



# **Draft Eviction and Resettlement Guidelines and Draft Bill, 2012**

*An abridged version*



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## LIST OF ABBREVIATIONS & ACRONYMS

<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>Art.</b>	Article
<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination Against Women
<b>CERD</b>	Convention on the Elimination of all Forms of Racial Discrimination
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>COHRE</b>	Centre on Housing Rights and Evictions
<b>CRC</b>	Convention on the Rights of the Child
<b>EIA</b>	Environmental Impact Assessment
<b>HIV</b>	Human Immunodeficiency Virus
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IFC</b>	International Finance Corporation
<b>JBIC</b>	Japan Bank for International Cooperation
<b>KENSUP</b>	Kenya Slum Upgrading Programme
<b>KPA</b>	Kenya Ports Authority
<b>KRC</b>	Kenya Railways Corporation
<b>MIAD</b>	Mwea Irrigation Agricultural Development
<b>NEMA</b>	National Environment Management Authority
<b>NIB</b>	National Irrigation Board
<b>RAP</b>	Relocation Action Plan
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>USA</b>	United States of America

## PREFACE

In 2006 the Centre on Housing Rights and Evictions (COHRE), the Economic and Social Rights Centre (Hakijamii) and the Ministry of Lands convened a training workshop in Naivasha to discuss the issue of forced evictions and human rights. The workshop drew participants from key Government ministries and agencies whose mandates relate to land administration and management. A key output of the workshop was the formation of a Task Force, coordinated by the Ministry of Lands, to comprehensively look at the issue of forced evictions and come up with clear guidelines on how to handle future cases. The workshop took place against the backdrop of the Kenyan Country Periodic Report to the United Nations Human Rights Committee in 2005 in New York, USA. During the deliberations of the Committee the issue of the then threatened forced evictions in Kibera was raised with the Kenyan delegation led by the former Attorney General, Hon. Amos Wako. In its Final Concluding Observations the Committee stated as follows:

“The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made”.

After a number of false starts, the Task Force finally begun serious work in 2009 and by March 2010 had produced the first draft of the Eviction and Resettlement Guideline. Following extensive consultations with a wide range of stakeholders, it was decided that having a guideline was not enough. There was need to have an enforceable legal instrument in the form of a Bill that would be enacted into legislation. What is contained in this publication is the abridged version of the context of the Draft Guideline as well as the resulting Draft Bill.

The development of this document is a classical example of how effective, constructive engagement between duty bearers and rights holders, inspired by good faith, can contribute to meaningful policy and legislative processes. Although the Bill has not been enacted, all the indications are that within the context of the ongoing implementation of the Constitution, it will soon be presented to the Cabinet for discussion and approval for onward transmission to

Parliament. The enactment of the Bill will be yet another landmark in the promotion of human rights in the country. It will be an important tool in protecting the rights and dignity, especially of the poor, who have continued to suffer as a result of the endemic cases of forced evictions.

We express our gratitude to all the community members who patiently, but without losing hope, continued to struggle and lobby for the Bill. Without your efforts, commitment and remarkable contribution in the face of great adversity, this would not have been achieved. We also take the opportunity to extend our gratitude to the officials of the Ministry of Lands who tirelessly provided leadership and coordination in the development of the final document. To the members of the Task Force, from the Government Ministries, civil society organizations and community-based organizations, we say Hongera for a job well done.

Finally we most sincerely thank the Embassy of Sweden through the Civil Society Urban Development Program (CSUDP) for making the publication of this popular version possible. We must also not forget the consistent support we received from Misereor, the American World Jewish Services and Kios without which most of the advocacy efforts that finally resulted into the development of the Guidelines and the Bill would not have been carried.

The ball is now in the Government's court and we hope that those concerned, especially the Minister of Lands, will move with speed and have the law passed to save Kenyans from the scourge of forced evictions. It is a legacy for which you will be remembered by millions of Kenyans.

**Odindo Opiata**

Executive Director

HAKIJAMII



*Forced evictions are carried out without notifying the victims*

## 1.0 INTRODUCTION

### 1.1 OVERVIEW

The practice of forced evictions is a global phenomenon and is carried out in both developing and developed nations, in all regions of the world.

Forced evictions are normally caused by various and often complex but interconnected factors. These include:

- Illegal/irregular allocation of public land
- Insecurity of tenure
- Development and infrastructure projects
- Environmental concerns
- Large international events, e.g. Olympic Games, the World Cup or international conferences
- Urban redevelopment and beautification initiatives
- Property market forces and gentrification
- Absence of state support for the poor
- Political conflict, ethnic cleansing or war
- Planning initiatives



- Discovery and extraction of natural resources. These include minerals
- Implementation of existing Land Acts like the Land Consolidation Act and the Land Adjudication Act
- Government land surveys.

Under international human rights law the practice of forced evictions is considered a gross violation of human rights.

## 1.2 PROBLEM

For decades, evictions have taken place in Kenya, especially in informal settlements in contravention of international human rights standards. Mass forced evictions are usually carried out by government agencies or private developers claiming ownership of land on which some of the settlements stand. Use of police and bulldozers is common and violence, at times resulting in death, occasionally occurs. Forced evictions have devastating effects on individuals and communities. Majority of the victims are the poor who live in informal settlements. It was, however, the November 2011 evictions of the middle class in Syokimau that finally prompted Parliament to appoint a Committee to address the matter with some level of seriousness.

In the rural areas, squatters and former labour tenants are the main victims. Squatting is widespread in the country. It is usually a result of displacement due to development projects, different forms of violence, redundant labour/tenants, forest evictees and corrupt land registration practices.

The trend of forced evictions also runs parallel to cases of irregular and/or illegal land allocations. Cases of irregular land allocation have been documented and are numerous, as recorded in the Report of the Commission of Inquiry into the Illegal and/Irregular Allocation of Public Land (popularly known as the **Ndung'u Report**).

About 80% of land in Kenya is largely held under customary tenure in form of trust land (community land under the new Constitution). While the land is supposed to be held in trust by county councils on behalf of the local residents, this is not always the case. The case of the Endorois of Baringo illustrates how county councils and the Government have abused the trust.

In 1974 the Government evicted the Endorois community from the land around Lake Bogoria without following the law. This was ostensibly to establish the Lake Bogoria Game Reserve. When the residents failed to get effective remedies in the domestic jurisdiction they opted for

the Africa Commission on Human and People's Rights in Banjul, Gambia. A ruling was delivered in their favor in 2009. Among other recommendations, the Africa Commission ruled that the Government should:

- (a) Recognize rights of ownership to the Endorois and reinstate their ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

The Government promised to implement the ruling but to date this has not happened.

Both the National Land Policy 2009 and the Constitution 2010 recognize the need to have an appropriate eviction guideline. It is within this context that the following Eviction and Resettlement Guideline was developed. It was a joint effort between the Ministry of Lands and other relevant Government departments on the one hand, and civil society organizations on the other. This is an abridged version of the Guideline.



Forced evictions have no regard for human rights

## 2.0 GLOBAL CONTEXT

The practice of forced evictions has been comprehensively addressed by a number of regional and international declarations, covenants and conventions. Taken together they form the most authoritative global commitment on the right to adequate housing. The most important documents are the conventions and covenants which are legally binding treaties. Declarations and recommendations are also important even though they are accorded less legal weight than treaties.

