

# JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY LAW JOURNAL



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**JOMO KENYATTA UNIVERSITY  
OF AGRICULTURE AND  
TECHNOLOGY LAW JOURNAL**

**VOL 2 (2018)**

**lawAfrica**

Published by

LawAfrica Publishing (K) Ltd.  
Top Plaza, 3<sup>rd</sup> Floor  
Kindaruma Road, (Off Ngong Road)  
P.O. Box 4260-00100 GPO  
Nairobi, Kenya  
Wireless: +254 20 249 5067  
Cell: +254 708 898 189  
Fax: +254 20 249 5067

Email: [sales@lawafrica.com](mailto:sales@lawafrica.com)

Website: [www.lawafrica.com](http://www.lawafrica.com)

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ISBN 978-9966-53-039-4

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# EMBRACING STRUCTURAL INTERDICTS IN THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN KENYA: ANALYSIS OF THE COURT OF APPEAL DECISION IN THE MITUBELL CASE

ANDREW BARNEY KHAKULA\*

## ABSTRACT

This paper discusses the place of structural interdicts or post-judgment supervision in the enforcement of socio-economic rights in Kenya in light of the Court of Appeal judgment in *Kenya Airports Authority v Mitubell Welfare Society and 2 Others*. It argues that this decision reverses the gains made by the courts in Kenya in the enforcing socio-economic rights under Article 43 of the Constitution, and thus makes a case for the use of the structural interdicts in socio-economic rights litigation despite the misgivings by the Court of Appeal.

## 1. INTRODUCTION

The High Court decision in *Mitubell Welfare Society v Attorney General and 2 others* (herein referred to as *the Mitubell Case I*)<sup>1</sup> was a ground breaking and pace-setting in the enforcement of socio-economic rights in Kenya. In fact, Lady Justice Mumbi Ngugi's dictum has been cited with approval in several socio-economic cases when she stated:

The argument that socio-economic rights cannot be claimed at this point that is two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its Constitutional obligations.<sup>2</sup>

In short, the court in this case refused to postpone realisation of socio-economic rights in Kenya and stressed that the state had to take immediate steps towards progressive realisation of these rights.

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\* LL.D Candidate, LL.M UNISA, LL.B MOI, PGD KSL, Advocate of the High Court of Kenya and partner at the firm of J.S Khakula and Company Advocates. Email; khakulaandrew@gmail.com. Tel: +254 721937749.

1 *Mitubell Welfare Society v Attorney General and 2 Others* [2012] eKLR.

2 *Ibid* Para 53.

It is, however, notable that the judicial enforcement of socio-economic rights presents unique challenges in judicial decision-making. The major concerns normally relate to the application of the doctrine of separation of powers,<sup>3</sup> where the main contentions usually revolve around whether it is proper for courts to make decisions that may have an impact on resource allocation, as well as whether they possess the necessary skills to evaluate policy choices made by the legislative or executive branches of government.

The other concern in enforcement of socio-economic rights relates to the vagueness in the definition of socio-economic rights.<sup>4</sup> For instance, it may be validly asked what the right to access housing actually mean, and how much the right to health care actually constitutes.<sup>5</sup> Indeed, what may seem to be inadequate housing in developed countries may actually be considered adequate in some developing or third world countries. The same may not be an issue in the enforcement of civil and political rights where, for instance, what constitutes the right to participate in choosing leaders through elections is the same regardless of whether the right is being exercised in developed nations or in third world countries.

The third concern that is associated with enforcement of socio-economic rights relates to the fact that these rights have to be realized progressively, which would easily involve extended judicial oversight, necessitate repeated court appearances, and require the court to engage in nuanced factual analyses of government actions.<sup>6</sup> Progressive realisation of socio-economic rights takes cognizance of the fact that not all socio-economic rights have to be implemented immediately.<sup>7</sup> As recognised by the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>8</sup> states are required to take

3 M Ebadolachi, 'Using structural interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic & Social Rights in South Africa' (2008) 83 *New York University Law Review* 1567.

4 *Ibid.*

5 *Ibid.*

6 The Constitution of Kenya takes into consideration that socio-economic rights cannot be realized immediately and thus requires progressive realization these rights. Article 21(2) of the Constitution of Kenya provides that the state shall take legislative, policy and other measures including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

7 C. Mbazira, 'A path to realizing economic, social and cultural rights in Africa? A critique of New Partnership for Africa's Development' (2004) 4 *African Human Rights Journal* 36.

8 International Covenant on Economic, Social and Cultural Rights G.A res. 2200A (XXI), 2. U.N GAOP Supp (No.16) at 49 U.N. Doc. A/6316 (1996), 993 U.N.T.S 3, entered into force Jan 3, 1976.

steps to ‘the maximum of their available resources with a view to progressively achieving the full realisation of socio-economic rights’.<sup>9</sup>

Hence, the involvement of the courts in supervision of whether progress has been made may result to costs that can be prohibitive.<sup>10</sup> Indeed, this principle has its foundation on the argument that realisation of these rights usually requires vast resources for their implementation, and more often than not, they will have budgetary implications. Although the ICESCR provides that some of the obligations are of immediate effect, this does not necessarily mean that states are compelled to do what is impracticable.<sup>11</sup>

It is against this backdrop that the judgment in the *Kenya Airports Authority versus Mitubell Welfare Society and 2 Others* (herein referred to as the *Mitubell Case II*),<sup>12</sup> which reversed the decision in *the Mitubell Case I*, can be reviewed.

## 2. BRIEF FACTS

### 2.1 The High Court Matter

The *Mitubell Case I* primarily involved the interpretation of the right to property under Article 40, and the right to accessible and adequate housing and reasonable standards of sanitation under Article 43(1)(b) of the Constitution of Kenya. The petitioners (Mitubell Society), residents of an informal settlement, were given a seven days’ notice to vacate a parcel of land that they had occupied for more than 19 years. Their homes were subsequently demolished as part of a process of forcible eviction.

The land in question was registered in the name of the Kenya Airports Authority, and therefore, it was the court’s finding that the petitioners did not have any rights over the land under Article 40 of the Constitution. The main question that the court had to grapple with was whether the evictions and demolitions that took place amounted to a violation of the petitioners’ Constitutional rights.

9 Article 2 (1) ICESCR.

10 *Ibid.*

11 Mbazira (n 7) 157. See also General Comment No. 3 (Fifth Session 1990) [UN doc E/1991/23]. The nature of states’ obligations available at <<http://www1.umn.edu/humanrts/gencomm/epcomm3.htm>> accessed on 24 January 2018.

12 *Kenya Airports Authority v Mitubell Welfare Society and 2 Others*, Civil Appeal No. 218 of 2014 [2016] eKLR.

The court held that failure to give the petitioners adequate notice and alternative shelter before being evicted violated their Constitutional rights. The Constitutional court referred to the UN Guidelines on Evictions<sup>13</sup> as enunciated by the United Nations High Commissioner for the Human Rights in general comment 7.<sup>14</sup> The court was of the opinion that since Kenya did not have legislation to govern evictions, it was bound to follow the UN guidelines on evictions by dint of Article 2(5) and (6) of the Constitution.<sup>15</sup>

The Respondents *inter alia* argued that socio-economic rights were not justiciable *per se*<sup>16</sup> and argued that a balance ought to be struck. The court, therefore, had to strive to address the question of availability of funds from the executive for the enforcement of socio-economic rights.<sup>17</sup> The decision of the Supreme Court of India in the case of *Olga Telles v Bombay Municipal Corporation* was cited wherein it was held that the removal of persons who had encroached on pavements and footpaths was justified.<sup>18</sup>

Further, the South African case of *Thiagray Soobramoney v Minister of Health (Kwa – Zulu Natal)* was relied on in which the Constitutional court of South Africa stated that one of the limiting factors to the attainment of the Constitutional guarantee to socio-economic rights is that of limited resources.<sup>19</sup> The South African Constitutional Court's decision in the *Irene Grootboom case* was also cited wherein the court had held that section 26 and 28 of the Constitution of South Africa did not entitle the petitioner to claim shelter or housing immediately upon demand.<sup>20</sup> The Respondents thus argued that similarly, the petitioners were not entitled to claim socio-economic rights two years after the promulgation of the Kenyan Constitution, since these rights are supposed to be realized progressively. The respondent's arguments were premised on Article 21(2) of the Constitution of Kenya, which provides that the state shall take legislative policy and other measures including the setting

13 United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement A/HRC/4/18 available at [http://www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf).

14 CESCR, general comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997) available at <http://www1.umn.edu/humanrts/gencomm/escgencom7.htm> accessed on 20/01/18.

15 Para 40.

16 Page 5 paragraph 22.

17 *Ibid.*

18 *Olga Telles v Bombay Municipal Corporation* (1985) Supp SCR 51.

19 *Thiagray Soobramoney v Minister of Health (Kwa-Zulu Natal)* 9188 (1) SA 765.

20 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC).

of standards to achieve the progressive realisation of rights guaranteed under Article 43 (socio-economic rights).

The court found that the respondent's argument that socio-economic rights could not be claimed immediately since their realisation is progressive in nature was misplaced as the theory of classification of rights has long been abandoned and the indivisibility and interdependence of human rights recognized.<sup>21</sup>

The court also pointed out that the argument that socio-economic rights cannot be claimed immediately ignored the fact that no provision of the Constitution was to wait until the state felt it was ready to meet its Constitutional obligations. Progressive realisation meant that the state must begin to take steps, and be seen to take steps towards the realisation of these rights.<sup>22</sup>

The act of demolishing the petitioners' informal settlement after giving them a seven day notice without providing alternative shelter was, therefore, found to amount not only to a violation of the petitioners' rights under Article 21(1) and (2)<sup>23</sup> and Article 43 of the Constitution, but the Constitution itself and the obligations it imposes on the state and also the national values and principles of governance set out in Article 10 which includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.<sup>24</sup>

The court found that the state had an obligation to protect the petitioners' existing homes rudimentary as they were, while doing what it could to the extent of its available resources, to ensure their progressive access to adequate housing. Even if the petitioners had no right to the land, their houses could not be arbitrarily demolished without providing them with alternative accommodation. The state has an obligation to observe, respect, protect,

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21 The court referred to paragraph 5 of the Vienna Declaration and Programme of Actions adopted in the World Conference on human rights on 25<sup>th</sup> June 1993 which states that 'All human rights are universal and interdependent and interrelated'. The court also quoted General Comment No. 9 on Domestic application of the covenant, 19<sup>th</sup> session 1998, UN DOC E/C 12/1999/24 (1998) paragraph 10 in which the committee on economic, social and cultural rights (CESCR) stated 'the ... of a rigid classification of economic, social and cultural rights which puts them by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principal that two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups'.

22 Page 11 – 12 para 53.

23 Article 21(1) provides; it is a fundamental duty of the state and every organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Article 21(2) provides, 'The state shall take legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43'.

24 Page 12 para 54.

promote and fulfil the petitioners' right to adequate housing and the actions by the respondents were unlawful and unconstitutional.<sup>25</sup>

The High Court also made the following orders which gave rise to post-judgment supervision or a structural interdict:<sup>26</sup>

1. THAT the respondents do provide, by way of affidavit, within 60 days of today, the current state of policies and programs on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.
2. THAT the respondents do furnish copies of such policies and programmes to the petitioners, other relevant state agencies, Pamoja Trust (and such other civil society organizations as the petitioners and the respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the petitioner's grievances) to analyse and comment on the policies and programs provided by the respondents.
3. THAT the respondents do engage with the petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identify an appropriate resolution to the petitioner's grievances following their eviction from Mitumba Village.'

## 2.2 The Court of Appeal Decision

While the High Court, inspired by progressive legal authorities on socio-economic rights, ruled in favour of the inhabitants of the informal settlement, the Court of Appeal sadly reversed the High Court's decision. In doing so, it rubbished jurisprudence that is so crucial to the realisation of constitutional aspirations hitherto developed by the High Court.<sup>27</sup> One of the grounds that the Court of Appeal based its decision was that post-judgment supervision (structural interdict) is not recognized in Kenyan law.

The Court of Appeal began by affirming its commitment to the realisation and justiciability and enforcement of socio-economic rights. The court stated that, to afford socio-economic rights, less judicial protection and enforcement is erroneous because, in their very nature, socio-economic rights are crucial to a state's development ; they cannot be mere 'aspirations' and must be afforded

25 Page 12 para 57.

26 Para 45.

27 A Attalo, 'Turning back the clock on socio-economic Rights: Kenya's Court of Appeal decision in the Mitubell case' available at [www.ohrh.law.ox.ac.uk](http://www.ohrh.law.ox.ac.uk) accessed on 21/10/17.

the protection they rightly deserve.<sup>28</sup> What followed, however, did not reflect this commitment to the realisation, justiciability and enforcement of socio-economic rights.

The Court of Appeal took cognizance of the fact that jurisdictions like India, South Africa and Canada exercise post-judgment supervision. However, Article 23(3) of the Constitution of Kenya, which permits the High Court to grant appropriate relief, should not be construed to be a provision that permits the High Court to borrow legislation from other countries and through judicial interpretation embed them into the laws of Kenya. Article 23(3) is not a legislative instrument for the courts.<sup>29</sup> It is to be noted that the said article allows courts to be creative in crafting appropriate relief on a case-by-case basis. The court argued that under the political question doctrine, a court has no jurisdiction to make orders to policy formulation or give guidelines on who should participate in the formulation of policy.<sup>30</sup>

The Court of Appeal made a finding that the High Court abdicated its judicial function by interpreting Article 23(3) of the Constitution which requires it to grant appropriate relief to a petitioner as the basis for ordering the parties to explore and report back to the court on progress towards resolving the petitioner's grievances. In this regard, the Court of Appeal stated that:

A judgment brings to an end the jurisdiction of the court that delivers the same in the concept of a partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law. A court of law in delivering its judgment must determine the rights and liberties of parties... Delivery of judgment marks an end to litigation and marks an end to the jurisdiction competence of the court.<sup>31</sup>

Respectfully, this was not accurate because the High Court made a declaration that the rights of the petitioners had been violated when they were forcefully evicted from their homes thus effectively determining the dispute between the parties in the matter. The post-judgment supervisory order was only meant to allow the violator remedy the violation under the watchful eye of the court which, drawing from the experience of comparative jurisdictions like South Africa, is an acceptable way of enforcing socio-economic rights.<sup>32</sup>

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28 Para 34.

29 Para 112.

30 *Ibid.*

31 Para 71.

32 This will be discussed in detail later in this paper.

The court also noted the classical view that the role of the legislature is to make laws and policy and that the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature.<sup>33</sup>

Notably, the Court of Appeal seemed to be ‘breathing hot and cold’ at the same time. The court made a clear finding that there is no place for post-judgment supervision in Kenya’s legal framework.<sup>34</sup> It then contradicted itself by arguing that supervisory orders can be used by courts on a case-by-case basis only if they are properly crafted to avoid vagueness so that the court is not seen to be engaging in policy formulation or give guidelines on who should participate in formulation of government policy.<sup>35</sup> The court forgot that the role of the ‘reasonableness test’ in socio-economic rights cases which involves the court interrogating the policies and programmes that the state has put in place in an effort to realize socio-economic rights.

In the *Grootboom case*,<sup>36</sup> the South African court held that measures aimed at the realisation of socio-economic rights must be reasonable, coherent, well-coordinated and comprehensive.<sup>37</sup> It was further emphasized that the court was not bound to inquire whether more desirable or favourable measures could have been adopted by the government or whether public money could have been better spent as the state had a wide variety of options to choose from in implementing its obligations under the Constitution.<sup>38</sup>

In the case of *Lindwe Mazibuko and others v City of Johannesburg and others*, which involved the right to access water under section 27 of the South African Constitution,<sup>39</sup> the SACC employed the reasonableness test where the reasonableness of the city’s policy regarding water was questioned. The court noted that a reasonableness challenge requires the government to explain the choices it has made by providing the information it has considered and the

33 *Madison v Marbury* 5 U.S. (1 Cranch) 137 (1803).

34 Para 98.

35 Para 112.

36 *Grootboom Case* 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC)

37 Paragraphs 21 & 34.

38 Paragraph 41.

39 [2009] ZACC 28. Similarly in *Johnson Matatoba Nokotyana and others v Eturheleni Metropolitan Municipality and other* [2009] ZACC 33, the court declined to make a finding on the reasonableness of the municipality’s new policy as the policy had fundamentally changed on appeal.

process it followed to determine its policy.<sup>40</sup> It was held that the city repeatedly reviewed and revised its policies to ensure that they do promote the progressive achievement of the right to access sufficient water.<sup>41</sup>

The reasonableness test in enforcement of socio-economic rights does not mean that the court usurps the position of the executive by engaging in making policy and all manner of political decisions. The court merely interrogates the reasonableness of the executive's decision primarily with an aim of establishing that executive is taking reasonable steps to ensure realisation of socio-economic rights within available resources and in a progressive manner. A structural interdict is, therefore, one of the avenues through which the courts to enquire into the policies made by the executive in compliance with court orders to ensure realisation of socio-economic rights.

### 2.3 The Nature of a Structural Interdict

The Court of Appeal faulted the High Court for using a structural interdict, which involves the court supervising the implementation of its judgment by allowing the policy makers to come up with solutions to the constitutional violations and report back to the court within a specified time frame.

Although there is no clear and formal definition of a structural interdict,<sup>42</sup> briefly, it is a remedy in terms of which the court orders an organ of state to perform its constitutional obligations and to report to the court on its progress in doing so.<sup>43</sup> In other words, the court plays a supervisory role in ensuring state compliance with its order.

The structural interdict is particularly useful and appropriate when it comes to enforcing state compliance in socio-economic rights cases. Firstly, since the state is obliged to report to the court on its progress in implementing the orders of the court, the structural interdict is particularly suitable for the enforcement of duties which are ongoing, for instance where the court has directed the state to provide alternative housing to squatters before evicting them. A structural

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40 Para. 71

41 Para. 163.

42 In *Thozamile Eric Magidimisi v The Premier of the Eastern Cape* Case Number 2180/04 Froneman J at para 29 stated: 'Whatever the proper legal pigeon hole may be for this kind of order, it has been sanctioned in appropriate cases by the Constitutional Court.' Mr Trengrove, for the applicant, referred to it as a 'mandamus with a wrinkle'.

43 See the description provided by Trengrove (1999) *Economic and Social Rights Law Review* 8-10.

interdict becomes quite appropriate and efficient in this context because the court can devise a time framework within which the state must comply.<sup>44</sup>

Secondly, structural interdicts are also appropriate when the conduct of the state results in a breach of fundamental rights and affects a group of people as opposed to one or two individuals. In granting a structural interdict in *Kiliko v Minister of Home Affairs and Others*,<sup>45</sup> Van Reenen J stated:

As the manner in which the Department discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings, but also fails to adhere to the values embodied in the Constitution, I incline to the view that the instant case is an appropriate one for the granting of a structural interdict.

Wesson asserts that if the court were to exercise supervisory jurisdiction in socio-economic rights cases (such as in *Grootboom*<sup>46</sup> and *TAC*<sup>47</sup>) by asking the state to report back to it at a later stage with an outline of the measures that it regards appropriate, that would then be evaluated by the court, it would be able to ensure that such judgments are given their full effect.<sup>48</sup> He, however, clarifies that supervisory jurisdiction should not be regarded as an unwarranted assertion of authority on the part of the judiciary, but establishes a relationship of collaboration between the state and the judiciary in terms of which branch of government brings its particular skills to bear on the problems of realizing socio-economic rights.<sup>49</sup>

According to Currie de Waal, the elements of structural interdicts include the following: (i) a declaration identifying how a sphere of government has violated an individual or groups Constitutional right / failed to comply with

44 In *Thozamile Eric Magidimisi v The Premier of the Eastern Cape* Case Number 2180/04 at para 39 Froneman J ordered that the Department of Social Development and the Premier comply with the order within a specific time frame. In *Satrose Ayuma and Others v The Registered Trustees Kenya Railways Staff Retirement Benefit Scheme and 3 others* [2013] eKLR, the court also directed the state file within 90 days of the judgment an affidavit in court detailing out existing or planned state policies and Legal Framework on Forced Evictions and Demolitions in Kenya and that within 21 days of the judgment, a meeting be by the Managing Trustees of Kenya Railways Staff Retirement Benefit Scheme together with the petitioners where a programme of eviction of the petitioners shall be designed; that the agreed programme shall be filed in court within 60 days of the judgment and that each party shall have liberty to apply.

45 *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) 127 at para 32.

46 *The Grootboom Case* (2000) 11 BCLR 1169 (CC), 2001 (1) SA 46 (CC).

47 *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16.

48 M Wesson, 'Grootboom and Beyond Reassessing the Socio-economic jurisprudence of the South African Constitutional Court' (2004) *SAJHR* 307.

49 *Ibid.*

its Constitutional obligations; (ii) court mandates that the violator must comply with its Constitutional mandate; (iii) the violator is ordered to prepare and submit a comprehensive report under oath describing in detail the action plan for remedying the challenged violations. Usually the report would give the violator an opportunity to choose how it intends to comply with the constitutional rights in question as opposed to the court itself developing or dictating a solution; (iv) the court evaluates the proposed plan: whether it remedies the violations or brings the violation into compliance with its constitutional obligations; and (v) final order by the court if it approves the plans.

A critical look at the preceding analysis of the elements of structural interdicts confirms that a structural interdict can, in certain circumstances, be viewed as a partial judgment or interim judgment. In this regard, it is arguable that the Court of Appeal was categorical that the concept of a partial or interim judgment was not part of the Kenyan legal system, meaning that structural interdicts cannot be used by courts in Kenya to enforce their judgments in socio-economic rights cases.<sup>50</sup>

In the case of *Pretoria City Council v Walker*<sup>51</sup> the court held that litigants seeking either declaratory or mandatory order to vindicate a Constitutional right could also obtain a court order that the sphere of government in question takes appropriate action as soon as possible to eliminate the violation of rights and report back to the court in question.

In the recent case of *Economic Freedom Fighters v Speaker of the National Assembly & Others: Democratic Alliance v Speaker of the National Assembly (the Nkandla Judgment)*,<sup>52</sup> the South African Constitutional Court used a structural interdict when it directed the National Treasury to determine reasonable costs of measures implemented by the Department of Public Works at President Zuma's Nkandla's homestead that did not relate to security features. The National Treasury was then required to report back to the court within 60 days and the president had to personally pay the amount determined by the National Treasury within 45 days of the court's signification of its approval of the report.

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50 Para 141(d).

51 (CCT8/97) [1998] ZACC 1.

52 CCT 143/15; CCT 171/15 [2016] ZACC1.

### 3. THE ROLE OF STRUCTURAL INTERDICTS IN ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

The role of structural interdicts in the enforcement of socio-economic rights can be viewed through both positive and negative lenses.

#### 3.1 Advantages of Structural Interdicts

Structural interdicts relocate a dynamic dialogue between the judiciary and other branches of government in remedying the violation of Constitutional rights while avoiding getting into the arena of policy formulation a task that courts are ill-suited to perform. This was clearly shown in the *Nkandla Judgment*.

Structural interdicts also allow the courts to inspect proposed plans and ensure that they are not constitutionally suspect. This was arguably the reasoning of Lenaola J (as he then was) and Mumbi Ngugi J in *Satrose Ayuma*<sup>53</sup> and *Mitubell Cases*<sup>54</sup> when they rendered their judgments which included a post-judgment supervision order. This gives the judiciary an effective tool to remedy bill of rights violations, thus bolstering the political and popular integrity of the courts.<sup>55</sup>

Government accountability is also greatly improved by structural interdicts since the process of formulating and presenting a plan to the courts helps officials to identify which organ or department of the state is responsible for providing particular services or for ensuring access to specific right.<sup>56</sup>

It is arguable that structural interdicts have contributed to the better understanding of public authorities of their Constitutional legal obligations in particular areas whilst (also assisting) the judiciary in gaining valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties.<sup>57</sup> The exchange of information between various experts and government officials grappling with critical policy decisions may help to clarify the contents of social- economic rights at stake.<sup>58</sup>

Structural interdicts provide a more fundamentally fair outcome than other remedies in Socio-economic rights litigation in the sense that relief can be

53 *Satrose Ayuma and Others v The Registered Trustees Kenya Railways Staff Retirement Benefit Scheme and 3 others* [2013] eKLR.

54 *Mitubell Welfare Society v Attorney General and 2 Others* [2012] eKLR.

55 'Ebadolachi' (2008) 83 NYU LR 1596.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

provided to all members of a situated class, whether or not any given individual has the resources to litigate his or her own case thus avoiding queue jumping<sup>59</sup> to access Socio-economic rights<sup>60</sup>

### **Disadvantages of Structural Interdicts.**

On the other hand, court supervision of government planning can lead to prohibitive enforcement costs, resourced diversion and wastage.<sup>61</sup> Nagel and Fiss have debated the institutional legitimacy of structural interdicts which may blur the line between the traditional judicial function and more political action.<sup>62</sup> In other words, it is very easy for the courts to find themselves engaging in policy making and in the process interfering with the work of the executive.

Some US commentators have also claimed that structural interdicts permit to much judicial discretion and are costly remedies that reflect 'moral hubris and intellectual confusion' by meddling judges.<sup>63</sup>

## **4. CONCLUSIONS AND RECOMMENDATIONS**

What is confusing about the Court of Appeal's finding in the *Mitubell Case II* is that the court seemed to deny the applicability of structural interdicts in Kenyan law,<sup>64</sup> then later suggested that courts can use structural interdicts save that the order has to be precise and specific to avoid vagueness which can easily result in breach of the doctrine of separation of powers where the judiciary finds itself making policy instead of interpreting the law.<sup>65</sup>

The argument here is the effective enforcement of socio-economic rights cannot be achieved in Kenya without the use of innovative remedies that the constitutional court has the discretion to formulate under article 23(3) of the

59 Ebadolachi (2008) *NYU LR* 83: 1597. Queue jumping refers to the concern that parties can use litigation to secure scarce socio-economic resources out of turn ie in a manner that conflict with extant government planning scheme or that dislodges others waiting for the same resources. This is particularly problematic in the context of access to land for housing squatters overtaking vacant lots earmarked for future housing developments may be 'jumping ahead' of others waiting for access without squatting see eg *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery Pty Ltd 2004* (6) S.A 40 (SCA) at 54.

60 *Ibid.*

61 *Ibid.*

62 Owen Fiss, 'The Civil Rights Injunction 60(1978) and Robert Nagel, Controlling Structural Injunction' (1984)7 *Harvard Journal of Law and Public Policy* 395, 398-9.

63 *Ibid* at 218-219.

64 Para 98.

65 *Ibid* Para 112.

Constitution of Kenya.<sup>66</sup> One of these innovative remedies is a structural interdict. As we know, courts do not issue orders in vain;<sup>67</sup> court orders ought to be obeyed and / or complied with. The nature of socio-economic rights demands or requires positive action from the state<sup>68</sup> by way providing the much needed socio-economic goods and services such as health, shelter and clean water among others. The state may not take immediate action unless the court monitors compliance.

