

Confronting Complexity

Using Action-Research to Build Voice, Accountability, and Justice in Nairobi's Mukuru Informal Settlements

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Nairobi is the most populous city in East Africa and one of the fastest growing cities in the world. Yet more than half of its 4 million residents (an estimated 55 percent) are crammed into about 200 informal settlements (slums) that occupy 5 percent of the city's residential area, or just 1.62 percent of the city's total land area.¹ The residents of these slums live in conditions of considerable insecurity and indignity characterized by inadequate housing and little access to clean water, sanitation, health care, schools, and other essential public services. The weak basic services that do exist are often controlled by cartels that charge extortionate rates for access.

Mukuru Kwa Njenga and Mukuru Kwa Reuben are two densely populated and vibrant slum settlements in Nairobi. Spanning 450 acres, these two settlements are part of a larger stretch of settlements in an industrial section in the south of Nairobi. Together, they are home to an estimated 500,000 people served by more than 200 informal schools and countless informal businesses, health facilities, and other social services.² Perhaps most striking about the Mukuru settlements is that 92 percent of all inhabitants are tenants who pay rent to absentee landlords who often own the structures but not the land underneath. Because the Mukuru settlements are built on privately held lands, they have not benefited from slum-upgrading programs in the same way that, for example, the Kibera and Korogocho settlements, located on public lands, have.³ In addition, the identity of the titleholders is largely unknown to residents and difficult to determine, and owners of both the lands and the

- 1 City Council of Nairobi, *City of Nairobi Environment Outlook 24–25, 36*, (2007), http://www.unep.org/geo/pdfs/NCEO_Report_FF_New_Text.pdf.
- 2 A lower number of 110,000 people was reported in Kenya National Bureau of Statistics, *The 2009 Kenya Population and Housing Census* (Government of Kenya 2010). The research drawn on in this chapter suggests the much higher figure.
- 3 *UN-Habitat and the Kenya Slum Upgrading Programme*(strategy document, UN-Habitat 2003), <http://mirror.unhabitat.org/pmss/getElectronicVersion.aspx%3Fnr%3D2602%26alt%3D1&rt=j&frm=1&q=&esrc=s&sa=U&ei=6qCxU5rIEIq7uASLmoCgCQ&ved=0CCAQFjAC&usg=AFQjCNH0JBtuW8UV1A1BRlptEYWw7oUZLA>; World Bank, *Kenya Informal Settlement Improvement Project (KISIP)* (2011), http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2011/03/07/000371432_20110307092557/Rendered/PDF/582670PAD0P1135420IDA1R20111004611.pdf; Government of Kenya, *National Housing Policy* (2004), <http://www.mintoreal.com/policy-documents/kenya-national-housing-policy>.

structures often hail from the Kenyan elite, including civil servants, government officials, and businessmen.⁴ Residents live under a constant threat of eviction due to insecure land tenure and land use contestation.

How can Mukuru's inhabitants achieve security of tenure and protect their basic rights, when so often they live outside the law, and so many terms of the debate are contested? This chapter describes efforts to confront those challenges through a multidisciplinary, action-based research project. The aim of this research is to help the residents of Mukuru identify solutions to improve tenure security and gain access to safer and more affordable basic services and ultimately more dignified and just living conditions. The research is designed to support efforts to achieve positive change on a number of levels:

- To understand the nature of land tenure and basic services in Mukuru
- To understand the interaction between formal and informal institutions and practices, including state and nonstate actors in the settlements
- To look at how various provisions under Kenya's new Constitution, including those on land tenure, human rights—especially economic and social rights—and the protection of vulnerable groups can be used to advance the welfare of informal settlers
- To work with Mukuru residents to develop new legal, planning, and financing tools and strategies of engagement

In some situations, strategies will address existing technical and political obstacles through targeted engagement with public authorities. In others, the research aims to provide the evidentiary foundation for legal advocacy.

The research was initiated by the Akiba Mashinani Trust (AMT), building on long-term support that it has provided to Mukuru residents, and Muungano wa Wanavijiji (MWW), a community organization. The research represents an attempt to move beyond previous advocacy efforts, which tended to be reactive, case-by-case responses to emergencies. Initial research activities involved attempts to identify private owners and titleholders of the lands in Mukuru Kwa Reuben and Mukuru Kwa Njenga. The need for research took on added dimensions following a number of successful advocacy campaigns, including an injunction putting a halt to demolitions in 2012 in Mukuru, and support to help residents use community savings schemes in one neighborhood to secure a loan to buy a 23-acre plot of land.⁵ Those developments raised questions about shifting dynamics in the settlements and how to improve conditions and regularize service delivery. In the background is a sense that existing government and donor slum-upgrading efforts, although showing some successes, have failed to live up to principles of participatory upgrading

4 Kipchumba Some, *Nairobi Slum Dwellers Plan to Sue Firms over Land*, Daily Nation (Sept. 9, 2012).

5 For international reporting on these and related efforts in Mukuru, see, for example, Daniel Howden, *Kenya Slum Dwellers versus the Elite*, Independent (Sept. 26, 2012); William Oeri, *Nairobi Slum Residents to Build Homes without Govt Help*, Daily Nation (Dec. 12, 2011).

and have been based on inadequate knowledge and false assumptions about the underlying realities and dynamics, particularly regarding ownership and control of land tenure, and interactions between state and nonstate actors and between formal and informal institutions.

To address those questions and provide support to residents on a settlement-wide level, AMT and MWW are collaborating with the University of Nairobi's School of Urban Planning, Strathmore University's School of Law and School of Finance, and the Katiba Institute.⁶ The research is based on two premises: working with settlement dwellers to formalize tenure rights of the inhabitants is a key to overcoming other challenges, especially around basic services; and achieving justice and legal solutions requires multidisciplinary research (lawyers, urban planners, finance specialists, and community organizers) and a mix of legal and nonlegal interventions. The efforts described in this chapter are still under way. The goal of this chapter is to make a case for the approach as a model to address layers of complexity and interrelated legal gaps in an effort to support broader legal and community-led advocacy efforts.

The efforts described in this chapter are by no means unique. However, the combination of groups and activities described here, when taken together, provide a model for finding solutions to the layers of urgent and complex problems faced in contexts such as Mukuru.

The chapter situates efforts on behalf of Mukuru within three larger debates around the promotion of access to justice, voice, and accountability. First, the enshrinement of economic and social rights under Kenya's 2010 Constitution has given rise to potential clashes over rights similar to those seen in other countries. Second, the research process described here is an affirmation of the need for multidisciplinary evidence to feed into policy reforms and efforts to formulate and enforce social and economic rights remedies resulting from public interest litigation. Finally, the link between legal and nonlegal advocacy efforts and how building legal awareness among community members can enhance ongoing nonlegal advocacy efforts is discussed. Dominant threads throughout the three debates are the close interlinkages between security of tenure and better access to services and the challenges in building links between formal and informal structures related to land use and service delivery. The chapter concludes by highlighting the potential limits of legal interventions, as well as the potential power of legal interventions in confronting the layers of complexity found in Mukuru.

Mukuru Kwa Reuben and Mukuru Kwa Njenga: The Conditions and Players

Much like other settlements across Nairobi, Mukuru Kwa Njenga and Mukuru Kwa Reuben are an overcrowded, unplanned, sprawl of shanty dwellings

6 The International Development Research Centre in Canada is providing financial and technical support for the project.

and commercial premises. Understanding the challenges faced by residents requires a look at both the conditions they live in and the complex web of actors, both formal and informal, in the settlements. One set of actors, the residents, live in structures that have been built haphazardly, with insufficient roads or pathways, thus rendering access to basic water, sewer, drainage, and waste disposal services impossible. The situation deteriorates during rainy periods, when the roads and pathways, which are almost all unpaved, become untraversable stretches of mud.

Houses in the two settlements are mostly single-roomed dwellings (usually measuring 10 feet by 10 feet) built from rusted corrugated iron sheets and, in some cases, lacking paved floors. So congested are these settlements that almost all the homes are dark and airless with little light and insufficient ventilation. This situation is aggravated by smoke or fumes emitted by the wood fires, charcoal burners, and kerosene stoves used for cooking. A direct result of these intolerable housing conditions is a high rate of respiratory diseases—a frequent cause of death, especially among young children. Proper water and sanitation are also chronic challenges.

Most housing units are built around narrow courtyards, with 11 housing units per plot. Although some of these plots share a pit latrine and bathroom, many are built without any toilet facilities. Families without facilities either pay to use public toilets on a per use basis or use makeshift methods to dispose of waste. Those challenges are even worse at night, when the settlements are unlit. Women and children face serious threats of sexual violence and rape when they dare to venture outside to make use of public toilets or otherwise.

Another set of actors is the formal service providers, such as the Nairobi County government and other governmental utilities providers, which provide next to no municipal services in Mukuru Kwa Njenga and Mukuru Kwa Reuben. Garbage is not collected and is dumped indiscriminately around the settlements; there is little to no access to sewage services; public latrines are emptied manually, with the nearby rivers often serving as dumping grounds. The government-run water company provides water only up to the edge of the two settlements. Consequently, most residents have no other option but to buy water from water cartels. This is an additional set of actors who supply water into the settlements through a complex and chaotic system of pipes, popularly known as “spaghetti connections,” that connect to taps in each neighborhood. This makeshift water infrastructure is often laid on the ground and is prone to breakage and contamination from overflows from pit latrines and drain leaks. The average price for residents to fill a 20-liter can of unsafe water from those taps ranges from two-thirds to six times more than the average rate charged by the water company in formal settlements.⁷ Similar realities are seen with electricity. The large majority of households have access to elec-

7 Based on initial research. See also City Council of Nairobi, *supra* note 1, at 46.

tricity in Mukuru (86 percent in Kwa Reuben, 75 percent in Njenga), although almost entirely through informal *Sambaza* connections.⁸

An additional set of actors is the owners or titleholders of land in the Mukuru settlements. Many of the homes in the Mukuru settlements are built on private lands. These lands were allocated in the 1980s and 1990s by the state to private individuals and corporations for the development of light industry. At the time of the grants, most of the lands were already occupied; others were occupied at various dates after the issuance of title. The government, before allocating lands, and the private parties who subsequently received titles to the lands, however, failed or neglected to secure or take possession of the lands.

The research team has been able to obtain copies of several title deeds issued for the lands on which these settlements are located. Both people and companies hold title to the lands on a leasehold basis. Some of the land has been retained by the original allottees, while some has been transferred to others by sale, sometimes two or more times. In a number of cases, land has been used as security for loans from banks, and in cases of default on these loans, the banks have taken over possession of titles. Only a small portion of land has been developed by the allottees or later transferees, even though the government's primary requirement in granting land was that it be developed for light industry purposes within two years.

In recent years, land in Mukuru has seen a dramatic rise in value, which has led to a sharp increase in the threat of eviction for residents who, in some cases, have occupied the land for decades. After years of neglect, many of the titleholders now see the land as a prime area for redevelopment and want to obtain vacant possession of the land by evicting the residents and selling the land to the highest bidder.

Another group of actors is the numerous individuals known as structure owners who built shacks on the land. Structure owners rent their units to tenants, often as absentee landlords, employing local agents, often youth from the communities, to collect rents.

The conditions faced by the residents of Mukuru Kwa Njenga and Mukuru Kwa Reuben—threat of evictions, extortion by formal and informal actors while trying to access services, insecurity, lack of sanitation, and failure to access water and health services—are also challenges for ensuring access to justice and accountability. Evictions have arguably been the most debilitating justice issue in Mukuru because, quite simply, they negate the ability of residents to enjoy what meager rights they have. Evictions are often conducted in the most inhumane of manners, posing security risks to residents and sometimes resulting in death. Many evictions happen at night, when families are sleeping, and, worse, by setting fire to housing units. The inaccessibility of the area and the lack of basic infrastructure services make it almost impossible

8 *Sambaza* is a Swahili word that translates to “spread” but is often used to imply sharing of services or resources.

for fire services to put out fires. Determining where to lay blame and who is responsible for evictions is sometimes impossible, in part because of the complex and uncertain status of tenure. Even where the parties responsible for ordering or carrying out evictions can clearly be identified, they are almost never held to account because of challenges in accessing a functional formal justice system.

To illustrate, structure owners are so accustomed to evictions through fire or other means that they have a “rapid response” strategy to mitigate against evictions. Building materials and labor are always readily available to reconstruct structures, which can often be erected within hours of being razed by a fire, allowing residents to quickly resume their daily activities. However, structure owners or landowners in many cases carry out evictions because they intend to “replan” and reconstruct newer, more profitable structures. In such instances, it is not uncommon for the owners to hire gangs to carry out the evictions and guard the area until new structures are in place and, sometimes, until new tenants have moved in.

In terms of the formal police system, security officers often collude with landowners in effecting evictions. Residents report this happening in different ways. Sometimes the police stand guard to ensure that residents do not resist evictions. In other instances, police action takes the form of noninterference, that is, by allowing organized gangs to stand guard. In interviews, residents indicate that they have little if any regard for formal security systems, instead choosing to develop or acquiesce to informal security systems that control the area.

Building an Action-Research Process around New Laws and a Constitutional Challenge

The 2010 Constitution of Kenya has provided some hope and led to some concrete progress in confronting the challenges of evictions and access to justice faced by vulnerable groups such as the residents of Mukuru. The Constitution emphasizes human rights and the protection of the marginalized as a national value and principle, in addition to introducing the right to decent housing and other basic services in its Bill of Rights.⁹ New jurisprudence has begun to emerge, addressing the human rights implications of evictions. Of note, in 2011 in the case of *Satrose Ayuma and 11 others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme*, the High Court of Kenya determined that it was unconstitutional to carry out evictions without adhering to international guidelines for evictions.¹⁰

9 Constitution of Kenya (2010), subsecs. 10(2), 43(1).

10 Constitutional Petition no. 65 (2010). This requirement was articulated as part of an interlocutory order to stop evictions that Justice Lenaola later confirmed in his final judgment on that matter. Similar holdings were reached by the High Court in *Mitu-Bell Welfare Society v. The Attorney General, Kenya Airports Authority, and the Commissioner of Lands and Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security & 3 Others*.

Buoyed by the new Constitution and the court's willingness to protect slum settlement dwellers, residents of Mukuru through MWW filed a petition in the High Court in 2012 requesting similar protections from arbitrary evictions. The petition came when Mukuru residents were experiencing increasing threats of evictions, and it was brought with the assistance of AMT and the Katiba Institute. In the petition, the Mukuru residents asked the court to clarify the tenure status of the land that they occupied. More specifically, the petition sought a declaration that the grants issued to titleholders were unlawfully obtained and should therefore be canceled. The petition seeks to take advantage of Kenya's 2010 Constitution, as well as implementing legislation creating a National Land Commission (NLC), which has the power to review unlawfully obtained titles.¹¹ The basic allegation is that many of the grants issued to the titleholders in Mukuru did not comply with basic procedures for allocating land under the law at the time, and most of the grantees did not comply with the conditions attached to the grant of title in most cases (i.e., requiring that the lands be developed for industrial purposes within two years of the grant). The court ordered a stop to evictions (by way of an injunction) in Mukuru Kwa Njenga and Mukuru Kwa Reuben, pending a final ruling on the issues raised in the petition.¹² A hearing on the issues raised by the petition was pending as of September 2014.

Although the court order did not eliminate the harassment faced by Mukuru residents, it did secure a moratorium on evictions. If the petition is successful, then many of the titles could be found to be unlawful and eventually canceled, meaning that the lands now home to the Mukuru settlements would revert to public lands. More generally, the case stands to help residents resolve tenure disputes, which will be important in providing direction to other justice issues in Mukuru.

The Kenyan Constitution also introduced a right to "accessible and adequate housing, and to reasonable standards of sanitation."¹³ Beyond the courts, there has been a push on developing a regulatory framework that would entrench a human rights-based approach in dealing with eviction matters. A draft bill on evictions and resettlement has been developed and is due to be introduced in Parliament.¹⁴ The technical experts who helped develop the bill include three members of the Mukuru research project.¹⁵

11 Art. 67 of the Constitution creates the NLC; subpart 14 of the National Land Commission Act gives the NLC the power to review all grants and dispositions of public land to establish propriety and legality.

12 *Muunganowa Wanavijiji and Others v. The Hon. Attorney General and Others*, Petition No. 403 2012, High Ct. of Kenya in Nairobi (Constitutional & Human Rights Division) (Sept. 12, 2012). See also Leonard Mutinda, *Judge Blocks Slums Evictions*, Daily Nation (Sept. 12, 2012).

13 Constitution of Kenya, art. 43(1)(b).

14 Evictions and Resettlement Procedure Bill (2013), http://www.lands.go.ke/index2.php?option=com_docman&task=doc_view&gid=246&Itemid=134.

15 The members were Patricia Kameri-Mbote (Strathmore and Nairobi Universities), Jane Weru (Akiba Mashinani Trust), and Korir Sing'Oei (Katiba Institute). Weru learned that she would be invited as a technical expert to the task force when she led Mukuru residents to deliver a memorandum to the cabinet minister of lands in regard to evictions in Mukuru.

The Constitution also put in place a new framework for land rights that affirms the principles of equitable access to land and security of land rights.¹⁶ It is hoped that the combination of clear regulatory framework and progressive jurisprudence on evictions will help diminish arbitrary and inhumane evictions. Such an achievement would be critical for Mukuru residents given their vulnerability to illegal, arbitrary, and inhumane evictions.

To support the legal action and larger advocacy efforts in Mukuru Kwa Njenga and Mukuru Kwa Reuben, AMT, along with MWW, initiated an action-based research project. The project is based on the premise that the insecurity of tenure faced by Mukuru residents is at the root of many of [the] challenges to housing and access to services they face. This insight has been a driving policy strategy of the international community in confronting the challenges of the urban poor and informal settlements for some time.¹⁷ The goal of the research in Mukuru is to move beyond general prescriptions about tenure security to address the layers of competing interests and rights and failures in governance that would likely persist even in the face of greater tenure security.

Greater security of tenure for the Mukuru inhabitants is only the first step in confronting a complex web of challenges related to voice, accountability, and justice. Even if the residents of Mukuru achieve more permanent security of tenure, two fundamental challenges will arise. Confronting both challenges requires a better evidence base. First, there will be the need to identify criteria to select legitimate beneficiaries of the efforts to regularize tenure and service delivery, for example, distinguishing between long-term residents and casual workers who arrive for short-term employment opportunities. Second, there will be a need to replan the area based on a better understanding of realities on the ground.

These two challenges are, in the first place, practical, although as discussed below, they also pose a series of legal questions. The project has started to answer these questions by undertaking a situational analysis to build a better understanding of realities on the ground. The research has been participatory from the start, with the researchers engaging with community members to gather information. The University of Nairobi Planning School and Strath-

16 Constitution of Kenya, arts. 60–68 generally.

17 See, for example, *Habitat II, Istanbul Declaration on Human Settlements*, UN Doc.A/Conf.165/14 (UNGA), at para. 75 (June 14, 1996) (“Access to land and legal security of tenure are strategic prerequisites for the provision of adequate shelter for all and for the development of sustainable human settlements affecting both urban and rural areas. It is also one way of breaking the vicious circle of poverty”); *Holding Their Ground: Secure Land Tenure for the Urban Poor in Developing Countries* (A. Durand-Lasserve & L. Royston eds., Earthscan 2002). A more fulsome discussion of the varying forms of security of tenure, de jure and de facto, formal and informal, is beyond the scope of this chapter. A helpful overview of debates regarding land tenure security issues and how they apply in Nairobi and Mukuru more specifically is provided by P. Kameri-Mbote, C. Odote, A. Meroka, & F. Kariuki, *Literature Review for “Moving beyond Understanding the Dynamics of Informal Settlement Land Tenure and Service Delivery”* (Strathmore U. 2014).

more University's School of Finance have played major roles in helping community members develop a better understanding of, for example, who lives where and owns what in Mukuru; the number of households and population in each settlement; how services such as security, water, sanitation, and electricity are provided; who controls their provision, including the interface between formal service providers such as the Nairobi City Water and Sewerage Company and the prevailing informal service providers; how much land is available in Mukuru and is suitable for housing development; and what the different income levels are across the settlements. The main role of the Katiba Institute and Strathmore University's School of Law has been to work closely with the community to investigate the different existing tenure arrangements in Mukuru to determine how the Constitution and land laws can be used to address challenges related to insecure land tenure.

As of September 2014, the situational analyses were being completed. They will provide information that was previously unavailable to policy makers due to bureaucratic inertia or political motivations not to address conditions in the Mukuru settlements. Anecdotally, policy makers in the Nairobi County government have remarked to research team leaders that conditions in Mukuru and in informal settlements generally have gone unaddressed because they are viewed as too complex.¹⁸ The value of the situational analyses, thus, is to enable research teams to develop appropriate financial, planning, and legal models that will help demystify the complexity of the situation. The models will help the residents begin developing tentative plans for upgrading the Mukuru settlements.

Part of the challenge is technical. For example, when it comes to housing, the communities have made it a priority to minimize the displacement of residents; many of the people living in Mukuru have strong social ties and derive their livelihoods from the settlements. Given that the densities in Mukuru are very high, any replanning may call for the development of multistoried housing, which brings up major financing and technical design issues. Thus, based on the initial situational analyses, the urban planning and finance teams will work closely with the community to determine what kinds of housing will be

18 Daniel Brinks and Varun Gauri note that the lack of knowledge in such situations might be symptomatic of larger challenges in political will: "Particularly in developing countries, there exists a dissonance between shared, universalistic discourses supporting constitutional and political aspirations for 'social justice' or 'human dignity' on the one hand, and the clientelistic and particularistic exchanges used to construct and maintain the political order, on the other. Social and political actors are generally aware of these dissonances; but for any given claim they may not possess specific knowledge whether fulfillment of aspirations is economically, politically, and technically feasible. It is often in the interest of political elites, moreover, to hide the true cost of fulfilling universalistic commitments so that public expenditures can continue to be used for narrow partisan or sectarian agendas." *See A New Policy Landscape in Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* 348 (Varun Gauri & Daniel Brinks eds., Cambridge U. Press 2010). *See also* C. Rodriguez-Gravito, *Latin-American Constitutionalism: Social and Economic Rights: Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 Tex. L. Review 1664 (2011): "One of the defining traits of systemic policy failures is the lack of reliable data on the conditions of the victimized population."

appropriate and affordable to the categories of people in Mukuru. The hope is that the plans will gain greater legitimacy and ownership among residents due to their involvement in developing them.

The challenges faced by the communities are not simply practical or technical, however. Research teams are interrogating the existing systems of service delivery with a view toward trying to unravel some of the underlying reasons that formal service provision has failed to reach the Mukuru settlements. The solution is not as simple as coming up with a plan to formalize and regularize service provision. Such action could risk displacing positive innovations that the informal service delivery systems have developed. In addition, formalizing service provision would likely mean upsetting entrenched power dynamics, for example, irregular (and highly lucrative) relationships between formal and informal providers.¹⁹ Recommendations on how services can be provided in an efficient and affordable way will include strategies of engagement with public officials and utilities providers that target these “nontechnical” elements. To illustrate, the collection of sewage is often performed by youth, providing them a steady if modest income that might be lost if service provision were formalized without a clear alternative.²⁰ An intermediary arrangement between a purely formal and informal setup would help ease the potential loss of employment. By contrast, a strategy related to water and electricity providers might call for efforts to formalize service provision, but would need to focus on possible risks to residents due to displacing existing monopolies on service provision, in addition to confronting a possible reluctance to extend services into the settlements due to political inertia. A main obstacle for Mukuru residents in seeking formal service provision from public utilities has been the lack of security in tenure. Holding title is typically a requirement for being connected, which brings us back to the starting point of the research: the concept of the relationship between land tenure and service delivery.

Efforts to develop situational analyses and planning, finance, and legal models are being undertaken in an ever-changing environment. Due to the increase in tenure security in Mukuru, however temporary, that resulted from the 2012 injunction freezing evictions, structure owners have been erecting better constructed and equipped structures in order to charge higher rents.²¹ This development has caused the research team to adjust its thinking: previously the main focus was on residents, titleholders, and service providers, but the structure owners are now emerging as important actors whose competing interests must be addressed in any plans. It is in confronting this overlay of entrenched and, at times, competing interests—between residents and title-

19 An informal system of tenure reported to operate as an overlay to the existing formal title system—along with the social and political structures underlying it—would also be displaced or disrupted through efforts to achieve greater tenure security for the residents.

20 A group of youth sewage collectors approached MWW to request financial assistance to purchase plastic gloves and masks to foster more hygienic working conditions.

21 Based on observations and focus group discussions with community members by the research teams.

holders, informal service providers and structure owners—that the law and legal solutions hold their greatest potential in helping to confront the challenges faced by Mukuru’s residents. Here is also where the experiences in Mukuru raise larger questions about how to promote justice, voice, and accountability for vulnerable groups in the face of complex and colliding interests.

Access to Justice Issues in Mukuru

Looming in the background to the situational analyses and efforts to develop community-driven upgrading plans is the ongoing litigation, which has yet to go to trial. In other words, the research efforts are not simply geared to an optimistic vision of the case’s outcome. Research findings are intended to target the access to justice, voice, and accountability challenges faced by the residents in Mukuru. The findings will in our view help improve both the quality and the outcome of any final judgment in the Mukuru case. More specifically, the research findings aim to inform the outcomes in terms of the court’s findings on the merits of the case and the substantive scope of the rights at stake, as well as on any determination of the appropriate remedy and any subsequent monitoring of such a judgment by the court.

In terms of the substantive scope of the rights at stake, Article 43(1)(b) of the Kenya Constitution provides that everyone has a right “to accessible and adequate housing, and to reasonable standards of sanitation.” Three critical elements of Article 43 rights are relevant to the Mukuru case: horizontal application of Article 43 rights, potential clashes between private property rights and Article 43 rights, and the principle of progressive realization.

In considering the application of Article 43 rights, the first challenge is in determining who should be responsible to whom. In Mukuru, the majority of actors are private individuals, especially in relation to housing. These actors are the titleholders and structure owners, who in many ways are in an agency relationship with the titleholders. In this context, then, the most straightforward outcome from the perspective of the Mukuru residents would be for the court to decide in their favor on the issues of title, that is, by canceling the titles of current titleholders. In that case, title would arguably revert to the state, and the remaining issues related to housing and sanitation would become more of a traditional state-citizen dispute resolution, with the state more clearly holding responsibility in relation to rights claims. In that situation, reference could be made to Article 43(1) cases such as *Mitu-Bell* and *Satrose Ayuma*, where the courts placed an obligation on the state to ensure that alternative accommodation is available to residents prior to conducting any evictions.²²

22 Consistent with approaches in other countries, such as *Grootboom* (South Africa) and *Olga Telis* (India) and the need to develop reasonable plans, or at least to halt evictions until a plan is developed.

Horizontal Application of Rights

Should the court show a reluctance to cancel titles, issues would arise concerning the horizontal application of Article 43 rights. The horizontal application of a constitutional right denotes an obligation to fulfill a right can be applied to a private individual.²³ In the case of Mukuru, Article 43(1) on the right to housing and sanitation arguably applies horizontally to the titleholders and structure owners. In other words, those actors have a positive obligation to ensure that proper sanitation is available in relation to housing units that they rent out, even if there are good reasons to argue that the government should be largely responsible for developing sanitation infrastructure. On sanitation, given the relationship between informal and formal service providers, there might be a possibility to impute an obligation under Article 43(1) on the informal providers. The argument here would be that the informal providers have stepped in to perform a public function and thus should carry the obligations that normally accompany that role. There is also an argument that the Constitution obligates landlords to put sanitary facilities in rental units that meet a certain standard of decency. In fact, part of the argument being developed in the case is that failure to provide any or decent sanitary services is a violation of the right to human dignity provided for under Article 28 of the Constitution. Conversely, responsibility for the informal providers could be imputed on the government, given its active role in the irregular provision of services or its tacit role in allowing the informal-formal relationships to continue while failing to meet its own state obligations to provide reasonable standards of sanitation.

The issue of private actors' responsibility in relation to housing and sanitation was confirmed by Justice Lenaola in the High Court case of *Satrose Ayuma*. The respondents, Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme, argued that Article 43 rights could not be enforced against them because they were nonstate actors. Justice Lenaola rejected that defense and affirmed that the enforceability of the Bill of Rights was not limited to a state organ. What is yet to be clarified is whether private actors attract the same level of obligation as the state in the application of the Bill of Rights or a diminished level of responsibility, depending on the nature of the right, as is the case in South Africa.²⁴ Arguments that certain elements of Article 43 should apply to titleholders, structure owners, or informal services providers remain largely untested.

23 Constitution of Kenya, art. 20(1).

24 Unlike in Kenya, where the Bill of Rights does not provide for any qualification on the obligation on the applicability of a right either between private or state actor or on the basis of the nature of the right, sec. 8 of the South African Constitution makes a distinction on the basis of the nature of right. Sec. 8 reads: "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state; (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Potential Clashes in Rights

The level of responsibility of structure or title owners horizontally could further be shaped by how the court seeks to resolve the clash in constitutional rights arising in Mukuru, namely, between the right to private property of the titleholders and the right to housing and sanitation asserted by the informal settlement residents.²⁵ Not only are titleholders likely to resist any claim that they owe positive, horizontal obligations under Article 43, they might assert that they are the victims in this context, having been denied the right to use their property by informal settlers who have “invaded” their land. A telling example is the case of *Orbit Chemicals Ltd.* in which a titleholder in Mukuru (Orbit Chemicals Ltd.) sued the government for loss of use on account that “squatters” had invaded the land and this prevented Orbit as titleholder from using the land.²⁶ Although the Orbit Chemical case predated the current Constitution, Orbit’s property rights claim could now be framed in terms of property rights under Article 40 of the Constitution. When framed in this way, resolving Orbit Chemicals’ claims regarding Mukuru lands becomes a question how best to balance its asserted property rights and residents’ competing housing rights claims.

The issue of how to strike a balance between individual-based rights and the need to safeguard the legitimacy of the state through the protection of vulnerable communities was front and center in drafting of the recent Evictions and Resettlement Procedure Bill and proved quite contentious. Many stakeholders were concerned that the bill would undermine indefeasible rights to property and lead to massive encroachments and the breakdown of the rule of law. As of September 2014, the bill had yet to be enacted, suggesting possible continued reservations about how to balance the competing interests at stake.

Resolving these competing claims is a complex adjudicative exercise. In respect to publicly held lands, the High Court sought to balance property rights with the housing rights of informal settlers in the *Mitu-Bell* and *Satrose Ayuma* cases by providing the minimum steps to be undertaken before demolition and eviction can occur. In both cases, the court ruled that evictions could not be undertaken unless alternative accommodation is available to settlers—and placed the obligation on the state. This approach is analogous to the judgments of the South African Constitutional Court, which has grappled with similar clashes on a number of occasions. For example, in *Port Elizabeth Municipality v. Various Occupiers*, the court ruled that the property rights of a private landowner did not permit a municipality to evict squatters from private lands without finding suitable land for the squatters. The South African Constitutional Court resolved, on the one hand, that property rights are “defensive

25 The right to property is provided for in art. 40 of the Constitution.

26 Specifically, Orbit demanded that the government be held liable for the “loss of user, income, mesne profits and possession of the plaintiff’s property.” See *Orbit Chemical Industries Ltd v. Attorney General* (2012), eKLR, Civil Case 876 of 2004 (Oct. 12, 2012). Although the issue of loss of use was not tried, it formed the basis under which Orbit Chemical was awarded a settlement by the court.

rather than affirmative,”²⁷ whereas, on the other hand, the constitutional right to housing protections are not unlimited and expressly contemplate evictions of settlement dwellers, “even if it results in loss of a home.”²⁸ The court also emphasized the “need to seek concrete and case-specific solutions to the difficult problems that arise.”²⁹

Another significant element from the *Port Elizabeth* case is that what began as essentially a dispute between private actors took on a public dimension because the state, as arbiter of whether housing rights of the squatters should give way to the property rights of the landowners, was ultimately required to help resolve the dispute. In other words, the state is under an obligation to ensure that alternative arrangements are available for squatters in case of eviction or that private property owners are compensated for the loss of their use of property if eviction is not possible. Indeed, land rights under the South African Constitution are conditioned by considerations of public interest, much as they are in the Constitution of Kenya, and both the Constitutional Court and the Supreme Court of Appeal in the *Port Elizabeth* case rejected the High Court’s earlier finding that sought to uphold private property rights of landowners, and thus justify the eviction of squatters on public interest grounds.

In Kenya, a similar balancing approach is possible under the Constitution. First, in light of the emphasis that the Constitution places on human dignity and the protection of marginalized and vulnerable groups, the property rights of owners would likely yield to the housing rights of settlement residents in cases where eviction would mean leaving people homeless with no alternative. Any limit to the right to property is subject to a general limitation clause in Article 24 that requires that any such limits be enacted through the least restrictive means. Evictions, when they leave informal settlers homeless—and especially due to the violent manner in which they are carried out in Nairobi—engage the right of residents not to be subjected to cruel, inhuman, or degrading treatment. The Constitution provides for no limitation on that right, arguably tipping the balance in favor of Mukuru residents in weighing their rights against those of private property owners.

The South African Constitutional Court affirmed a role for the state in helping reach a solution in the face of competing rights in *Modderklip Boerdery*, which involved squatters on private lands. Indeed, that case perhaps best illustrates the dilemma of competing rights where the parties implicated are

27 “The land-owner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers.” See *Port Elizabeth Municipality v. Various Occupiers*, Constitutional Ct. (2004) (12) BCLR 1268 (CC) (South Africa), at para. 20.

28 *Id.*, at para. 21, referencing subsec. 26(3) of the South African Constitution.

29 *Id.*, at para. 22. Additional considerations to ensure that any eviction is just and equitable include the circumstances under which the settlers occupied the lands in question, the duration of their stay, and the availability of alternative suitable accommodations or land. With respect to the duration of the stay, the court ruled that “a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure,” which would mirror the situation currently faced by most Mukuru residents. *Id.*, at para. 27.

all nonstate actors, as in Mukuru. *Modderklip Boerdery* is sometimes critiqued because, rather than make a substantive ruling on the squatters' right to housing, the Constitutional Court framed the issue in terms of the right to the rule of law and access to justice. The rule of law protection under the South African Constitution requires that the state "provide the necessary mechanisms for citizens to resolve disputes that arise between them."³⁰ In this case, the state was obliged to provide mechanisms to resolve the dispute between private parties that include "the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders."³¹

With this judgment, the court sidestepped the issue of the horizontal application of the rights at stake (the private property owners had raised this argument vis-à-vis the squatters) and focused on the need to ensure that any actions to resolve the dispute between property owners and settlement residents minimized "large-scale disruptions in the social fabric" and prevented "social upheaval."³² As a remedy, the court ordered the state to pay compensation to Modderklip for losses related to the invasion by squatters of his land and prevented any evictions of the squatters from the land until the state had found an alternative place to relocate them. In essence, the court protected Modderklip's loss of use while preserving the right to housing of the squatters. As noted earlier, the South African Constitution appears to place a lower responsibility on private actors than state actors, a distinction not explicitly made in the Kenyan Constitution. It is unclear whether the Kenyan courts would be so quick to sidestep the issue of the horizontal application of rights when considering the same clash in rights between private parties. Notwithstanding questions of the horizontal application of rights, the court's order in *Modderklip*—which placed the onus on the government to address both sets of rights—seems apposite to the Mukuru context in at least one respect. Specifically, such a ruling could help confront the lack of engagement and bureaucratic inertia by public officials seen by Mukuru residents in the face of threats of eviction from private actors. Indeed, as discussed below, the larger challenge may be in the enforcement of any judgment, on top of challenges in seeking a judgment to affirm the rights of Mukuru residents.

30 *President of the Republic of South Africa & Anor v. Modderklip Boerdery & Ors*, Constitutional Ct. of South Africa, Case CCT 20/04 (May 13, 2005), at para. 39 (applying subsec. 39 of the const.). See A. van der Walt, *The State's Duty to Protect Property Owners and the State's Duty to Provide Housing: Thoughts on the Modderklip Case* 21 South African J. Hum. Rights 144 (2005), on the public dimensions of the private law dispute.

31 *President of the Republic of South Africa & Anor v. Modderklip Boerdery & Ors.*, para. 41.

32 *Id.*, at paras. 31, 43, 46. *Occupiers of 51 Olivia Road, Bereas Township and 197 Main Street Johannesburg v. City of Johannesburg*, 2008(3) SA 208 (CC) and *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others*, 2010(3) SA 454 (CC) also affirmed an obligation of the state of "meaningful engagement" with settlement dwellers who risked being left homeless by evictions. See, for example, Anashari Pillay, *Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement*, 10(3) I-Con 732 (2012), for a more detailed discussion.

Progressive Realization

The third element relevant to Article 43 rights affecting Mukuru is the principle of progressive realization. Economic and social rights in Article 43 are qualified by Article 21(2), which requires the state to take legislative, policy, and other measures, including the setting of standards to achieve the progressive realization of those rights. The Supreme Court of Kenya has made attempts to elaborate what the concept of progressive realization means, which it explained in terms of a “phased-out attainment of an identified goal” in its opinion in Advisory No. 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*.³³ In determining Article 43 rights, including those of housing and sanitation, courts have required the state to show that it is putting in place mechanisms that help move toward the progressive realization of the rights. This approach is well developed in other jurisdictions with social and economic rights, such as South Africa and India, where courts often require the state or those with the obligation to facilitate a social economic right to show tangible and systematic efforts being made to progressively realize the right.³⁴

It is less clear how the Kenyan court will apply progressive realization in light of the horizontal application of rights contemplated under the Kenyan Constitution. Who would bear this responsibility, in situations where the parties implicated are all nonstate actors as in Mukuru, needs to be determined. In the context of Mukuru, both the horizontal application of rights and progressive realization pose a number of evidentiary issues. Here is where research findings can feed into a substantive analysis of the case.

In respect to the horizontal application of rights, the structure owners as well as other service providers are in many ways amorphous, operating largely as cartels. Although Mukuru residents can often point to who supplies water with relative ease, as well as to any actual or putative agency relationship among structure owners, service providers, and titleholders, generating sufficient evidence to prove these relationships in a manner that leads to legal liability presents a challenge. It is precisely these types of dynamics—who is providing what to whom—that the situational analyses are trying to chart with more accuracy. Similarly, the current efforts to work with the communities to identify legal, financial, and planning models—that is, to define what is tangibly possible for residents in terms of establishing dignified and desired living arrangements—should go a long way to helping define, more concretely, what progressive realization of the right to access to housing and

33 *Orbit Chemical Industries Ltd v. Attorney General*, *supra* note 26.

34 See, for example, *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) (2000) ZACC 19, where the court established a “reasonableness” standard to be used in evaluating how the state is responding to the requirement of progressive realization of a right. The reasonableness standard was further developed in cases such as *Minister of Health and Others v. Treatment Action Campaign and Others* (No. 1) (CCT9/02) (2002) ZACC 16, and in *Khosa and Others v. Minister of Social Development and Others*; and *Mahlaule and Others v. Minister of Social Development and Others* (CCT 13/03 and 14/03) (2004) ZACC 11.

reasonable sanitation entails. The project has involved discussions with policy makers, especially from Nairobi County government and the NLC, in a proactive effort to feed into their thinking on any solutions that they are developing to address the challenges faced by residents of Mukuru, and in Nairobi's informal settlements more generally.

By providing a detailed analysis of conditions in Mukuru, the research thus aims to help the presiding judges apply emerging legal standards under the Constitution and craft an appropriate remedy—whether the courts opt for a remedy that follows a procedural *Modderklip* path or a more substantive application of housing rights to resolve competing claims in Mukuru.³⁵ The models being developed with residents will provide a practical roadmap for the state to engage meaningfully with the residents of Mukuru to find solutions to the many problems they face daily and preserve the social fabric of their communities. To be sure, the “state” or “government” has been treated somewhat amorphously to this point; in reality, a series of responsibilities can be distinguished between the national and county levels. The research has thus sought to bring clarity to the separate or overlapping responsibilities of the different public bodies—in terms of lands, service delivery, planning, and so on—both in deciphering the applicable legal frameworks and in undertaking related legal and public advocacy. Anecdotally, efforts to use research to feed into litigation materials are helping reinforce a nascent culture of using expert evidence and evidence-based pleadings by groups bringing public interest litigation under the recent Constitution.

Challenges in Crafting a Remedy and Monitoring Its Enforcement

The importance of using research to feed into the crafting of an appropriate remedy should not be underestimated. That exercise, in contexts of social and economic rights adjudication like Mukuru, might be the larger challenge for the court (larger, that is, than resolving issues related to competing rights, progressive realization, and so on). The challenge of remedies can be formulated in two ways, each associated with larger debates about social and economic rights litigation.

At one level are traditional critiques about the legitimacy of courts in respect to public interest litigation, namely, that they not be seen as overreaching their role by issuing overly prescriptive or expansive rulings, and thus usurping executive and legislative powers on questions of public policy that the courts might neither be well positioned nor have the expertise to handle.³⁶ Economic and social rights have been a particular target of such critiques

35 More generally, *see*, for example, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1085 (2004), on fact-finding challenges faced by courts confronted with polycentric problems with a myriad of actors.

36 *See*, for example, *id.*, for a summary of classic critiques, primarily in an American context, notably referencing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976). *See also* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social*

because, by their nature, they typically involve larger, contested political choices regarding the use and redistribution of resources.³⁷

In the context of Mukuru, however, the concern is more with a second, more recent, focus on the effects of social and economic rights litigation. National courts in a number of countries have increasingly upheld economic and social rights protections, often relying on newer constitutions. Questions have arisen, in turn, as to whether this increased protection of rights has achieved the sought-after social change; in other words, to what degree has it helped solve the social and economic problems targeted by litigation? Questions about the effects of economic and social rights litigation take on an added dimension in developing-country contexts, where poverty is more widespread and endemic than in more economically well-developed countries. From this perspective, questions arise as to what role courts and legal processes can play in finding solutions to large-scale social and economic challenges, which likely have eluded existing poverty reduction interventions.³⁸

Attempts to analyze the impacts of social and economic rights litigation, to date, have focused on remedies as well as on the related issue of what role courts have played in supervising the enforcement of orders. With respect to remedies, commentators have tried to understand, for example, the relative effects of judgments and whether the judgments target more directly private or state actors and how prescriptive, expansive, or flexible the judgments are in directing actors to remedy the right's violation in question.³⁹ Where a court crafts remedies that eventually are not enforced—whether because of the complexity of the remedies or a lack of a culture of respect for rule of law, or because the remedy was not effective in addressing the rights violation—this has the potential to bring the administration of justice into disrepute. The early experiences in Kenya with social and economic rights litigation have been sensitive to such concerns. The enforcement of remedies in Kenya has generally been problematic, which points to a culture of respect for the rule of law that remains largely elusive.⁴⁰ In this light, the strategy of the courts in cases such as *Mitu-Bell* and *Satrose Ayuma* has been to retain supervisory jurisdiction, thus requiring parties to report on progress in complying with the court's order. Yet another strategy, seen in the *Satrose Ayuma* case, is for the court to clarify general principles of law and require the parties to work out

Change? (U. of Chicago Press 1991).

37 For a discussion of these debates in the Indian context, where they have been somewhat pronounced, see, for example, P. B. Mehta, *The Rise of Judicial Sovereignty*, 18 J. Demo. 70 (2007); S. Shankar & P. B. Mehta, *Courts and Socioeconomic Rights in India*, in *Courting Social Justice*, supra note 18.

38 See, for example, Brinks & Gauri, *Introduction*, in *Courting Social Justice*, supra note 18, for a more detailed discussion of the possible role of courts and litigation.

39 Questions of legitimacy are related to questions of the impact of judgments, inasmuch as decisions that are viewed as illegitimate might stand a greater chance of not being followed and thus having less effect.

40 The new constitution was enacted, among other reasons, to strengthen the culture of rule of law.

the most appropriate course of action under the circumstances. In these ways, the courts might be heeding the advice of Irene Ndegwa, who has stated, "The nature of remedy sought and granted must therefore take into account the attitude of the government during the course of the litigation or its previous record of compliance with court orders on related issues."⁴¹

The remedial strategy in *Satrose Ayuma* appears consistent with the balanced approach that Yash Ghai and Jill Cottrell have recommended, where parties are encouraged to work out solutions in economic, social, and cultural rights disputes while the courts play a superintending role with the option to intervene when there is a deadlock.⁴² To situate this approach within a broader body of literature, the initial experiences in economic and social rights litigation points to an approach that is "experimental" or "dialogical," emphasizing relatively open remedies, but strong supervision by courts.⁴³

Studying the trend in the enforcement of judgments made by the Kenyan courts, especially those judgments for social economic rights, will foster a better strategy for the types of remedies that will be most appropriate in cases like Mukuru. Using research to guide what constitutes appropriate remedies also amplifies the role of experts in devising judicial remedies. As Brinks and Gauri note, "[l]itigation campaigns that demonstrate the feasibility of social action can redefine what is socially possible and transform what were utopian aspirations and barely articulated wishes, which could be dismissed or bought off with more tangible short-term benefits, into needs that *must* be met by governments."⁴⁴ Against this backdrop, the research experiences in Mukuru could shed light on larger questions regarding enforcement of social and economic rights remedies. For example, will providing detailed analysis on the situation in Mukuru and working with residents to identify possible solutions to housing and basic services needs leave the court more inclined to view parties as better placed to work out remedial options (viz. restricting its role to monitor compliance with its ruling)? The research project could offer clues as to whether the strategy of providing information on options to the court increases the likelihood of compliance with the court's judgment. Finally, there are questions regarding how the court, when armed with bet-

41 Irene Ndegwa, *A Roof over Wanjiku's Head: Judicial Enforcement of the Right to Housing under the Constitution of Kenya*, in *Judiciary Watch Report, Judicial Enforcement of Socio-Economic Rights under the New Constitution: Challenges and Opportunities*. 143, 175 (J. Biegon & G. Musila eds., Kenya Sec. of the Intl. Commn. Jurists 2011).

42 Jill Cottrell & Yash Ghai, *The Role of the Courts in Implementing Economic, Social, and Cultural Rights*, in *Economic, Social, and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social, and Cultural Rights* (Y. Ghai & J. Cottrell eds., Commonwealth Secretariat 2004). This approach is discussed in *Port Elizabeth Municipality v. Various Occupiers*, *supra* note 27, at paras. 39–47.

43 Rodriguez-Gravito, *supra* note 18, relies on notions of constitutional dialogue and cites related literature in more detail. See Sabel and Simon, *supra* note 35, for a discussion of the experimental approach.

44 Brinks and Gauri, *supra* note 18, at 25.

ter information, could help parties move beyond potential deadlocks as they arise.

Challenges posed by potential deadlocks point to questions of power dynamics between parties and challenges in overcoming political inertia and the lack of bureaucratic capacity to address problems on the scale of those faced by the Mukuru residents. Brinks and Gauri suggest that courts can play a role in social and economic rights litigation in imposing a “unifying body of law in exchange for intervening in otherwise unequal local relations of power, especially in cases involving local authorities.”⁴⁵ The chapter by René Uruena in this volume points to experiences in Latin America where courts have been an important tool in overcoming analogous deadlocks, by empowering or compelling agencies to address large social problems faced by the poor and mediating intense divisions over redistribution of resources in the process.⁴⁶ In the case of *Port Elizabeth*, which affirms the importance of court-supervised mediation, Justice Sachs found that the opportunity for mediation between the parties had run its course.⁴⁷ The approach taken by the research team thus has been one that does not see the courts or the law as panaceas.⁴⁸ The Mukuru research project is premised on working with communities to identify solutions, which implicitly evinces a preference not to rely solely on courts or legal processes to resolve the challenges that the settlements face. The research team has tried to use the evidence generated from the research to strengthen engagement with public officials in an effort to increase policy windows outside judicial proceedings. Finally, as described in the next section, legal advocacy efforts are seeking, in part, to rely on administrative redress mechanisms outside the courts, which might prove to be an alternative, complementary venue to the courts. The approach is guided by the view that administrative redress mechanisms might be easier to access, and more responsive and flexible, than the courts and could guard against an overreliance on judicial pronouncements and constitutional challenges in addressing large-scale social problems.⁴⁹

Combining Legal Advocacy with Community Mobilization Efforts

The challenges in enforcing court judgments and remedies point to possible limits of the law and legal solutions in solving the many layers of challenges faced by residents in Mukuru Kwa Njenga and Mukuru Kwa Reuben. Con-

45 Brinks & Gauri, *supra* note 18, at 347.

46 Chapter 4 in this volume, “Courts and Regulatory Governance in Latin America.”

47 *Port Elizabeth Municipality v. Various Occupiers*, *supra* note 27, at para. 47.

48 In this regard, see Justice Markandey Katju’s judgment in the Supreme Court of India, *Writ Petition (Civil) 580 of 2003*, para. 56, remarking that “the view that the judiciary can run the government and can solve all the problems of the people is not only unconstitutional, but also fallacious and creates a false impression that the judiciary is a panacea for ills in the society.”

49 For a general discussion on these points, see, for example, Varun Gauri, *Redressing Grievances and Complaints regarding Basic Services*, 41 *World Dev.* 115 (2013), on overreliance on courts.

scious of these limits, the research team has tried to build links to ongoing community-level advocacy efforts in addition to efforts to support the legal challenge on behalf of residents. More specifically, through efforts to involve community members in data collection activities and to share findings with them, the research process aims to build awareness of physical and legal situations. Three examples illustrate how increased awareness has had an empowering effect and helped community members better target their advocacy efforts.

The women of Mukuru recently mobilized to see how they could best solve the appalling living and health conditions they face. Aware of their rights to health and sanitation under the Constitution, a group of about 20 women began a campaign in November 2013, with AMT's assistance, to collect 20,000 signatures to demonstrate the number of people who are aware of and willing to demand action relating to their sanitary plight. On August 21, 2014, and having collected 15,000 signatures, the women delivered a letter to the cabinet secretary for health formally requesting him to set up an inquiry under Section 11 of the Public Health Act of Kenya. The letter proposes that the inquiry investigate and make recommendations on how to address the public health conditions in the two settlements. It is hoped that the results of such an inquiry would put pressure on the government to address larger tenure and planning shortcomings that are at the root of poor services such as the water and sewage infrastructure and associated health risks in Mukuru. This strategy, which begins with community mobilization, is based on an awareness of basic constitutional rights and seeks a response from public officials by way of formal, statutory processes as well as through the broader processes of political pressure. These efforts, still under way, are an example of using administrative recourse mechanisms as an alternative to relying solely on constitutional litigation.⁵⁰

In 2013, leaders of a youth empowerment organization called Wajukuu, from an informal settlement in Lunga, not far from Mukuru, approached MWW leaders. The Wajukuu youth leaders had heard about MWW's efforts to support the Mukuru communities against evictions and sought guidance against similar threats of demolition in their neighborhood. The youth reported that their area chief (a leader under the informal governance structures in the settlement) had issued notices to vacate the settlement. Apparently, the local chief and the district commissioner were working closely with the structure owners, who were trying to negotiate to buy the land where the settlement is situated—an example of the power dynamics and interplay between formal and informal governance structures in the settlements. The lands in question followed the typical pattern: a company had been allocated land titles—a 2.5-acre stretch in the settlement—on the condition (never fulfilled) that the lands be developed for light industry within six months. The structure owners had

50 For an earlier account, see, for example, Mark Anderson, *Kenyan Women Sue for Ownership of Nairobi Slum*, *Guardian* (Oct. 2, 2013).

also approached MWW to ask it to withdraw a case, similar to the one in Mukuru, seeking cancellation of the company's title.

MWW and Wajukuu's first step was to mobilize area residents to inform them of the risk of demolition. During two awareness-building meetings held in the settlement, which hundreds of residents attended, MWW informed the community about the land that they occupied. In particular, MWW explained that the company had failed to fulfill the conditions under which the land was allocated, meaning that the NLC had the power to cancel the title. As the next step, community leaders held two meetings with the NLC requesting a cancellation of title. The NLC's chair was not prepared to cancel title and recommended that the leaders negotiate with the landowners to purchase the land. The chair explained that the NLC had the power to cancel and reissue the title to the original grantee. After this meeting, the district administration handed out pamphlets to settlement residents informing them that the land would be sold. Surveyors began demarcating the land into plots, but residents chased them away before they could complete the task. After this incident, the residents gathered in large numbers for a peaceful demonstration at the district chief's office. A few days later, residents held a peaceful demonstration along Lunga Road, and the settlement has experienced no further threats since.

In July 2012, similar efforts were undertaken in Mukuru after MWW discovered, through an advertisement in a national newspaper, that lands that house the Maendeleo community primary and secondary schools were slated to be auctioned. Thanks to a similar mix of community awareness raising and peaceful demonstrations, the auction was called off. That case predates the research project and the injunction freezing evictions in Mukuru Kwa Reuben and Mukuru Kwa Njenga. These examples demonstrate how public advocacy efforts were successful in building the confidence of residents to confront and stem the threat of eviction and the actions of titleholders that fell outside the constitutional framework in place in Kenya. The experiences demonstrate that raising awareness about the contested legal status of the lands can be a powerful tool for mobilizing coordinated community action. Yet these efforts also demonstrate the need for better legal frameworks and more predictable processes to regulate disputes. Although guided by an awareness of legal rights and peaceful in their execution, those efforts were ultimately successful because residents succeeded in shifting power dynamics in their favor. Those dynamics are continually in flux, however, and increased clarity on the applicable legal frameworks would help ensure that disputes are resolved in a more orderly and predictable manner—as has been the case since the 2012 injunction put a halt to evictions in Mukuru.

Conclusion

In a recent right to health case, Justice Majanja of the Kenyan High Court noted that

the success of our Constitution largely depends on the State delivering tangible benefits to the people particularly those who live at the margins of society. The incorporation of economic and social rights set out in Article 43 sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and disease. Failure to deal with these existing conditions will undermine the whole foundation of the Constitution.⁵¹

In an earlier case in South Africa, Justice Yacoob of the Constitutional Court remarked, “People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be proactive and not purely defensive.”⁵² In many respects, these two complementary sentiments have served as the launching point for the research project described in this chapter. A challenge going forward will be to achieve balance between empowering citizens and engaging with public officials to bring about the tangible benefits that Justice Majanja evokes. A related challenge will be in managing the expectations of residents who are eager to see change after decades of living on the margins of society.

As of fall 2014, the project was just past its midway point, and the problems that it seeks to understand are likely to persist for some years beyond the project’s lifespan. Some of the above experiences point to the limits of legal action in the face of such endemic problems, as well as to how the research team is trying to carve out opportunities in the face of them. The ultimate successes of the project in combining knowledge building from different disciplines (urban planning, finance, and legal) with different types of policy engagement and advocacy, legal or otherwise, remain to be seen. The hope is that this model of action-based research will be a valuable example for promoting greater voice, justice, and accountability for vulnerable groups faced with similarly complex contexts. For the time being, the efforts are ultimately about helping the residents of Mukuru find solutions to their living conditions and, in the process, achieve their human rights to dignity now firmly entrenched in the Constitution of Kenya.⁵³

51 *Mathew Okwanda v. Minister of Health and Medical Services & 3 others*, Pet. No. 94 of 2012, High Ct. at Nairobi, at para. 13.

52 *Occupiers of 51 Olivia Road v. Johannesburg*, *supra* note 32, at para. 20.

53 Constitution of Kenya, art. 28.