Countries that have ratified or acceded to these conventions or general rules of international law are duty bound to comply with the provisions therein. Kenya is party to a number of these treaties and is bound by the general rules of international law and hence is under legal obligation to comply with the provisions. Key regional and international instruments are discussed below.

### 2.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The UDHR is considered the mother of all international instruments on human rights. It provides the inspiration to all subsequent human rights treaties. Adopted and proclaimed by the General Assembly on 10 December 1948, Article 25 of the UDHR guarantees the right of everyone to adequate housing. Kenya is a member of the United Nations that adopted the Declaration and is therefore deemed to be a party to the Declaration.

## **2.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)**

The ICESCR is a treaty that came into force on 3 January 1976 and is now legally binding in more than 149 countries. Kenya became a party in 1972. The right to adequate housing is found in Article 11(1). This is the most legally significant universal codification provision recognizing this right and has been subject to the greatest analysis, application and interpretation. The Covenant recognizes the right to housing as a part of the larger right to an adequate standard of living, under international human rights law, but the right to adequate housing is understood as an independent or free-standing right.

The Committee on Economic, Social and Cultural Rights (CESCR) which is responsible for monitoring state party compliance to the Covenant, in its General Comment No. 7 on Forced Evictions, set out the following procedural protection to be followed:

- An opportunity for genuine consultation with those affected;
- Adequate and reasonable notice for affected people prior to the eviction;
- Information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- Government officials or their representatives to be present during an eviction;
- Anyone carrying out the eviction to be properly identified;
- Evictions are not to take place in particularly bad weather or at night unless the affected people consent;
- Provision of legal remedies;
- Provision, where possible, of legal aid to people who are in need of it to seek redress from the courts;
- Governments must also ensure that no one is rendered homeless or vulnerable to the violation of other human rights as a consequence of eviction. Adequate alternative housing and compensation for all losses must be made available to those affected prior to eviction, regardless of whether they rent, own, occupy or lease the land or housing in question.

## **2.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

The ICCPR is a treaty which entered into force on 23 March 1976. Over 156 countries are parties to it. Kenya became a party in 1976. The ICCPR has increasingly been used to enforce housing rights. For instance, homelessness has been found to threaten violations of the right to life (Art. 4) and forced evictions have been found to contravene the right to be free from arbitrary or unlawful interference within the home under Article 17.

In 2005 the UN Human Rights Committee in its Concluding Observations to the periodic report of Kenya specifically recommended the adoption of appropriate eviction guidelines.

## **2.4 CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)**

The CERD entered into force on 4 January 1969 and is binding in 158 countries. The UN Committee on the Elimination of all forms of Racial Discrimination (CERD) monitors compliance with the Convention. The Convention expressly prohibits discrimination in the housing sector. Kenya has yet to become a party to the Convention.

Article 5(e) (iii) of the Convention prohibits any form of racial discrimination in the enjoyment of the right to housing.

## **2.5 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)**

The CEDAW entered into force on 3 September 1981 and is binding in 163 countries. The UN Committee on the Elimination of All Forms of Discrimination against Women monitors state party compliance with the Convention. Kenya became a party in 1994. Article 14(2)(h) of the Convention protects the rights of rural women to adequate housing.

## **2.6 CONVENTION ON THE RIGHTS OF THE CHILD (CRC)**

The CRC entered into force on 2 September 1990 and is binding in 191 countries. The Committee on the Rights of the Child monitors state party compliance with the Convention. Kenya became a party in 1990. Article 27(3) of the Convention protects the housing rights of children.

## **2.7 THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

The Charter entered into force on 21 October 1986 and is now binding on 53 African countries. Kenya became a party in 1992. The Charter under Articles 14 and 16 on the right to property and the right to health, and Article 18(1) on the state's duty to protect the family have been held to provide and protect the right to housing.

This was affirmed in the case of *Social and Economic Rights Action Center & The Center for Economic and Social Rights vs. Nigeria*. The case involved the land rights of the Ogoni people in Nigeria. In its ruling, the Commission held that even though the right to housing is not explicitly provided for under the African Charter of Human and People's Rights, it is nevertheless implied and as such protected. The same principles were applied to the Endorois case referred to earlier.

## **2.8 INTERNATIONAL STANDARDS AND THE NATURE OF STATE OBLIGATIONS**

Under international human rights treaties the obligations of state parties are categorized under four broad headings:

- Obligation to respect: this requires the government and/or its agents or servants to desist or refrain from any act that could violate the human rights of individuals or groups (e.g., chiefs evicting slum dwellers)
- Obligation to protect: this requires the government to prevent non-state actors from violating the rights of others (e.g. landlords evicting their tenants without following the law)
- Obligation to fulfill: this requires the government to take positive steps to implement human rights (e.g. making budgetary allocations for slum upgrading projects)
- Obligation to promote: requires the government to educate people on their rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the most important treaty that deals with issues of housing and evictions. Article 11 of the Covenant provides for the right to an adequate standard of living that includes the right to adequate housing.

The Committee on Economic, Social and Cultural Rights has provided authoritative interpretation on the meaning of the right to adequate housing. Under General Comment No. 4 the right to adequate housing has the following elements:

- Legal security of tenure – legal guarantee against forced evictions
- Availability of services, materials, facilities and infrastructure
- Affordability
- Habitability
- Accessibility
- Location.

These are the regional and international standards that informed the recommendations in the National Land Policy 2009 and have also been incorporated under articles 2(6) and 43 of the Constitution 2010.



*Victims are not given enough time to seek alternative settlements*

## **3.0 THE NATIONAL CONTEXT**

### **3.1 POLICY FRAMEWORK**

A number of national policies address the issue of forced evictions. The two key important ones are discussed below.

#### **3.1.1 THE NATIONAL LAND POLICY**

One of the principles of the National Land Policy (Sessional Paper No. 3 of 2009) is security of tenure. The implementation of the policy is therefore critical in addressing the problem of informal settlements and forced evictions. Under the Policy, the Government shall, among others, put in place an appropriate legal framework for evictions based on internationally acceptable guidelines.

The Policy provides a clear basis for the Eviction and Resettlement Guidelines.

#### **3.1.2 THE NATIONAL HOUSING POLICY**

The goal of Sessional Paper No. 3 of 2004 on Housing Policy is to facilitate the provision of a healthy living environment at an affordable cost to all socio-economic groups in Kenya. One of its objectives is to facilitate security of tenure for all socio-economic groups. It also recognizes the need for the progressive realization of the right to housing. This includes the enactment of legislation on forced evictions.

Both the National Land Policy and the Housing Policy emphasize the need to address the systemic causes of evictions and propose appropriate preventive measures.

## **3.2 THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK**

### **3.2.1 THE CONSTITUTION OF KENYA 2010**

The Constitution is the supreme law of the land. Chapter Four on the Bill of Rights and several other provisions have a direct bearing on the right to housing in general and evictions in particular.

Article 2 provides that any treaty or convention ratified by Kenya is considered part of the Constitution. A number of treaties to which Kenya is a party explicitly recognize the right to adequate housing and are thus applicable. Article 10 on national values and principles of governance includes, among others, participation of the people, commitment to human dignity, human rights, non-discrimination and protection of the marginalized.

Article 21 imposes an obligation on the Government to pass laws, adopt policies and take other measures, including the setting of standards to achieve the rights under Article 43. One of the rights under Article 43 is the right to accessible and adequate housing and a reasonable standard of sanitation.

The right to adequate housing encompasses freedoms. These freedoms include protection against forced eviction and arbitrary destruction and demolition of one's home. A comprehensive legislation on eviction would provide specific procedures and standards and make it easier to enforce the right to adequate housing. A similar approach was adopted in South Africa through the enactment of the Prevention of Illegal Evictions From and the Unlawful Occupation of Land Act, 1998.

Article 31 provides that every person has the right to privacy which includes the right not to have their person, home or property searched and their possessions seized. Arbitrary eviction always interferes with people's privacy. The UN Human Rights has interpreted this provision under the ICCPR to mean protection against forced evictions and was the basis of its recommendation to Kenya in 2005.

Article 26 provides that every person has the right to life and that a person shall not be deprived of life intentionally, except to the extent authorized by the constitution or other written law. Some jurisdictions, like India, have interpreted the right to life to include both livelihood and the means of earning that livelihood.

Article 27 provides for equality and freedom from discrimination before the law.



Article 28 on human dignity provides for the respect and protection of human dignity. Eviction that is carried out in a dehumanizing manner would be contrary to this provision.

Article 40 provides for the right to protection of property and states that no one can arbitrarily be deprived of property of any description or of any interest in, or right over any property of any description. The Article under sub section 4 makes a significant departure from the previous practices as it provides that:

*This opens the door for thousands of poor people who are currently staying on public land in both urban and rural areas without titles to be considered for compensation if they can establish good faith.*

Article 47 on Fair Administrative action provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This requires that all administrative actions that adversely affect fundamental freedoms and rights must be accompanied with written reasons so that arbitrariness is discouraged.

Article 33 on freedom of expression guarantees the *freedom of expression, which includes freedom to seek, receive or impart information or ideas*. It should be read together with Article 35 on the freedom to information. They provide the framework for meaningful prior to, during and after evictions so that the affected persons are provided with all the relevant information relating to the proposed eviction.

All these provisions clearly create a constitutional framework for the adoption of eviction guidelines.

The above provisions have already been the subject of interpretation by the courts. In the cases of **Satrose Ayuma and others Vs The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme (Petition 65 of 2010)**, **Susan Waithera Kariuki Vs The Town Clerk, Nairobi City Council and Others (Petition No. 66 of 2010)** and **Ibrahim Sangor and other Vs The Hon. Minister of Internal Security and Provincial Administration (Petition No.2 of 2011)**, the High Court declared that the practice of forced evictions is unconstitutional and proceeded to further state that the government should develop appropriate legal guidelines on forced evictions and displacement so that if people have to be evicted, the act is done without violating their constitutional rights and without causing extreme suffering. The Draft is intended to do just that.

### **3.2.2 OTHER LEGISLATIONS**

Pending the enactment of new legislation, the following are some of the statutes that have some bearing on the practice of forced evictions.

### **3.2.2.1 THE GOVERNMENT LANDS ACT CAP 280**

Section 8 of the Act requires the Commissioner of Lands to seek court orders before illegal occupiers of government land can be evicted.

In practice this is hardly done and in most cases such evictions are normally done without following the due process of the law. A more effective legislative mechanism is therefore required.

### **3.2.2.2 PHYSICAL PLANNING ACT (CAP. 286)**

Section 29 of the Act allows local authorities to prohibit or control use and development of land and buildings within their areas of jurisdiction and give permission for all development within their areas. Where no such permission has been granted, the local authority is allowed to demolish any such structures. The Act, however, does not provide any procedures to be followed where demolition is to be carried out. This has often resulted in ugly and violent confrontations between council *askaris* and illegal occupiers.

### **3.2.2.3 PUBLIC HEALTH ACT (CAP. 242)**

Section 116 of the Act also allows local authorities to take all lawful, necessary and reasonably practicable measures to maintain its districts at all times in clean and sanitary condition, and for preventing the occurrence of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to institute proceedings against any person causing or responsible for the continuance of any such nuisance or condition. In the majority of cases, legal proceedings are hardly instituted before evictions are done.

### **3.2.2.4 LAND ACQUISITION ACT (CAP. 295)**

Section 3 of the Act provides the procedure to be followed by the Minister during compulsory acquisition of land and allows “every person who appears to be interested in the land” to be served with notice. It is however doubtful whether illegal occupiers are covered under this. Indeed the practice appears to be that it is only those who have legal titles who are covered.

### **3.2.2.5 KENYA AIRPORTS AUTHORITY (CAP. 395), KENYA PORTS AUTHORITY ACT (CAP. 391) AND KENYA RAILWAYS CORPORATION ACT (CAP. 397)**

The Act allows the Corporations to demolish buildings that may cause any obstruction or danger to their services. There is, however, a requirement that before any such building is demolished an application should be made to the High Court for an order.

In spite of these provisions, the Corporations have never really followed the procedure.

### **3.2.2.6 THE KENYA ROADS AUTHORITY ACT (CHAPTER 2) OF 2007**

Section 23 allows any of the road authorities to enter into negotiations with registered owners of private land whenever they require land. If the land is public land, the Minister responsible for lands may, at his discretion and upon such terms and conditions as s/he may deem fit, place such land at the disposal of the concerned Authority for its purposes. Squatters, most of whom occupy public land, are not covered under the provision and can therefore be evicted without notice or any form of consideration as there is no specified procedure for addressing their concerns.

### **3.2.2.7 LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING ESTABLISHMENTS) ACT (CAP. 301)**

Under section 4 of the Act, termination of a controlled tenancy (which means a tenancy which has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or contains provision for termination, other than for breach of covenant, within five years from the commencement date) can only be done after notice has been given and the tenant is given an opportunity to challenge such notice. Indeed eviction is very difficult under controlled tenancies under this Act. Most landlords prefer agreements that exclude them from these procedures. In any case, the Act only applies to business premises. Most of the evictions affect residential areas in informal settlements.

### **3.2.2.8 THE RENT RESTRICTION ACT (CAP. 296)**

This is by far the most comprehensive legislation that covers the tenant-landlord relationship in the country. Section 14 lays down a detailed and very comprehensive procedure that has to be followed and conditions to be fulfilled before an order of eviction can be issued.

For all intents and purposes it is a very tenant-friendly legislation as it offers extensive protection against forced evictions. Despite its positive provisions, the Act has not succeeded in providing an effective mechanism for evictions in the country. This can be attributed to a number of factors some of which include:

- (a) The legal nature of most informal settlements often prevent most of the tenants from engaging with the legal system because of their perceived illegal status and poverty.
- (b) The Act does not apply to the Government or its agencies so residents of most of the informal settlements that are on public land cannot enjoy its protection. Moreover, such residents never have any tenant/landlord relationship with the Government or its agencies.
- (c) The Tribunal, that has the original jurisdiction in these matters, is mostly confined to Nairobi and is also extremely under-staffed, so access to effective remedies is out of reach for the majority.

