







THE ALL KENYAN MOOT COURT COMPETITION (AKMCC) 8TH EDITION 19TH -21ST MARCH 2020

THEME:
THE RULE OF LAW: ENSURING GOVERNMENT ACCOUNTABILITY FOR THE ENFORCEMENT OF HUMAN RIGHTS

TEAM CODE:

……**809**……..

APPLICANTS





GOVERNMENT OF KENYA
OFFICE OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

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LIST OF ABBREVIATIONS.

ARPU	Anti-Riot Police Unit
GDP	Gross Domestic Product
IDP	Internally Displaced Persons
NGO	Non- Governmental Organization
PAP	Project Affected Population
UHRC	Umma Human Rights Commission
USD	United States Dollar
ICCPR	International Covenant of Civil and Political Rights

LIST OF AUTHORITIES

1. STATUTE

The Constitution of Umma, 2010

Land Act, 2012.

Handbook on the United Nations Basic Principles and Guidelines on

Development-based Evictions and Displacement A/HRC/4/18

2. JUDICIAL PRECEDENT.

CASE LAWS	**PAGE/PARAGRAPH APPLIED.**
Basil Criticos V Attorney General and 8 others [2013] eKLR.	*Para 58*
Dry Associates Ltd v Capital Markets Authority and another Interested Party Crown Berger (K) Ltd [2012] eKLR	*No paragraphing*
Law Society of Kenya and 2 others v AG and 2 others [2018] eKLR	*Para 38*
Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security and 3 others [2011] eKLR	*No paragraphing*
I.P Veronica Gitahi & Another v. Republic [2017] eKLR	*No paragraphing*

Mitu-Bell Welfare Society v Attorney General & 2 others [2013] EKLR	*Para 46*
Olga Tellis –vs- Bombay Municipal Corporation (1985) Supp SCR 51	*Page 72*
R v Cabinet Secretary Ministry of Transport and Infrastructure Ex Parte Francis N Kiboro and 198 others [2015] eKLR	*Para 46*
Richard Bwogo Birir v. Narok County Government & 2 others (2014) eKLR	*No paragraphing*
Susan Waithera Kariuki & 4 others -v- Town Clerk Nairobi City Council & 2 others Petition No. 66 of 2011	*Para 57*
Social Economic Rights Action Center V Nigeria (2001) AUV	*Para 46*
Velasquez Rodriguez v Honduras, Inter-Am. Ct. H.R No.4 (1998)	*No paragraphing*

STATEMENT OF JURISDICTION AND LOCUS STANDI.

The High Court at Umma is possessed of jurisdiction to hear and adjudicate on this matter and the parties in the suit have legal standing to present this suit before it

JURISDICTION.

Pursuant to Article 165 (3) (b) of the Constitution of Umma read alongside Article 23(1), the High Court at Umma has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and grant appropriate reliefs in accordance to Article 23(3) of the Constitution. This case concerns the alleged violation of human rights including the right to adequate and affordable housing, the right to fair administrative action and the right to access to justice.

LOCUS STANDI.

The Umma Human Rights Commission(hereinafter referred to as UHRC) has legal standing to present this petition on behalf of the Msoto residents by dint of Article 22 (1) (b) and (c) of the Constitution which provides that court proceedings on any matter in the Bill of Rights may be instituted by a person acting in the interests of a group or class of persons and may also be instituted by a person acting in the public interest. A person in the Constitution of Umma is defined under Article 260 as including a company, association, or other body of persons whether incorporated or unincorporated. The

Commission is thus permitted to file this petition acting in the interests of the Msoto residents and also in the public interests to ensure that human rights and fundamental freedoms are upheld and enforced.

SUMMARY OF FACTS.

Umma as a Republic

Umma is a country situated in the East side of Uwezo continent. It is adjacent to Bahari Ocean. The population of Umma is 35 Million people according to a census conducted earlier this year. Umma adopted a new in 2010 with an expansive Bill of rights. Umma has a GDP of $58.53 billion USD and has recorded a growth rate of 2.3% over the past five years. Umma is a third world country with a poor economic status attributed to several political coups experienced in the country.

Factors leading to the suit

On 5th June 2019 the Government of Umma issued an eviction notice to all persons living within Msoto area to pave way for the construction of a major road. The government promised to compensate all persons who complied with the order. The population of Msoto comprises mostly of Internally Displaced Persons (IDPs). The Umma Human Rights Commission (UHRC) moved to court seeking an injunctive restraining order against the government that was granted, prohibiting the government from carrying out the demolition process.

The government brought in its demolition machinery advancing the excuse that they had not been served with the court orders. After the 11 days lapsed, the government issued a statement allowing for further negotiations on an amicable compensation

scheme. This, however, only applied to families that registered for the compensation process. This statement resulted in a major riot in Msoto area that was termed as illegal and unlawful. The riot led to the setting up of a meeting between the Msoto residents and inter-ministerial committee members. The government lifted the caveat to allow all affected persons to register for the compensation.

The demolition process began on 15th June at 2.00p.m and it was only halted at midnight following heavy rains. The Anti-Riot Police used excessive force on the residents with clear instructions. The Msoto residents ganged up and destroyed the demolition machinery. Activists from Msoto sought to have a meeting with the inter-ministerial committee but they were confined allowing for the demolition to be completed, the demolition process was marked by numerous police brutality that attracted the attention of NGOs and civil societies.

The UHRC set up a case on behalf of Msoto residents concerning the demolition process that failed following a ruling by a pro-government judicial officer. During the demolitions of Masponyo estate, Msoto residents caused chaos leading to their arrest and detention. The police failed to produce all people that had been detained following a court order failing to comply with the order of Habeas Corpus. They were eventually produced in the far-west city of Omena. A year after the demolitions the uncompensated victims are still homeless.

ISSUES FOR DETERMINATION.

i) Whether failure by the respondents to adhere to court orders was a violation of the right of access to justice of Msoto residents.

ii) Whether the actions of Umma Government in the demolition Process carried out on 20th June 2019 was in Violation of the principle of due process of law.

iii) Whether the failure by the respondents to compensate Msoto residents amounted to a violation of their right under Article 43(1) (b) of the Constitution of Umma.

SUMMARY OF ARGUMENTS.

I. The petitioners aver that the failure of the respondents to adhere to court process was a violation of the right to access to justice of Msoto residents in that the violation of the first court order led to the eviction of the petitioners and the violation of the second order led to a violation of the Absolute Right to *Habeas Corpus.*

II. Counsel for the petitioners aver that the Umma government actions in the eviction process of 20th June, 2019 violated the principle of the due process of law by first not giving the Msoto residents adequate prior notice, by not engaging the Msoto residents in effective negotiations and finally by not adhering to the requirement of necessity and proportionality as to the use of force.

III. The petitioners aver that the residents violated the petitioners right to adequate and accessible housing as enshrined in Article 43 (1) (b) of the Constitution in that the government had the obligation that right and secondly that the government should have offered the Msoto residents' alternative accommodation.

SUBSTANTIVE ARGUMENTS.

I. WHETHER THE FAILURE BY THE UMMA GOVERNMENT TO ADHERE TO COURT ORDERS WAS IN VIOLATION OF THE RIGHT OF ACCESS TO JUSTICE.

It is the petitioner's position that the respondents violated their right of access to justice through violation of Court orders. The right of access to justice has been provided for under Article 48 of the constitution of Umma.The right of access to justice was defined in ***Dry Associates Ltd v Capital Markets Authority***[1] as

i. Awareness and understanding of the law
ii. Availability of information important to one's rights
iii. Equal protection of those rights by law enforcement agencies.
iv. Easy access to the justice system particularly the formal litigation process
v. Provision of a conducive environment within the judicial system
vi. Expeditious disposal of cases
vii. Enforcement of judicial decisions without delay.

Article 2.3 of the ICCPR provides that each party the covenant should ensure that the competent authorities shall enforce remedies when granted.

The petitioner seeks to establish that

[1] *Dry Associates Ltd V Capital Markets Authority and another Interested Party Crown Berger(K) Ltd [2012] eKLR*

i) violation of the first court orders led to the eviction of the petitioners

ii) violation of the Second court order led to the violation of the Absolute Right to *Habeas corpus*.

VIOLATION OF THE FIRST COURT ORDER

It is the petitioner's position that the respondents violated the first court order which led to the eviction and subsequent homelessness of the Msoto residents.

Order 5 Rule 9 of the Civil Procedure Rules provides that personal service is not a perquisite when the person to be served with the order has knowledge of the order.

Concerned government officials were asked were informed of the court order on 16th June 2019[2]. As such when they carried out the demolition on 20th June 2019 they were aware of the order[3]. Personal service was not a requirement.

It was held in the case of ***Basil Criticos V Attorney General and 8 others***[4] that the law has changed and as it stands today knowledge supersedes personal service and for good reason and they added that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service should be effected will not be necessary.

[2] Paragraph 9, Fact Pattern
[3] Paragraph 15, Fact Pattern
[4] [2012] eKLR

The respondents were aware of the court order and still continued with the demolition process. It is the petitioner's averment that the respondents intentionally violated their right of access to justice in that they were made aware of the existing court order but went on to conduct the evictions

VIOLATION OF THE SECOND COURT ORDER.

It is the petitioner's averment that the violation of the second court was a violation of the right of access to justice and a violation of the absolute right of *habeas corpus.*

Article 25(d) of the Constitution of Umma as read with Article 49(1) (f) provides for the right of *habeas corpus* as an absolute right. Further Article 29 (b) of the Constitution of Umma provides that every person has the right to freedom and security of the person which includes the right not to be detained without trial, except during a state of emergency.

The police detained Msoto demonstrators following the chaos they had caused during the demolition process in Masponyo Estate.[5]They were not produced in court on Monday as was expected and the inspector of police violated the order to produce the remaining suspects within six hours. [6]

[5] Paragraph 26, Fact Pattern
[6] Paragraph 28, Fact Pattern

The Msoto demonstrators were being held incommunicado[7] and being forced into a merge settlement. This act by the state subjected the Msoto demonstrators to torture, a violation of Article 25(a) of the Constitution of Umma.

Section 4 (iii) of the Prevention of Torture Act defines torture as an act which causes severe pain or suffering, whether physical or mental. The act has to be intentionally inflicted on a person for the purpose of intimidating or coercing him or her or any other person to do or refrain from doing anything.

Article 2(6) of the Constitution of Umma allows for the use of treaties and conventions ratified by Umma to form part of the laws of Umma.

Article 9(3) of the ICCPR provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time.

In the case of ***Law Society of Kenya v AG***[8], it was held that "the current state of Chemistry and physics do not accept that the mass of a person can vanish or disappear into thin air without external factors".

The Msoto demonstrators were arrested and detained by the police,[9] further there was a video that showed the demonstrators being hurled into a police truck [10]they were

[7] Incommunicado detention is a type of detention where the detainee cannot communicate with anyone other than his captors with no contact with the outside world. Nigel Rodley, *Treatment of Prisoners under International Law* 2nd edn. (Oxford University Press, 1999) p.334

[8]*Law Society of Kenya and 2 others v AG and 2 others [2018] eKLR*

[9] Paragraph 26, Fact sheet.

[10] Paragraph 28, Fact sheet

thus in police custody. The respondents were also aware of the court order as it was issued in the presence of state law officers.[11]

Therefore, the petitioners aver that the ignorance of this court order was a violation of the right of access to justice as the right to *habeas corpus* was violated.

[11] Paragraph 29, Fact sheet

II. WHETHER THE ACTIONS OF UMMA GOVERNMENT IN THE DEMOLITION PROCESS CARRIED OUT ON 20TH JUNE, 2019 WAS IN VIOLATION OF THE PRINCIPLE OF DUE PROCESS OF THE LAW.

It is the petitioner's averment that the actions of the Umma government in the demolition process carried out on 20th June, 2019 was in violation of the principle of due process of law. In asserting this conclusion, the applicants will seek to prove that three indispensable elements of due process were violated namely:

1. First, that the respondents failed to give the people of Msoto adequate prior notice before conducting the evictions;
2. Secondly, that the respondents failed to adequately consult the residents of Msoto before the evictions started;
3. Ultimately, that the evictions were unlawful in that they violated the petitioners' rights not to be subjected to any form of violence from either public or private sources;[12]

1. ADEQUATE AND PRIOR NOTICE.

It is the petitioner's submission that the respondents violated the principle of due process of law by failing to adhere to the requirement of adequate and prior notice in conducting evictions.

[12] *Ibid*, Article 29 (c)

At the core of due process of law, one of the two crucial elements include the according of the person with reasonable and prior notice[13]. It is now well settled in law that when an administrative action is likely to adversely affect the rights of a person, that person should be given prior notice of the nature and the reasons for that administrative action[14].

Section 152 C of the Land Act, 2012 provides that the National Land Commission shall inform those affected by a decision relating to eviction from public land in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement at least 90 days before the evictions. Furthermore, Section 155(4) further establishes that, amongst others, the following considerations should be made before determining adequate notice

a) the length of time that person has been on that land, the person's age and general circumstances.
b) whether that person or any dependents of that person are in employment near to that land;

The people of Msoto were given 11 days in which they were to vacate. Even though the communication constitutes prior notice, it fails to meet the standard of adequacy in that the respondents failed to take into consideration the prolonged duration of time in which the Msoto residents lived in the area which was approximately 10 years and the

[13] *Richard Bwogo Birir v. Narok County Government & 2 others (2014) eKLR*
[14] Fair Administrative Actions Act, 2015, Section 4 (3) (a)

fact that a significant number eked a living from low income employment in the area[15]. Thus, they drew their livelihood in the area. In the case of ***Susan Waithera v Town Clerk Nairobi City Council***[16], 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 " if 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 a few days' notice to move out of their respective homes.

2. CONSULTATION AND PUBLIC PARTICIPATION.

It is equally the petitioner's assertion that the respondents failed to adequately consult with the residents of Msoto area before conducting the evictions

The second core element of due process of law is the according the person concerned with an opportunity to be heard[17], an opportunity to be heard and make representations thereof[18]. The Supreme Court of India in ***Olga Tellis v. Bombay Municipal Corporation***, consultations with the people concerned is required even when the eviction is deemed to be for a legitimate purpose[19].

In this case, while consultations were held, the officials involved admitted their lack of authority in negotiating with the Msoto resident, a factor that rendered the whole

[15] Fact pattern, para 5
[16] *Susan Waithera Kariuki & 4 others -v- Town Clerk Nairobi City Council & 2 others Petition No. 66 of 2011*
[17] *Richard Bwogo Birir v. Narok County Government & 2 others (2014) eKLR*
[18] Fair Administrative Actions Act, 2015, Section 4 (3) (a)
[19] *Olga Tellis –vs- Bombay Municipal Corporation (1985) Supp SCR 51*

negotiation process moot. Furthermore, the State ignored the residents, plea for further engagement.

3. VIOLATION OF THE PETITIONERS RIGHT TO FREEDOM AND SECURITY OF THE PERSON.

Counsel for the petitioners submits that the actions of whipping and maiming the Msoto residents in the eviction process of 20th June, 2019 violated the petitioners' right not to be subjected to any form of violence from public or private sources and the requirement of necessity and proportionality in the use of force during evictions[20].

The constitution guarantees the right to freedom and security of the person which includes the right not to be subjected to any form of violence from either public or private sources[21]. The ARPU who were in the vicinity whipped and maimed the Msoto residents while the demolition ensued[22] which contravenes the conditions that are required as to the use of force by police agents[23]. They stipulate that non- violent means should be employed first before resorting to force. The force used should be proportionate to the objective, seriousness of the offence and the resistance of the person against whom it is used and only to the extent that is necessary. The Court of Appeal in ***I.P Veronica Gitahi & Anr v. Republic*** has recently established this[24]. There is

[20] Land Act, 2012, Section 152G
[21] Constitution of Kenya, 2010, Article 29©
[22] Fact sheet, paragraph 15
[23] National Police Service Act, CAP 84, Sixth Schedule.
[24] *I.P Veronica Gitahi & Anr v. Republic [2017] eKLR*

no indication in the record that the Msoto residents resisted the eviction process and the old woman was accosted by the police officer without just cause[25]. This is indicative of the arbitrary and unlawful use of force, hence, a violation of the right not to be subjected to violence from public sources.

[25] Fact sheet, paragraph 20

III. WHETHER THE FAILURE BY THE GOVERNMENT TO COMPENSATE MSOTO RESIDENTS AMOUNTED TO A VIOLATION OF THEIR RIGHT UNDER ARTICLE 43(1) (b) OF THE CONSTITUTION.

It is the petitioner's position that the government violated their right under Article 43(1) (b)[26] which provides for the right to accessible and adequate housing. The petitioner will seek to establish this in two limbs:

i) That the government had an obligation to fulfill rights of the petitioners.

ii) that the government should have offered alternative accommodation for the displaced Msoto residents**.**

I. OBLIGATION TO FULFILL THE RIGHTS OF THE PETITIONERS.

It is the petitioners' position that the respondents had an obligation to fulfill their right to adequate and accessible housing through compensation.

General Comment No.4 of the Committee on Economic, Social and Cultural Rights[27] (hereinafter referred to as CESCR) defined adequate housing. Adequate housing should be interpreted to mean somewhere where there is security, peace and dignity. Shelter is more than merely a roof over one's head or viewing shelter as a commodity.

[26] Constitution of Umma, Article 43(1) (b),
[27]CESCR General Comment No.4: The Right to Adequate Housing (Art.11(1) of the Covenant), 1992

Accessibility is interpreted to mean full and sustainable access to adequate housing resources. Disadvantaged groups must be accorded full and sustainable access to adequate housing.[28]

Article 21(1) of the Constitution of Umma imposes an obligation to the government to respect, protect, fulfill, observe and promote the rights of individuals.[29]Under the obligation to fulfill, states are expected to take steps towards the realization of the rights of individuals. The steps to be taken depend on the availability of the state's resources and the right concerned. Furthermore, Article 20 (5) (b) of the Constitution of Umma states that in allocating resources for rights provided for under Article 43 the state shall give priority to the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.

In the case of ***SERAC V Nigeria,***[30] it was held that before authorizing forced evictions or demolitions, the court should consider its impact on vulnerable and disadvantaged groups.

The petitioner submits that some of the Msoto residents were disadvantaged owing to the fact that they were victims of the 2007/2008 post-election violence. They also lacked

[28] CESCR General Comment No.4: The Right to Adequate Housing (Art.11(1) of the Covenant), 1992

[29] Constitution of Umma, Article 21(1)

[30] *Social Economic Rights Action Center V Nigeria (2001) AUV*

academic and property ownership documents. [31]These were factors the government should have considered before evicting them even though they were on public land. Further, the government moved the Masponyo residents to houses whose prices had been subsidized.[32] This was discriminatory to the residents of Msoto and a violation of Article 27(2) of the Constitution of Umma, which states that equality includes the full and equal enjoyment of all rights and fundamental freedoms by all citizens. The government of Umma accorded preferential treatment to the Masponyo residents over the Msoto residents.

II. ALTERNATIVE ACCOMMODATION.

it is the petitioner's assertion that the government should have offered alternative accommodation to the Msoto residents as a form of compensation.

Compensation refers to the indemnification for financial or non-financial damages, including physical and mental harm; lost opportunities (such as employment, education or social benefits); material damages and loss of earnings.[33]

Article 21(2) of the Constitution of Umma states that the government should take legislative, policy and other measures to ensure progressive realization of socio-economic rights.

[31] Paragraph 5, Fact sheet
[32] Paragraph 24, Fact sheet
[33] UN Doc A/RES/ 60/147 (16th December 2005) Principle 21

Where the state is responsible for the violation of human rights through its acts and omissions it has an obligation to provide adequate, effective and prompt reparation to the victims.[34]

The government of Umma evicted the Msoto residents and only compensated those that had registered for the compensation schemes.[35] The Msoto residents derived their livelihood from that Msoto and thus through the eviction they lost not only their homes but also their informal trading business.[36] The state being the one that issued the eviction notice within a short period and subsequently went through with it, it has an obligation to offer compensation to the Msoto residents.

It was held in the case of ***R v Cabinet Secretary Ministry of Transport and Infrastructure and 3 others Ex Parte Francis N. Kiboro and 198 others***[37] that where the state allows people to occupy land be it private or public for a considerable period of time, it would be inhuman for the state to suddenly evict them forcefully without affording them an opportunity to seek alternative mode of accommodation.

The cited case demonstrates that there has to be a balance between the propriety rights of the government and the interests that the Msoto Residents had having been on that piece of land for a considerable amount of time of approximately 11 years. Further the

[34] Human Rights Committee, General Comment No.31 Paragraph 16
[35] Paragraph 24, Fact sheet
[36] Paragraph 5, Fact sheet
[37] *R v Cabinet Secretary Ministry of Transport and Infrastructure Ex Parte Francis N kiboro and 198 others [2015] eKLR*

government failed to accord the Msoto residents with enough time to seek alternative accommodation.

In the case of ***Ibrahim Sangor v Minister of Internal Security***[38]***,*** where the right to accessible and adequate housing under Article 43 had been violated, the respondents were ordered to reconstruct reasonable residences for and/or provide alternative accommodation or housing for the petitioners.

A similar dictum should be applied so that the respondents will be compelled to offer compensation for the Msoto residents through providing alternative accommodation for them.

[38] *Ibrahim Sangor Osman v Minister of State for provincial administration and internal security and 3 others[2011] eKLR*

PRAYERS SOUGHT.

The petitioners in this matter pray that this Court finds in favor of the petitioners generally and in particular:

1. That this Court finds that the failure of the respondents to adhere to court orders was in violation of the right of access to justice of Msoto residents
2. That this Court finds that the actions of the Umma government in the demolition process of 20th June, 2019 was in violation of the principle of due process of law.
3. That this Court finds that the failure of the government to compensate some of the Msoto residents amounted to a violation of their rights to adequate housing under Article 43 (1) (b) of the Constitution.
4. That this Court compels the respondents to adequately compensate the Msoto residents and offer them alternative accommodation in line with their statutory obligations to IDPs.
5. That this Court compels the respondents to prosecute the individual police officers involved in the brutality that occurred on 20th June, 2019.