

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CONSTITUTIONAL PETITION NO. OF 2011

IN THE MATTER OF: ARTICLES 2(6), 22(2)(a), (3)(d), 23(1), (3) &
165(3)(a),(b),(d)(i), (ii) OF THE CONSTITUTION
OF KENYA 2010

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 26(1),(3),
27(1),(2), 28, 29(c),(d),(f), 35, 40(1)(a),(b), (3), (4),
43(1)(b),(c),(f), 45(1), 47(1),(2), 50(1), 53(c),(d), (2) &
57(b) and (c) OF THE CONSTITUTION OF KENYA

BETWEEN

IBRAHIM SANGOR OSMAN
í í .í í í í í í .í í ..í í PETITIONER
(ON HIS OWN BEHALF AND
ON BEHALF OF 1,122 EVICTEES OF MEDINA
LOCATION, MUNICIPAL COUNCIL OF GARISSA)

-VERSUS-

1. THE HON. MINISTER OF STATE
FOR PROVINCIAL ADMINISTRATION
& INTERNAL SECURITY
2. THE MUNICIPAL COUNCIL OF GARISSA
3. THE HON. MINISTER FOR LANDS
4. THE HON. ATTORNEY
GENERAL í í í í í í í í RESPONDENTS

AMICUS CURIAE INTERVENTION

**(Articles 22(1),(2) & (3), 23(1) & (3) & 165(1) & (3) of the
Constitution of Kenya, 2010, Rules 20 and 21 of the Constitution of
Kenya (Supervisory Jurisdiction and Protection of Fundamental
Rights and Freedoms of the Individual) High Court Practice and
Procedure Rules, 2006**

I. Introduction and Interests of Amici

1. The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), the Socio-Economic Rights Institute (SERI), the Community Law Centre (CLC), the Centre for Economic and Social Rights (CESR), the Centre for Equality Rights in Accommodation (CERA) and the Social Rights Advocacy Centre (SRAC), members of the International Economic, Social and Cultural Rights Network (ESCR-NET)

Adjudication Working Group, as well as Malcolm Langford, Co-Coordinator of the ESCR-Net Adjudication Working Group and Director of the Socio-Economic Rights Programme (Norwegian Centre for Human Rights, University of Oslo) (hereinafter *Amici*) respectfully seek leave to intervene as *amicus curiae* in the above-reference case.

2. The *Amici* are human rights organizations with a shared interest in the adjudication of economic, social and cultural rights and with experience in litigating such rights before domestic and international fora. The *amici* have provided assistance to many domestic courts and international human rights bodies in interpreting and applying social and economic rights, particularly the right to adequate housing. The *amici* have assisted other courts and human rights bodies in interpreting and applying international human rights law relevant to forced evictions. They have assisted courts and human rights bodies where they have applied rights such as the right to adequate housing, the right to life, security of the person and equality in cases involving evictions.

3. The *Amici* seek to assist the Court in the present case with the application of relevant international law, including as a means of interpreting the Constitutional provisions relied upon by the Petitioners. *Amici* also will provide at the merits phase and analysis of international law as well as comparative law dealing with relevant constitutional rights and application of international law.

II. Brief overview of relevant facts alleged by Petitioners

4. Petitioners were evicted from their homes and had their homes demolished in or about December 2010.

5. Petitioners were rendered homeless on account of the evictions and had personal property destroyed during the eviction including building materials and household goods.

6. Petitioners were not provided with alternative land or alternative housing, they were not provided with due process protections including adequate notice or the ability to challenge the legality of their eviction, nor the opportunity for meaningful participation in decisions related to the eviction.

7. The eviction resulted in Petitioners relocating to areas with no access to free and compulsory basic education for children or to other essential services. It also resulted in cutting off access to livelihood opportunities that affect the rights to food, water and sanitation, and health care.

III. Brief overview of international law binding upon the Republic of Kenya prohibits forced eviction.

8. The international community has repeatedly affirmed that forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing.¹

9. The Republic of Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 January 1976 and consequently became bound to respect, protect and fulfill the rights therein, including the right to adequate housing and the related prohibition of forced eviction, as guaranteed by Article 11 of the ICESCR as well as the right to education as guaranteed by Article 13 of the ICESCR.

10. The UN Committee on Economic, Social and Cultural Rights (CESCR), mandated with monitoring compliance with the ICESCR, provides a detailed analysis of the prohibition on forced eviction under international law. Forced eviction is defined by the Committee as:

The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.²

11. Furthermore, the CESCR has clarified that notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.³ This requirement applies to those living in informal settlements.

12. Additionally, for evictions to be justified under the ICESCR, they must (1) only be carried out in the *most exceptional circumstances*;⁴ (2) after *all feasible alternatives* to eviction that address the exceptional

¹ Commission on Human Rights, Resolution 1993/77, UN Doc. (10 March 1993); Commission on Human Rights, Resolution 2004/28, UN Doc. (16 April 2004).

² Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), para. 4, U.N. Doc. E/1998/22, annex IV at 113 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

³ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) at para. 8(a).

⁴ *Id.* at para. 18.

circumstance are explored *in consultation with the affected community*;⁵ and (3) after due process protections are afforded the individual, group or community.⁶

13. The ICESCR imposes an additional obligation upon governments to ensure that no form of discrimination is involved in any eviction. Nor should an eviction render persons homeless or vulnerable to other human rights violations. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.⁷

14. In its Concluding Observations on the Republic of Kenya in 2008, the CESCR referenced to the above-referenced standards, recommending that the Republic of Kenya:

Consider including a provision in its new draft Constitution to ensure that evictions are only used as a last resort, adopt legislation or guidelines strictly defining the circumstances and safeguards under which evictions must take place, in accordance with the Committee's general comment No. 7 (1997) on forced evictions, and ensure that each victim of forced evictions is provided with adequate alternative housing or compensation and that he or she has access to an effective remedy.⁸

15. The International Covenant on Civil and Political Rights (ICCPR), ratified by the Republic of Kenya on 23 March 1976, also prohibits forced eviction under Article 17. Indeed, the Human Rights Committee, which monitors compliance of the ICCPR, addressed forced eviction in Kenya in 2005, finding that forced eviction "arbitrarily interferes with the Covenant rights of the victims of such evictions, especially their rights under article 17 of the Covenant" and that the Government "should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those

⁵ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003) at para. 14.

⁶ *Id.* at para. 16.

⁷ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003) at paras. 13, 16.

⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations: Kenya, UN Doc. E/C.12/KEN/CO/1 (1 December 2008) at para. 31.

affected have been consulted and appropriate resettlement arrangements have been made.⁹

16. With respect to the African Charter on Human and Peoples' Rights (African Charter), ratified by the Republic of Kenya on 23 January 1992, the African Commission on Human and Peoples' Rights (African Commission) relied on the substantive content of the right to adequate housing and the prohibition of forced eviction under the ICESCR to interpret provisions of the African Charter. In doing so, the African Commission has held that there is an implied right to adequate housing and related prohibition on forced eviction in Articles 14 (right to property), 16 (right to enjoy the best attainable standard of physical and mental health) and 18(1) (right of the family to be protected by the State) of the African Charter.¹⁰ The African Commission subsequently held, again relying on the ICESCR jurisprudence, that evictions can only occur in the most exceptional circumstances and after all feasible alternatives are explored with the affected community.¹¹

17. Amici will elaborate on the international prohibition on forced eviction, including on how it applies directly and by way of interpretive guidance to the present case, during the merits phase.

IV. International law binding upon the Republic of Kenya must be used to interpret national constitutional and legislative protections.

18. The Vienna Convention on the Law of Treaties requires that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"¹² and that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."¹³

19. The United Nations General Assembly has stated that "States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations."¹⁴

⁹ Human Rights Committee, Concluding Observations: Kenya, UN Doc. (2005).

¹⁰ African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria (27 May 2002) at para. 60.

¹¹ African Commission on Human and Peoples' Rights, Communication 276 / 2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, at para. 200.

¹² Vienna Convention on the Law of Treaties, Article 26, 1155 U.N.T.S. 331, entered into force 27 January 1980.

¹³ *Id.* at para. 27.

¹⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United Nations General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005).

20. Furthermore, the Committee on Economic, Social and Cultural Rights has adopted General Comment No. 9 which states that “although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.”¹⁵ The Committee also emphasized that “courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant.”¹⁶

21. Finally, the Constitution of the Republic of Kenya states that “The general rules of international law shall form part of the law of Kenya”¹⁷ and that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”¹⁸ In *Susan Waithera Kariuki & 4 others v. Town Clerk, Nairobi City Council & 2 others*, the High Court of Kenya at Nairobi relied on these Constitutional provisions to resort to international law for guidance in dealing with a case of forced eviction.¹⁹

22. Consequently, national constitutional provisions and legislation must be interpreted consistently with a country's international legal obligations including those related to human rights referenced in the present case.

IV. Eviction and Destruction of Homes Results in Irreparable Damage

23. The Optional Protocol to the ICESCR provides guidance on the appropriateness of interim measures such as injunctive relief in the case of forced eviction. Informed by legal standards prevalent in most national and international legal systems, the Optional Protocol states that:

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant (Nineteenth session, 1998), para. 5, U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).

¹⁶ *Id.*

¹⁷ Constitution of the Republic of Kenya, 2010, Article 2(5).

¹⁸ *Id.* at Article 2(6).

¹⁹ High Court of Kenya at Nairobi, *Susan Waithera Kariuki & 4 others v. Town Clerk, Nairobi City Council & 2 others*, Petition Case 66 of 2010 [2011] eKLR.

circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.²⁰

24. It is accepted in international human rights law that interim measures are necessary to ensure the integrity of adjudicatory processes.

The Human Rights Committee for example, has stated that a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or renders examination by the Committee moot and the expression of its views nugatory and futile.²¹ In its General Comment No. 33, the Committee affirmed that failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.²² Interim measures including injunctive relief is a common interim remedy that at the domestic level is mandatory on the parties concerned.

25. As stated above, forced eviction is a gross violation of human rights, and such violations of human rights result in irreparable damage to those evicted. If forcibly evicted again, Petitioners would suffer further irreparable damage including, *inter alia*, the loss of shelter and other personal belongings, the dangers associated with lack of shelter due to resulting homelessness, the loss of social services and networks, lack of access to education for children, and trauma suffered by the evictees including in particular children and other vulnerable members of the community.

26. Consequently, due to the urgency of the matter presented by Petitioners, the threat of further gross violations of human rights in the form of forced eviction, and the resulting irreparable damage, the issuance of interim measures including injunctive relief to prevent any further eviction is warranted in the present circumstances.

V. Mandatory Injunction (Writ of Mandamus)

27. Given that an initial forced eviction of Petitioners has already occurred and has resulted in ongoing and persistent injury to Petitioners, mandatory injunction, or a writ of mandamus, is also an appropriate interim measure.

²⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. res. 63/117 (2008), at Art. 5.

²¹ Human Rights Committee, Communication No 973/2001.

²² Human Rights Committee, General Comment No. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights at para 19

28. Pursuant to international law, including that cited above, the proper remedy for forced eviction is to return the victims as close as possible to the status quo ante.²³ In the case of most forced evictions, however, as in the present case, the previous forced eviction has resulted in ongoing and persistent injury to Petitioners and remedying such injuries can not wait until the ultimate resolution of the case. These ongoing and persistent injuries include lack of adequate housing, lack of access to safe drinking water and sanitation, lack of access to education for children, and lack of access to other social services ó all of which amount to ongoing and persistent human rights violations negatively impacting the wellbeing, safety and dignity of Petitioners. International law also requires positive obligations to remedy inadequate housing conditions, including the provision of security of tenure and the improvement of living conditions.

29. The United National General Assembly lends support for this proposition, adopting a resolution in 2005 stating that:

Remedies for gross violations of international human rights í include the victim's right to í adequate, effective and prompt reparation for harm suffered.²⁴

30. Given the ongoing and persistent injuries caused by the initial forced eviction, Respondents must be compelled through a writ of mandamus to immediately provide remedies which mitigate these ongoing and persistent injuries and to move towards the fulfillment of the right to adequate housing.

31. The Supreme Court of Appeal of the Republic of South Africa provides persuasive authority in this regard. In the case of *Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality*, the Supreme Court of Appeal considered forced eviction as a violation of the right to have access to adequate housing enshrined in Article 26(1) of the Constitution of the Republic of South Africa. In doing so, the Court held that the proper remedy was the restoration of the status quo ante and ordered that the "occupiers must get their shelters back" and that "the respondents should, jointly and severally, be ordered to reconstruct them."²⁵

²³ See, e.g., Universal Declaration of Human Rights, Art. 8; see also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United National General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005) (stating that "restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law í occurred.ö).

²⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United National General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005), at Art. 11(b) (emphasis added).

²⁵ Supreme Court of Appeal of the Republic of South Africa, *Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality*, 2007 SCA 70 (RSA) at para. 28.

32. The European Court of Human Rights also provides persuasive guidance. In the *Case of Moldovan and Others v. Romania*, the European Court dealt with the forced eviction of a Roma community in Romania. In doing so, it found a violation of Article 8 (respect for family and private life and respect for the home) and Article 3 (prohibition on degrading treatment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms for the failure of Romania to remedy the inadequate and substandard living conditions in which the community lived subsequent to and on account of the forced eviction.²⁶

33. Respondents must also be compelled through a writ of mandamus to provide all relevant information necessary for Petitioners to exercise their human right to meaningfully participate in the decisions related to their situation as well as this case. Indeed, the United Nations General Assembly has also stated that:

Remedies for gross violations of international human rights include the victims' right to access to relevant information concerning violations.²⁷

and that:

Victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and to learn the truth in regard to these violations.²⁸

34. Consequently, appropriate interim remedies, in addition to an injunction prevent further eviction, could and should include:

(a) Provision of emergency alternative housing, food, clean and safe drinking water, sanitation facilities, health care services, and access to education in the areas known as Balarik, Bula Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa.

(b) Provision of all relevant information related to:

(i) The status of adjudicating, demarcation, or registration of ownership of the land in the areas known as Balarik, Bula

²⁶ European Court of Human Rights, *Case of Moldovan and Others v. Romania*, Application Nos. 41138/98 and 64320/01, Judgment No. 2 (12 July 2005), in particular paragraphs 108 - 114.

²⁷ *Id.* at Art. 11(c).

²⁸ *Id.* at Art. 24.

Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa.

(ii) Written information exhibiting the decision(s) and reasons(s) for eviction and demolition of homes and other structures, including the exceptional circumstances deemed to justify eviction, eviction notices, court order(s) and/or any other written authority authorizing the forced eviction or demolition of homes of the Petitioners from the areas known as Balarik, Bula Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa.

(iii) Information exhibiting any efforts or steps undertaken by the Respondents to provide alternative housing as well as efforts and steps undertaken to genuinely consult with Petitioners regarding the exploration of all feasible alternatives to eviction or regarding alternative housing for those evicted from the areas known as Balarik, Bula Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa.

(c) Facilitation of the meaningful participation of the Petitioners in all decisions related to the above-mentioned remedies.

VI. Conclusion

35. Based on the foregoing, Amici request that the Court support the motion of Petitioners, including:

36. Issuance of an immediate injunction to prevent any further eviction of Petitioners.

37. Issuance of a mandatory injunction, or writ of mandamus, to remedy the results of the forced eviction of December 2010 and resulting ongoing harm as highlighted above.

DATED AT DULUTH, U.S.A. THIS 6th DAY OF MAY 2011

Bret Thiele, Esq.
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(ADVOCATE FOR THE AMICI)

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TO BE SERVED UPON:-

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2. THE HON. MINISTER IN-CHARGE OF
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3. THE TOWN CLERK
MUNICIPAL COUNCIL OF GARISSA
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4. THE HON. MINISTER FOR LANDS
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