### **3.2.2.9 TRESPASS ACT (CAP. 294)**

Section 3 of the Act criminalizes trespassing and shifts the burden of proof to the suspected trespasser. It does not provide adequate procedures for investigating the circumstances of any such trespass and opens the door for the possibility of exposing poor people to arrest and criminal prosecution in circumstances that ideally should be civil in nature.

### **3.2.2.10 LIMITATIONS OF ACTIONS ACT (CAP. 22)**

Section 7 provides a statutory basis to the common law doctrine of adverse possession that allows a person who has, or persons who have, occupied a piece of land for twelve or more years without the consent or authority of the registered owner or owners to apply to be registered as the legal owners. The law, however, does not apply to occupation of public land. But even where circumstances may allow for the use of the procedure, the complexity and expenses make it impossible for most of the poor to use it.

### **3.2.2.11 ENVIRONMENTAL AND MANAGEMENT COORDINATION ACT NO. 8 OF 1999**

The main objective of the Act is to provide an appropriate legal and institutional framework for management of the environment. It should further be pointed out that Article 42 of the Constitution guarantees every person the right to a clean and healthy environment. Consequently the protection of the environment is a constitutional duty. This means that there are circumstances under which people may have to be evicted to protect the environment. The real challenge therefore is to have in place a procedure that creates an effective balance between the right to a clean and healthy environment and the human rights of the residents.

Under part V of the Act (Sections 42-57) power is given to the Director-General of the National Environment Management Agency (NEMA) and the Minister in charge of environmental affairs to take measures and give guidelines for the protection and conservation of the environment. Areas that are considered to be environmentally fragile include rivers, lakes, wetlands, hillsides, mountain areas, hilltops, coastal zones and forests. The Act however, only makes it a criminal offence to put up structures in such areas and the penalties provided are criminal in nature. There are no set procedures that would allow the environmental authority to have the people removed from such areas and yet there are a number of instances where evictions have been carried out without regard to the provisions of the Act.

### **3.2.2.12 THE FOREST ACT 2005**

This Act covers the establishment, development and sustainable management, including conservation and rational utilization of forest resources, for the socio-economic development of the country. It created the Kenya Forest Service whose main function is to manage all state

forests. Part of managing the forest includes ensuring that there is no encroachment on forest land. The Act allows the Service to prevent people from encroaching on forest land. However, the penalty for such encroachment is confined to a fine or imprisonment. In the other words, the Act does not lay down any procedures that the Service would use to move people who have encroached into the forest. This is perhaps the reason why there is always confusion on whether the Service can legally issue and enforce an eviction order. On enforcement, all that the Service can do is to issue an eviction notice. However, if the notice is not complied with, the only recourse is criminal prosecution and the penalty prescribed does not include an order for eviction. This appears to be left to private individuals who under Section 58 can file a petition in the High Court seeking among others, an order of an injunction which presumably may include mandatory injunction. This is a very unsatisfactory state of affairs and unless clear guidelines are put in place, evicting people who are illegally occupying forest land may be found to be unconstitutional and lacking any legal backing.

### **3.2.2.13 THE WATER ACT NO. 8 2002**

This an Act to provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water and to provide for the regulation and management of water supply and sewerage services. It vests all water resources in the state and creates a number of institutions to help in administering and managing the water resources. One such body is the Water Resources Management Board that is responsible for managing and protecting water catchments. One of the ways of protecting water catchments is to ensure that there is no illegal encroachment. Many structures continue to be on water catchment areas. The Act further allows the Authority, with the approval of the Minister, to declare some areas as protected areas and impose regulations prohibiting certain activities in such areas; this may include prohibiting human habitation and could, if such areas are already habited, require removal of the inhabitants. But the Act is silent on what procedures to be followed to evict such people. This is yet another gap in the existing laws that the proposed guidelines would obviously help address.

### **3.2.3 PREVIOUS ATTEMPTS TO ADDRESS THE ISSUE**

Some previous attempts have been made by the Government to come up with a legal framework to address the problem of evictions.

#### **3.2.3.1 THE GOVERNMENT LANDS (AMENDMENT) BILL 2001**

This was the most ambitious attempt to come up with legislation on eviction but it was never passed. For the first time an attempt was made to specifically provide for a procedure for carrying out evictions. The Bill defined evictions and emphasized the need to provide security of tenure for people living in informal settlements. It provided an elaborate procedure to be followed before any eviction can be done. Most of the standards were in line with the international requirements

and had the Bill been adopted, perhaps there would have been no need to develop the current Draft. However, the Bill was never presented to Parliament.

### **3.2.3.2 THE LANDLORD AND TENANT BILL 2007**

The Bill was intended to consolidate and update the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301)** and The Rent Restriction Act (Cap. 296). Another stated objective was to establish a framework for the regulation of landlords and tenants so as to promote stability in the rental sector; protect tenants from unlawful rent increases and unlawful evictions; to balance the responsibilities of landlords and tenants and to provide for the adjudication of disputes and other purposes incidental thereto.

One important change proposed by the Bill was the increasing of the applicable rent from a maximum of Kshs. 2,500 to Kshs. 15,000. This would have brought more tenancies under the ambit of the legislation. The Bill also allowed the minister to establish tribunals in other areas. The Bill empowered the Tribunal to determine fair rent which in principle would act as a mechanism for controlling rent-based evictions.

On evictions, the Bill provided that an eviction can only take place upon an order made by the Tribunal upon an application. The Tribunal was empowered to refuse to grant such an order unless it was satisfied, taking into account all the circumstances, that it would be fair to do so. A landlord who evicts a tenant without the authority of the Tribunal would be guilty of an offence and liable to a fine not exceeding two months' rent of the premises or to imprisonment for a term not exceeding six months, or both.

The Bill, had it been passed, would have constituted a significant improvement on the protection and promotion of tenants' rights. It would, however, still not have comprehensively addressed the multiple instances of evictions in the country. First, the Bill only dealt with landlord/tenant relationships while a number of evictions occur in circumstances where such relationships do not exist. Second, the Bill did not adequately address itself to the mandatory procedures that should be followed before any eviction can be found to be justified and gave the Tribunal a lot of discretion.

### **3.2.3.3 THE HOUSING BILL 2011**

The development of a Housing Bill began in 2004 and to date has not been finalized. The latest version is dated 2011. A keen reading clearly shows that it has not addressed itself to the issue of forced evictions

### **3.2.3.4 PLANNING AND BUILDING LAW AND REGULATIONS**

There is no single policy guiding the planning and building sector. The lack of a comprehensive land use planning policy to guide the way in which land is utilized creates disharmony in land

utilization. The outdated building code governing the construction industry in Kenya is inadequate, lacking in effective and objective controls and enforcement mechanisms hence occasioning major impediments to housing and building delivery, leading to inadequate and outdated planning and building legislation and proliferation of slums and informal settlements. Planning and building regulations are a prerequisite to sustainable human settlements. The proposed planning and building regulations are not explicit.

### **3.2.4 SOME EMERGING PRACTICES**

There are some emerging practices on evictions and resettlements which are not anchored on any clear policy or legislation but provide some valuable lessons.

#### **3.2.4.1 THE MAU FOREST CASE**

When the Government announced plans to reclaim the Mau water tower, it faced a lot of opposition and problems because the area was heavily populated and some of the residents were innocent purchasers. To find an amicable solution the Government first formed a Task Force whose main mandate was to inquire into the nature and circumstances of the settlements in the forest and help determine the claims of the various inhabitants. After completing its work the Task Force made a number of recommendations that informed the formation and work of the Interim Coordinating Secretariat within the Office of the Prime Minister whose main mandate is to coordinate the implementation of the recommendations on the rehabilitation and conservation of the Mau Forest complex.

Negotiation was identified as a key element in facilitating the movement of people from the forest. However, the process has been dogged by political controversies. The approach adopted in addressing the issue of eviction and resettlements was a demonstration that with focused and committed goodwill, it is possible to address the issue of eviction in a manner that minimizes possibilities of violations of human rights. It is hoped that if the proposed Mau Forests Complex Authority is established, a more lasting solution will be found in addressing the issue of striking a balance between the protection of water catchment areas and the human rights of those staying around or within such areas.

#### **3.2.4.2 RAILWAY RELOCATION ACTION PLAN**

In 2006 Kenya Railways Corporation contracted its railway operations to the Rift Valley Railways. Over a period time parts of the railway reserve had been encroached upon by hundreds of small scale traders, informal institutions like schools and residential units. The railway reserve in Kibera and Mukuru in Nairobi has been particularly encroached by a large number of people. In the concession agreement it was agreed that the occupied reserve land would have to be vacated to give room for expansion and to reduce cases of accidents. The World Bank agreed to finance the expansion project.

To facilitate the removal of those trading or residing on the railway reserve, an initial Relocation Action Plan (RAP) was developed and finalized in 2005 but was never implemented. The Plan was meant to provide an alternative to forced evictions. A new RAP was done and finalized in 2010 and is now the subject of discussion between the residents and the Railway authorities. The Plan is supposed to be guided by the World Bank Operational Policy 4.12, that provides that every resettlement plan or policy framework must include measures that ensure that displaced persons are informed about their options and rights pertaining to resettlement and must be consulted, offered choices, and provided with technical and economically feasible resettlement alternatives. It is expected that these requirements will be strictly adhered to during the railway resettlement programme. It is hoped that if the Plan is successfully implemented it will provide a useful model on how relocation can be done involving illegal occupiers and without violation of human rights.

### **3.2.4.3 MWEA IRRIGATION AGRICULTURE DEVELOPMENT (MIAD) PROJECT**

The National Irrigation Board (NIB) has identified areas of expansion to boost rice production and increase water supply in Mutithi location of Mwea division in Kirinyaga district. The project will consist of an additional 8,860 hectares of irrigation area and construction of a dam downstream of Thiba River to be located at Kabare location, Gichugu division. This means that land will be acquired for construction of the dam and distribution infrastructure. The area to be acquired is owned by private individuals under freehold land tenure systems.

A Resettlement Action Plan (RAP) was done to guide the process in line with the requirements of the former Japan Bank for International Cooperation (JBIC) guidelines for Confirmation of Environmental and Social Considerations, and the World Bank Policy Guidelines on Involuntary Resettlement – OP 4.12, December 2001. In addition, the RAP has borrowed heavily from the International Finance Corporation (IFC) Handbook for Preparing a Resettlement Action Plan.

The objective of the Resettlement Action Plan was to conduct a census and socio-economic survey to determine the affected persons, compile an inventory of affected assets with the aim of setting compensation guidelines and providing a budget for implementation. The RAP study provided guidelines to NIB on land acquisition needs, people whose land will be taken and hence require to be resettled and assets affected by the project. It also provides for stakeholder participation in the mitigation of adverse social impacts of the project. Public consultations on the Environmental Impact Assessment (EIA) and Resettlement Action Plan (RAP) were conducted in order to inform the communities about the project and the objectives of the EIA and RAP. To avoid false claims for compensation or rehabilitation following disclosure of project plans, an explicit eligibility cut-off date was determined and announced in both Kabare and Mutithi, at least seven days before the start of the census and socioeconomic surveys.



The RAP study considered the fact that in Kenyan traditional culture, ownership of land or interest in land is not dependent on the possession of a title deed. Majority of the households in the project area live under the traditional land ownership model, where the registered owner of the land may have several other people living and owning property on the land but do not have legal titles to the land. Many of the land parcels in the affected area have been informally sub-divided, and allocated to children or other relatives of the registered owners. Others may have been sub-divided formally, but the changes have not been effected at the land registry for various reasons. There are also some sub-divisions or sales that have undergone the formal processes and titles issued, but the changes have not been effected in the current records at the land registry, or in the current survey maps. Where such cases were encountered, the census recorded the new title numbers and owners, rather than what is reflected on the survey maps or at the land registry. Hence, the affected people include all those who have an interest in the land whether they have the legal right of affected land and assets, or live in the affected area without a legal title to land. Land to be acquired at the proposed dam site is mainly residential cum agricultural, with only a few institutions.

The National Irrigation Board is in the process of implementing the RAP and resettlement sites have already been identified within Kirinyaga District.

#### **3.2.4.4 RELOCATION ACTION PLAN FOR KIBERA'S SOWETO EAST INFORMAL SETTLEMENT**

The Kenya Slum Upgrading Programme (KENSUP) is a Government initiative through the Ministry of Housing intended to address systematic improvement of all slum settlements in urban areas of Kenya. The programme, implemented in collaboration with other development partners like UN-Habitat, targets the progressive improvement of livelihoods of people living and working in slums and informal settlements in urban areas of Kenya.

The implementation will be carried out in three phases and upgrading of Kibera slum is part of the first phase which covers major towns in the country. In order to upgrade the slums, sections of the community had to be relocated in phases to the decanting site in Lang'ata to create space for housing development and related infrastructural services. According to the KENSUP relocation strategy, the movement of affected persons from Soweto East to the decanting site followed a sequential process.

The process involved:

- Identifying persons to be relocated, and holding consultative meetings with relevant stakeholders for common understanding and coordination.
- Sensitizing target groups in order to build trust and ownership of the process, issuance of vacation notices, allocation of housing units at a decanting site, removal of structures by owners, and signing of memorandum of understanding.

- Signing of tenancy agreements indicating the house allocated.
- Rent payable and the condition of temporary relocation since the persons are expected to relocate back to Soweto East once the new houses are complete.

The Ministry facilitated the movement of families and household goods to the decanting site by providing transport. The residents were given a two-month grace period. The Government was able to relocate 3,529 people from Kibera's Soweto East Zone A to the decanting site in Lang'ata without forcibly evicting them.

The principles that underpinned the Project were quite human rights-friendly. Implementation has, however, been problematic and part of the problem may well be that these principles are merely voluntary guidelines and no enforcement mechanism exists in case of breach. Can such voluntary mechanisms really work where stakes are so high?

#### **3.2.4.5 ZIWA LA NG'OMBE SLUM SETTLEMENT – MOMBASA**

This involved the construction of a school, administration block and access road. Here, the KENSUP relocation strategy was used. The process involving giving a notice of intent to improve the area was done through *barazas*, although the request for improvement had come from the community. There was a consultative meeting with all stakeholders to ensure common understanding and coordination, sensitization of target groups, involvement of Mombasa Municipal Council which is KENSUP's implementing agency in all stages, from planning to implementation. An Executive Committee was instituted for community mobilization and participation. Eventually, the residents removed their structures willingly and the school and administration blocks were completed and handed over to the community. The access road project is ongoing.

