The Supreme Court of Kenya published its judgment in *William Musembi v The Moi Educational Centre Co. Ltd.*, on the 16th July 2021. The case arose after fourteen families — the residents of two informal settlements, City Cotton and Upendo village in Nairobi — petitioned the High court following their evictions in 2013. They had lived on the land since 1968 when it was public land. The first respondent claimed that they had legitimately acquired title to the land by letters of allotment and that the land was therefore private land. According to *Amnesty Kenya*, the evictions began in the early morning, without warning. Groups of young men burst into homes. Four hundred homes were demolished and personal possessions were destroyed. Crowbars and sledgehammers were used. The police were present. They fired live ammunition and used teargas canisters during the operation.

In the *High Court*, Judge Mumbi Ngugi held that the petitioners’ rights to dignity, security, and adequate housing had been infringed. There had been a violation of the rights of children and elderly persons under the constitution. She awarded damages. At the *Court of Appeal* this judgment was partially set aside. While accepting that there had indeed been violations of the rights to dignity and security, the Court of Appeal nonetheless set aside the order of damages arguing that “there was no material before the court on the basis of which the orders for compensation were made” and that, because it was unable to work out how the damages had been quantified, “the only relief that should have commended itself to the trial Court was a declaration that the forced eviction and
demolition of their houses without a Court order is a violation of their right to human dignity and security.” Following this, the petitioners appealed to the Supreme Court.

Importance of the Supreme Court judgment

The importance of this case is, as Gautum Bhatia has written, that it raised the question whether “the right to accessible and adequate housing could be applied inter se between private parties”. It can thus be distinguished from the same Supreme Court’s Mitu-Bell Welfare Society v The Kenya Airports Authority, which ruled on evictions from public land.

Amongst several issues for determination, the petitioners in the present case asked the court to reach a determination of the question whether the letter of allotment held by the first respondent, the Moi Educational Centre, was issued lawfully or legally. Because that question had not been conclusively determined at the High Court or at the Court of Appeal, the petitioners sought “a declaration that the acquisition of the suit property was illegal and unlawful.”

The Supreme Court declined to do this. Arguing that in the High Court Judge Mumbi Ngugi had been right in holding that the question of the propriety of the first respondent’s title was a matter for the National Land Commission and that it is the Land and Environment Court that properly has jurisdiction over this question, the Supreme Court held in William Musembi that “the title of the first respondent remains unimpeached”. Instead, it held, the only question it ought to determine was whether, in evicting the petitioners, the respondents violated the petitioners’ rights to human dignity and security, as well as the rights to housing and health.

It is on the basis of the “unimpeached” title of the first respondent that the court goes on to make its landmark finding. For determination by the court was the question whether the first respondent, being a private party, could nonetheless be responsible for the violation of constitutional rights. Recognising that “the mandate to ensure the realization and protection of social and economic rights does not extend to the first respondent” because it is a private entity which is not under any obligation to ensure the progressive or immediate realisation of those rights, the court found that private parties do nonetheless have a “negative obligation to ensure that it does not violate the rights of the petitioners.”

For Bhatia, the judgment’s significance lies partly in its finding that “a negative obligation not to interfere with socio-economic rights (such as the right to housing), ...applies to both public and private parties” although he argues persuasively that “the distinction between negative and positive obligations is doing a lot of work” and that the concrete practice of evictions significantly blurs the boundary between public and private actors. He rightly notes that “evictions invariably involve concert of action between State forces and private landowners, with the latter relying upon the former (either directly, or through forbearance) to accomplish physically removing people from land.”

Public and private

If the distinction between negative and positive obligations is somewhat artificial, I also want to suggest that Kenya’s history of land grabbing shows that so too is the distinction between the state and private landowners. More than just state forces doing the bidding of private landowners, wielding batons and using bullets to break into homes in the early morning, in Kenya the state/private distinction is a mirage. In William Musembi, the court does not elaborate on the important history of letters of allotment in Kenya and the process by which they enabled public land to morph into private land. Instead, it affirms the first respondent’s title – and proceeds to make an important ruling on the obligations of private actors. However, the history of land grabbing and the
murky past of letters of allotment is a critical one to keep at the front of our minds.

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The report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land established in 2003 set out in forensic detail the illegal and irregular land awards made over the years using the mechanism of the letter of allotment. Awards of land were made to the families of Presidents Kenyatta and Moi, numerous former ministers, members of parliament and civil servants, as well as to individuals in the military and the judiciary. The report sets out how out of proximity to the state, private property owners were created. Public land – land set aside for the building of public health clinics or schools for example – mysteriously turned into private land on which malls, private residences, and diplomatic headquarters appeared. No doubt some individuals acquired perfectly legitimate letters of allotment. But from the 1970s onwards, a thriving market in improper letters of allotment developed. They came to be treated as tradable land documents. Widely but mistakenly used as land titles (with the collusion of lawyers), they changed hands quickly in sales of grabbed land. This was done in order to get the benefit of the principle that an innocent third party for value without notice takes good title. The full extent of this practice is unknown: the Ndung’u Commission warned that its report provided only a snapshot of the illegal/irregular land allocations that had taken place over the years.

I have written elsewhere that land grabbing is sedimented in Kenya’s political economy such that we can describe it as a “grabbed state”. The “normal” economy is founded on accumulation by dispossession. It is not possible to understand Kenya’s political economy without an understanding of how the normal and the supposedly abnormal are pervasively linked. Far from land grabbing being an aberrant phenomenon that can be sharply distinguished from normal business practice, the illegal and irregular appropriation of land structures Kenya’s economy.

Wide...
extension of constitutional obligations to private actors is to be welcomed. But it is important to recognize also that by refusing jurisdiction to question the first respondent’s title – and ruling that this is a matter for another forum – the Supreme Court effectively sanctioned the enclosure of what the appellants claimed was unalienated public land and potentially legitimated the grabbing of public land.

The court does not elaborate on the important history of letters of allotment in Kenya and the process by which they enabled public land to morph into private land.

Instead, the Supreme Court might have used Art. 23 which provides for the authority of courts to uphold and enforce the Bill of Rights, to try to fashion a remedy. It could have expressly referred the question of the integrity of the first respondent’s title to the National Land Commission rather than state as unequivocally as it did that it is unimpeached. At the very least, given the importance of a letter of allotment and the question of title in the case, the court should have rehearsed Kenya’s history of land grabbing and corruption as revealed by the Ndung’u report so as to give it judicial notice and provide a starting point for the wider task of challenging ill-gotten titles by those who might seek to do so.

Reinstating Judge Mumbi Ngugi judgment in the High Court and in particular her finding that damages should be paid to those evicted, the Supreme Court ordered the first respondents, the Moi Educational Centre, to pay fourteen families KSh150,000 (just over 1000 euros) each in damages. The government will also pay each family KSh100,000. In return, unless the National Land Commission or the Land and Environment Court are asked to rule on the propriety of the first respondent’s title and find against them, the Moi Educational Centre now hold unimpeached title to very valuable land in Nairobi. That is quite a windfall.

Violent evictions of families from their homes are not episodic and exceptional events. They go to the heart of Kenya’s political economy and its long history of valorising the rights of those who hold private title, however acquired. How far can the courts be relied upon to undo accumulation by dispossession?

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