



RECOGNITION OF THE RIGHT TO ADEQUATE HOUSING OF THE POLICE IN KENYA

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (L.L.B.) OF
STRATHMORE UNIVERSITY

STRATHMORE LAW SCHOOL

MARCH 2016

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DEDICATION

I dedicate this work to the Almighty God in reparation and thanksgiving for all the graces received.

ACKNOWLEDGEMENT

First and foremost, I wish to thank the Almighty God for the strength, support and inspiration which he has graced me with throughout the study.

Secondly I would like to express my heartfelt gratitude to my supervisor Miss Jerusha Asin Owino for her patience and firm guidance throughout the research.

Finally, I wish to thank my parents Mr. Stephen Kirima & Mrs. Rita Kirima without whom all this would not be possible as it is they through their hard work and perseverance who have enabled me to pursue my undergraduate studies that has led to completion of this study.

DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.

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ABSTRACT

The right to adequate housing of the police has not been adequately catered for under the law nor in practice in Kenya, yet it is enshrined in the highest law of the land, the Constitution of Kenya under Article 43(b). This study sought to establish the extent to which the housing rights of the police have been ignored, the inadequacies of the current laws in addressing the poor housing that the police are currently facing and come up with recommendations on how best to solve the problem. The study hopes the proposed recommendations will be used by the government in the on-going security reforms.

The study was conducted through literature review of housing norms, analysis of the current laws & policies in the country on housing and labour relation laws and their role in the inadequate recognition of the right to housing currently being faced by the police. A comparative study was additionally made between the Republic of South Africa and Kenya, as South Africa has historically been plagued by the problem of marginalized groups in the housing sector due to the shortfalls of the law.

In order to solve the problem, the study recommends the reform of current housing laws and policies and other relevant laws in the country to cater in a special way for the unique needs of the police as pertaining to institutional housing, and the introduction of welfare Schedule under the National Police Service (Amendment) Act No. 11 of 2014. Additionally, the study recommends that public and private partnerships need to be embraced should the current problem have any hope of being solved.

LIST OF ABBREVIATIONS

GOK	Government of Kenya
ICESCR	International Covenant on Economic Social and Cultural Rights
NGO	Non-profit Organization
UNCESCR	United Nations Committee on Economic Social and Cultural Rights

LIST OF CASES

Beatrice Wanjiku v Attorney General & Another [2012] eKLR 6

Grootboom v Oostenberg Municipality and others 2000 (3) BCLR 277 (C).

Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000 (11) BCLR 1169.
(CC)

Soobramoney v Minister of Health, Kwa Zulu-Natal, [1997] ZACC 17

Matelly v. France (application no. 10609/10)

CHAPTER ONE: INTRODUCTION

1.0. Problem Statement

The promulgation of the Kenyan Constitution 2010 ushered a new dawn in the legal system of the country. It brought about the need to reform various systems in various sectors in the country so as to conform to the dictates of the constitution.

The government through the Ministry of Land Housing & Urban Development, which is charged with the mandate of facilitating Civil Servants to own houses through Civil Servants Housing Scheme Fund¹ has endeavored in the last few years to provide housing and housing benefits to its civil servants. A case in point is the Ngara Civil Servants Housing Scheme in Nairobi City whose benefactors were over 3000 civil servants from various institutions in the Government.²

However, it has emerged that in spite of such efforts employed by the government some Civil Servants poor housing conditions are yet to be taken into consideration consequently leading to the continued infringement of their right to adequate housing. These are the civil servants who work in the Kenyan Police Force. It has come to light that the housing situation of the police in the Police Force is utterly deplorable. This is evidenced by the report of the Task Force on Police Reforms published in 2009.

The Task Force had been established in the year 2003 and was mandated to analyse the poor policing practices at the time and provide recommendations.³ The Task Force proposed a

¹ Ministry of Land, Housing, <http://www.ardhi.go.ke/default/housing/> on 9th Jan 2015

² Wamugundo A, 'The Ngara Civil Servants Housing Scheme In Nairobi City, Kenya' (*Zakenya*), <http://www.zakenya.com/housing-estates/the-ngara-civil-servants-housing-scheme-in-nairobi-city-kenya.html> on 5th February 2015

³ Mageka A, 'Police Reform in Kenya: Challenges and Opportunities', *Security Sector Reform Resource Center*, 9 October 2015, <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/> on 19th Jan 2016

number of recommendations among them the implementation of organizational reforms and institutional restructuring.⁴

The report published in 2009 reported that police housing was inadequate and where available grossly overcrowded with poor sanitary conditions.⁵ It should be noted however that the 2009 report is not the first official discussion of the poor housing conditions of the police force that has taken place. Poor housing of the police has been the subject matter of Parliamentary Debates as early as 1980, where on July of the said year, the Assistant Minister for Transport and Communication (Mr. Lotitoyo) requested something to be done for the administration police hailing from barlasoi, Kirimon and Suguta Marmar police posts whose housing conditions were then in a very poor state and thus an impediment to their discharging their duties.⁶

Indeed the situation is so dire that it has come to the attention of the international community who have consequently raised an alarm over the situation with some going as far as to issue reports and exposes on the subject. Amnesty International is one such International Organisation. In light of the recent police reforms in the country, the organisation has stated that the current reforms need to encompass the improvement of the housing of the police force.

In the report published by the NGO '*police reform a drop in the ocean*', Amnesty International opines that although it is of great importance to focus on the soft side of reforms, such as culture and attitude change, we must not forget that the condition of service for the officers is the biggest impediment to reform of the police service⁷. As such our key

⁴Mageka A, 'Police Reform in Kenya: Challenges and Opportunities, *'Security Sector Reform Resource Center*, 9 October 2015, <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/> on 19th Jan 2016

⁵ Republic of Kenya, 'Professionalism, Terms and Conditions of Service and Empowerment,' Ch. 4 in Task force on police reforms, *Report of the National Task Force on POLICE REFORMS* (2009), 20, V

⁶ Kenya National Assembly official Record, Vol 53, June 19-Nov 13, 1980

⁷ Amnesty International, 'Police Reform in Kenya, A drop in the ocean', *Amnesty International Publications* (2013), 19, 5.4

concern at the moment should be boosting their morale through better terms of service including housing.⁸

1.1.Hypothesis of the study

The lack of recognition of the right to adequate housing of the police is caused by the inadequacy of our housing laws and policies in catering to the particular housing needs of the police.

1.2. Significance of the study

In light of the aforementioned problem identified in the problem statement, the 2010 Constitution and the ongoing police reforms, this study shall seek to establish that the current policies and the implementation processes employed by the government in the recognition of the right to housing of the police are inadequate, thus the police are facing an infringement of their right to adequate housing.

1.3. Statement of Questions:

The study shall seek to demystify the problem of poor housing of the police by answering four main questions that shall serve as a guide in identifying the problem areas in our current laws and possible solutions to the problem. The questions are as follows;

1. What is the content of the right to housing? And implications of domestic and international instruments on this right?
2. Who are the duty bearers and the right bearers of the right to adequate housing? Are the police encompassed in this right?
3. What are the current housing policies in the country and to what extent do they cater for the needs of the police?
4. What are the possible solutions to the problem of poor housing of the Police if indeed there are any?

⁸ Amnesty International, 'Police Reform in Kenya, A drop in the ocean', *Amnesty International Publications* (2013), 19, 5.4

1.4. Theoretical Background

The study shall be founded on two major theories, the Kantian Theory of Value and the Theory of Motivation.

The Kantian Theory of Value was propounded by the German philosopher Immanuel Kant. He believed that all human beings have ‘an intrinsic worth, i.e., dignity,’ which makes them valuable above all price.⁹ Kant’s idea that the human being is above all price has two implications. The first implication is that human beings should be treated as an end and never as a means, consequently, everyone has a duty of beneficence towards other persons and should therefore strive to promote their welfare and respect their right.¹⁰ In this case the right to adequate housing. The second implication was that since human beings should not be used as a means to an end they should thus not be manipulated for the use of others for certain purposes no matter how good those purposes are.¹¹

Both implications can perfectly be used to explain the foundations of the right to housing for the police officers in that, due to the duty of beneficence, the government should strive to promote the welfare of the police and respect their rights, in this case their right to housing and not only “housing” but “adequate housing”. The failure by the government to adequately cater for the housing needs of the police that is discharge their obligation, through their various mandates and powers, has subsequently led to the infringement of their core right, i.e. the right to human dignity.

The second implication of the Kantian theory of value has not been spared either. By virtue of the government of Kenya using the police in a very noble and key docket in the country, that of security, without a care for their general welfare, evidenced by the current poor housing conditions of the police (as shelter is a right upon which all this other rights are based on for example, a person needs an abode for him to access food, water...), the

⁹ Rachel J, ‘Kantian Theory: The Idea of Human Dignity’ in James Rachel’s (eds), *The elements of Moral Philosophy*, Random House Inc. (1986) 114-17, 122-23, 1,

¹⁰ Rachel J, ‘Kantian Theory: The Idea of Human Dignity’ in James Rachel’s (eds), *The elements of Moral Philosophy*, 1, 7

¹¹ Rachel J, ‘Kantian Theory: The Idea of Human Dignity’ in James Rachel’s (eds), *The elements of Moral Philosophy*, 1, 8

government has failed to discharge its mandate to recognise and uphold the right of human dignity¹² of the police.

The second theory that the study will be based on is the theory of Human Motivation which was advanced by Abraham Maslow. Maslow opined that deficiency needs must be satisfied for growth to occur.¹³ According to Maslow's theory, there are four types of needs that must be satisfied before a person can act unselfishly. The first needs are those that are physiological in nature.¹⁴ Maslow labeled the first needs as 'deficiency needs' as they create a tension within human beings when not satisfied.¹⁵

Therefore using Maslow as a key reference, this paper shall try to illustrate how by denying the police adequate housing their physiological needs are not quite met. This consequently negatively impacts the development of the country as the force will have zero motivation to discharge their mandate of enforcing security in the security docket.¹⁶

1.5. Literature Review

Housing has been the center of much academic and political discussion as poor housing has been a persistent problem facing the country. Much literature has been published to this end advancing numerous recommendations on how best to solve the problem. The study shall sample a few of the literature in the subsequent section while analysing the attention that has been given to the police if any.

¹² See Lutz M, 'Cantering Social Economics on Human Dignity,' *Taylor & Francis*, Vol 53 No. 4, (1995), 171-194, where the author expounds on the notion of human dignity giving evidence of the intrinsic value of human dignity

¹³ Griffin E, 'A First Look at Communication Theory' Ch. 10, 125, <http://www.afirstlook.com/docs/hierarchy.pdf> on 18 February 2015.

¹⁴ Physiological needs also known as basic needs. They include; food, water, shelter & clothing. These are the needs that are vital to man's survival.

Griffin E, 'A First Look at Communication Theory' Ch. 10, 125, <http://www.afirstlook.com/docs/hierarchy.pdf> on 18 February 2015

¹⁵ Griffin E, 'A First Look at Communication Theory' Ch. 10, 125, <http://www.afirstlook.com/docs/hierarchy.pdf> on 18 February 2015.

¹⁶ See, *International Monetary Fund's analysis of the impact of the militia group Al-shaabab attacks in Kenya*, Nyang R, 'Insecurity is Destroying Kenya's Economy,' 19 December 2014.

The recognition of any Economic Social & Cultural right under which the right to adequate housing is classified, needs a steady supply of resource allocation to necessitate the fulfilment of these rights. However, these resources are not always available. The Economic and Social Rights Center in Kenya (Hakijamii) herein after, Center, identified inadequate resource allocation as one of the drawbacks to the implementation of the housing policy in the country found in Sessional Paper No. 3 on Housing Policy of 2004.¹⁷

The government in its efforts to try and resolve the problem, identified some goals that were to be implemented in the course of the next three years. They include; that 50 housing cooperatives are set up, that 10 informal settlements with infrastructure investments should be provided, construction of 860 housing units by the National Housing Corporation should be undertaken and that 500 houses for the civil servants should be constructed¹⁸.

The goals set up by the government are well and good and will go a long way in trying to combat the gap identified by the Center. However, the particular needs of the police have once again been neglected. Firstly, there has only been mention of construction of 500 houses of civil servants. The government has taken it upon itself to solve the problem of poor housing of its civil servants in a general manner without taking into consideration the unique working situations of some of its employees.

That might render this mass building of houses for civil servants in general not feasible for some of the very civil servants. Let me expound further. The police generally stay in camps, commonly known as “kambis” in the different police posts in the country, where the government has over the years provided housing. This housing method is known as institutional housing¹⁹. How then can the same government claim to provide housing in one

¹⁷ Hakijamii, ‘Report On Housing Sector Financing In Kenya’, *American Jewish World Service Publishers*, (August, 2013), 2.

¹⁸ Hakijamii, ‘Report On Housing Sector Financing In Kenya’, 2

¹⁹ *Institutional housing is basically Space provided by an employer to its employees for long-term housing of individuals whose reason for shared residence is their association with the business or organization. The business or organization is responsible for some aspects of resident life beyond the simple provision of living quarters. Examples include medical care facilities and schools,* http://www.teachmeanance.com/Scientific_Terms/Institutional_living_quarters.html#ixzz3xqfJgWlh on 19th Jan 2016

location when there is in existence thousands of camps around the country? This goal therefore is irrelevant in the improvement of housing conditions of the police. The study shall therefore analyse how the government through the different policies and strategies of improving the housing of its civil servants have marginalized the needs of the police and a need has consequently arisen for these policies to be reformed to take into consideration the particular housing needs of the police.

Mankind is in constant need to improve his standard of living. He does so by obtaining the things that they value.²⁰ The fastest way of ensuring that socio-economic rights are implemented and that the rights holders', who are the police in this case, are ensured enjoyment of the rights that accrue to them, thus improving their standards of living, is when and if they are given the freedom and capabilities to do so.²¹ Good housing is definitely one of the things that human beings value as it is an integral part of their basic needs. Therefore, they should be given means to be able to acquire good housing through their own efforts in addition to the government's efforts.

Norton L. Steuben in his editorial note in his discussion on housing, as pertaining housing in the United States of America, stated that there are certain irreducible rights to housing one of which includes the right to equal treatment in the search and acquisition of housing.²² In light of the desperate position that the police are in, and the continued failure by the government to discharge its mandate to improve the housing situation of the police, there is a need to empower the police to the extent that within the set system (and we acknowledge the difficulties that might be faced in this regard) they may be able to help themselves to get out of the sad situation.

Not much is said about the aforementioned right in Kenya. The research that will be brought forth by the study shall analyse how the recognition of this right might go a long way in solving the inadequate housing currently faced by the police.

²⁰ Amartya Sen, 'Development as freedom.' 1st Ed, (1999) (Oxford University press), 18.

²¹ Amartya Sen, 'Development as freedom', 18.

²² Norton L. Steuben, 'Editors Notes; A Right to Housing?' Vol. 5 (*Journal of Affordable Housing & Community Development Law*) (1996), 303-304, 303.

If the right to equal treatment and fair acquisition is embraced, then the police will no doubt be inaugurated into the rental sector in the country. Karanja Mwangi in his article 'The nature of the rental housing in Kenya'²³ where he analyses the tenancy in the private housing sector and council rental housing states that due to the negligence of the government, the conditions of the rental sector have deteriorated greatly yet the greater percentage of people in the towns are living in rental houses.²⁴ The study shall attempt to marry one of the recommendations of Karanja's paper which is, the merging of the governments and the private sectors efforts in the improvement of the sector²⁵, to the problem facing the police of poor housing and how both the rural and urban police can benefit from such efforts.

1.6. Research Methodology

The study shall rely on the qualitative research method, which is an exploratory method, in its analysis of the relationship of the law in the country with the socio-economic right to housing and the implications it has had on the housing of the police in the country.

The main objective of analysing the law with the social science will be to explore the legal recourse available to the police in their quest to improving their standards of living through attainment of adequate housing which they are currently lacking.

The sources of the data shall be both primary and secondary sources which shall include, the Constitution of Kenya 2010, legislated laws, books and reports from both the government and private institutions, journal articles and online websites.

1.7. Limitations of the Study

This study is limited by the following factors. First is the time constraint. This study is part of the course work for the requirements of the award of the degree of Bachelor of Laws. The study therefore has to be conducted and submitted within the prescribed time period.

Secondly, the study is the first in the legal academic field therefore the literature authority is limited.

²³ Mwangi K I, ' The Nature of rental Housing in Kenya.' Vol. 9, No. 2 ,*Environment and Urbanization*, 1997,141

²⁴ Mwangi K I, ' The Nature of rental Housing in Kenya',144-146

²⁵ Mwangi K I, ' The Nature of rental Housing in Kenya',157

1.8. Research Timeline

Chapter Two – Month of November 2015

Chapter Three – Month of December 2015

Chapter Four – Month of January 2016

1.9. Chapter Breakdown

Chapter One: Introduction

The first chapter of the study shall serve as an introductory chapter. It shall introduce the problem that the study seeks to bring to the attention of all stakeholders who include the government of Kenya and private organizations charged with the mandate of ensuring the right to adequate housing of the police is achieved.

A brief outline of how the study shall be undertaken, the expected limitations of the study and the surrounding literature around the topic shall also be illustrated in the introductory chapter.

Chapter Two: Legal Framework on Right to Housing of Police

The second chapter of the study shall deal with the legal framework surrounding the right to housing in the country with particular emphasis on the police. The chapter shall first look into the content of the right to housing, establishing the contours of such a right and its implications on both the rights holders (the police) and the duty bearers of the right (the government and private players).

After establishing its standing in the hierarchy of rights, the study shall then dive into the current policies and regulations pertaining to the right in the country and conclusions made on whether these laws are consistent with the international interpretation of the right in the respective instruments.

Chapter 3: The Intercourse between the Realization of the Rights to Adequate Housing of the Police and the Limitations of Labour Rights of the Police

The third Chapter shall look into the relationship between the right to adequate housing of the police and the limitation of labour relation rights such as the right to unionize by the

Constitution of Kenya and the effects it has on the realization of the right to adequate housing by members of the police force.

Chapter 4: Comparative Study with the Republic of South Africa

The fourth chapter shall make a comparative study with South Africa on the interpretation of the obligation by the governments as duty bearers in the promotion of the right to housing. The choice of South Africa has been informed by the fact that a landmark case ,Grootboom case, was decided in which marginalised and vulnerable groups were identified as is the case with our study with the police, and guiding norms set out on how the law and the government should deal with such a problem where it arises.

The comparative study shall be important in illustrating the level of obligation required by the GOK in discharging their mandate in the recognition of the right to adequate housing of vulnerable groups with particular regard to the members of the police force in Kenya.

Chapter 5: Conclusion & Recommendations

The fifth chapter shall be the concluding chapter which shall make recommendations that the study hopes will go a long way in improving the recognition of the right to adequate housing of the police in the country, by being taken into consideration in the ongoing police reforms, that is seeking to improve the performance of the security agents thus improving the security situation in the country that will consequently impact positively on the country's development agenda.

CHAPTER TWO: THE LEGAL FRAMEWORK ON THE RIGHT TO ADEQUATE HOUSING OF THE POLICE IN KENYA

2.0. Introduction

Having identified that there is in existence a gap in the policies surrounding the right to housing of the police in Kenya, a review of the legal framework surrounding the right to housing in the country is necessary in the search for a solution to the problem. The police as alluded to in the first Chapter are part and parcel of the Civil Society in the country, this Chapter shall therefore be divided into two sections. The first section shall be an analysis of the content of the right to adequate housing, the legal instruments in the country pertaining to this right and whether they adequately conform to the international instruments and international norms to the extent that they sufficiently cater to the housing needs of the police in the country.

The second section shall look at the right to adequate housing from the standpoint of labour relations, as the provision of housing to the police is primarily done by the Government of Kenya by virtue of their being civil servants.

2.1. Analysis of the Right to Adequate Housing

The 2010 Constitution introduced socio-economic rights in Chapter IV which were previously not recognized in the 1963 Constitution. This has therefore brought about a need to reform our laws and regulations to ensure the adequate recognition of these rights.

But for us to fully recognize these rights and give them their due importance, we have to first establish what it means to have a right and the implications of these rights. Simply put we need to know what a right is, to whom it accrues and the consequence of these rights.

In a concrete legal sense a right is a power, privilege, demand, or claim possessed by a particular person by virtue of law.²⁶ However, a right does not solely accrue to a human being by virtue of the law (positive law) but also and primarily so due to the inherent dignity which is part and parcel of all members of the human family.²⁷ It is this inherent dignity that

²⁶ <http://legal-dictionary.thefreedictionary.com/right> on 11 December 2015

²⁷ Preamble, *Declaration on Human Rights*, 10 December 1948, UN A/RES/271.

renders all human rights universal, inalienable and indivisible as all human beings are members of the human family.²⁸

Human rights which we have established are claims afforded to all persons to ensure peaceful existence and co-existence can however only be fully implemented when the responsibilities attached to them are also recognized. The 1993 Vienna Declaration and the Program for Action which was adopted by the international community as a common plan for the strengthening of human rights work around the world,²⁹ is authoritative on this assertion. The preamble of the Declaration reaffirms the solemn commitment of all states to fulfil their obligations to promote universal respect for and observance and protection of all human rights and fundamental freedoms for all.³⁰

Additionally in Article four of the Vienna Declaration and the Program for Action, the state's responsibility in the promotion of human rights is further emphasized due to their being part of the international community which the Declaration declared played a big role in the implementation of human rights.³¹

As established earlier in the Chapter, that rights accrue to all human beings and that the governments have an obligation to ensure the recognition and enjoyment of these rights by the holders of the rights, we can now venture into the subject at hand that is the right to housing in Kenya. The right is enshrined in Chapter Four of the Constitution 2010, Article 43 sub-section 1(b) where all persons have the right to an accessible and adequate housing. This provision is largely informed by the country's efforts at conforming to the International Covenant on Economic Social and Cultural Rights under which the right is enshrined and Kenya a signatory.

One may ask though, to what authority do we attach the obligation of the state to conform to the International Covenant among other International Instruments other than principles of good faith? Article 2(1) indeed states that the Constitution of Kenya is supreme law however,

²⁸ Preamble, *Vienna Declaration and Programme of Action*, 25 June 1993, A/CONF.157/23

²⁹ United Nations Office of the High Commissioner, 'World Conference on Human Rights, 14-25 June 1993, Vienna, Austria,' <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx> on 18th Jan 2016

³⁰ Preamble, *Vienna Declaration and Programme of Action*.

³¹ Article IV, *Vienna Declaration and Programme of Action*.

the Constitution further states in Article 2(5) that general rules of International Law shall form part of the laws of Kenya.

The study does acknowledge that 'Article 2(5)' of the Constitution is subject to wide-spread scholarly discussion within a faction of scholars and judicial officers opining that the framers of the Constitution did not intend that international conventions and treaties should be superior to local legislation and should take precedence over laws enacted by their chosen representatives under the provisions of Article 94.³² They opine that Article 1 of the Constitution places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers.³³

The discussion however is a moot point in this forum as Article 2(6) of the 2010 Constitution states that any treaty or convention ratified by Kenya shall form part of the law of Kenya. The international convention on economic, social and cultural rights was ratified by Kenya on 1st May 1972.

Relying therefore on Article 2(6), we can therefore conclusively state that the Government of Kenya has an obligation to ensure the adequate recognition of the right to housing in conformity with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. The covenant requires states to take steps to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights without discrimination.³⁴

The GOK, fortunately cannot be said to have been ignorant of its obligations conferred to it by the Covenant prior to Article 2(5) of the 2010 Constitution, as various laws and regulations from independence have been passed to aid the state and other stake-holders in the provision of housing to the people of Kenya.

³² Beatrice Wanjiku v Attorney General & Another [2012] eKLR 6

³³ Beatrice Wanjiku v Attorney General & Another [2012] eKLR 6

³⁴United Nations High Commission, 'Key concepts on ESCRs - What are the obligations of States on economic, social and cultural rights?' 1,

<http://www.ohchr.org/EN/Issues/ESCR/Pages/WhataretheobligationsofStatesonESCR.aspx>, on 7 January 2016

In 1966/67, Sessional Paper No.5 on Housing policy of 1966/67 was passed. This was the first legislation passed in the country with regards to housing rights and presented the government's aspiration to provide decent and affordable housing through both the private and the public sector.³⁵ The legislation led to the subsequent five-year National Development Plans and the latest addition to the housing policy framework, Sessional Paper No. 3 on National Housing Policy of 2004.³⁶

The goal of Sessional Paper No. 3 is to facilitate the provision of adequate shelter and healthy living environment at an affordable cost to all socio-economic groups in Kenya and the expansion of infrastructure such as electricity and water which are crucial for adequate and affordable housing³⁷

In 2012, the Housing Act (Cap 117) was passed. It was later revised in the year 2014. The main Objective of the Act was to establish the National Housing Corporation³⁸ whose primary mandate is to play a principal role in the implementation of the Government's Housing Policies and Programmes.³⁹

Its mandate is far reaching to both the local and the national government and generally includes acting as a guarantor to those persons given money (civil servants) to buy or construct a dwelling house, undertake research and experiment in discovering the emerging methods of housing that may be beneficial to all the rights holders of the right to housing, to encourage the collection and dissemination of information concerning housing and related matters, to operate a housing finance institution with powers to borrow funds from the government, overseas agencies, pension and trust funds as well as to collect deposits and

³⁵ Obuta S, 'Influence Of Government Policy In Provision Of Low Cost Housing In Kenya: the case of low cost housing in Nairobi', *Unpublished Post Graduate Thesis, University of Nairobi*, (October 2013), 11-12

³⁶ Obuta S, 'Influence Of Government Policy In Provision Of Low Cost Housing In Kenya: the case of low cost housing in Nairobi', 11

³⁷ Obuta S, 'Influence Of Government Policy In Provision Of Low Cost Housing In Kenya: the case of low cost housing in Nairobi', 11

³⁸ Section 3, *Housing Act Cap 117 (2012)*

³⁹ http://www.nhckenyaco.ke/index.php?option=com_content&view=article&id=70 on 10 December 2015

savings from the public to be applied to the financing of the residential housing development and related matters.⁴⁰

Section 11 of the Act also confers powers to the local authorities to acquire land, construct approved dwellings and carry out approved schemes within the area of its jurisdiction. This is subject however to conditions set by the Corporation and the Minister for housing.⁴¹

There is however no single legislation that is authoritative on the welfare needs of the police consequently there is not in existence any policy or regulation that informs the housing of the police in the country. The National Police Service Act 2014 which governs the service is most notably silent on the issue.

This oversight thus begs the question, are the current laws of housing in Kenya in conformity with the International Covenant on Economic Social and Cultural Rights and other similar instruments that provide for the right to housing? And are they sufficient to cater for the housing needs of the police?

The right to housing was first given legal recognition in the year 1988 which was the fortieth anniversary of the Universal Declaration of Human Rights⁴² under Article 25.1 which stipulates that “*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing...*”

In 1976, the International Covenant on Economic, Social and Cultural Rights came into force and served to bring into force a class of rights, the economic, social and cultural rights, in which the right to housing is categorized and recognized in Article 11.1.

Economic, social and cultural rights include the rights to adequate food, to adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation and to work.⁴³ These rights are generally new and different from civil and political rights that

⁴⁰ Section 7A & 7B, *Housing Act Cap 117*, (2012)

⁴¹ Section 11, *Housing Act Cap 117*, (2012)

⁴²Leckie S, ‘The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach’ *Human Rights Quarterly*, 11 No. 4 (1989) , 525,4

⁴³ United Nations Office of the High Commissioner, ‘Frequently asked questions on economic, social and cultural rights,’ 2009, <http://www.ohchr.org/EN/Issues/ESCR/Pages/ESCRIndex.aspx> on 13 November 2015

have over the decades had an opportunity to be ingrained in the societies largely due to the numerous wars that have rocked the world over the years and the dictatorial leaderships around the world.⁴⁴

It is the novelty of these rights which were previously only viewed as liberties in comparison to their counter-parts the civil and political rights, which has led to the rejection of their legal validity⁴⁵ by some scholars⁴⁶ and thus the dismal recognition of the rights by the different states. Maria Ferial Tinta in her article “*Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights*” in which she looks at the inter-related nature of civil and political rights and the economic, social and cultural rights while simultaneously proving that socio-economic rights are indeed legally valid, opines that the debate on the legality of socio-economic rights have been founded on the basis that these rights were not of the immediate application but merely aspirations of progressive realization whereas civil and political rights were considered legal due to their immediate applicability.⁴⁷

She states that socio-economic rights were merely viewed, prior to World War II as stated in Chapter one, as soft law and therefore obligations conferred were obligations of conduct as opposed to the obligations of results that was conferred by the civil and political rights.⁴⁸

Maria Tinta, speaks in the past tense when referring to the reasons why socio-economic were not considered as rights on their classification as she views the ratification of these rights by the states as consent to the legality of the rights and the obligations conferred by the rights. However, in light of the debates disputing these rights that are still alive and the continued

⁴⁴ Tinta M, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ *Johns Hopkins University Press*, May 2007, 433

⁴⁵ Tinta M, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’, 433

⁴⁶ For instance scholar Peter D. Salins referred to later in the study.

⁴⁷ Tinta M, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’, 432

⁴⁸ Tinta M, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ 433, 1

violations by different states of these rights points to the contrary. That at heart, perhaps these rights have not fully been accepted.

Let us look at the particular areas of contention in the right to housing. The major point of departure by the antagonists of this right is their belief that the obligation enforced on the government is untenable. This is precisely the argument brought forward by Peter D. Salins in his article⁴⁹ in which the writer advances the arguments that in addition to the unattainability of this 'right', it is also completely unnecessary and does not make economic sense as there are no feasible returns.⁵⁰

The arguments of Peter D. Salins are important for our study as it helps us understand where the antagonists come from and adequately offer counter-arguments and offer an explanation as to why this right is important. The problem of the arguments advanced by scholars such as D. Salins is that they completely miss the point of the inherent nature of a right. Human rights are not dependent on whether the duty bearer can discharge his duty or not as they are inalienable.⁵¹ This inalienability stems from the inherent dignity of every member of the human family.⁵²

It is with the same argument that we can thwart the assertion that the right to housing does not make economic sense as the object of the right is not to make economic gains, but to respect the human dignity of each and every person. Peter D. Salins to support his assertion in the article, gives an example of the economy of the United States of America. In which he opines that what helped the U.S. in curbing housing problems was not founded on the intervention of the government in its obligation to recognize the right to housing, but from a combination of rising household incomes and private housing market.⁵³

⁴⁹ Salins P 'Comment on Chester Hartman's "The case for a right to housing": Housing is a right? Wrong!' *Taylor & Francis*, (March, 2010), 260

⁵⁰ Salins P 'Comment on Chester Hartman's "The case for a right to housing": Housing is a right? Wrong!', 260

⁵¹ Ross D, 'Understand the difference between rights and privileges' *Nwi.Com*, 29 June 2012 http://www.nwitimes.com/news/opinion/mailbag/understand-the-difference-between-rights-and-privileges/article_33cdb9ab-7b0d-5301-894f-2968a6db8687.html on 6 January 2016

⁵² Preamble, *Universal Declaration of Human Right*, 10 December 1948, U.N. Doc A/810 at 71

⁵³ Salins P 'Comment on Chester Hartman's "The case for a right to housing": Housing is a right? Wrong!', 262

His assertion is contradictory in nature, as the rising of household incomes and the increased presence of the private market precisely stems from government intervention through policy reforms to favour the two factors. The Special Rapporteur appointed by the United Nations in 1992 with the mandate to promote the realization of the right to adequate housing, pointed out in his first report in 1993 to the world body that human right to adequate housing did not require the state to build housing for the entire population or to provide housing free of charge.⁵⁴ He stated that a state adheres to its responsibility by also undertaking a series of measures indicating policies and legislative recognition of each of the constituent aspects of the right.⁵⁵

We can therefore conclude that the issue with the right is not their lack of legal validity but that even at its rudimentary level, it is complex.⁵⁶ It contains many elements which are difficult to reconcile with one another. For instance private versus public ownership of property, rented versus owned housing, self-built versus state- built.⁵⁷

Having established that socio-economic rights are rights with legal validity and therefore by extension the right to housing is indeed a right, what then are the methods advanced by international instruments and international custom necessary for the adequate recognition of the right? Dr Pudraic Kenna, Lecturer from the Faculty of Law, National University of Ireland Galway in his article “Housing Rights and Human Rights” expounds in detail the methods provided by the ICESCR.

⁵⁴ Sidoti C, ‘Housing as a Human Right’, *Human Rights and Equal Opportunity Commission*, (September 1996), 2 http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf on 6 January 2016

⁵⁵ Sidoti C, ‘Housing as a Human Right’, *Human Rights and Equal Opportunity Commission*, (September 1996), 2 & 3 http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf on 6 January 2016

⁵⁶ Leckie S, ‘The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach’ *John Hopkins University Press*, 11 No. 4 (1989), 527, 3

⁵⁷ Leckie S, ‘The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach’ 527, 3

*“Firstly, all countries must recognize the human rights dimension of the right to housing, while ensuring that no measures of any kind are taken with the intention of eroding the legal status of the right. Second, legislative measures coupled with appropriate policies geared towards the progressive realization of housing rights also forms part of “realizing the right”. Thirdly a genuine attempt must be made by States to determine the degree that the right is not in place and therefore target housing policies and laws towards attaining this right for everyone in the shortest time.”*⁵⁸ These three key areas are basically the minimum threshold that the governments are expected to fulfil.

These three minimum threshold advanced by Dr. Pudraic have further been expounded by the UNCESCR General Comment No. 4. General Comments are important as they are means by which treaties are further interpreted and their precise meaning and implications established. General Comment No. 4 was advanced by the UN Committee on Economic Social Cultural Rights in 1992 after years of accumulation of information with regards to this right from the year 1979. The committee was gathering information on how best the right might be recognized and implemented and General Comment No. 4 was the answer.

The Comment is first and foremost very insistent on the fact that the right should not merely be looked at as just the right to housing but instead the right to “adequate” housing. The difference in the construction of the two is that “right to housing” is too narrow an interpretation which equates it with merely having a roof over one’s head. It should be viewed as the right to live somewhere in security, peace and dignity.⁵⁹ The connotation “adequate” is key in the recognition of the right to housing as it underlines the necessary factors in determining if the shelter is satisfactory or not.⁶⁰ For the benefit of the government and the other relevant stake-holders with the obligation to ensure the enjoyment of this right by all persons.

⁵⁸ Dr. Kenna P, ‘Housing Rights and Human Rights’, *National University of Ireland Galway*, 2,2 <http://www.nuigalway.ie/media/housinglawrightsandpolicy/Housing-rights-and-human-rights.pdf> on 6 January 2016

⁵⁹ CESCR General Comment No. 4, *The Right to Adequate Housing*, 13 December 1991, UN Doc E/1992/23, 7

⁶⁰ CESCR General Comment 4, *The Right to Adequate Housing*, 8

It would be worthwhile to mention that there are core pillars in ascertaining whether housing in a particular area is satisfactory or not, they include: the availability of services, materials, facilities and infrastructure, where an adequate house must contain certain facilities essential for health, security, comfort and nutrition.⁶¹ The second pillar is affordability.⁶² The housing provided should be compatible with the income levels of the recipients of the housing facilities. The third pillar is habitability. The housing provided should be adequate in space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.⁶³

It should be noted that there are other pillars but for the purposes of this study which is focusing primarily on the very basic requirements for the police. It would be superfluous of us to try and claim luxurious additions to the housing yet we are grappling with the very basic essentials, such as habitability and affordability as has been mention previously in this chapter.

It is this difficulty in fulfilling even these basic requirements, most especially in the developing countries- the reason why we have the problem of housing with our forces- that has led the ICESCR through the General Comment Number 4 to issue guidelines on the recourse these countries have. The Committee in section 10 states that if a state claims that it is unable to meet even its minimum core obligations afforded by the right due to lack of resources, international assistance should at the first instance be sought after.⁶⁴ If the state is still unable to meet its obligation, then the onus is on them to demonstrate that the measures being taken at that instance are the maximum measures that can be taken with a direct correlation to the resources available to them.⁶⁵

The Kenyan Constitution 2010, Article 20(5) states that in applying any right under Article 43 (under which the right to housing is stated), if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall have to be

⁶¹ CESCR General Comment 4, *The Right to Adequate Housing*, 8(b)

⁶² CESCR General Comment 4, *The Right to Adequate Housing*, 8(c)

⁶³ CESCR, General Comment 4, *The Right to Adequate Housing*, 8(d)

⁶⁴ CESCR, General Comment 4, *The Right to Adequate Housing*, 10

⁶⁵ CESCR, General Comment 4, *The Right to Adequate Housing*, 10

convinced by the state that the resources are not available and that adequate measures are being taken to ensure that the widest percentage of persons are enjoying the right giving priority to the disadvantaged groups or rather the more affected groups. However, the right cannot be deferred indefinitely. The General Comment 4 on the right to adequate housing is clear on that front.

CHAPTER THREE: THE INTERCOURSE BETWEEN THE REALIZATION OF THE RIGHT TO ADEQUATE HOUSING OF THE POLICE AND THE LIMITATION OF LABOUR RIGHTS OF THE POLICE

As reiterated in the previous Chapters, the police force of Kenya are part of the civil society of Kenya whose housing is under the mandate of the GOK as their employer. In Chapter two, the study analysed in detail the right to adequate housing and how the GOK is expected to adequately recognise the right. We are now clear on the acceptable standards of recognizing the right in the country. The study shall now analyse the right to adequate housing of the police in relation to labour relations as the point of the study is to illustrate that the police as civil servants have been neglected in the government's efforts to improve the housing conditions of its civil servants and additionally gagged from voicing their grievances to their employers by the State through the Constitution through the limitation of their labour relations rights.

3.0 An analysis of the intercourse between the two rights

In Chapter one of the study, we introduced the 'right to equal treatment in the search and acquisition of housing' advanced by Norton L. Steuben, as one of the irreducible rights to the right to adequate housing. This right as defined earlier in the study in Chapter one, is the empowerment of a set group of persons to improve their housing situations by giving them the capabilities to do so. This can either be done through opening up housing options that were previously not available to them prior, such as rental housing as expressed in Chapter one or if that is overly an ambitious concept, they are given the right to improve their housing conditions through the lobbying for better housing from their employers as is the right of any employee. A concept enshrined under International Conventions.⁶⁶ This Chapter shall focus on the latter that is the right to unionize.

The right to unionize is enshrined in the earliest United Nations (UN) agreements i.e. the Universal Declaration of Human Rights Article 23⁶⁷ and is reaffirmed in many subsequent

⁶⁶ E.g. Article 23 of the Universal Declaration of Human Right, 10 December 1948, U.N. Doc A/810 , Freedom of Association and Protection of the Right to Organise Convention No.87,9 July 1948, A/HRC/23/39

⁶⁷ Article 23 ,*Universal Declaration of Human Right*, 10 December 1948, U.N. Doc A/810 at 71,*member states have agreed to states that '[e]veryone has the right to form and to join trade unions for the protection of his interests'*

international human rights conventions⁶⁸ such as The International Covenant on Economic, Social, and Cultural Rights (ICESCR)⁶⁹ which expands upon what is included in the right to unionize.⁷⁰ Constitutional guarantees of the right to unionize are fundamental to ensuring that labor legislation will be enforced and that workers are able to negotiate for better wages, working conditions, and benefits⁷¹

The right to unionize ensures that where employees are grievanced in one way or the other, they have the right to strike and boycott their duties for a certain period until such a time that the employer meets their demands or a compromise is reached. However, ILO⁷² recognises that strikes may be limited in respect of workers in essential services, essential services in most cases being those that fall under the security docket.⁷³ In most cases however, as opposed to merely limiting the right, the right to strike is all together prohibited. This is because, the unionization of Defence personnel has been viewed as conflicting with the unique nature of the military and its role in maintaining national security and public order.⁷⁴

It is argued that members of the armed forces are not workers in the conventional sense in that on employment they subject themselves to a comprehensive system of restrictions under a system of military discipline that is far more extensive than the usual control of an employer over an employee.⁷⁵ Membership by servicemen and -women of trade unions or

⁶⁸Heymann J, Raub A, CONSTITUTIONAL GUARANTEES OF THE RIGHT TO FORM AND JOIN TRADE UNIONS IN 193 COUNTRIES , *WORLD Policy Analysis Center*, (2015), 2.

⁶⁹Article 8, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, GA/RES/2200A (XXI), '[n]o restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.'

⁷⁰ Heymann J, Raub A, CONSTITUTIONAL GUARANTEES OF THE RIGHT TO FORM AND JOIN TRADE UNIONS IN 193 COUNTRIES , 2.

⁷¹ Heymann J, Raub A, CONSTITUTIONAL GUARANTEES OF THE RIGHT TO FORM AND JOIN TRADE UNIONS IN 193 COUNTRIES , 2.

⁷² Article 9(1), *Freedom of Association and Protection of the Right to Organise Convention No.87*, 9 July 1948, A/HRC/23/39

⁷³ UNISON / INTERNATIONAL CENTRE FOR TRADE UNION RIGHTS, *Trade union rights in public services, International Center For Trade Union Rights*, (November 2010), 4.

⁷⁴ OSCE, ODIHR, DCAF, Chapter 9 of the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede291111odihrhandbook_sede291111odihrhandbook_en.pdf accessed on 23rd March 2016, 1.

⁷⁵ OSCE, ODIHR, DCAF, Chapter 9 of the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede291111odihrhandbook_sede291111odihrhandbook_en.pdf accessed on 23rd March 2016, 2.

other collective representative bodies poses two distinct problems. The first is the question of military discipline and possible interference with the esprit de corps.⁷⁶ The raising of collective grievances on the part of members of the armed forces has traditionally been seen as equivalent to insubordination or even the serious military offence of mutiny. It is argued that the disciplined nature of the armed forces requires that orders should not be questioned. Moreover, industrial action could disrupt vital operations in a way that threatens national security⁷⁷ thus the extensive limitation on labour relations.

3.1. A deeper analysis into the relevant Kenyan Constitutional Provisions

Relations between employer and employees are governed by the provisions of Article 41 of the Kenyan 2010 Constitution. Article 41(2)(b-d) is expressly clear that every worker has the right to reasonable working conditions, inter-alia Article 43(1)(a),⁷⁸ to form, join or participate in the activities and programmes of trade union and to go on strike.

However, the same Constitution under Article 24(5) limits the aforementioned rights. Where it equivocally states that despite clause (1) and (2) of the same Article, which is instructive on how and when rights and fundamental freedoms are limited, a provision in legislation may limit the application of the rights or fundamental freedoms in the provisions of -Article 31 concerned with the right to privacy, Article 36 concerned with freedom of association, Article 37 concerned with right to Assembly, demonstration, picketing and petition, Article 41 concerned with the labour relation rights, Article 43 concerned with economic and social rights and Article 49 concerned with the rights of arrested persons- to persons serving in the Kenya Defence Forces or the National Police Service.

The study is most concerned on the limitation placed on Articles 36, 41 and 43 that are concerned with the rights to association labour relations and economic and social rights respectively. The limitations on the respective rights in a nutshell means that right to equal

⁷⁶ OSCE, ODIHR, DCAF, Chapter 9 of the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede291111odihrhandbook_/sede291111odihrhandbook_en.pdf accessed on 23rd March 2016,2.

⁷⁷ OSCE, ODIHR, DCAF, Chapter 9 of the Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede291111odihrhandbook_/sede291111odihrhandbook_en.pdf accessed on 23rd March 2016,2.

⁷⁸ The right to adequate housing of the police that is the subject matter of the study.

treatment in the search and acquisition of housing of better housing through the use of the right to association which would be mandated by the members to lobby and ensure that housing options are made available to them are non-existent.

3.2. Conclusion

In the preceding Chapter of the study, the oversight by the government in discharging its mandate of adequately housing the police could be justified with the argument that the government had done their best with the resources at its disposal. However, the current Chapter has introduced a new fact that needs to be taken into consideration. This is the current limitation of core rights (labour relation rights) that would be key and are indeed key for every civil servant, as they ensure the government is accountable to them and that basic welfare rights and needs are met that enable them to discharge their functions effectively. This is especially so for the right of association and trade union as it is the tool through which civil servants are able to ensure that their employers adequately recognize their rights.

The limitation therefore of these rights handicaps the servicemen from attaining adequate housing through their own motion and as explained in the Chapter, denies them one of the irreducible rights to housing that is the right to equal treatment in the search and acquisition of housing, equal treatment here connoting the treatment afforded to the other civil servants who can join these trade unions and like associations. The end result of this is that the police are stuck in a state of limbo with poor housing and no means of getting themselves out of the deplorable conditions.

CHAPTER FOUR: COMPARATIVE STUDY WITH THE REPUBLIC OF SOUTH AFRICA

4.0 Introduction

The study has established in Chapter two that Kenya has a legal framework for the right to housing that is quite robust and that has captured the essence of the right to adequate housing. The study went ahead and established the relationship between the right to adequate housing of the police and the limitations placed on the labour relations rights of the police and how they affect the efforts of the police in attaining conducive living conditions. It was established under Chapter three that the police find themselves in an extremely vulnerable position as a consequence of the limitations on their labour rights however necessary these limitations might be. This chapter shall delve deeper into the repercussions of this vulnerability that is as a result of the Constitutional limitations on their labour relations and the effect it has on the level of obligation that the GOK has to the police who find themselves at a very vulnerable position. The study shall analyse South Africa's response to the same problem as was identified in the landmark case *Grootboom v Oostenberg Municipal Council and Others*.⁷⁹ The choice of South Africa for the basis of the comparative study is inspired by the fact that it is in this landmark case that the standard of care by a government in discharging its obligation to a vulnerable group was analysed and looked into.

The right to adequate housing is found under Section 26 (1) of the South African Constitution and provides that everyone shall have the right of access to adequate housing, with accessibility. Accessibility connotes that the state must create conducive conditions for its citizens, irrespective of their economic status to access affordable housing.⁸⁰ Additionally, the state is required to make reasonable legislation and other measures, within its available resources to achieve the progressive realization of the right.⁸¹

⁷⁹ *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C).

⁸⁰ Section 26, *Constitution of South Africa*, 1996

⁸¹ SAHRC, 'Right to Adequate Housing', Ch. 2, (March 2001), http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_2.pdf on 8 January 2016

Prior to the *Grootboom case*, the government of South Africa had passed various legislation with a view to provide all its citizenry with “shelter” and eradicate the slums and shacks that had plagued the country. Unfortunately these policies turned out to be unfavorable to some groups of people such as Irene Grootboom effectively leaving them in very desperate and deplorable conditions.

4.1. The Grootboom Case

Irene Grootboom was one of 4000 residents living in Wallacedene, an informal settlement outside of Cape Town in 1998. The living conditions in the settlement were appalling and its residents were desperately poor. The settlement lacked running water, sewer, and garbage collection services. Just five percent of the inhabitants had electricity. Twenty-five percent of the inhabitants had no income, and more than two-thirds lived on less than R500 (US\$70) per month⁸². Many residents were on the municipal waiting list for affordable housing; some had been waiting as long as seven years⁸³ as the government of SA had a system of waiting lists in which the municipal council would provide low cost housing.

Due to the appalling conditions, Irene Grootboom applied to the Cape of Good Hope High Court for an order requiring government to provide them with adequate basic shelter as was their mandate, basing their argument on section 26(1) & 26(2) of the South African Constitution which provides that everyone has the right of access to adequate housing and which under sub-section 2 imposes an obligation upon the state to take responsible legislative and other measures to ensure the progressive realization of the right within the available resources, at least until they obtained permanent accommodation and were granted certain relief,⁸⁴ i.e. provide the permanent housing under the low-cost housing.

⁸²Tadamun, 'The Landmark Case of Grootboom versus the Republic of South Africa,' 5 January 2014, <http://www.tadamun.info/2014/01/05/the-landmark-case-of-grootboom-versus-the-republic-of-south-africa/?lang=en#.VmohcvmyOko>- on 8 January 2016

⁸³ Tadamun, 'The Landmark Case of Grootboom versus the Republic of South Africa,' 5 January 2014, <http://www.tadamun.info/2014/01/05/the-landmark-case-of-grootboom-versus-the-republic-of-south-africa/?lang=en#.VmohcvmyOko>- on 8 January 2016

⁸⁴ *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C).

The High Court, relying on the principles of judicial deference outlined by the Constitutional Court in the *Soobramoney*⁸⁵ case, found that the respondents had taken ‘reasonable measures within available resources to achieve the progressive realisation of the right to have access to adequate housing’, as required by s. 26(2) of the Constitution. However, because the right of children to shelter in section 28 was not subject to available resources, the High Court therefore held that the government was obligated to provide shelter to the children when and where the parents could not and where this was the case the children’s parents were entitled to accompany them⁸⁶

The government subsequently appealed the ruling of the High Court and the case then proceeded to the Constitutional Court where Section 26 came up for consideration.

The Constitutional Court overruled the assertion that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. According to the court section 26 does not expect more than is achievable within the states available resources.⁸⁷ It however went ahead and ruled that although it was unreasonable to require the state to provide adequate housing immediately in view of its limited resources, it is equally unreasonable for the government to make no provision for the relief of people in desperate need such as Irene Grootboom.⁸⁸

Therefore the court concluded that the municipal housing program violated the squatters’ right to housing under Section 26 of the Constitution. The Court cautioned that a government

⁸⁵See, *Soobramoney v Minister of Health, Kwa Zulu-Natal*, [1997] 17, a case in which the claimant brought an action against the Minister after he had been denied access to dialysis in a state-owned hospital when his funds had run out for private medical attention. He claimed that his social-economic right to health had been violated by the hospital by denying to discharge medical attention to him. The court held that obligations imposed on the state regarding access to health care are dependent upon the resources available, as stated in sections 27(1) and (2). Because of limited resources the hospital had adopted a policy of admitting only those patients who could be cured within a short period and those with chronic renal failure who are eligible for kidney transplant. The court declared that it could not interfere with decisions taken in good faith by political organs and medical authorities as to how to allocate budgets and decide on priorities.

⁸⁶ *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C).

⁸⁷ *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169. (CC)

⁸⁸ *Government V Grootboom*

program cannot ignore the immediate needs of those in desperate situations in order to focus on medium and long-term goals, and stated that the housing program must include reasonable measures to provide relief for those in dire need most especially those who had no access to land.⁸⁹

Irene Grootboom died in 2008; penniless and homeless, still waiting for a decent home for herself and her family.⁹⁰ However she inspired major policy changes in the country. In 2004, a national housing program focused on providing relief for persons in crisis situations was adopted as a new chapter of the National Housing Code.⁹¹

In 2009, the government established a Housing Development Agency (HDA). The HDA was established to work with provinces, municipalities and private sector developers to double the country's housing delivery rate. By the end of the March 2009, South Africa was projected to have built 2.8 million houses since 1994, providing shelter to more than 13.5-million people. Over 1.2-million of the houses were built from 2004 onwards.⁹²

4.2. Conclusion: A deeper analysis of the Grootboom Case in relation to the housing rights of the police

The Constitutional Court ruled that there were no minimal core obligations that had to be met in the provision of housing. It was equivocally clear that as long as the government has done all that is possible with the available resources at its disposal, they are well within the acceptable standards required of them. However, the court went ahead and ruled that by virtue of the fact that there were children who were in an extremely vulnerable position and the fact that their parents could not afford them the right shelter, the government had a higher obligation to immediately alleviate the dire conditions that they were in indirectly benefiting the adults.

⁸⁹ Government V Grootboom

⁹⁰ Tadamun, 'The Landmark Case of Grootboom versus the Republic of South Africa,' 5 January 2014, <http://www.tadamun.info/2014/01/05/the-landmark-case-of-grootboom-versus-the-republic-of-south-africa/?lang=en#.VmohcvmyOko>- on 8 January 2016

⁹¹ Child Rights International Network, 'Government v Grootboom', <https://www.crin.org/en/library/legal-database/government-v-grootboom> on 8 January 2016.

⁹² Child Rights International Network, 'Government v Grootboom', <https://www.crin.org/en/library/legal-database/government-v-grootboom> on 8 January 2016.

This ruling is instructive as it is authoritative on the fact that where a certain group is of a certain level of vulnerability, the state has higher duty to immediately improve that group's position. This ruling can be juxtaposed to our discussion of the housing of the police. Had the police not have been in the vulnerable position of having their labour rights limited by the Constitution, the study would have a hard time in trying to justify the need for the government to immediately alleviate the condition faced by the police as ruled by the Constitutional Court in the *Grootboom Case*. However, due to the limitation, they do qualify as a vulnerable group with a need for immediate and special attention which basically elevates the level of obligation that the government has to provide the police officers with adequate housing with most haste.

CHAPTER FIVE: CONCLUSION & RECOMMENDATION

5.0 Introduction

This chapter shall look into the findings of the study and recommendations put forward on how best the right to adequate housing of the police might be realized. The study hopes that the recommendations will be taken into consideration by the relevant government departments in the on-going police reforms.

5.1 Findings

In Chapter one of the study, we identified that the government had been made aware of the problem of inadequate resource allocation that was inhibiting the proper housing of its civil servants. However, the study has found that the police have been sidelined in the response strategies employed by the government in its efforts to correct the problem. The government as identified in Chapter one, has taken upon itself to solve the problem of inadequate housing faced by its civil servants in a general manner (the memorandum to construct 500 houses, 10 informal settlements with infrastructure investments should be provided, construction of 860 housing units by the National Housing Corporation) not taking into consideration the unique circumstances and needs that face some of them, such as geographical location.

It has also emerged from the study that as the structure of housing of the police currently stands at the moment, the police are at the complete mercy of the government. This is to mean that the police have no way of finding their own housing units that are satisfactory to them as they fall under the mode of housing that is known as institutional housing as established in Chapter two of the study. The fact that there is no single legislation that addressed the police's welfare needs under which their housing rights would be addressed, commits the police in a perpetual state of limbo. Where their right to adequate housing continues to be ignored by the government who have the obligation to ensure that the police are properly housed as their employer and no legal recourse is available to them as no welfare laws are currently in existence that addresses their particular needs, and their rights of unionizing having been completely prohibited.

The study in Chapter two has also made the distinction that the government are under no obligation to immediately address the problem, as other factors need to be taken into

consideration such as the lack of sufficient resources at the government's disposal. However, they do have the duty to enact favourable laws and policies that can be implemented within reasonable time-frame and that efforts are being made to ensure that the largest percentage of the police are enjoying the right with the resources at hand. Article 20(5) of the Constitution is instructive on this. The fact that the police feature nowhere in the policies or in the on-going projects is a clear indicator that the problem is not the lack of resources but the lack of recognition under the law as recipients of the right to adequate housing.

In summary, it is in no way a fallacy for us to conclude that the neglect by the laws of the land, the government and the private sector with regards to the needs of the police has led to the marginalization of the police in the housing sector consequently the infringement of their right to adequate housing as provided for under Article 43 of the Constitution.

5.2 Recommendations

5.2.1 The right of equitable treatment in the search and acquisition of better housing needs to be embraced in the country.

As explained under the literature review in Chapter one, the right to equal treatment in the search and acquisition of better housing is one of the irreducible rights to housing⁹³. This right basically empowers the holders of the right (in this case the police) to improve their own housing conditions.

If the right is embraced, it could lead to a new era in the housing of the police in the country as they shall no longer be confined to the archaic method of housing where they no-longer have to stay in 'Kambis', at the complete mercy of the government, but can access work and discharge their duties while enjoying their right to adequate housing through other housing options. These options include rental options and low-income housing some of which are independent from the governmental i.e. the private sector.⁹⁴

⁹³ Norton L. Steuben, 'Editors Notes; A Right to Housing?' 303-304, 303

⁹⁴ Mwangi KI, 'The Nature of rental Housing in Kenya', 157

Additionally, it was alluded to in Chapter three that the members of the National Police Service need to be allowed to unionize even if it within the current structures so as to enable them to participate in the aforementioned right in the equitable treatment in the search and acquisition of better housing. One good example is the formation of an equivalent of a military association for members of the National Police Service. Such an association would go a long way in improving the housing conditions of the police as it would pursue the grievances of the police on their behalf, and consult or negotiate on collective conditions of service in the police service.

This would need an amendment on the Constitution as it has been established by the study that it is the Constitution that has placed a blanket ban on trade union membership by members of the service. This would be in line with the recent ruling by the European Court of Human Rights (ECHR)⁹⁵ that ruled that the blanket ban on trade unions in the French army violates Article 11 of the European Convention on Human Rights that protects the right to freedom of assembly and association, including the right to form trade unions.⁹⁶ The European ruling confirms that whilst certain restrictions can apply to military personnel, in terms of expression and action, a blanket ban on trade union membership violates the fundamental human right to freedom of assembly and association.

5.2.2 The renewed emphasis on public-private partnerships in the recognition of the right to adequate housing of the police.

In Karanja Mwangi's article one of the recommendations that he puts forward in improving the rental sector is the merging of the governments and the NGO's (who represent the private sector) efforts.⁹⁷ This study shall borrow this recommendation and apply it to our problem, the inadequate recognition of the right to housing of the police that has led to the poor housing that they are currently facing.

This is not a new concept. Earlier in March 2015, there was talk in the Kenyan media of some apartments known as the Eastgate apartments that a private company owned by Othaya

⁹⁵ Matelly v. France (application no. 10609/10)

⁹⁶ Matelly v. France (application no. 10609/10)

⁹⁷ Mwangi K I, 'The Nature of rental Housing in Kenya', 157

MP Wanjiru had been contracted to build for police officers.⁹⁸ Unfortunately the whole deal was marred by claims of corruption. For purposes of this study however, what is important is not the negative press on the whole deal but the illustration that it is possible for the government and players of the private sector to act together in the solving of the problem at hand, i.e. poor housing of the police and more such projects need to be undertaken by the government.

5.2.3 A Schedule introduced in the National Police Service (Amendment) Act No. 11 of 2014 on police welfare

It was established by the study in Chapter two, that there is not in existence any legislation that is tailor made to govern or cater for the welfare needs of the police. These are all the needs that are crucial for their survival and level of performance in the workplace. These needs are stated in Article 43 of the Constitution that deals with socio-economic rights. As established in Chapter one of the study under the theory of Maslow, welfare needs directly impact the motivation that employees have in discharging of their duties.

The country has been complaining about the inadequacy of the police in discharging their mandate of enhancing security of the country.⁹⁹ But how can we demand much from them when their basic needs such as adequate housing that fall under basic needs have not been met? Naturally the motivation they would have in sacrificing their lives for our protection will be close to non-existent. Therefore if any of the reforms that are being undertaken by the government in the security sector are to have any positive impact, the welfare needs of the police will have to be taken into consideration.

The introduction of a Schedule in the National Police Service Act No. 11 of 2014 is a good place to start.

⁹⁸ Ayaga, W,' I was not involved in housing scam, Othaya MP Mary Wambui says,' (March, 2015), <http://www.standardmedia.co.ke/article/2000156085/i-was-not-involved-in-housing-scam-othaya-mp-mary-wambui-says> accessed on 19th Jan 2016

⁹⁹ Kyama R,'Kenya faces an uphill battle to revamp police force,' 13 April 2014, <http://mg.co.za/article/2014-04-13-kenya-faces-uphill-battle-to-revamp-police-force> accessed on 19th January 2016

5.3 Conclusion

In conclusion, the right to adequate housing of the police has clearly been infringed and the police brutally sidelined in the national housing policies. However, all is not lost, as evidenced in paragraph 4.3.2 of this Chapter. The government need only note of the pressing nature of the issue and act with all expediency to resolve the issue as the country's development is dependent on this.

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