



REPUBLIC OF KENYA



KENYA LAW
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**Albert v Njoroge (Civil Appeal E001 of 2024)
[2025] KEHC 12635 (KLR) (10 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E001 OF 2024
GL NZIOKA, J
SEPTEMBER 10, 2025**

BETWEEN

NJUGUNA ALBERT APPELLANT

AND

FRANCIS NJOROGE RESPONDENT

(Being an appeal from the decision of Hon. J. Ndengeri (PM) delivered on 16th August 2022 in Naivasha Chief Magistrate Civil Miscellaneous Application No. E019 of 2022)

JUDGMENT

1. By a notice of motion dated 16th June 2022, brought under the provisions of; Article 50 of *the Constitution* of Kenya 2010, Section 1A & 1B and 3A of the *Civil Procedure Act*, Order 45 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the applicant (herein “the appellant”) was seeking for the following orders verbatim reproduced: -
 - a. That this Honourable court be pleased to issue a temporary injunction restraining the respondent by himself, his agents and or servants from threatening/harassing, intimidating, abusing, harming and or contacting the applicant either physically or through the phone pending the hearing and determination of this application.
 - b. That this Honourable court be pleased to issue an injunctive order as against the respondent orders injunction restraining the respondent by himself, his agents and or servants from threatening, harassing, intimidating, abusing, harming and or contacting the applicant either physically or through the phone.
 - c. That the Honourable court be pleased to order the OCS of Gilgil Police Station to provide security to the applicant and his family upon terms and conditions it may impose.
 - d. That the cost of this application be provided for.



2. The application was based on the grounds thereto and an affidavit sworn by the appellant of even date in which he deposes that, he had employed the respondent as a casual worker at his construction site.
3. That the respondent without any reason or information failed to go to work for a couple of days which prompted the appellant to deduct his salary for the days he did not work. That the respondent was aggrieved by the salary reduction and started contacting the applicant via threatening text messages asking him to pay the remaining amount failure to which he would organize other workers to demonstration against the respondent.
4. Further that respondent informed him that he would give out the appellant's telephone number to other workers to harass him. That in one message the respondent stated that: -

“Hi this is now joking with others life, this evening there were some of your workers at my house demanding for me to buy some food for them coz you went missing with their money so it's serious coz I have no other choice so I will give them your number so that they can talk to you directly so can I give them”?
5. That the respondent has also made several phone calls to him threatening his life and of his family and threatened to make his life a living hell and has warned him not step foot in Gilgil town. Further that the respondent has threaten to storm his house
6. That the respondent then made a post on social media and Facebook accusing him of not paying him and other workers their dues. Consequently, the social media users went ahead to harass him asking him to pay them, causing him emotional anguish.
7. As a result, he seeks that this court grants the prayers sought herein.
8. The appellant was granted interim injunctive orders ex parte but the respondent was aggrieved and filed an application dated 12th July 2022 brought under the provisions of; Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 of the Rules and Article 29 of the Constitution of Kenya, 2010, seeking for the following orders: -
 - a. That pending the hearing and determination of this application inter parties, the Honourable court be pleased to vacate and/or set aside order No. 4 that the Respondent be and is hereby restrained from being within 2 kilometres of the Applicant's home, business premise issued on 23rd June, 2022.
 - b. That the Honourable court be pleased to vacate and/or set aside the entire proceedings and subsequent orders entered against the applicant on 22nd June, 2022.
 - c. That the Honourable court be pleased to strike out the notice of motion application dated 16th June, 2022.
 - d. That the Honourable court be pleased to grant any further orders as it deems just in the circumstances.
 - e. That the cost of this application be provided for.
9. The respondent averred in the supporting affidavit that, his home is less than one kilometre from the business premises of the appellant and actually a stone's throw away.
10. That to comply with the order No. 4 issued on 22nd June, 2022 is not only impossible and impracticable but also amounts to substantively evicting him from his residence and will be required to relocate from his home altogether.



