners have resided on the properties where they are being evicted from for many years. It is unreasonable and indeed unconstitutional to give the petitioners one or two day 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."

129. In the instant case, at paragraph 57 of the judgment, the trial court expressed itself as follows:

"**In the present case, the State had an obligation to protect the petitioners existing homes, rudimentary as they were, while doing what it could, to the extent of its available resources, to ensure their progressive access to adequate housing. It cannot properly argue, as it has in this case, that since the petitioners had no right to the land, their houses in Mitumba village could be demolished arbitrarily without providing them with alternative accommodation…"**

130. In the case of **Satrose Ayuma & 11th Others -v- The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others, Nairobi HC Petition No. 65 of 2010**, the learned judge Lenaola, J. at paragraph 90 of his judgment expressed himself as follows:

"It does not matter that the petitioners do not hold title to the suit premises and even if they had been occupying shanties, the 1st respondent was duty bound to respect their right to adequate housing as well as their right to dignity."

131. Muchelule, J. in **Ibrahim Sangor Osman -v- Minister of State for Provincial Administration & Internal Security Constitutional Petition No. 2 of 2011** adopted the ***Article 13*** of the International

Covenant on Economic, Social and Cultural Rights (ICESCR) and expressed himself as follows:

"Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction…."

132. In **Veronica Njeri Waweru & 4 others -v- The City Council of Nairobi & others, Nairobi Petition No. 58 of 2011**, Mumbi Ngugi, J. in a judgment delivered on 2nd March 2012 at paragraph 29 of her judgment expressed herself as follows:

"The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licences to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land and they therefore cannot be deprived of that which they have no rights over."

133. On the question whether the eviction of the petitioners violated their right to housing, the learned judge at paragraph 31 expressed herself as follows:

"Article 43 (b) guarantees to everyone the right to accessible and adequate housing and to reasonable standards of sanitation….Article 43 (3) deals with the right to housing. It does not encompass, in my view, persons in the circumstances of the petitioners in this case who are in their own words, operating businesses such as garages, hardware and furniture shops and who have invested millions of shillings in their businesses on the road reserve. Indeed, even in the case of those who may be poor residents of informal settlements, the duty of the state may be limited to putting up in place policies to ensure access to adequate housing. Article 43 cannot therefore be interpreted to impose a duty on the respondents to provide alternative business premises to men who can afford to invest millions in their businesses. I find therefore, in the instant case, no violation of the petitioners rights under Article 43 of the Constitution."

134. On the issue forcible eviction and the right to fair administrative action and reasons for eviction, in ***Veronica Njeri Waweru* (supra)**, Mumbi Ngugi, J. at paragraphs 35 and 38 of her judgment expressed herself as follows:

"As noted above, the petitioners are licensees. As such they are entitled to the rights that accrue to the holders of licenses. There can be no violation of their rights under Article 47 if they have been given reasonable notice to vacate the land and neither can their rights be deemed to have been violated with regard to land that they have no rights of use or ownership over…..The land in question is a road reserve and the public interest demands that such land should be used for the purpose it is intended and should not be appropriated for private use. The claim of the petitioners that they have operated their businesses on the land for the last ten years cannot outweigh the public interest to have the land revert to the purpose it was intended to serve as a road reserve."

135. Odunga, J. in ***Kepha Omondi Onjuro (supra) at paragraph 142*** of his judgment expressed himself as follows:

"In my view, where the State allows people to occupy land, be it government or private for a considerable period of time so that the people consider the said land to be their homes, it would be inhuman for the State to suddenly evict them forcefully therefrom without affording them an opportunity to seek alternative mode of accommodation."

136. We have surveyed the emerging judicial decisions in Kenya in an attempt to discern the emerging principles to address the seeming tension between private property and realization of socio-economic rights. The Constitution in the Bill of Rights recognizes and protects the right to private property. Whereas socio-economic rights are recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another. In Latin, socio-economic rights cannot confer *rights in alieno solo*. Under the law as it stands today, enforcement and realization of socio-economic rights does not override the provisions of the **Limitation of Actions Act (Cap 22 of the Laws of Kenya).** Prescriptive rights to land cannot be acquired in the name of enforcement of socio-economic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineering, take away and re-distribute property rights. Subject to ***Article 25*** of the Constitution, all provisions in the Bill of Right are to be treated as equal with no one provision overriding another.

137. Finally, the appellant urged us to find that the trial court erred in holding that it was responsible for eviction of Mitumba residents and demolition of residential houses and other structures at Mitumba village. It was the appellant's submission that it was not responsible for the eviction and demolition. We have considered the evidence on record; there is no dispute that eviction and demolition took place; there is no dispute that there was presence of security agents at the time of eviction and demolition. The uncontroverted presence of security agents means that the State was responsible for the eviction and demolition. As regards culpability of the appellant, there is no dispute that the appellant issued a notice to the residents of Mitumba village vacate the suit property; there is no dispute that the notice explicitly stated that there shall be no further reference to the residents if they did not vacate the property upon expiry of the notice period. From these facts, the trial court came to the conclusion that the appellant was also responsible for the eviction and demolition of the residential houses and structures at Mitumba village. The legal issue is whether the trial court erred in drawing the inference that the appellant, in addition to the State, was responsible for the eviction of Mitumba residents and demolition of their houses and other structures.