The government wants to build a school here.  
But you don't need to worry. You will be  
relocated and compensated



It is the government's responsibility to relocate and compensate victims of legal evictions

## 4.0 TOWARDS A SOLUTION: EVICTION GUIDELINES

Although the Government has made numerous efforts to find effective legal and policy solutions to the problem of evictions, a comprehensive approach is now called for, especially in view of the new Constitution that has introduced completely new obligations.

### 4.1 FORCED EVICTION CONCERNS

In developing these guidelines, several concerns should be addressed. These are discussed below.

#### 4.1.1 LAND TENURE

Generally there has been a focus on the provision of individual land titles. Individual land titling delivers security of tenure but it does so at great human and financial cost. In Kenya, with the rolling out of titles for 100 years, only 15 percent coverage of the national land surface has been achieved. This suggests that a range of different types of tenures have to be introduced. This

will enhance the delivery of security of tenure, especially for the urban and rural poor. Examples of these tenure types include occupancy rights, anti-eviction rights, adverse possession, unregistered leases and rentals.

#### **4.1.2 LAND ADMINISTRATION**

These systems are vital as it is not possible to supply land rights and security of tenure without an appropriate technical and institutional (governance) system to underpin these rights. These include land records, administrative procedures, and appropriately decentralized delegation of functions. Conventional land registration (titling) systems are highly centralized, expensive, rely on scarce professionals, and are based in major towns. This means that those living outside major urban areas, especially the poor and the illiterate, cannot easily use or access the conventional systems.

#### **4.1.3 STRATEGIC PLANNING**

The systems of managing and planning development have not changed significantly since independence and are not in line with Kenya's present urbanization and settlement patterns. Strategic planning approaches have to be strengthened to ensure that development control and land use management is sustainable. Countrywide and affordable planning approaches and standards, including plot sizes and service standards need to be developed and enforced.

#### **4.1.4 DECENTRALIZATION AND IMPROVED LOCAL GOVERNANCE CAPACITY**

In the past, the role of vulnerable groups in decision making and local governance has not been fully incorporated into the existing decentralized frameworks. In lieu of the above, the county governments under the new constitutional dispensation shall be required to adequately devolve resources, authority and qualified manpower. Transparency and participation of communities in development decisions shall be upheld.

#### **4.1.5 PLANNING AND SOCIAL AMENITY STANDARDS**

Most towns/settlements still depend on planning and social amenities standards that are not responsive to the challenges of urbanization and contemporary development trends. There is need to ensure that the physical planning standards address the social amenity needs of informal and slum settlements.

#### **4.1.6 FINANCING MECHANISMS**

In most cases it is necessary to own a registered land title to be able to obtain a mortgage or housing loan from a commercial bank. Institutional strengthening of the financial sector is required accompanied by supportive legal instruments and pro-poor foreclosure laws.

#### **4.1.7 BUILDING STANDARDS AND HOUSING DELIVERY**

Most towns still have colonial building standards appropriate for middle class housing, yet the majority of the population is low income and poor. The Habitat Agenda encourages governments to create a framework that facilitates housing delivery by involving all stakeholders, particularly the private sector (including informal sector), in partnership with the public sector. Housing co-operatives remain under-developed despite their proven ability to cater for low income groups in other parts of the world accompanied by the capacity to promote services for all to justify the taxes.

There is need to ensure that the draft Building Code and Regulations addresses the needs of the low income groups.

#### **4.1.8 LAND TAX**

In Kenya, land tax uses the land registration (cadastral) system as the information system to indicate who should be paying taxes. If the majority of the population is living outside the land titling system then a county or municipality cannot increase its tax, or tax the rich who are not living in the formal system. Appropriate approaches to tax parcels, tax records and tax procedures have to be developed.

The underlying principle in dealing with the challenge of slum settlements is that emphasis should be given to a preemptive approach that is directed to guiding and facilitating orderly urban and housing development. As much as possible, forced eviction of a segment of the population who mostly have no place to go and have been trying to survive with no other alternative housing and income-generating facilities needs to be avoided. While evictions may sometimes be necessary, they should be a last resort.

These are the considerations that inform the attached Draft Eviction and Resettlement Bill.

### DRAFT EVICTION AND RESETTLEMENT GUIDELINES BILL, 2012

#### ARRANGEMENT OF CLAUSES

##### PREAMBLE

##### PART I—PRELIMINARY

- 1—Short title
- 2—Definitions
- 3—Objects of the Act
- 4—Right to housing and protection against forced evictions

##### PART II—PRINCIPLES OF, AND PROCEDURES IN, EVICTIONS

- 5—General principles
- 6—Notice of eviction
- 7— Environmental, etc. impact assessment
- 8— Mediation committee
- 9— Eviction of unlawful occupiers
- 10— Urgent proceedings for eviction
- 11— Eviction instituted by a State organ
- 12— Mandatory guidelines during eviction
- 13— Resettlement
- 14— Remedies for forced evictions.
- 15— Jurisdiction of magistrate's court and the Environment and Land Court
- 16— Resettlement and rehabilitation
- 17— Monitoring, evaluation and follow-up
- 18— Role of stakeholders
- 19— Offence to give out land for unlawful occupation
- 20— Offence to evict contrary to this Act
- 21— Interpretation

**AN ACT** of Parliament to provide for the establishment of a legal framework, including guidelines, for forced evictions that accord with the Constitution and conform to internationally acceptable standards; to provide for protection against inhumane and unlawful evictions and for matters incidental thereto.

## **PREAMBLE**

WHEREAS Article 29 of the Constitution provides for the right of every person to freedom and security of the person which includes the right not to be subjected to any form of violence from either public or private sources and not to be subjected to torture in any manner, whether physical or psychological and not to be treated or punished in a cruel, inhuman or degrading manner;

WHEREAS Article 40 of the Constitution protects the right to property which includes the right not be arbitrarily deprived of property of any description or of any interest in, or right over, any property of any description;

WHEREAS Article 43(1)(b) of the Constitution provides for the right to accessible and adequate housing, and to reasonable standards of sanitation;

WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of owners to apply to a court for an eviction order in appropriate circumstances;

WHEREAS special consideration should be given to the rights of the vulnerable including the elderly, children, disabled persons and households headed by women, and that it should be recognized that the needs of those groups should be considered;

RECOGNIZING that the practice of forced evictions constitutes a gross violation of human rights; RECOGNIZING that it is desirable that the law regulates the eviction of unlawful occupiers of land in a fair manner, while protecting the rights to property of the owners of the occupied land.

**ENACTED** by the Parliament of Kenya, as follows—

## **PART I—PRELIMINARY**

### **1— Short title**

This Act may be cited as the Eviction and Resettlement Guidelines Bill, 2011 and shall come into force in accordance with the Constitution.

## 2— Definitions

In this Act, unless the context requires otherwise —

“*Cabinet Secretary*” means the cabinet secretary for the time being responsible for matters relating to land;

“*consent*” means the express or tacit permission, whether in writing or otherwise, of the owner to the occupation by the occupier of the land in question;

“*consultation*” refers to the process whereby the affected persons, on their own or through their organizations or appointed representatives are provided an opportunity to be heard and to participate in the decision-making process on matters involving any proposed eviction so that they can protect their legitimate collective interests and shall include appropriate documentation and feedback mechanisms;

“*court*” means the High Court in whose area of jurisdiction the land in question is situated; a court established under Article 162(2)(b) of the Constitution;

“*forced evictions*” or “*arbitrary eviction*” refer to the permanent or temporary removal, against their will, of individuals, families or communities from their home or land which they occupy, without the provision, and access to, appropriate forms of legal or other protection;

“*housing*” means any building or other shelter or part thereof in which people live or carry out business;

“*land*” has the meaning assigned thereto in the Constitution and includes a building or any dwelling structure erected on land;

“*State organ*” refers to the National Government, County Government or any other public body referred to as a state corporation under any written law;

“*owner*” refers to a person who owns or holds legitimate interest in land, including State organ;

“*person in charge*” means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question;

“*professional squatters*” refer to individuals or groups who habitually occupy lands for speculative purposes without the express or tacit consent of the landowner or person in charge. The term shall



also apply to persons who have been previously awarded home lots or land by the Government but who sold, leased or transferred the same to settle illegally in the same place or in another area. The term shall not apply to individuals or groups who simply rent land and housing from professional squatters or squatting syndicates.

“*property*” includes any vested or contingent right to, or interest in or arising from—

- (a) land, or permanent fixtures on, or improvements to land;
- (b) goods or personal property;
- (c) money and negotiable instruments;

“*public interest*” includes the interest of the health and safety of those occupying the land and the public in general;

“*unlawful occupier*” refers to a person who has taken possession of, or occupied land without the consent of the owner, or without any other right in law to take possession of, or occupy such a land.

### **3— Objects of the Act**

(1) The objects of this Act are to—

- (a) ensure that evictions of unlawful occupiers of public, community or private land do not suffer inhumane evictions or have their rights violated during any process of eviction;
- (b) protect the right to property of the evictees and the rightful owners of unlawfully occupied land;
- (c) ensure State assistance to persons evicted from their previous dwellings;
- (d) ensure appropriate penalties for persons responsible for alienating public, community or private land leading to unlawful occupation.

(2) This Act does not apply to professional squatters as defined herein.

### **4— Right to housing and protection against forced evictions**

No person may be evicted from their home, or have their property demolished without a court order and which court order shall consider all the circumstances regarding the eviction and the situation of the evictees and their families.

## **PART II—PRINCIPLES OF, AND PROCEDURES IN, EVICTIONS**

### **5— General principles**

The following principles shall apply in evictions—

- (a) an opportunity for genuine consultation;
- (b) adequate and reasonable notice;
- (c) environmental, economic and social impact assessment before the eviction and preparation of resettlement action plans;
- (d) opportunity for legal redress;
- (e) transparency, openness and compliance with international human rights principles in any eviction process.

### **6— Notice of eviction**

(1) Before any decision to carry out an eviction is made notice of intent of not less than three months shall be issued to the proposed evictees by the owner.

(2) The notice shall be in writing and shall include a version in a local language or the language spoken by the majority of people in the locality where the proposed eviction is to take place and delivered to the proposed evictees either through—

- (a) public *barazas*;
- (b) broadcast media at the national and local levels.

(3) The notice shall contain adequate information on the reasons for the proposed eviction and the alternative purpose for which the land or structure is to be used.

(4) Adequate consultations through public hearings with the affected persons or their duly designated representatives on all feasible alternatives to evictions with a view to avoiding, or at least minimizing, the need for eviction.

(5) Where no alternatives exist, arrangements shall be made for measures to minimize the adverse effects of the eviction.

### **7— Environmental, etc impact assessment**

(1) The Authority or person proposing the eviction shall carry out a holistic and comprehensive environmental, economic and social impact assessment and prepare a resettlement action plan.

- (2) The impact assessment conducted under subsection (1) shall include—
- (a) establish a cut-off date for enumeration process;
  - (b) evaluation, enumeration and recording of individuals, families and their assets;
  - (c) proposed plans and alternatives;
  - (d) alternatives to evictions;
  - (e) magnitude of displacement;
  - (f) information on the full resource base of the affected population, including income derived from informal sector and non-formal activities, and from common property;
  - (g) the extent to which groups will experience total or partial loss of assets;
  - (h) public infrastructure and social services that will be affected;
  - (i) effective dissemination by the authorities of relevant information in advance including land records and proposed comprehensive resettlement plans specifically addressing efforts to address to protect vulnerable groups;
  - (j) formal and informal involvement of institutions (such as community organizations, etc) that can assist with designing and implementing the resettlement programmes;
  - (k) proposals of the affected people to any proposed resettlement options.
- (3) In any eviction special attention shall be paid to disadvantaged groups including people with disabilities, the elderly, youth, women and children, and those living with HIV/AIDS.

## **8— Mediation committee**

- (1) Any disputes arising from the execution of the notice of eviction in respect of public or community land shall first be referred to a mediation committee established in accordance with this section.
- (2) The mediation committee referred to in subsection (1) shall comprise—
- (a) a representative of the Principal Secretary in the ministry responsible for lands who shall be the chairperson and convener of the committee;
  - (b) a representative of the National Land Commission;
  - (c) a person appointed by the party being evicted; a representative of the Principal Secretary in the Ministry responsible for housing;
  - (d) where the land is community land, a representative of the Governor of the county in which the land is situated;
  - (e) a representative of the Kenya National Human Rights and Equality Commission.
- (3) The committee may co-opt any other person who in its opinion may assist the committee discharge its function.

(4) The committee shall conduct the mediation for a period of not more than one month starting from the date of the commencement of the mediation process.

### **9— Eviction of unlawful occupiers**

(1) Notwithstanding anything to the contrary contained in any law, the provisions of this section apply to proceedings by an owner of the land for the eviction of an unlawful occupier.

(2) At least twenty-eight days before the hearing of the proceedings contemplated in subsection (1), the court shall serve written notice of the proceedings on the unlawful occupier.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if the court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service shall be effected in the manner directed by the court:

Provided that the court shall consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) shall—

- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

(6) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it shall grant an order for the eviction of the unlawful occupier, and determine—

- (a) a just and equitable date on which the unlawful occupier shall vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(7) In determining a just and equitable date contemplated in subsection (6), the court shall have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

(8) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such persons on the land in question.

(9) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.

## **10— Urgent proceedings for eviction**

(1) Notwithstanding the provisions of section 8, the owner of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—

- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
- (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
- (c) there is no other effective remedy available.

(2) Before the hearing of the proceedings contemplated in subsection (1), the court shall give a written notice of the intention of the owner to obtain an order for eviction of the unlawful occupier to the unlawful occupier.

(3) The notice of proceedings contemplated in subsection (2) shall—

- (a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

## **11— Eviction instituted by a State organ**

(1) If a State organ is of the opinion that any persons are in unauthorized occupation of any public

premises and that they should be evicted, the State organ shall issue a notice, of not more than thirty days and in writing, calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) A State organ may institute proceedings for the eviction of an unlawful occupier of public or community land.

(3) The court may grant such an order as it thinks just and equitable, after considering all the relevant circumstances, and if—

- (a) the consent of that State organ is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
- (b) it is in the public interest to grant such an order.

(4) In deciding whether it is just and equitable to grant an order for eviction, the court shall have regard to—

- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- (b) the period the unlawful occupier and his or her family have resided on the land in question, and
- (c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(5) A State organ contemplated in subsection (1) may, before instituting such proceedings, give not less than thirty days' written notice to the owner of the land to institute proceedings.

## **12— Mandatory guidelines during eviction**

(1) Where the court has ordered an eviction, the eviction process shall observe the following guidelines—

- (a) all evictions shall be carried out in the presence of a representative from the ministry responsible for lands and the Kenya Police Service;
- (b) the persons involved in the eviction shall possess identification documents and the owner shall keep a record of the identities of such persons;
- (c) the person responsible for the eviction exercises shall present formal authorization for the eviction if required to do so;
- (d) evictions shall not be carried out during bad weather, at night, during festivals or religious holidays, prior to an election, during or just prior to school examinations;
- (e) evictions shall be carried out in a manner that respects the dignity, right to life and security of those affected; special measures shall be taken to ensure that the human

rights of the vulnerable, including women and children are respected and that they are not subjected to any form of violence;

- (f) special measures shall be taken to protect the property of the evictees against illegal appropriation and damage that may through reasonable care be avoided.
- (g) property left behind involuntarily shall be protected against destruction, illegal appropriation, occupation or use;
- (h) if force is necessary, its use shall respect the principles of necessity and proportionality and shall be consistent with the Constitution and with international standards.
- (i) the evictees shall be given the opportunity and adequate time to remove any structure they may have erected on the land and any other property.

(2) Only where the evictees fail to comply with a court order to vacate or remove their structures or other property shall force be used to effect eviction.

### **13— Resettlement**

(1) Following an eviction, the Cabinet Secretary shall facilitate the resettlement of the evictees.

(2) The Cabinet Secretary shall take measures to ensure equal participation of women, persons with disabilities and other vulnerable groups in the planning and implementation processes and in the provision of basic services and essential supplies during resettlement.

(3) Measures shall be taken to ensure that—

- i. families are not separated;
- ii. people and their property are protected;
- iii. essential medical services are accessible;
- iv. counseling services are provided;
- v. special attention is paid to people with special needs and vulnerable persons;
- vi. on-going medical treatment of any evictee is not disrupted as a result of relocation;
- vii. prevention of the spread of contagious and infectious diseases at the relocation sites is avoided;
- viii. food, water and sanitation are provided;
- ix. basic shelter and housing is provided;
- x. education for children is not interrupted unduly or otherwise provided;
- xi. other essentials of livelihood resources are availed.

(4) The Cabinet Secretary shall take steps to build the capacity and strengthen the ability of those evicted to be able to adjust to the new environment and tap potential opportunities that exist in the new area.

(5) The Cabinet Secretary shall pay for any costs, including resettlement costs and shall be responsible for ensuring that those resettled get security of tenure to avoid future evictions.

(6) The Cabinet Secretary shall take steps to ensure that no new illegal structures are erected in the area where people have been evicted.

(7) The affected persons shall be accorded the opportunity and facilitated to fully participate in the planning and implementation of the resettlement plan.

(8) The resettlement plan shall include appropriate physical planning.

(9) Where large scale eviction of people is to be carried out, the Cabinet Secretary shall prepare and public a detailed resettlement plan, timetable and budget.

(10) As much as possible, preference shall be given to land-based resettlement options especially for people from agricultural or urban informal settings.

(11) The resettlement plan shall take into consideration the interests of the host community and in particular, the resettled persons shall be assisted to fully integrate socially and economically with host communities in order to minimize any adverse effects on the host communities and the resettled community.

#### **14— Remedies for forced evictions**

(1) Notwithstanding the provisions of any law any person threatened with or subjected to forced eviction shall have the right to timely access to legal remedies and access to legal aid.

(2) A court may make such orders including declaration of rights, compensation, injunction or any such other relief as it may deem appropriate.

#### **15— Jurisdiction of magistrate's court and Environment and Land Court**

(1) Notwithstanding any provision of any other law, a magistrate's court has jurisdiction to issue any order or instruction or to impose any penalty authorized by the provisions of this Act.

(2) An appeal from the magistrate's court shall lie to the Environment and Land Court.



## **16— Resettlement and rehabilitation**

Resettlement shall be carried out in a just and equitable manner and in accordance with the provisions of this Act, the applicable principles of the Constitution and with the relevant international standards.

## **17— Monitoring, evaluation and follow-up**

(1) The Kenya National Human Rights and Equality Commission and the National Land Commission, shall monitor and investigate forced evictions and the State's compliance with these guidelines and international human rights law and include their respective findings in their annual reports to Parliament outlining the state of evictions in the country, challenges and recommendations on what needs to be done.

(2) Monitoring reports and findings prepared under subsection (1) shall be made available to the public or otherwise publicized.

## **18— Role of stakeholders**

All stakeholders bear an obligation to promote, protect and fulfill the right to housing and property before, during and after eviction.

## **19— Offence to give out land for unlawful occupation**

(1) No person may, whether for on receipt or on promise or receipt of any money or other consideration as a fee or charge or without such receipt or promise arrange or organize or permit a person to occupy land without the consent of the owner.

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a fine of not more than one million shillings or to imprisonment not exceeding one year, or to both such fine and such imprisonment.

(3) The court which convicts any person of a contravention of this section, shall order any money or other consideration received by that person, to be paid back to the persons who paid it to the accused or be forfeited, where such person or persons cannot be found.

(4) An order under subsection (3) has the effect of and may be executed against such person as if it were a civil judgment in favour of that person or persons from whom the money or other consideration was received or in favour of the State.

## **20— Offence to evict contrary to this Act**

(1) No person may evict an unlawful occupier except on the authority of an order of a competent court.

(2) No person may willfully obstruct or interfere with an official in the employ of the State or a mediator in the performance of his or her duties in terms of this Act.

(3) Any person who contravenes the provisions of subsection (1) or (2) is guilty of an offence and liable on conviction to a fine of not more than five hundred thousand shillings, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.

## **21— Interpretation**

These provisions shall not be interpreted as limiting, altering or otherwise prejudicing the rights recognized under international human rights, refugee, criminal or humanitarian law and related standards, or rights consistent with these laws and standards as recognized under the Constitution of Kenya.

## MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to provide for humane and lawful evictions of persons unlawfully occupying public, community or private land. The Constitution provides for the right to property as well as the right to housing and the right to be treated with dignity among others. This Bill seeks to provide a legal framework by which these, sometimes competing rights, can be balanced so that right to property of the owners of the occupied property is protected while at the same time the evictees are handled in a manner that respects their dignity and avoids undue interruption of their lives. It is also sought to make provision for eviction from unlawfully occupied public and community land.

The Bill proposes the use of mediation to deal with disputes over occupation of public and community land before formal eviction proceedings may be commenced.

Notice of at least three months shall be issued to persons intended to be evicted and in the interim the State is expected to assist them find alternative accommodation/settlement.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the ....., 2011.

**JAMES A. ORENGO,**  
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