



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 112 OF 2016**

**YUSUF ALI SHEIKH.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**THE COUNTY GOVERNMENT OF LAMU.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. In the Application dated 12<sup>th</sup> May, 2016, the Plaintiff is seeking for the following orders:-

**(a) THAT upon interpartes hearing this Honourable Court be pleased to issue a temporary injunction to restrain the Defendant/Respondent herein by itself, its agents, servants, representatives, assigns, any contractor acting on their instructions or any other person claiming under them from continuing with the construction or heaping of stones and other building materials for the construction of a Fish Market on the plot/parcel in front of Fisheries -Kiunga in Kiunga sub-location, Kiunga Location, Kiunga Division and the former Lamu West District, Lamu County, being part of the Plaintiff's/ Applicant's parcel of land, unregistered and unsurveyed, being and having been under his occupation and that of his forefathers situated within Kiunga Island pending the hearing, determination and final disposal of the suit herein.**

**(b) THAT this Honourable court be further pleased to make such other interlocutory orders and/or directions as it may appear to the Court to be just and convenient.**

2. In his Supporting Affidavit, the Plaintiff has deponed that he is the legal owner of the suit property having continuously occupied it since 1965, when he inherited it from his grandmother.

3. It is the Plaintiff's case that the suit land is their ancestral plot; that on 30<sup>th</sup> September, 1963, the Council of Elders declared the suit land as belonging to his late grandmother and that the said land has never been surveyed.

4. The Plaintiff has deponed that the Defendant has contracted an unknown contractor who is heaping building stones on the suit land and that he was neither consulted nor compensated for the usage of his land.

5. In his reply, the Defendant's Chief Officer for Fisheries Department deponed that the Defendant contracted a contractor to carry out the construction of a fish market next to the old fish market and in front of the fisheries offices in Kiunga.

6. It is the Defendant's case that the land on which the fisheries offices are located and on which the fish market is being constructed is public land and that the documents exhibited by the Plaintiff do not confer title to him.

7. The Defendant's representative deponed that the Plaintiff was not and has never been in occupation of any land located at the front of fisheries offices and that unalienated land is classified as public land pursuant to the provisions of Article 62 of the Constitution.

8. The advocates for the Plaintiff and the Defendant filed submissions which I have considered.

9. It is not in dispute that this suit property has not been surveyed. It is also not in dispute that the suit property is not what used to be referred to as Trust land under the repealed Constitution and the Trust Land Act.

10. The Plaintiff has annexed documents to show that the elders recognized his grandmother as the owner of the suit land as early as in 1962.

11. The Applicant has not denied the allegation by the Defendant that he has never been in occupation of the suit property which falls within 30 meters from the highest water tide.

12. If it is true that the suit property falls within 30 meters from the highest water tide, then such land is public land and cannot be alienated.

13. However, if the suit land does not fall within the reserve land, then the burden is on the Plaintiff to prove that the said land is not public land as defined by Article 62 of the Constitution.

14. The evidence before me shows that the suit land is still unalienated Government land.

15. The Plaintiff has not placed any evidence before me to show that the government granted him or his grandmother a letter of offer for the said land. In the circumstances, I am unable to find that the Plaintiff has established a prima facie case with chances of success.

16. In any event, the Plaintiff is not in occupation the of land and the impugned construction is meant for public purposes.

17. In the event that the Plaintiff succeeds in his suit, then he will be entitled to compensation. Having failed to show the irreparable damage that he may suffer that cannot be compensated by damages, I find and hold that the Plaintiff's claim is unmeritorious.

18. For those reasons, I dismiss the Application dated 12<sup>th</sup> May, 2016 with costs.

Dated, signed and delivered in Malindi this 3<sup>rd</sup> day of February, 2017.

**O. A. Angote**

**Judge**