138. In civil cases, a court makes its findings and determinations on a balance of probabilities. This means that it must be established that the fact in issue more likely than not to have happened; that is, that it is 'quite likely' or 'not improbably' though less likely than not that it happened***(See Davies v. Taylor [1974] A.C. 207; see also*** In ***In re A (A Minor) (Care Proceedings)*** **[1993] 1 F.L.R. 824*).***

139. **In *Re B (2008) UKHL 35*,** Lord Hoffman expressed the term balance of probability using a mathematical analogy:

"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

140. In the instant case, the burden to prove that the appellant evicted the residents of Mitumba village and demolished their residential houses and structures lay upon the 1st respondent. There is no evidence on record to show that the security agents who were present during the demolition and

evictions were acting at the behest and upon instructions of the appellant. In law, security agents do not and cannot take instructions from the appellant. There is a strong possibility that the appellant instigated the eviction and demolition; however findings of the court should not be based on possibilities but probabilities. Is it probable that the appellant instigated the evictions and demolitions" The link between the appellant and the security agents who made the demolition and evictions is not established by the evidence on record. In the absence of the link it is speculative to assert that the appellant was responsible for eviction and demolition of Mitumba village. Suspicion, speculation and possibilities are not the basis of civil responsibility and liability. We are not satisfied that there is evidence on a balance of probability to prove that the appellant was responsible for the eviction and demolition of Mitumba village; to this extent the trial court erred in holding the appellant responsible for the eviction and demolition. We concur with the trial court that the State was responsible for the eviction of residents of Mitumba village and that the State is responsible for the demolition of the residential houses and structures at Mitumba village.

DETERMINATION

141. We have considered all the other grounds of appeal and we are satisfied that the grounds analyzed in this appeal are adequate and sufficient to dispose the appeal. We hasten to add that in any eviction, forcible or otherwise, adequate and reasonable notice should be given. Respect for human rights, fairness and dignity in carrying out the eviction should be observed. The constitutional and statutory provisions on fair administrative action must be adhered to. Based on the facts of this case and the relevant applicable law, the analysis we have conducted above leads us to arrive at the following conclusions and determinations:

a. *The trial court made correct findings as regards the 3rd respondent but erred in law in making final orders that are applicable and enforceable against the 3rd respondent. The 3rd respondent as Commissioner of Lands is under no legal obligation to allocate or alienate land that is already alienated and registered in the name of a third party; to this extent the trial court erred in law in making a composite order and issuing directives applicable and enforceable against the 3rd respondent.*

b. *The trial court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the petitioners' grievances.*

c. *Subject to limited exceptions, delivery of judgment renders a trial court functus officio. The trial court erred in law in reserving for itself outstanding issues to be considered after judgment. The court further erred in allowing affidavits and or pleadings to be filed after delivery of judgment.*

d. *Whereas a court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim judgment is not part of the Kenyan legal system. Whereas a trial court has the jurisdictional competence to make interim orders, the trial court erred in delivering a judgment that was not a final judgment that determined the rights and liability of parties.*

e. *Under the political question doctrine and noting the provisions of Article 20(2) and 20 (5) (c) of the Constitution, a trial court should rarely interfere with a decision by a state organ concerning the allocation of available resources for progressive realization of socio-economic rights solely on the basis that it would have reached a different conclusion.*

f. *The trial court erred in law in issuing orders and directions on unpleaded issues.*

g. *The trial court erred in law and fact when it failed to properly evaluate the pleadings and evidence on record and to take into account critical aspects of evidence relating to the flight path to Wilson Airport; the court failed to evaluate the security and safety of the flight path viz-a- viz the structures in Mitumba village; the court failed to evaluate the issue of unregulated garbage attracting birds along Wilson Airport's flight path. Due to these failures, we interfere with the findings and conclusions made by the trial court and come to a determination that the trial court erred in fact and law in failing to properly evaluate the evidence on record.*

h. *The trial court erred in law in issuing orders and directions compelling the appellant to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements while ignoring the appellants express statutory mandate.*

142. The totality of the foregoing errors leads us to find that this appeal has merit and is hereby allowed. We set aside in entirety the judgment, decree, orders and directions given by the trial court in its judgment dated 11th April 2013. We set aside all consequential orders ensuing therefrom. Having held that a trial court becomes *functus officio* after delivery of judgment and that no further pleadings can be filed after judgment, and that on the facts of this case the trial court has no post-judgment supervisory powers, we hereby direct that no further proceedings shall be conducted by the trial court emanating from the amended Petition dated 1st December 2011. Each party is to bear its costs in the court below and in this appeal.

Dated and delivered at Nairobi this 1st day of July, 2016

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR