THE HIGH COURT OF KENYA AS AN EGALITARIAN PRO-POOR COURT

By Joshua Malidzo Nyawa

> You cannot eat the constitution, you cannot wear it and you cannot sleep in it but the constitution can ensure the safeguard of your right to food and the right to housing[1]
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> "Do not deny the rich what is theirs by right; but make sure the poor actually receive equal right without regard to their poverty"[2]

Introduction

For the classical liberalists, the government should only operate in a night watchman state[3]or as minimal state[4], a state which protects the right to life, freedom and property and does not take wealth from the 'haves and give to the have nots'[5].In this type of state, the right to property and the right to a free market are fundamental, and these rights are therefore not limited by the poverty or needs of others, while the right to a free market includes a minimal interference by the government.As *Michael McConnell* puts it: "The classical liberal tradition emphasizes limited government, checks and balances, and strong protection of individual rights."[6]The night watchman state is therefore a critique of the welfare society, for the classical liberalists including the likes of *Milton and Friedman* believe that there is no reason that the government should be

[1]Laksiri Fernando, 'You can't eat the constitution ' But The constitution can Ensure your right to Eat (Food)law
[2]Walter Kendall, *Reflections on Judicial Review and the Plight of the Poor in a World Where Nothing Works*, 37 John Marshall L Rev 555, 572 (2004)
[3] In this type of a state, the government's sole role is to protect the property and liberty of the people from external attacks while ensuring a free market
[4] A view that is postulated by Robert Nozick in his work Anarchy, State, and Utopia
[5]Joseph Grcic*, The Contradictions of Libertarianism ,Etica & Politica / Ethics & Politics*, XIII, 2011, 2, pp. 365-382 365
[6]Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?* 119 HARV. L. REV. 2387, 2391 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY:INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005))

spending so much money on social expenditures, such as welfare[7]. However the 2010 constitution clearly rejects this type of a state, the struggle for the 2010 constitution was founded by a different set of prayers and hopes by the Kenyan people, *Nicholas Orago*[8] captures these hopes in the following terms

> The struggle for a new constitutional dispensation in Kenya was underpinned by the desire for a new political, economic and social dispensation capable of eradicating poverty, inequality and marginalisation. The aim of the Kenyans who struggled for the new political and socio-economic dispensation was the entrenchment of a just system of government that will enhance access to the basic socio-economic goods and services for the Kenyan people, especially the poor, vulnerable and marginalised.

The promise of a 'New kenya'[9] is therefore different from that of the past, In the 'New Kenya', there is a promise to ensure that the poor, marginalized and other disadvantaged groups have access to socio-economic services, the promise of the new kenya therefore is the'amelioration of the dire poverty, inequality and socio-economic marginalisation of many Kenyans, and to enhance social justice[10] and the egalitarian transformation in Kenya'[11], if this is to be appreciated as the true conception of the promise for a new dawn in kenya, then it has the effect of removing

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[7]Friedman, Milton, and Rose D. Friedman. *Free to Choose: A Personal Statement*. New York: Harcourt Brace Jovanovich, 1980. Print

[8]Nicholas Wasonga Orago, Socio-economic rights and the potential for structural reforms: A comparative perspective on the interpretation of the socio-economic rights in the Constitution of Kenya, 2010 in Morris Kiwinda Mbondenyi, Human rights and democratic governance in Kenya: A post-2007 appraisal Pretoria University Law Press (2015); In the South African Context, Sandra Liebenberg 'Socio-Economic Rights – Adjudication under a Transformative Constitution' (2010) 36 opines thus: 'The recognition of socio-economic rights represents an attempt to redress the tendency within liberal human rights discourse to exclude issues of impoverishment and material disadvantage from it referential framework.'

[9] New Kenya is a term borrowed from the conceptualization of the country after the promulgation of the new constitution by President Mwai Kibaki , see The Promulgation Speech by HE Hon Mwai Kibaki during the promulgation of the Kenyan Constitution on 27 August 2010 http://english.alshahid.net/archives/11884

[10] see Dr. (Mrs.) Saroj Bohra, Social Justice and Indian Constitution, International Journal of Law and Legal Jurisprudence Studies: Volume 2 Issue 1, where social justice is described as:
"Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society".

[11]East African Centre for Human Rights (EACHRights) 'Compendium on economic and social rights under the Constitution of Kenya, 2010' (October 2014) 24 - 25 http://www.eachrights.or.ke/pdf/2014/A-Compendium-On-Economic-And-Social-Rights-Cases-Under-The-Constitution-Of-Kenya-2010.pdf

the minimalist state concept or the night watchman state by the liberalists from the 2010 dispensation.

In this paper, I seek to show that the High Court of Kenya has clearly understood its role in the post 2010 dispensation and has at its heart the promises of the 2010 constitution, it has rejected the classical liberalists concept of a night watchman state and accepted the welfare state[12]. The high court has been enforcing the transformative leitmotif and the egalitarian ethos of the constitution. I will consider how the court has baptized the issue of standing, the liberalization of the test of standing under the constitution, secondly I will consider how the High Court has refused to be guided by the undesired 'Anarita precedent' and thirdly the writer will show how the high court has enforced the socio-economic rights.

THE HIGH COURT'S INTERPRETATION OF ARTICLE 22 AND 258; CLEARING THE WAY IN THE WILDERNESS?

[12]By a welfare state, I conceive a state in which the government has affirmative duties, a state in which the government is to play a role of healing the wounds of the past and transforming the state.

The High Court has been able to adopt a broad approach to standing and opened the gates to the poor, those who cannot bring claims on their own name, the high court[13] has grasped the intent of article 22 and 258 of the constitution which was to heal the memories of the past where the poor would be blocked form presenting their issues to court because of the locus standi inhibition[14]. If the court is to be used to attain social justice and uphold the dreams and aspirations of Kenyans' in the 'NEW KENYA', there is a need to relax the procedural and standing barriers to public interest litigation. *Rehan Abeyratne* believes that this relaxing is important "because the very purpose of the law . . . was undergoing a transformation'. It was being used to foster social justice by creating new categories of rights. If the courts are expected

[13] It is not my case that it is only the high court that has interpreted article 22 and 258 correctly, however the jurisprudence from the court of appeal is not interesting.

[14] see Joshua Malidzo Nyawa, Justice Erastus Githinji at the tiller: The rancor against the constitution, *The platform For law, justice and society*, issue Number 35, September 2018 ,pp 76-pp 83

to protect the rights of Kenyans, then there is a need for them to adopt a broad approach to the issue of standing, Chaskalson P in *Ferreira v Levin No and others,* clarified that:

> It is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.[15]

In *Ms. Priscilla Nyokabi Kanyua*[16], where the petitioner sought a declaration that section 43 of the retired constitution did not bar prisoners from voting, the respondents objected to the petition by stating that petition was defective since the petitioner lacked standing to bring the action since the she had not alleged that any particular individual right guaranteed by the constitution that had been violated with respect to her. The high court expressed itself as follows:

> A new dawn was ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalized and a purposeful approach took the driving seat in the area of Public Law.

Justice Mukunya went on to endorse the views of the academician Loots, stating:

> Many people...whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which then remain merely on paper...When large numbers of persons are affected in this way, there is merit in one person or organization being able to approach the court on behalf of all those persons whose rights are allegedly infringed.

Further the high court has held that Article 258 relaxes the issue of standing and opens the doors of the courts very wide to welcome 'any person who has *bona fide* grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief '[17]

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[15] *Ferreira v Levin No and others* 1996 (9) BCLR 1240 para 165.
[16] *Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission* Nairobi HCCP No. 1 of 2010,
[17] see *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR at para 60

Similarly in *Mining Temoi &another vs. Governor of County of Bungoma & 17 others*[18], while construing Articles 22 and 258, the court stated that:

> I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms. A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the "CEO/CO-ORDINATOR" of the organization and the Petition is about the alleged violation of the Constitution, Mr. Khaoya has in my view illustrated that there is a nexus between him and the organization."

Justices Lenaola, Majanja and Mumbi Ngugi held in *John Harun Mwau*[19]as follows:

> The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened.

Justice Joseph Onguto (as he then was) also delivered the wider interpretation of article 22 in *Board of Management of Uhuru Secondary School*[20], the learned judge held that

> The Petitioner claims to have filed the Petition on behalf of the Principal and or the students ofthe school whose rights the Petitioner alleges have been violated or are on the fringe of beingviolated. Article 22 of the Constitution grants 'any person' the right to institute court proceedingsclaiming that a right or fundamental freedom in the Bill of Rights has been denied, violated orinfringed or is threatened. Clause (2) of the said Article expands the sphere of locus. Under theConstitution the grievant need not personally file a claim. A person acting on his behalf may.Likewise, a person acting on behalf of or a member of a group or class of persons may also file aclaim. So too may a

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[18][2014] eKLR

[19]*John Harun Mwau & 3 Others –v- Attorney General & 2 Others* High Court Petition No. 123 of 2011, see also*Kevin Turunga Ithagi v Fred Ochieng & 5 others* [2015] eKLR at 40 where the court held that:

> Even with a textualized and restricted reading of those two Articles of the Constitution, it is apparent that the avenues for litigants to come to court were made wider in 2010. A party need not necessarily be personally affected by the alleged violation of any Constitutional provision. The idea, in my view, is to ensure that any person is in a position to protect and defend the Constitution by all means, including litigation. A restricted reading of both Articles 22 and 258 of the Constitution ought, consequently, to be discouraged.

[20]*Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* PETITION. NO. 359 OF 2015 from para 33-36

> person acting in the public interest…Article 22 like all other articles of the Constitution is not to be read in isolation and simplytextualized. It ought and must be read alongside Articles 258 and 259. As was conceded by Mr.Sitima, the avenues were opened wider by the Constitution. A party need not necessarily havebeen personally affected by the alleged violation of any Constitutional provision or right. Myreading of the three Articles would also lead to that wide berth. The purposes, values andprinciples of the Constitution would be better served if the doors were not shut to any litigant solong as the litigant is not simply a busy body but person with a genuine grievance and concern.The rights and fundamental freedoms can be better advanced if a wider and more liberal asopposed to a limited reading of Articles 22 and 258 is effected…I do not believe that the Applicant herein is a busy body. The Applicant has an apparent genuinegrievance and concern as far as the students of the school are concerned. The Principal couldcertainly act in his own name but all the students of the school cannot. The Petition allegesinterference and or infringement with the rights under Articles 41, 47 and 53 of the Constitution. Itwill be for the trial court to interrogate whether such infringement or violation has changed. I alsodo not view it that the Petitioner filed the instant Petition for any personal gain or ill-motives andwould discount the Respondents joint submissions to like effect.

Onguto J(as he then was) proceeded with this gospel and further held in *His Highness Prince Aga Khan Shia*[21]that the courts should not continue throwing away petitions just because the society is unincorporated, he delivered himself thus

> Additionally, the definition of the word" persons" under Article 259 of the Constitution seems to encompass unregistered associations as well. Article 259, as read together with Articles 258 and 22 of the Constitution, marked a clear departure from the jurisprudence of the old that unincorporated societies or associations could not bring a suit or be sued in their names but only through its registered officials. I say no more in this regard.

The High Court and the Anarita precedent: The case of bold spirits and agents of change

Karl Klare[22] has described judges into two, on the one hand, there are those who are jurisprudential conservatives, these are those whoinduce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution than are permitted by the text and drafting history. On the other hand, there are the are progressive judges. The progressive judges easily fit

[21]*His Highness Prince Aga Khan Shia & another v Attorney General* [2016] eKLR at para 35

[22]Karl E Klare 'Legal culture and transformative constitutionalism' 14(1998) *South African Journal of Human Rights* 146

the description of bold spirits by Lord Denning, he had argued that bold spirits are those who are not fearful allowing a new cause of action if justice so required."[23], if the law is to develop, then the same is to be credited not to the conservative judges[24] but to the progressive judges who have refused to be bound by the dead hand of the past. The principle that was developed in Anarita can only apply in post 2010 courtesy of judges who pay blind obsession with the rites and rituals sanctioned by an outmoded Anglo-Saxon Jurisprudence[25]. If there is a principle that needs to be rechecked in post-2010, then it is the principle that was developed in the Anarita decision, this is a case in which the judges allowed a technicality to rip the petitioner's case apart[26]. *Y.V. Chandrachud J*[27], cleared captured the grounds for ripping a case apart in the following terms

> I am no pessimist but at times I see dark clouds gathering over law's rarefied atmosphere... Long and interminable arguments, whisperings of heavy professional fees, the unethically expensive impost of court fees by the State which does not plough back its profits from justice by undertaking programmes like free legal aid, the chronic delays in disposal of cases and, may I say, the not so- chronic delay in decision-making are all matters which require of the men of law, a careful and urgent attention.

The supreme court of India have adopted the famous 'epistolary jurisdiction'[28] to avoid sacrificing justice at the altar of technicalities. The court has been acting on letters written by or on behalf of the oppressed people as a strategy for facilitating access to justice[29]. The method espoused in Anarita is an old method which will lead to undesirous consequences, Lord Devlin while criticizing the old methods of initiating proceedings has argued that "If our methods were

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[23]*Candler v Crane, Christmas & Co*. (1951) 2 KB 164, 178.

[24]See Rodrigo Uprimny. "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates" in Roberto Gargarella, Pilar Domingo and Theunis Roux (Eds). *Courts and Social Transformation in New Democracies: AnInstitutional Voice for the Poor*? where Rodrigo shows the effect of conservative judges.

[25]*Veena Sethi* v. *State of Bihar*, AIR 1983 SC 339.

[26]Gibson KamauKuria has argued in Litigating Kenya's Bill of Rights in Kivutha Kibwana(ed.) *Human Rights and Democracy in East Africa* (1997) 67,68 that "*Today the efficacy of the Bill of Rights is impeded by: (a) the rules of constitutional interpretation which makes it difficult if not impossible to enforce the Bill'*

[27] Former Chief Justice of India speaking on Law Day function on 26th November, 1980.

[28] This has been recognised as one of the ways of relaxing the rules of procedure

[29] See for example*Sunil Batra* v. *Delhi Administration (1978) 4 SCC 494* where the petitionwas initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court. The prisoner complained of a brutal assault committed by a Head Warder on another prisoner. The Court treated that letter as a writ petition,

as antiquated as our legal methods, we should be a bankrupt country."[30] If the ultimate end of the law is justice, then when the law of procedure and the law of substantive rights conflicts, then it is appropriate that the latter presides[31]. *Walter Khobe*[32] has correctly identified the purpose of Article 22, 159 and the famous Mutunga Rules[33] , he argues that the enactment of these provisions of law was to cure the ills of the past and it is time that courts embrace a shift towards a 'liberal (even informal)' approach to proceedings. There is a need for the courts to apply caution when the Anarita ghost is relied upon by the respondent. The high court refused to be bound by the Anarita principle in *Kevin Turunga Ithagi*[34]and held that the said principle was only to be applied with caution.

> In my view, the ratio of Anarita Karimi Njeru –v- Republic (*Supra*) should be applied by the court with caution and prudence. Thus where the pleadings filed and documentation availed reasonably take the trajectory of Constitutional interpretation or application then that should suffice to have the Petition admitted and determined on its merits.

On a similar note, the late Justice Joseph Onguto[35] refused to follow the Anarita principle, *Walter* argues that the late justice appreciated the 'changed dynamic', this changed dynamic can clearly be attributed to the promulgation of the 2010 constitution and the enactment of the Mutunga rules. The late justice started off from the fact the Anarita case was decided nearly one

[30]*Hussein* v. *Chong Fook Kam* [1970] AC 942, at pp. 948-49.
[31]Dr. Mamta Rao, *Public Interest Litigation Legal Aid and Lok Adalats*, 3rd edn. (Lucknow: Eastern Book Company 2010), p.259.
[32]Walter Khobe, The Court of Appeal is failing to give effect to Constitutional aspirations (2016) 13/14 , the platform pp.85-91, he further argues that
However, the 2010 Constitution demands a break from the chains of this enduring legalistic mentality. The approach to constitutional adjudication in *Anarita Karimi* is dogmatic legalism and anti-2010 Constitution logic at its worst. Thus judges should not believe that they are shackled by the medieval chains of the *Anarita Karimi* principle.
[33]Rule 10(3) & (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013
[34]*Kevin Turunga Ithagi v Fred Ochieng & 5 others* [2015] eKLR at para 47
[35] see *Fazleabbas Mohammed Chandoo vs A.I Hussein - Kadhi, Kadhi's Court & 4 Others*, Petition Number 374 of 2015

quarter prior to the promulgation of the constitution[36], as a progressive judge, the late justice was prepared to accept the new position. On the applicability of the Ratio decidendi in Anarita[37], the late justice rendered himself thus

> Article 22(3) of the Constitution enjoins the Chief Justice to make rules providing for court proceedings relating to the Bill of Rights. Such rules are required to satisfy the norm that formalities relating to proceedings are kept to the bare minimum and in particular the fact that the Court is enjoined, if necessary to entertain proceedings on the basis of informal documentation. This clause read together with Article 258 of the Constitution leads to the more prudent conclusion that the rigorous requirements set out by the Court in the *AnaritaKarimi Njeru's* case need deeper reflection before being applied to any given case.''

Finally, while sitting as three justices, the high court[38] correctly appreciated the changed dynamic, but however fell short from overruling the principle[39], the court refused to worship at the altar of formal fetishism[40], the learned justices held that

> "45. We must point out that *Anarita Karimi Njeru* was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the new Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce the Constitution must begin with the provisions of Article 159 on the exercise of judicial authority. Among other things, this Article stipulates that: (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.
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> 47.This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits."

The Kenyan high court has appreciated that"Rules of procedure are very important but they are not an end themselves, they are often referred to as the hand maidens of justice but are not justice themselves. Rules form the procedural frame work within which a fair hearing in conducted"[41].

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[36] ibid at para 30
[37]ibid at para 31
[38] in *Trusted Society of Human Rights Alliance vs Attorney General & 2 Others,* Petition 229 of 2012
[39] ibid at para 46
[40] ibid at para 45 and 47

The High Court and Adjudication of Socio-Economic Rights: The Poor Peoples' Court

> "Neither shalt thou countenance a poor man in his cause. . . . Thou shalt not wrest the judgment of thy poor in his cause."[42]

During the Lochner era, the American Supreme Court maintained the minimalist state approach where much emphasis was put on the operation of a free market[43], and the government was not expected to interfere with the right to property of the individuals. The court is not to intervene so as to help the poor and the courts should emphasize on judicial restraint and deference.

However the leitmotifs of the 2010 constitution provides a new tune, this new tune is the balancing of the right to property and economic rights under article 43, this new tune recognises the incoherence in the liberalists argument of a free market. This new melody carries with it the egalitarian ethos, founded on social justice. *Walter Khobe*[44]has captured this new melody of the 2010 constitution, which is a legacy of anti-liberals, he has argued to the effect that

"In the post 2010 era the need for extensive transformation (including property reforms) is undisputable; the constitution obliges the state to effect social, economic and legal reforms – including through entrenching the right to housing, but also guarantees right to private property….In the post-2010 dispensation, a judge is expected to uphold the constitutional goals to ensure that the property system will have certain desired features and characteristics, such as tenure security, especially in one's home that is achieved through the entrenchment of the right to housing. The constitution in tandem with its 'post liberal" leitmotif also aims to prevent the property system from having certain unwanted effects , such as the potential for arbitrary eviction from one's home, landlessness and homelessness."

The high court can be referred to as the Kenyan poor peoples' court, I refer to it as the poor peoples' court because of its unwavering, undeviating constancy and fealty in the discharge of its duties. While interpreting the constitution and the bill of rights, the high court has not shied away

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[41]Justice Katurebe J.S.C in *Bakaluba Peter Mukasa vs Nambooze Betty Bakireke SCEP* Appeal NO. 04 of 2009
[42]Exodus 23:3, 23:6 (King James Version).
[43]*See* David E. Bernstein, *Lochner*'s Legacy*'s Legacy*, 82 TEX. L. REV. 1 (2003) Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243
[44]Walter Khobe, The Resurrection of Justice Dugdale Platform issue Number 21

from enforcing it against the state and the powerful. The high court has clearly understood its role, in its decisions, the high court is seen as adhering to the rallying call of *Baldry* which is the revival of social justice that is, ensuring systemic and structural social arrangements to improve equality, as a core political and social value"[45]the high court has indeed understood its role as the protector of the socio-economic rights.

Whereas the struggle for a new constitution culminated in the promulgation of a new, egalitarian and transformative constitution[46], the remaining challenge as correctly recognised by *Orago* is to transform these precepts into practice with their scrupulous implementation through legislative, policy and programmatic frameworks, as well as judicial decision-making[47]. It is the high court that has taken this role of judicial making seriously, it has equally recognised the socio-economic rights as antipoverty tools[48]which are to enhance the Realisation of the egalitarian transformation of the Kenyan society, and these antipoverty tools will however diminish if the courts interpret them as imposing weak obligations on the government[49].

1. The high court and substantial equality

Justice Dikgang Moseneke, has argued that any transformative jurisprudence must support a commitment to substantive equality, contextualize violations within actual societal conditions, re-order systemic and entrenched disadvantages, optimise human development, espouse the

[45]Eileen Baldry, 'The Revival of Social Justice' (Speech delivered at the Marg Barry Memorial Lecture, Alexandria Town Hall, 16 September 2010) 7.
[46]Nicholas Wasonga Orago, The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution, Journal of African Law, 59, 2 (2015), 237–270.
[47] ibid, see also Sandra Liebenberg, *South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty*where she argues for the need of transforming the socio-economic rights from mere paper promises.
[48]NW Orago, Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of A Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights DisputesPER / PELJ 2013(16)5, available at http://dx.doi.org/10.4314/pelj.v16i5.4
[49] Sandra Liebenberg supra ft 47

concept of the indivisibility and interrelatedness of rights, inclusive of SERs, as well as seek the attainment of the collective good through redistributive fairness[50]

In *John Kabui Mwai* [51]the High Court was called upon to determine whether a government policy restricting the number of pupils from private primary schools who could join national high schools was discriminatory and in violation of the right to education. The high court firstly underscored the historical injustices of the country and the need of enforcement of social justice in the following terms

> "When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection. Rightly or wrongly, and it is not for the court to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognizing the necessity of corrective measures … It was out of the realization that unequal people cannot be treated equally."

It later explained the importance of the entrenchment of socioeconomic rights in the constitution and their role in the elevation of the poor which is to enable the poor to break free from a past of oppression and inequality[52], It held that;

> In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b). The Realisation of socio-

[50] See also D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on HumanRights* 309, at 316-19

[51]*John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others,* Nairobi Petition No. 15 of 2011 [2011]*e*KLR

[52]See Yaccob, 'The Entrenchment and Enforcement of Socio- Economic Rights' (2004) pg. 3 available at http://housingjustice.ca/wpcontent/uploads/2012/03/the-entrenchment-and-enforcement-of-socio-economic-rights.pdf

> economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need.

This view by the high court resembles Chaskalson P's reasoning *inSoobramoney*[53] where he held that;

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty there is a high level of unemployment. Inadequate social security. And many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hallow ring.

2. The right to housing and the right to property

The greatest challenge has been balancing the two rights, whereas the liberalists advocate for the right to property for example the existing legal order before 2010[54], the new norm mostly advocated by transformative constitutions has been to balance the two with the right to property having no upper hand. Justice Fronemanclearly captured the dreams and aspirations of the transformative constitutionsas he held in *Daniels*[55]while borrowing from work of the late Prof Andre van der Walt[56]

> *"(T)raditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to… public-purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests."*

[53]*Soobramoney v minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC), 1997 (12) BCl,R 1696 *(Cc)at para 8*
[54]See O Opiata 'Litigation and housing rights in Kenya' in J Squires, M Langford & B Thiele (eds.), The road to a remedy: Current issues in the litigation of economic, social and cultural rights (2005) 155, where he argues that the existing legal order was meant to protect the protect the rights of the colonialists.
[55]*Daniels v Scribante and Another*, (CCT50/16) [2017] ZACC 13
[56]Prof. Andre van de Walt '*Property in the Margins' (Hart Publishing: 2009)*

In *Satrose Ayuma*[57], mostly known as *muthurwa estate*, Lenaola J balanced the two rights while relying on the history behind the struggle for a new constitution and the aspirations espoused in the constitution. He held that

> "[t]he crave for the new Constitution in this country was driven by people's expectations of better lives in every aspect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality."

In granting an injunction restraining the eviction of the petitioners in that matter, the court noted as follows:

> 'At some particular point in time the tenants will have to move out of the estate but when that time comes, that ought to be done in a humane manner. The challenge of providing accessible and adequate housing as required under Article 43(b) of the Constitution is all evident. The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto.'

In *Susan Kariuki*[58], Justice Musinga was again confronted with the issue of eviction of residents of an informal settlement in Nairobi. While holding that the eviction of the residents from their homes in the settlement would be in violation of the petitioners' right to housing, he observed as follows:

> *The petitioners have resided on the properties where they are being evicted from for many years. It is unreasonable and indeed unconstitutional for the respondents to give the petitioners one or two day notice to move out of their respective homes even without giving them any reason thereof and immediately upon expiry of the short notice embark on forceful eviction and demolition of their homes. The petitioners ought to be treated with dignity as required by our constitution. It is unconstitutional to forcefully evict such a large number of people from dwellings where they have lived for more than forty years and render them homeless overnight. The government has a constitution obligation to provide them alternative housing....even though it is important that the 1st respondent plans the City of Nairobi properly, and that may entail having to evict some people from informal settlements and on road reserves for purposes of road expansion and or beautification, the constitution rights of those people must be respected and given due consideration'.*

[57] *Satrose Ayuma and 11 others v The Attorney General and 2 Others* High Court petition no 65 of 2010 at 22.
[58] *Susan Kariuki & 4 Others –vs- Town Clerk Nairobi City Council & 2 Others* Petition No. 66 of 2011

Similarly the High Court sitting in Embu in *Ibrahim Sangor Osman*[59], Muchelule J held that a 21-day notice to vacate issued to people who had lived on the suit land since 1940 was insufficient and unreasonable. On an equal measure Mumbi J in the famous *Mitumba case*[60], held that:

> I agree fully with the sentiments of the court in the above matters. It is unreasonable, unconscionable and unconstitutional to give persons in the position of the petitioners seven days' notice within which to vacate their homes, and then demolish their homes without giving them alternative accommodation. It exacerbates the violation when the eviction is carried out, as in this case, even after those affected have sought and obtained the intervention of the court. I therefore find and hold that the eviction of the petitioners from Mitumba Village after a 7 day notice was unreasonable.

3. The right to food

In *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 others*.[61], where the petition was filed in relation to the failure of the relevant government agencies to take necessary fiscal, regulatory, good governance and other necessary steps to control, stabilise or reduce high fuel prices, leading to the high cost of subsistence goods and services, and thus violating the right to be free from hunger as well as the right to adequate food as enshrined in article 43 of the Constitution and in the UDHR. The court recognised the incorporation of the right to food in the constitution and reasoned as follows[62]

> The petitioner is to be commended for bringing up the critical issue of the enjoyment of socioeconomicrights by the citizen which it alleges have been violated through a failure to control the risingcost of living. The country now has, for the first time ever, recognition in the Constitution of the socioeconomicrights. Article 43 contains the constitutional guarantees to food, adequate health care,housing, water and sanitation. However, while the Constitution contains guarantees to these rights andimposes an obligation on the state to ensure their enjoyment, it also, at Article 20, limits the powers ofthe Court to question the fulfilment by the state of its obligations under Article 43.

[59] *Ibrahim Sangor Osman –vs- Minister of State for Provincial Administration and Internal Security & 3 Others*, Embu HCCC No. 2 of 2011
[60] *Mitu-Bell Welfare Society v Attorney General & 2 others*[2013] Eklr
[61] *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others*, High Court Petition No. 88 of 2011.
[62] ibid at para 28

However, the petition because of the failure by the advocates in drafting the petition.

4. Right to health

In *Mathew Okwanda* [63], where the petitioner sought a declaration that he was entitled to the highest attainable standards of health, the court held that

> I entirely agree with the eloquent and forceful submissions made by Dr Khaminwa on behalf of the petitioner that the success of our Constitution largely depends on the State delivering tangible benefits to the people particularly those who live at the margins of society. The incorporation of economic and social rights set out in **Article 43** sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and disease. Failure to deal with these existing conditions will undermine the whole foundation of the Constitution

In *PAO v Attorney General*, the high court was to balance between health rights and the protection of intellectual property in the context of the Anti-Counterfeit Act, 2008.[64] The Court held that taking into account the challenges of HIV/AIDs in Kenya, access to essential generic medicine for the preservation of the right to life, dignity and health of the Petitioners took precedence over the intellectual property rights of patent holders.[65]

Conclusion

> "[Because] every being in creation has his spur, his mainspring; man's is his self-respect; take it away from him and he becomes a corpse; and he who seeks activity in a corpse will only find worms."[66]

The courts play an active role in the transformation of a society, Judges are therefore required to use their judicial power in order to give social justice to the poor and economically and socially

[63] *Mathew Okwanda v Minister of Health and Medical Services & 3 others* [2013] eKLR at para 13
[64] PAO & Others v The Attorney General, High Court of Kenya, Petition No. 409 of 2009 (PAO case).
[65] PAO case, paras 85-86.
[66] Chief Justice Reynato Puno, Philippine Supreme Court, Socioeconomic Rights and Globalization (May 4, 2007), *available at*http://sc.judiciary.gov.ph/speech/Socio-economic.htm#_ftn1 (quoting Jose Rizal, *Indolence of the Filipinos*, *in* 194 LA SOLIDARIDAD (1890)).

disadvantaged[67], to fight the horrors of the past[68], *E Kibet & C Fombad*[69] have argued that whereas the constitution is the vehicle, it cannot drive itself, they argue that

> While the text of the Constitution is the vehicle for political, economic and egalitarian social transformation, the judiciary enjoys the powerful and influential position of being the driver of this vehicle. Thus, the potential of change through the Constitution cannot amount to much unless the courts live up to the task in the adjudication of rights and their enforcement in real cases[70].

The role of these judges is therefore not constant, not from one particular point to another, but it should be continuous, thinking of a new innovation each day and each moment a judge is met with a case, luckily the high court is made up of progressive judges and not the conservatives, of the bold spirits and not the timorous souls, *A J Van der Walt*[71] compares the need for new innovations to dancing, he argues that

> "However, even when we trade the static imagery of position, standing, for the more complex imagery of dancing, we still have to resist the temptation to see transformation as linear movement or progress - from authoritarianism to justification, from one dancing code to another, or from volkspele jurisprudence to toyitoyi jurisprudence... I suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing transformation, but that we should also deconstruct the codes we dance to; pause to reflect upon the language in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognize the liberating and the captivating potential of the codes shaping and shaped by that language.

To the poor of the society,

Look no further,

The high court is alive!

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[67]Avinash Govindjee, Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa:Walking the Tightrope between Activism and Deference?, National Law School of India Review, Vol. 25, No. 1 (2013), pp. 62-80

[68]Benta Kerubo and Tioko Ekiru Emmanuel, interrogating Emerging jurisprudence on the Right to Housing in Kenya's courts *Platform Number 33*

[69]E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340-366 http://dx.doi.org/10.17159/1996-2096/2017/v17n2a1

[70] see E Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 575.

[71]Van der Walt, Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state, 118 (2) J. S. APR. L. 258 (2001)