IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. E404 OF 2020

(CORAM: KARANJA, OKWENGU & WARSAME, JJ.A)

Between

ANGELA MBUGUA.....1ST APPLICANT

JAMES KIRAGU.....2ND APPLICANT

NJOKI WAINAINA.....3RD APPLICANT

JAMES KARIUKI.....4TH APPLICANT

CHRIS KIGATHI.....5TH APPLICANT

(**Officials of Redhill Kentmere Residents Association**)

AND

KO HOLDING LIMITED.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

NEMA.....3RD RESPONDENT

(Being an application for injunction pending an appeal against the

Ruling and Order of the Environment and Land Court at Thika (Lady

Justice Gacheru) delivered 19th November, 2020 in ELC No. 81 of 2020)

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RULING OF THE COURT

[**1**] On 19th November, 2020, the learned Judge of the Environment and Land Court (ELC) delivered a ruling in which she upheld a preliminary objection and struck out the applicants' suit against the respondents, on the ground that the suit was filed prematurely as the applicants had not exhausted the alternative dispute resolution mechanisms provided under the law.

[**2**] In their suit, the applicants had sought injunctive reliefs restraining the respondents from constructing a high density development on LR. No. 12020/88 (**suit property**). The applicants being aggrieved by the order striking out their suit, filed a notice of appeal dated 26th November, 2020.

[**3**] The applicants are now before us with a notice of motion dated 14th December, 2020 under Rule 5(2)(b) of the Court of Appeal Rules, seeking orders of injunction restraining K.O. Holdings Limited the 1st respondent, from constructing a multi-residential development on the suit property, pending the hearing and determination of its intended appeal.

[**4**] The motion is supported by an affidavit sworn by the 1st applicant **Angela Mbogua**, and grounds stated on the face of the motion. In a

nutshell, the applicants being officials of Redhill Kentmere Residence Association, are concerned with the wellbeing of their residents, and believe that the construction of a commercial high density development on the suit premises will have adverse environmental impact, and compromise their rights to a clean and healthy environment under Articles 42 of the Constitution.

[**5**] The application was opposed by the 1st respondent through grounds of opposition, in which it was contended that the applicants' intended appeal does not disclose an arguable appeal or a *prima facie* case, as the suit was dismissed solely on account of lack of jurisdiction, which was informed by previous decisions of the Court; that the applicants' intended appeal is anchored on issues which did not form part of the case in the superior court; that the ELC case was a challenge of the decision of the 2nd and 3rd respondents in issuing relevant approvals to the development, and the 1st respondent's right to act on such approvals; and that the applicants have refused to pursue the national environmental tribunal in canvassing any issues regarding the approvals given by the 2nd respondent.

[**6**] In addition, that the intended appeal is frivolous, vexatious and an abuse of the court process; and that the applicants' motion is based on misrepresentation and/or concealment of material facts. The 1st respondent maintain that the proposed project is in fact a low density comprehensive development, comprising of single dwelling homes on 0.1 hectares/quarter acre plots.

[**7**] In accordance with the Covid-19 practice directions, hearing of the applicants' motion was scheduled to proceed by way of written submissions without the presence of the parties or their counsel. Both the applicants and the respondents filed written submissions. The applicants also filed a rejoinder submission in reply to the respondents' submissions.

[**8**] This being an application for injunctive orders pending the hearing of an intended appeal, the following passage from the judgment of **Omolo, JA** in **Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others [2010] eKLR** is instructive.

> ***"Under Rule 5 (2)(b) the Court is entitled to give a preservative order where a notice of appeal has been lodged. It has been said time without number that in an application under Rule 5 (2)(b) what gives the Court the jurisdiction to hear and determine the motion is the filing of the notice of appeal. But it is not automatic that once a notice of appeal is filed the Court must give a preservative order. The Court has, over the years, developed certain well known guidelines on which it will grant or refuse to grant the preservative order sought. The appeal or the intended appeal must be one which is arguable, i.e. one which is not frivolous. If an appeal or the intended appeal is a frivolous one, the Court will refuse to grant an order preserving the status quo. Again the party seeking the preservative order must show to the Court that if an order is not granted and his appeal or the intended appeal were to succeed in the end, that success would have been rendered nugatory by the earlier refusal to grant the preservative order."*** *(Emphasis added)*

[**9**] The first issue that we must address is whether the applicants have an arguable appeal. It is evident that the dispute, subject of the intended appeal, is the striking out of the applicants' suit whose substratum is the construction of commercial development on the suit property. It is the applicants' contention that if the order of injunction pending the hearing of the appeal is not granted by this Court, the developments will continue, and this will adversely affect their environment and violate their constitutional rights, and also cause them irreparable harm.

[**10**] We have looked at the draft memorandum of appeal setting out 6 grounds that they intend to canvas at the hearing of the appeal. That the learned Judge erred in failing to consider: that the applicants could not have appealed against the decision of the 2nd respondent to grant approval to the 1st respondent, as they were not aware of the approvals; that the information that was within the knowledge of the applicants was that the previous approval given to the respondents had been revoked; that the court failed to consider the applicant's right to information under Article 35 of the Constitution; and lastly, that the court failed to consider whether there was any alternative effectual remedy available to the applicants.

[**11**] In **Ahmed Musa Ismael vs Kumba ole Ntamurua & 4 Others [2014] eKLR**, this Court stated that:

> ***"An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication."***

[**12**] It is clear to us that the applicants' intended appeal raises issues regarding the legality of the order striking out their suit without hearing the matter on merit. The intended appeal is therefore questioning the dismissal of the suit for want of jurisdiction on the grounds that there exists another avenue for resolution of the dispute. The question of the applicants' failure to pursue the alternative dispute resolution mechanism provided, and whether a party can be ejected from the seat of justice is an important matter to be resolved on appeal. We are therefore satisfied that the first limb of arguability has been demonstrated.

[**13**] On the second limb which is whether the appeal will be rendered nugatory, the applicants submitted that if the injunctive orders are not allowed, they will suffer substantial environmental harm from the construction which may be completed before the appeal, that in the event the appeal is successful, it would be rendered nugatory. The gist of the applicants' case is that unless the 1st respondent is restrained, the threatened construction on the suit property would proceed, and this would have far reaching irreversible adverse environmental impact.

[**14**] In **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others** [2013] eKLR), this Court stated inter alia that:

> ***"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages will reasonably compensate the party aggrieved"***

[**15**] According to the applicant, the construction that the 1st respondent intends to carry out on the suit property is an extensive development and the environmental harm complained of, are such that once the development takes place, it will be difficult to address them. In addition,

the developments are intended to be sold to third parties, and such action will complicate the situation and may compromise the appeal, thereby rendering it nugatory. We are also satisfied that the second limb has been established.

[**16**] For these reasons, we find that the applicants have satisfied the twin conditions for granting orders of injunction under Rule 5(2)(b) of the Court of Appeal Rules, as it is appropriate to preserve the substratum of the applicants' intended appeal by issuing the orders sought.

[**17**] Accordingly, we issue orders of injunction as prayed in the notice of motion dated 14th December, 2020. Costs in the appeal

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR