



**Korir v Khanyule (suing as legal representatives of the estate of Silas Alusiola Khanyule)
(Miscellaneous Application 162 of 2021) [2022] KEHC 11507 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 162 OF 2021
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

ISMAIL KORIR APPLICANT

AND

**AMBROSE SHUNZE KHANYULE (SUING AS LEGAL REPRESENTATIVES OF
THE ESTATE OF SILAS ALUSIOLA KHANYULE) RESPONDENT**

*(Being an application for stay of execution of the proceedings in Eldoret CMCC No 64 of 2006
and to appeal out of time against the ruling delivered by Hon Wairimu on March 26, 2019)*

RULING

1. What is before this court is a notice of motion application dated November 4, 2021. The application is expressed to be brought under order 22, rule 25, order 42, rule 6, order 50 rule 5, order 51 rule 1 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act.
2. The applicant seeks the following orders;
 1. Spent
 2. The warrants of arrest dated October 8, 2019 be set aside pending the hearing and determination of this application inter partes.
 3. The applicant be released from GK Prison in conditions to be specified by the court pending the hearing and determination of this application inter partes
 4. The applicant be granted leave to appeal out of time against the ruling delivered by Hon Wairimu on March 26, 2019.
 5. There be stay of execution or further execution of the decree in Eldoret CMCC 64 of 2006 pending the hearing and determination of this application inter partes.



6. There be stay of execution of the proceedings in Eldoret CMCC No 64 of 2006 for a period the court deems fit and pending the hearing and determination of this application and the appeal thereafter.
3. The application is based on the grounds therein and the deponements of the affidavit in support of the said application.
4. It is the applicant's case that he was brought to court through warrants dated October 8, 2019 in execution of the decree in Eldoret CMCC No 64 of 2006. There were no other warrants issued as confirmed in the virtual session that was being recorded on November 3, 2021 before Hon N Wairimu. As such, the warrants of arrest had expired after one year. He ought to have been released unconditionally.
5. He used to be represented by the firm of Ngeno Ondieki & Company advocates but they never used to attend court on his behalf therefore adverse orders were issued against him. He was advised that he should appeal the decision and is informed that the time within which he was to appeal had lapsed. He attached his draft memorandum of appeal and deponed that he had brought the appeal without undue delay.
6. The applicant cites order 22 rule 31 of the Civil Procedure Rules and submitted that before a warrant is issued in execution of a decree for money the court will issue a notice calling upon the judgment debtor to appear before the court on a day to be specified on the notice and show cause why he should be committed to prison. Prior to the warrants of arrest issued on October 8, 2019 there was a notice to show cause before his arrest. There are warrants of arrest the respondent alluded to in his replying affidavit. The same were dated March 30, 2021 and the question arising is whether before the warrants were issued, was the correct process under order 22 rule 34 followed? The application should be allowed on November 4, 2021.
7. The respondents responded *vide* a replying affidavit filed on November 2, 2021. He deponed that the application is defective and bad in law and should be struck out for contravening order 9 rule 9 of the Civil Procedure Rules 2010. The supporting affidavit was deponed by a person who was not a party in the suit.
8. The respondent annexed copies of the notices to show cause that were issued to the applicant on August 15, 2017, November 19, 2018, 28/03/2019 and June 27, 2019 but failed to attend court. The applicant made a proposal to settle the debt and failed to abide by the same. The appellant failed to abide by court orders issued on February 9, 2021 and this the advocates on record asked that a warrant of arrest be issued against the applicant. The court issued warrants dated March 30, 2021 and the applicant was arrested on November 3, 2021.
9. The ruling complained of by the applicant was delivered on March 26, 2019 therefore the applicant is guilty of laches of about 3 years. The applicant set various applications for hearing before the trial court and failed to appear on several occasions. There is inordinate delay as the applicant is seeking leave to file an appeal five years after judgment was delivered yet he participated in the proceedings immediately after the judgment was delivered. The intended appeal is an afterthought by the applicant.
10. Upon perusing the application and the submissions and pleadings therein I have identified the following issues for determination;
 - (i) Whether the application is defective
 - (ii) Whether the warrants of arrest were properly obtained



- (iii) Whether the leave to appeal out of time should be granted
- (iv) Whether stay of execution should be granted.

Whether The Application Is Defective

11. The respondent raised a very pertinent issue in the replying affidavit. Upon perusal of the pleadings, I note that the supporting affidavit is deponed by a Richard Simbala. Further, the jurat contains the name of Ismail Korir as the deponent and is not signed by said deponent. It is apparent that the supporting affidavit is defective. In *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR, when considering an unsigned replying affidavit, the court held;

We have no hesitation in finding that the purported replying affidavit filed by the 1st respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. we have checked all the eight copies of the replying affidavit as filed in the court registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no replying affidavit on record filed by the 1st respondent.

12. In the premises I find that the application is defective as the court cannot consider the supporting affidavit and thereby rendering the application a nullity.
13. I therefore will not delve into the rest of the application as it is dead on arrival.

DELIVERED, SIGNED AND DATED AT ELDORET VIA EMAIL THIS 20TH OF MAY 2022.

R NYAKUNDI

JUDGE

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