Evictions, social justice and the constitution
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In October 2010 the Trustees of the Kenya Railways Staff Retirement Benefits Scheme sent in bulldozers before sunrise to destroy the homes of its tenants: a mixture of Railways’ pensioners, and former employees, and statutory tenants. The Trustees had already announced their plans to sell the land (‘the estate’) transferred to it to ensure payment of pensions to former employees entitled to retirement benefits, to developers. Stories like this are happening all over the country, as developers, often in collusion with local and law enforcement authorities, destroy the housing of the poor (even those with good title), evict, often, long term residents, fence off the land, and begin its commercial exploitation. In this way numerous communities are dispersed, rendered homeless, their communal life destroyed, and denied access to sanitation, education for their children, jobs are jeopardised as workers are pushed to places far from where they work. Children, the elderly and the disabled suffer most. Land grabbing of this kind is rising, ironically perhaps because of the new constitution – rushing to acquire land before the new laws - that the constitution requires to give people secure rights of tenancy and residence - are enacted.

State authorities provide little protection to such communities. In desperation those who can, turn to the courts for help, with the assistance of a few NGOs and a few public spirited lawyers. The constitution guarantees social and economic rights which are routinely violated in the eviction of residents: rights to adequate housing, sanitation, health care, food, clean water, education and social security. Additional rights are given to vulnerable groups: children, women, elderly, disabled, and other marginalized groups. These rights are not merely pious declarations: they are enforceable. A fundamental responsibility of the courts is to enforce human rights, even if the only way to do so is by developing legal norms. The constitution gives people easier access to courts than ever before. Despite widespread criticism of the judiciary, some judges have risen to the challenge of the new constitution: greater independence and resources for the judiciary, but also greater responsibility for the protection and development of the constitution.

One such is Justice Musinga. He was assigned to hear the petition of the Muthurwa estate residents to stop the destruction of their homes and their eviction. He gave his interim judgment on 17 February, 2011. The petitioners had argued that it would be hard to find alternative accommodation in the neighbourhood, making them homeless. If removed from the neighbourhood, it would be difficult for their children to continue with their schools, which would adversely affect their education. The elderly, and many disabled, would find life particularly hard if they had to leave their houses. The chances are if their homes were destroyed, many families would disintegrate. If they were forced to live in a slum, as is very likely, living conditions would be insanitary and unhygienic. In all these ways their constitutional rights would be violated. Their water and sewage connections had been cut by the Trustees. The treatment given to them by the Trustees and the conditions in which they were likely to find themselves would deny them their dignity as human beings - another
violation of the constitution. There was every likelihood, from the past conduct of the Trustees that the evictions would be carried out in an unlawful, high handed, inhuman and degrading manner, and their security would be greatly threatened.

The Trustees claimed that the estate was private property, which the constitution protects. The rights of the residents, who were only tenants, were qualified by the ownership rights of the Trust, implying that the residents were subject to the law on tenancy, not the wider rights claimed by them.

Justice Musinga realized that he had to resolve conflicting claims of owners of private property and tenants most of whom were poor, and many of whom had lived, and most were born, in the estate. He was guided by the constitutional stipulation that the purpose of human rights is to ‘preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings’. He was also mindful of the constitutional provision that the courts were required to adopt the interpretation that most favours the enforcement of the right, and that - if the existing law was insufficient to protect the right - it was the responsibility of the court to fill that gap by developing the law. His approach to the interpretation of the constitution is worth noting. He adopts a purposive approach, which means that so far as possible, the meaning given to the articles of the constitution should be consistent with, indeed promote, its values and principles (important among which, in Kenya, are human rights and social justice).

Another important factor in his approach is that interpretation must reflect the social context underlying the constitution. He quoted, with approval, the approach of the South African Constitutional Court, in a case concerning the right to health care (‘Soobramoney case’), which, noticing the great disparities in wealth among South Africans, referred to the commitment, and the expectations of the people for the transformation of ‘society into one in which there will be human dignity, freedom and equality’. He said that the situation in Kenya was similar: ‘The craving for a new Constitution in this country was driven by people’s expectation of better lives in every respect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality’.

The immediate question before Justice Musinga was whether the injunction against eviction should be continued pending decision on the arguments of the two sides (scheduled now for May). In deciding to extend the injunction, he said that ‘the court has a duty to consider whether grant or denial … will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights … Dignity of the people ought to be a core value in our Constitutional interpretation’. He was willing to adopt international guidelines and rules on eviction, developing the law in the absence of supportive local law. One of these says 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’. Considering that forced eviction would violate important rights of the residents, he ordered continuation of the injunction until full arguments are rehearsed before the court in May. However, he has given notice that a fundamental issue would be the balancing of interests of private property owners and the claims of residents in the face of threatened evictions. Whatever the outcome, Justice Musinga’s judgment has set the right approach to, and standards of, constitutional interpretation.

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Kenyans evicted from their homes to make way for new developments routinely have their social and economic rights violated. But these rights are enforceable under the country’s new constitution, which gives people easier access to the courts than ever before. Justice Musinga’s judgement on the Muthurwa case sets ‘the right approach to, and standards of, constitutional interpretation’, write Yash Pal Ghai and Jill Cottrell Ghai.

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