11. Further that the orders are grave, unjust and prejudicial to him and his family as they are violations of his right to housing and human dignity.
12. That it is just and fair for this Honourable court set aside and vacate order No. 4 to allow him to be heard on merit given the nature of the orders granted amount to eviction.
13. Further suits are instituted by way of plaint, originating summons or petition and that a notice of motion application can only be filed within a properly instituted suit. Further that, the application dated 16th June, 2022 is incurably defective, misconceived and hinged on the wrong principles of law and procedure.
14. That the application as presented is a wanton abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the court and legal process
15. Upon hearing the respondent's application, the impugned order was vacated.
16. In the meantime, the appellant's application was opposed by the respondent who averred in the replying affidavit that he was employed as a foreman at the appellant's construction site but it is not true that he did not attend work for even a single day let alone the couple of days as alleged. That as foreman, he was at work daily as he was the link between the casual employees and the appellant.
17. That the appellant would at times require him to go to Mache Hardware Stores Ltd in Nakuru Town and purchase materials meant for the construction site and he could not be allowed to use that to excuse him of being absent from work.
18. That the appellant has illegally and without any colour of right proceeded to deduct his salary as well as other casual employees without any justifiable reason at all. Further, it became appellant's habit to employ casuals and fail to pay them then proceed to employ others and repeating the cycle. Furthermore, he uses his wealth and influence to harass, intimidate and silence the casuals through police officers based at Gilgil police station as well as filing such miscellaneous application to obtain orders, meant to silence and intimidate the casuals who have no means at all to defend themselves.
19. That he has never threatened the applicant in any way whatsoever, and that the appellant as one of the wealthiest persons in Gilgil who has the entire Gilgil police station under his influence cannot purport to say that he lives in fear of the casual labourers whom he has not even paid to date. That the assertions are just meant to mislead the court in a bid to obtain orders meant to victimize and silence his subjects.
20. The respondent denied having made any post on Facebook directed at the appellant as he is not even on Facebook and this demonstrates the many people he has illegally refused to pay.
21. That he has commenced all the necessary legal means available to him through his Advocate but is also alive to his constitutionally guaranteed rights under Article 37 to peacefully demonstrate if need be and the intention to demonstrate cannot be construed as threats. The respondent urged the court to dismiss the application.
22. The appellant's application was heard and by a ruling dated 16th August 2022 the application was dismissed with costs to the respondent.
23. However, the appellant is aggrieved and appeals against the whole of the said ruling and on the following grounds;
 - a. The Learned Trial Magistrate erred in law and in facts in failing to give due consideration to the provisions of temporary injunctions as set out in Order 49 Rule 1 of the Civil Procedure Rules 2010.



- a. The Learned Trial Magistrate misdirected herself in treating the applicant's submissions and the law pertaining to the issuance of injunctions before her superficially and consequently came to a wrong conclusion on the same
 - b. The Learned Trial Magistrate erred both in law and fact by finding that the appellant failed to meet the threshold of issuance of an injunction despite the imminent threats of harassment from the respondent.
 - c. The Learned Trial Magistrate erred in law and in facts by finding merit in the respondent's notice of motion application dated July 12, 2022 despite the respondent's lack of evidence to warrant the trial court to strike out the appellant's application dated June 16 2023.
 - d. The Learned Trial Magistrate erred in law and in fact by failing to consider the hefty evidence adduced by the appellant and by applying wrong principles such as Article 29 of *the Constitution* of Kenya and subsequently dismissing the Applicant's notice of motion application dated June 16, 2022 with costs.
 - e. The Learned Trial Magistrate erred in law by applying the wrong principle in allowing the respondent's notice of motion application dated July 12, 2022 as prayed
24. Consequently, the appellant prays for the following orders: -
- a. The appellants appeal be allowed.
 - b. The entire ruling delivered by Hon. J Ndengeri on August 16, 2022 in Naivasha Miscellaneous Civil Case No. E019 of 2022 and the orders thereof be set aside.
 - c. The costs of this appeal be awarded to the appellant.
 - d. Such other and/or further relief as this honourable Court may deem just to grant
25. The appeal was canvassed through filing of submissions and by submissions dated 5th August 2024, the appellant submitted that an appellate court will not tinterfere with the trial court's discretion unless the trial court acted on wrong principles.
26. He relied on the case(s) of; Mark William Trevor Price & Caroline Elsa Anne Sturdy v John Greaves Hilder [1984] eKLR and Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR, where the Court of Appeal stated that, it will not interfere with the discretion of the trial court unless it is shown that the court misdirected itself or acted on matters it should not have or failed to take into consideration matters it should have taken, and in doing so arrived at a wrong conclusion.
27. That the trial court erred in law and fact by failing to apply the established principles governing interlocutory injunctions, as set out in *Giella v Cassman Brown & Co Ltd* [1973] EA 358, namely that: a prima facie case must be established; there must be demonstration of irreparable harm; and that where there is doubt the court must consider if the balance of convenience is in favour of the applicant.
28. On whether a prima facie case was established, the appellant cited the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, where the Court of Appeal defined a prima facie case as one where a tribunal considering evidence before it concludes that a right has been apparently infringed and requires an explanation or rebuttal by the offending party.
29. The appellant argued that the respondent's conduct of sharing his mobile number on various social media platforms infringed his constitutional right to privacy under Article 31 of *the Constitution* of



