

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 68 OF 2004

AUGUSTINE AZUBUIKE NWANGWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Before me is a Chamber Summons which is not dated, but was filed on 4th February 2004 by the applicant AUGUSTINE AZUBUIKE NWANGWA. The application does not cite the law under which it is brought. The applicant seeks for the following orders, that –

1. The applicant having been dissatisfied and aggrieved by the dismissal of his application in total at the subordinate court do humbly file the same in this superior court for the re-evaluation of the same so that this court may be pleased to overrule the lower court's decision and order for the return of (his) household goods and other personal effects which had otherwise been used as exhibits during the trial of the original criminal case (Nairobi CM's Criminal case No. 875/01). The exhibits namely mattresses exhibit 4, blanket exhibit 5, pillow exhibit 6, sonny music system exhibit 9, carpet exhibit 10, promissory note exhibit 12, Erickson mobile cell phone exhibit 21, Nigerian Passport C.678835 exhibit 23. The ownership is not in dispute.
2. A further order be issued directed to the investigating officer of the case Chief Inspector James Muinde (PW 14) to immediately avail to this court the balance of all (his) other belongings still in his custody and not used as exhibits during the trial, more so the Motorola Radio Communication equipments, addresses book among many others as contained in the inventory drawn in his presence during the search of his house at south B's Golden Gate Estate shortly, after his arrest (both of these two orders loan heavily on the strength of section 121(1) CPC). The lower court happens to have denied this order.
3. Having been accomplished, this court may be pleased to order and oversee the above properties being handed over to him as the rightful owner. The lawyer on record for him then had successfully applied for their return at the close of the defence case (pg. 106 line 7-10) inspite of the promise by the then court prosecutor to do so, the same has not happened to date.
4. Applicant has pressing personal and business matters like collection of debts still outstanding, gathering and disposing some of the household goods, renewing his passport etc and as such do also humbly seek for further orders facilitating a 45 day continued stay in Kenya to enable him wind up the same. This order should be effective immediately soon after completion of his jail term.
5. That he be allocated date of the application.
6. any other order that the court may deem appropriate.

The application appears not to have been heard for a long period of time from the time it was filed in February 2004. It is not clear from the record why the hearing of the application did

not take place from 2004 to 2007. The original file appears to have been sent to this court much before the application was filed because of some other application.

When the application came up for hearing before me on 23/4/2007, the applicant was not present. A written communication received from Kamiti Main Prison dated 18th April 2007 was to the effect that the applicant was released from prison on 27th September 2006. Learned State Counsel, Mr. Obuo, submitted that as the applicant had been released from prison, the application had been overtaken by events. Counsel contended that the court could invoke section 177 of the Criminal Procedure Code on restriction of property. It was counsel's view that the applicant should apply for release of the property in the court which tried him. The applicant came to the wrong court and the application should be dismissed.

Having perused the documents filed it is clear that the applicant had in fact, in 2003, applied to this court for release of his properties. That was in Miscellaneous Criminal Application No. 903 of 2003. The application came before Hon. Justice Ang'awa who ordered that the applicant should make an application before the trial court. Though I have not seen the ruling of the magistrate, the applicant appears to be saying that the magistrate dismissed his application for release of the items.

This application cannot succeed. The court that is required to determine restitution of property in criminal cases, is the court before which a person is charged. This is the import of section 177 of the Criminal Procedure Code (Cap. 75). The applicant has not cited the law, and I have not myself come across the law, that allows the applicant who was tried in the subordinate, to apply by way Chamber Summons to this court for release of items which were subject of a criminal case in the lower court.

In my view, if the magistrate declined to release the items to the applicant, the only option available to the applicant was to appeal, in accordance with existing legal provisions. He has no legal basis to make a fresh application to the High Court by way of Chamber Summons, for the release of the subject item.

The application has no merits. It is misconceived. I strike it out.

Those are my orders.

Dated and delivered at Nairobi this 22nd day of June 2007.

George Dulu

Judge