The Court of Appeal in the *Mitubell Case II* interpreted the Constitution in such a narrow way whose effect was to stifle the enforcement of socio-economic rights. A constitution is not an ordinary statute; the constitution is the supreme law of the land; it's a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.<sup>69</sup>

A generous interpretation is always favoured over a narrow interpretation of the Constitution. It favours rights and is against their restriction. It entails drawing the boundaries of rights as widely as the language in which they have been drafted and in the context in which they are used makes possible. In the case of *Minister of Home Affairs (Bermuda) v Fisher* Lord Wilberforce stated:

A constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation in the articulation of the values bonding its people and in disciplining its government.<sup>70</sup>

The narrow interpretation favoured by the Court of Appeal delivered a dealt blow on the growth of enforcement of socio-economic rights jurisprudence in Kenya. The uniqueness of these rights requires the use of innovative reliefs such as structural interdicts which unfortunately was frowned upon by the Court of Appeal.

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66 Ibid. The Court of Appeal stated that article 23(3) permits the High Court to be innovative and creative in crafting appropriate relief on a case by case basis.

67 *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR para 18.

68 C Dlamini, *Human Rights in Africa: which way South Africa?* (Butterworth 1995) 5.

69 *Ringera J in Njoya and others v Attorney General and others* [2004] 1 EA 194.

70 [1980] AC 319 (PC) 328-9.

Constitutional values also play a major role in interpretation. The Court of Appeal failed to recognize that one of the national values in the Kenyan Constitution is human rights,<sup>71</sup> and therefore, article 259(1)(a) requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles. In *Coetzee v Government of the Republic of S.A* Sachs J commented on the significance of the values that are fundamental to a value-based approach in when interpreting the Constitution by saying:

The values that must suffice the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct.<sup>72</sup>

Notably, article 20(4)(a) of the Constitution of Kenya provides that in interpreting the bill of rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, which mirrors Sachs J's dictum in *Coetzee v Government of the Republic of S.A*.

It is arguable that if the Court of Appeal had adopted a value based interpretation of the Constitution, it would have upheld the use of a structural interdict in the *Mitubell Case I* since it was not in dispute in the appellate court whether the petitioners rights had been violated; what was being contested was the manner in which the violations were to be remedied and the particular parties to be held responsible. The Court of Appeal should have thus focussed on ensuring that the petitioners get justice for violation of their rights and not shoot down post-judgment supervision as a method of enforcing socio-economic rights.

Unless the courts are allowed to supervise their judgments, socio-economic rights litigation can easily turn into an exercise in futility. Courts may end up issuing orders that will never be complied with by the state. It is common knowledge among the legal circles in Kenya that the state is always lax when it comes to complying with court orders that require spending money. A good example is settlement of decrees in cases where the state has been ordered to pay out damages to a litigant.<sup>73</sup> Post-judgment supervision thus provide an

71 Article 10(2)(b).

72 (1994) 4 S.A 631 (CC) para 46.

73 *Republic v Permanent Secretary Office of The President Ministry of Internal Security & another Ex-Parte Nassir Mwandihhi* [2014] e-KLR. The applicant sought for committal orders against the permanent

opportunity for the courts to ensure compliance of orders emanating from socio-economic litigation. It would be very sad to have such an impressive and progressive bill of rights containing rights that cannot be realized because the state cannot be held accountable.

The role of the court is also to develop the law in such a way that rights are made readily accessible to the citizenry. Perhaps a more liberal approach was expected from the Court of Appeal since the enforcement of socio-economic rights requires the court to be innovative and creative in crafting constitutional remedies for rights violations.

It is the submission in this paper that, in the *Mitubell Case II*, the Court of Appeal did not clearly pronounce itself regarding the place of post-judgment supervision by courts in socio-economic cases. However, it is likely that, as courts continue to make findings on socio-economic rights litigation, the much needed clarity on post-judgment supervision or structural interdicts will emerge.

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secretary in the office of the president for failing to settle a decree where the state was ordered to pay damages to the applicant for malicious prosecution and wrongful imprisonment.