- Kenya. Furthermore, the respondent action of sending numerous threats on social media infringed on his freedom and security of the person under Article 29 of *the Constitution*. He relied on the case of Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR, where the Mativo J (as he then was) emphasized the right of protection of an individual against intrusion into personal life or affairs or his family by means of publication such as photography, written articles or caricatures.
30. On the principle of irreparable harm, the appellant argued that the harm from threats by the respondent cannot be quantified in monetary terms but can lead to irreparable harm if the respondent is not restrained. He cited the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, where the High Court defined irreparable harm as injury that cannot be adequately remedied by damages and stated that the applicant should show that if the injunction is not granted there is no remedy by which he can protect himself from the apprehended injury.
 31. On the balance of convenience, the appellant submitted that the trial court failed to weigh the conflicting interests of the parties and instead focused on procedural form. He argued he was likely to suffer greater harm if the respondent acts on his threats.
 32. That the the legal criteria for orders sought were met and prays that the appeal be allowed, the ruling of the trial court be set aside, and the injunctive orders reinstated.
 33. However, the respondent opposed the appeal vide written submissions dated 27th June 2024. He argued that, the appeal is incurably defective, having been filed without leave of court in contravention of Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules.
 34. That, the ruling was delivered on 16th August 2022, and the appeal filed on 15th January 2024 well beyond the 30-day statutory window prescribed under Section 79G of the *Civil Procedure Act*. However, the appellant never sought leave to file out of time thus rendering the appeal incompetent. Further, the impugned ruling is not among those appealable as of right, and leave is a mandatory prerequisite.
 35. The respondent relied on the case of Peter Nyaga Murake v Joseph Mutunga (CA Nairobi 86 of 2015) where the Court of Appeal stated that leave to appeal is necessary under Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules.
 36. The respondent further submitted that the appeal is not proper before the court and therefore the court lacks jurisdiction to entertain it. That jurisdiction is not a procedural technicality as it goes to root of the matter. He placed reliance on the case of Owners of Motor Vessel “Lilian S” [1989] KLR where the Court of Appeal stated that without jurisdiction the court downs its tools.
 37. The respondent further argues that the trial court correctly dismissed the appellant’s application dated 16th June 2022, as he sought for substantive order through a miscellaneous application unsupported by a plaint thus it was a nullity ab initio. He cited section 19 of the *Civil Procedure Act* and Order 3 Rule 1 of the Civil Procedure Rules on the manner of instituting of a suit and referred the court to the case of; Norah Ndunge Henry & Another v Abednego Mutiswa & Another [2022] eKLR, where the High Court held that a suit can only be instituted by a plaint, petition or originating summons and that a notice of motion can only be filed in a properly instituted suit.
 38. The respondent submitted that the appellant’s application is defective in both form and substance and if granted it deny him the opportunity to defend himself and cross-examine the appellant’s allegations.



39. At the conclusion of the hearing of the appeal, I note that the role of the 1st appellate court as stated by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.
40. In considering the matter herein, it is argued that the appeal was filed out of time and without the leave of court but the appellant has not responded to the same. I note that the impugned ruling was delivered on 16th August 2022, and the appeal filed on 15th January 2024. In that case there is no valid appeal to determine.
41. Be that as it may, assuming there is a valid appeal does it have merit. It is submitted that the appellant's subject application is defective for want of a substantive suit. Notably the appellant has avoided discussing that issue in his submissions.
42. In that regard, it suffices to note that, the appellant was seeking for injunctive orders. The legal principles that govern grant of an injunctive order were stated in the landmark case of *Geila versus Casman Brown* (supra) as follows: -
- a. The applicant must establish a prima facie case with a probability of success.
 - b. The applicant must show he or she will suffer a reparable injury if the injunction is not granted, which cannot be adequately compensated by damages.
 - c. If the court is in doubt on the first two principles, it will decide based on the balance of convenience.
43. As regards the first principle, the applicant must demonstrate that there is a serious issue to be tried and show a probability of success at the main trial. Therefore, the evidence presented must show a clear infringement of a right, not just raise arguable issues.
44. In the instant case, the appellant has conceded that he has not filed any substantive suit in this matter, that his intention was to be granted an injunction order and terminate the matter. The question that arises is, how will he meet the threshold of proving he has a prima facie case in the absence of a substantive suit in the form of a plaint or a petition or an originating summons, which the court can consider to establish whether he has a prima facie case or not.
45. The further question is; should the applicant have approached the court through a miscellaneous application? It is noteworthy that a miscellaneous application is filed to seek for an order to do something that doesn't fit neatly into an ongoing suit or to address a procedural matter outside the main suit. Such applications are used for various reasons such as; registering foreign judgments, seeking leave to appeal out of time or extension of time or request to transfer a case.
46. Indeed, miscellaneous applications are distinct from formal commencement of a lawsuit initiated by a plaint or a petition and the key characteristic of a miscellaneous applications are that, they are procedural in nature, in that they primarily address procedural or intermediate requests that arise during legal proceedings rather than the core substance of main legal dispute. Finally, unlike a suit initiated by a plaint and involves a main dispute, a miscellaneous application does not institute a suit in itself.
47. To revert back to this matter, it is the finding of this court that, without a substantive suit the court cannot determine whether the appellant has a prima facie case with any possibility of success and therefore the appellant has not met the main principle in *Geila's* case and on that ground alone the appeal cannot succeed.



48. In addition, the averments in the affidavit filed by the appellant in support of the subject application, clearly reveal that there are so many contentious issues. There are issues as to whether; the respondent worked all through or absconded duty, was paid all his dues, and whether the appellant was justified (if at all) in deducting his salary due to absence from duty.
49. Furthermore, there are issues of publication of defamatory messages and denial thereof and to resolve the matter there will be need to adduce viva voce evidence where the party alleging will have to tender evidence in support of the allegations and that evidence be subjected to cross-examination before a decision is made. That can only be done through a hearing of a formal suit not a miscellaneous application.
50. Furthermore, the appellant in the submissions that have been filed in this matter alleges infringement of his constitutional right to privacy under Article 31 and freedom and security of the person under Article 29 of *the Constitution* of Kenya. The question that arises is whether; the alleged infringement can be canvassed through a miscellaneous application or a formal suit filed as a petition.
51. Pursuant to the afore said, it is the finding of this court that the trial court arrived at the right and/or proper decision in the finding that the court was not properly moved or the applications was defective for want of a formal suit in support thereof.
52. However, having found that there was no valid matter before it, the trial court should not have descended into the arena of discussing the merit of that application and so any sentiments made as to the merit of that application should not have been the case.
53. That said and done, I find no merit in this appeal and I dismiss it with costs to the respondent.
54. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 10TH DAY OF SEPTEMBER, 2025.

GRACE L NZIOKA

JUDGE

In the presence of:

Ms Mwangera HB for Mr Gitonga for appellant

Mr Lumasai HB for Mr Karanja for respondent

Hannah: Court Assistant

