IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 34 OF 2018

BETWEEN

JAMES MUTUA MAWATHE.....1ST APPLICANT

OMONDI FREDRICK OUMA.....2ND APPLICANT

KENNEDY ODIWUOR.....3RD APPLICANT

SAUL ALUBALA AMBOYE.....4TH APPLICANT

SAMSON MUNGAI MWANGI.....5TH APPLICANT

ASSEMBLY CHRISTIAN CHURCH.....6TH APPLICANT

KARIOKOR CHURCH OF GOD.....7TH APPLICANT

(SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL

PERSONS RESIDENT IN, TRADING IN MATOPENI SLUMS IN

STAREHE IN NAIROBI COUNTY)

AND

THE HON. THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

(Being an application for Stay of Execution of a Ruling of the Environment and Land Court at Nairobi (E. Obaga, J.) dated 25th January, 2018

in

ELC Petition No. 12 of 2017)

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RULING OF THE COURT

In an application under **Rule 5(2)(b)** of this Court's Rules, it is trite that the applicant must demonstrate that the appeal he has presented or intends to present raises arguable points; and secondly, that the appeal or the intended appeal would be rendered nugatory if the interim orders were to be denied. In applying those principles, the Court exercises unfettered original and discretionary jurisdiction. In considering whether an appeal is arguable, it is sufficient if a single *bona fide* arguable ground of appeal is raised. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. An applicant must satisfy both principles.

While considering an application brought under **Rule 5(2)(b),** the Court must not make definitive or final findings of either fact or law. The principles and the foregoing factors were succinctly presented in **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others**, Civil Application 31 of 2012.

The seven applicants, suing on their own behalf and on behalf of a group described as "residents and trading in Matopeni Slum in Starehe in Nairobi," have moved us under the aforesaid **Rule 5(2)(b**) to grant them a relief framed in an unusual manner, that **"a preservation order do issue preserving the *status quo,* and staying of execution or implementation of the said ruling pending the hearing of the applicants' intended appeal..."**

The ruling in question was rendered by Obaga, J. after hearing an application brought simultaneously with a constitutional petition by the applicants. In the petition which is still pending, the applicants are seeking protection of their rights to property from being violated or threatened by the respondents. Pending hearing and determination of that petition, they applied to the court below for conservatory orders to restrain the respondents;

> **"....from threatening, interfering or impeding the life or the livelihood of the petitioners/applicants residing at Matopeni Village (L.R 209/6712)....and from carrying out the eviction, demolition, burning or in any other way, the destruction of the petitioners'/applicants' homes and other properties situated at Matopeni Village (LR N209/6712)."**

The respondents, in resisting the application, insisted that the applicants were not entitled to the relief they had sought as they had failed to demonstrate that they have any rights capable of being protected over the property in question.

The Judge, in his ruling to be challenged in the intended appeal, agreed with the respondents that the applicants had not established any basis for the grant of conservatory orders; that the applicants failed to identify the property that they were seeking protection over; and that while some claimed they occupied L.R 209/16779 others simply sought protection over "Plot C General Waruinge". In conclusion, he dismissed the application, being satisfied that it did not disclose a *prima facie* case.

From these facts, is the intended appeal arguable? Without being definitive in our reasoning, we think it is not. The Judge found that the threshold for the grant of interim conservatory orders had not been met. The basis of the applicants' claim was unclear. They simply said that they have been in quiet and peaceful possession and occupation of the property since 1987; and that in 2017 they received a notice requiring them to vacate it.

According to the 6th applicant, it was allocated LR. No. 209/16779 Pumwani, while the 7th respondent was granted an allotment letter for "*a plot off General Waruinge Street, Pumwani."*

On the other hand, the notice to vacate the property was issued by the OCPD of Starehe and required certain named individuals to vacate the property within 7 days because it belonged to the Kenya Police Service. It would appear from that notice that some of those individuals were even in occupation of police houses.

In the circumstances, and with respect, we do not think that the intended appeal is arguable.

Having failed in the first limb, the application must fail. It is accordingly dismissed. Costs will be in the intended appeal.

Dated and delivered at Nairobi this 8th day of March, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR