



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**PETITION 173 OF 2011**

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS  
UNDER CHAPTER FOUR ARTICLES 22 AND 23 (1) & (3) OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 27 (1), (2), (4) & (5), ARTICLE 40 (1)  
& (3), ARTICLE 47 (1) & (2), ARTICLE 50 (1) AND ARTICLE 165 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF PART II OF THE LAND ACQUISITION ACT CAP 295 LAWS OF  
KENYA**

**IN THE MATTER OF SECTION 159 OF THE REGISTERED LAND ACT CAP 300 LAWS OF  
KENYA**

**JOSEPH MUTUKU MASILIA ..... PETITIONER/APPLICANT**

**VERSUS**

- 1. TOWN COUNCIL OF WOTE**
- 2. PERMANENT SECRETARY MINISTRY OF LANDS**
- 3. DEPARTMENT OF PHYSICAL PLANNING MINISTRY OF  
LANDS**
- 4. DIRECTOR OF PHYSICAL PLANNING MINISTRY OF  
LANDS**
- 5. COMMISSIONER OF LANDS**
- 6. PERMANENT SECRETARY MINISTRY OF STATE FOR  
PROVINCIAL ADMINISTRATION AND SECURITY**

**7. DEPARTMENT OF PROVINCIAL ADMINISTRATION  
MINISTRY OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY**

**8. DISTRICT COMMISSIONER, MAKUENI DISTRICT**

**9. THE ATTORNEY GENERAL .....  
RESPONDENTS**

**R U L I N G**

Following the filing of a Petition under the Constitution, seeking declarations and a permanent injunction, the petitioner(applicant) Joseph Mutuku Masilia, filed a Notice of Motion (application) dated 11<sup>th</sup> July 2011. The application was filed under Article 22 (3) & (4), Article 23 (1) & (3) and Article 165 of the Constitution. The prayers are as follows:-

- 1. That the application be certified urgent and service thereof be dispensed with in the first instance.**
- 2. That an interim injunction be issued restraining the respondents, their agents, servants and/or employees and anyone claiming through them or under them from alienating, transferring, disposing of or in any other manner whatsoever interfering with the petitioner's quiet possession and enjoyment of land parcel number Makueni/Unoa/1395 until inter partes hearing of this application.**
- 3. That an interim injunction be issued restraining the respondents, their agents, servants and/or employees and anyone claiming through them from interfering with the petitioner's quiet possession and enjoyment of land parcel number Makueni/Unoa/1395 pending hearing and determination of the petition filed herein.**
- 4. That such orders and direction be given as the honorable court deems just and fit to grant.**
- 5. That costs of and incidental to this application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant is the registered proprietor of land number Makueni/Unoa/1395 which he was compelled by Chief Ngwili of Wote location to surrender in 1993 under the instructions of the 8<sup>th</sup> respondent, the District Commissioner; that the petitioner was forced to receive Kshs.200,000/= by the District Commissioner; that the petitioner has done great improvements and developments on the land; that the petitioner declined to sign transfer forms given to him; that the compulsory acquisition had not been gazetted, and the Land Control Board had not given its consent; that the 1<sup>st</sup> respondent, Town Council of Wote had severally invaded the petitioner's land and held or caused to be held public meetings thereon and had planted trees; that the 1<sup>st</sup> respondent had also detained or caused to be detained the petitioner's livestock whenever they feed on the subject land.

The application was filed with a short affidavit, which reiterates and repeats the grounds.

The petitioner through his counsel filed written submissions to the application on 13<sup>th</sup> January 2012. It was contended that the Articles of the Constitution 2010 cited were violated, as well as the Land Acquisition Act (Cap 295), and the Registered Land Act (Cap 300). It is the contention that the applicant had satisfied the requirements for the grant of an interlocutory injunction as enunciated in **Giella –vs – Cassman Brown Ltd(1973) EA 358**. It was contended that no sale agreement had been exhibited by the respondents.

The application is opposed. The 1<sup>st</sup> respondent claims to have filed an affidavit sworn on 10/11/2011 by Julius Wambua, which I do not see in the file. They contend, in their submissions, that the applicant had

come to court with dirty hands. He could not fail to complete the sale transaction on which he had received the purchase price, and then subsequently come to court and claim to enforce his Constitutional rights. Once he sold the land and received payment for it, a trust was created in favour of the lawful purchaser. It was contended that the applicant had sold the subject land and received payment (of Kshs.200,000/=) for the same. He was also guilty of delay beyond the limitation period of 12 years allowed by law. It was contended that the notion of compulsory acquisition of land cited by the applicant was misplaced, as the Government purchased the land, but did not acquire the same through compulsory acquisition.

Lastly, it was contended that the applicant had not demonstrated that he had satisfied the parameters for grant of an interlocutory injunction as enunciated in the case of **Giella –vs- Cassman Brown (supra)**.

The 2<sup>nd</sup> to 9<sup>th</sup> respondents, through the Attorney-General, filed a replying affidavit sworn on 9<sup>th</sup> November 2011 by Peter Ole Mutunga a District Officer (1) from Makueni District. It was deponed *inter alia*, that because of the creation of a new district in 1992, the Government through the Provincial Administration in Makueni District chose Wote as the District Headquarters. The Government bought land from several individuals, including the applicant, and paid for the land. That the applicant signed necessary documents and was paid the purchase price, but unfortunately the Government did not follow up the process to acquire the title deed in its name. That Constitutionally, the State or any person could not deprive anyone of his/her lawfully acquired land as enshrined in Article 40 of the Constitution. That this present action by the petitioner was filed outside the limitation period provided under section 7 of the Limitation of Actions Act (Cap 22) – that is 12 years. That the land is part of a public stadium for the entire Makueni District including the petitioner himself.

The 2<sup>nd</sup> to 9<sup>th</sup> respondents also filed written submissions on 6<sup>th</sup> March 2012. They argued that the grant of temporary injunction by the court was an exercise of judicial discretion – **See Sargent –vs- Patel (1949) 16 EACA 63**. They also argued that the applicant had not demonstrated that he had satisfied the parameters for grant of interlocutory injunctive orders. No *prima facie* case had been shown. No demonstration of irreparable loss. The balance of convenience was also in favour of the respondents, as granting the injunctive orders would deprive the people of Wote Town and other Kenyans the use of the stadium.

On the hearing date, Mr Mulei appeared for the applicant. Mr A.S Masika appeared for the 1<sup>st</sup> respondent, while Mr Opondo appeared for the 2<sup>nd</sup> to 9<sup>th</sup> respondents. All counsel who appeared orally highlighted the written submissions.

I have considered the application, documents filed and the submissions of the parties, both written and oral. On the 27<sup>th</sup> October 2011 the court granted prayer 2. Prayer 3 is the substantive prayer that I have to deal with.

Though prayer 2 is for orders pending the hearing of the application, while prayer 3 is for orders pending the determination of the petition, the two prayers are different. Prayer 2 asks for orders against alienating, transferring, and disposing while prayer 3 does not ask for these prayers. It talks about quiet possession and enjoyment, which is also an element of prayer 2.

The grant of interlocutory injunctive orders is an exercise of discretion, which should be exercised on sound legal reasons not on whim or conjecture – *see Sargeant –vs- Patel (1949) 16 EACA 63*. The parameters to be taken by a court in considering a request for the grant of an interlocutory injunction have long been settled since the decision in the now famous case of **Giella –vs- Cassman Brown Ltd (supra)**. An applicant must show a *prima facie* case with probability of success. Secondly, an applicant should show that he will suffer irreparable loss that cannot be adequately compensated in damages, if the injunction is not granted. Thirdly, if the court is in doubt, it will determine the application on the balance of convenience.

Has the applicant shown a *prima facie* case with probability of success? The applicant has stated that he is

still the registered owner of the land. This fact is not disputed. The issue of the completion or validity of the alleged sale is a matter which has to be determined after the matter is substantively heard on both sides. It cannot be determined at this preliminary stage. I find and hold that the applicant has demonstrated a *prima facie* case with probability of success.

Has the applicant demonstrated that he will suffer irreparable loss unless the interlocutory injunction is granted? This issue can only be determined in light of the prayer sought and the facts given to support the prayer. The petitioner/applicant does not state that he is actually on the land. In paragraph 1 and 2 of his petition, he states:-

**1. “The petitioner is the registered owner of all that parcel of land known as MAKUENI/UNOA/1395 with an absolute interest therein.**

**2. On or about the year 1993 the applicant was forced to surrender his parcel of land number MAKUENI/UNOA/1395 to the town council of Wote by one chief Ngwili of Wote location under the instructions of the 8<sup>th</sup> respondent and was threatened that he would be arrested when he refused to do so.”**

This court can only act on facts that are disclosed by litigants. With the facts disclose by the applicant, the impression created is that he is already out of the land. Therefore, in my view, the applicant has not demonstrated irreparable loss that will be visited upon him if the specific injunctive orders sought by him for enjoyment and quiet possession, are not granted. The two parameters firstly of *prima facie* case and secondly irreparable loss go together. If one is not satisfied, the application for interlocutory injunction cannot be granted. The applicant has failed to demonstrate that he will suffer irreparable loss. Therefore, the application for injunctive orders cannot succeed.

On the balance of convenience, as the applicant appears to be out of the land, and same is being used for public purposes such as a stadium, I find that the balance of convenience is in favour of the public who are represented by the Government Departments. On that score also, the injunctive orders sought cannot be granted.

For the above reasons, I find no merits in the application and dismiss the same. The interim orders granted are hereby vacated. Costs in the cause.

Dated and delivered at Machakos this 1<sup>st</sup> day of **August** 2012.

.....  
**George Dulu**  
**Judge**

**In the presence of:**

Nyalo – Court clerk

N/A for Petitioner

Ms. Thiongo holding brief for Mrs Kayugia for 1<sup>st</sup> Respondent

N/A for 2<sup>nd</sup> – 9<sup>th</sup> Respondents