

Questionnaire

Access to Justice for the Right to Housing in Kenya

1. Are the following components of the right to housing subject to hearings and effective remedies before courts and/or tribunals in your country? If yes, please explain which law provides this protection, who has standing to bring claims forward and what court or tribunal adjudicates the claim. Provide an example of a leading case and explain briefly how this may have advanced protection of the right to housing.

a.) Non-discrimination (including accommodation of disabilities) Yes/No

Yes. **Constitution – Article 27** prohibits discrimination against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. **Article 43** –right to accessible and adequate housing

b.) Security of tenure (including prohibition of eviction without appropriate alternative housing) Yes/No

Yes. **Constitution – Article 40** - Evictions can only be justified under reasonable ground (public interests) and following due process;

Land Act 2012 - s. 152G lays out mandatory procedures that must be followed during evictions.

Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012 (IDP Act) – prohibits arbitrary displacement; displacement and relocation due to development projects only lawful if justified by compelling and overriding public interests

c.) Adequacy standards (habitability, access to water, sanitation, services, health and safety etc.) Yes/No

Yes. **Constitution Article 43** lays out social and economic rights - highest attainable standard of health, which includes the right to health care services; accessible and adequate housing; reasonable standards of sanitation; clean and safe water in adequate quantities

Water Act 2016; Water Service Regulations; Public Health (Drainage and Latrine) Rules, Physical Planning (Building and Development) (Control) Rules 1998 – contain provisions on water, sanitation, health and safety in buildings)

d.) Non-retrogression (review of effect on right to housing of program cuts, removal of legal protections or austerity measures) Yes/No

It is not clear if Kenyan laws have specific provisions in this regard, although the presence of progressive realization may be applicable. Progressiveness requires positive steps i.e. non-retrogression. In the case of **Mitubell Welfare Society vs Attorney General and 2 Others** (Petition No.164 of 2011), the court stated that “the State must begin to take steps and be, seen to take steps, towards realization of social and economic rights”

e.) Progressive Realization – (obligation to take reasonable measures, establish and meet goals and timelines, prioritize the most disadvantaged, allocate maximum available resources, etc.) Yes/No

Yes. **Constitution Article 21(2)** - The State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of social and economic rights.

Article 20(5) - In applying social and economic rights, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

- (a) it is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals;

Overarching points

Who can bring a case? Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. A case may also be brought by person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members – (Article 22 Constitution)

Adjudicating court or tribunal – High Court of Kenya – has several divisions with the most relevant ones being the Constitutional and Human Rights Division and the Judicial Review Division. Environment and Land Courts (created by Environment and Land Court Act) also exist as well as Rent Tribunals (created by Rent Restriction Act).

Relevant Case - Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (Petition 65 of 2010)

The Court affirmed the right to accessible and adequate housing and the prohibition of forced evictions. It laid out the procedural requirements that must be met during evictions and reiterated the applicability of general rules of international law to Kenya. Court also held that measures such as disconnection to water and sanitation aimed at forcing people to move out of their houses was a violation of the rights to housing.

2. What measures have been taken or are planned to improve access to justice for the right to housing? Please include, where applicable, measures relating to i) education of lawyers, advocates and potential rights claimants; ii) barriers facing women and other groups; iii) access to legal representation; iv) making hearings and other procedures more accessible and less intimidating or costly; v) more effectively addressing systemic issues; and vi) ensuring implementation of remedial orders.

Article 159(2) of the Constitution encourages alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms and provides that justice shall be administered without undue regard to procedural technicalities. **Article 48** requires the State to ensure access to justice for all persons and, if any fee is required, for it to be reasonable and not impede access to justice.

The **Legal Aid Act** creates the national legal aid service to administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable as well as encouraging and facilitating settlement of disputes through alternative dispute resolution. The Act creates a Fund from which legal aid service providers are paid. However, Act is yet to be operationalized.

Legal education is provided through various universities in the country followed by an ‘advocates training programme’ offered by the Kenya School of Law. The Law Society of Kenya organizes an annual ‘Legal Awareness Week’ where organizations involved in legal work show-case their services with a view to promoting a better understanding by the public of the role lawyers play in the advancement of legal literacy and advocacy and offer pro bono services to the public.

3. Please identify where responsibility lies for education and training of judges and administrative decision-makers regarding their international human rights obligations. What measures have been taken to ensure that domestic law is interpreted as far as possible to provide for effective remedies for the right to housing?

The Constitution establishes the Judicial Service Commission whose functions include preparing and implementing programmes for continuing education and training for judges and other judicial officers. This is done through the **Judiciary Training Institute (JTI)** which was established in 2008 to provide judicial education for judges and magistrates. International human rights education and training is covered by JTI through its various programs, seminars, public lectures, research, and other forms of discourses.

Article 20(2) of the Constitution provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. It adds that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it gives effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

4. Are you aware of examples in your country of community-based initiatives to provide hearings and remedies for the right to housing outside of formal court or tribunal processes? How have they been supported and how effective have they been? Do these operate at the national or subnational level, and do decisions create precedents that can be relied upon by others?

The Constitution allows and encourages ADR mechanisms. This includes community-based initiatives. (However, we are not aware of their use for housing related matters.)

5. What role does your National Human Rights Institution play in ensuring access to justice for the right to housing? Are there other human rights bodies that play a role in this respect, such as an ombudsperson?

The Kenya National Commission on Human Rights monitors and documents cases of displacement and forced evictions in Kenya. It also engages the government and highlights infringement of human rights, including the right to housing.