



**Khan v Oyaró (Miscellaneous Civil Application E019 of 2023)
[2023] KEHC 20012 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E019 OF 2023**

JK SERGON, J

JULY 6, 2023

BETWEEN

MOHAMED ZAKARIA KHAN APPLICANT

AND

DENNIS MASAKI OYARO RESPONDENT

RULING

1. The subject matter of this Ruling dated 16th May, 2023 whereof Muhammed Zakaria Khan, the applicant herein sought for the Orders calling for his arrest and committal to Civil Jail issued vide Kericho CMCC. No.E035 of 2022 to be reviewed and set aside. The Applicant also applied to be released from Civil Jail.
2. The Applicant filed an Affidavit he swore in support of the motion. Denis Masaki Oyaro, the Respondent herein filed a replying Affidavit he swore to oppose the Motion.
3. When the motion came up for hearing, this Court gave directions to have the matter disposed of by written submissions.
4. I have considered the grounds set out on the face of the motion plus the facts deponed in the rival Affidavits. I have also considered the written submissions.
5. It is the submission of the applicant that on 12th May, 2023, he was arrested in Mombasa on a warrants of arrest in execution of the decree given by the Subordinate Court vide Kericho C.M.C.C. No.E035 of 2023, Dennis Masaki Oyaro -vs- Chartless Auctioneers and Qasim Yahya Limited. It is the applicant's averment that he is not a party to the aforesaid suit.
6. He also stated that he is not a director of Qasim Yahya Limited, the Judgment Debtor in Kericho C.M.C.C. No.E035 of 2022.



7. This Court was therefore urged to exercise its revisionary power of review to set aside the committal order.
8. The Respondent on its part filed a replying affidavit to oppose the application stating that the Miscellaneous Application is incompetent, defective and bad in law.
9. It is pointed out that the Applicant is seeking for substantive orders in a Miscellaneous Application yet it is not permissible in law.
10. Having considered the rival submissions, it is clear that the main point of contention raised by the Respondent is on the competence of the Miscellaneous Application. With respect, I do not think the objection raised by the Respondent can hold.
11. The truth is that the applicant has approached this court to exercise its power of review. The Applicant is right to approach the Court through a Miscellaneous Application. It is not a must in the circumstances to file a substantive action.
12. The Respondent has not disputed the applicant's assertion that he is neither a party to the suit before the subordinate nor is he a director of Qasim Yahya Limited.
13. It is not disputed that the applicant was arrested and sent to Prison to serve Civil Jail for his failure to satisfy the decree pronounced against a Limited Liability. In the absence of proof that the Applicant is a director of the Judgment, then the Trial Court was wrong to execute against an individual who is distinct and separate from a limited liability company.
14. There is no evidence that the Corporate veil was lifted before the applicant was ordered to settle the Company's debt.
15. In the end, I find the motion dated 16th May, 2023 to be meritorious. The same is allowed.
16. Consequently, the orders issued by the trial Court for the arrest and committal to civil jail of Muhamed Zakaria Khan are reviewed and set aside.
17. The Applicant namely Muhamed Zakaria Khan is hereby ordered set free. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF JULY, 2023

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Maengwe for the Respondent

No Appearance for Omoko for the Applicant

