



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 237 of 2002**

**(From original Criminal Case No. 500 of 2002 of the Chief Magistrate’s Court at Nakuru – G. A. Ndeda [C.M.]**

**KIRPAL SINGH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**AND**

**DIPAK PREMCHAND SHAH.....APPLICANT**

**RULING**

The applicant, Dipak Premchand Shah has applied to this court under the provisions of **Section 178 (4)(6)(7) of the Criminal Procedure Code** seeking the order of this court for the release to him of Compressor machine serial number 15368 NM 21368/83 which was produced and marked as exhibit number one in Nakuru CMCRC NO. 500 OF 2002 (**Republic –vs- Kirpal Singh**). The application is supported by the annexed affidavit of the applicant. The appellant in this case, who is the respondent filed a preliminary objection to the applicant’s application. He contended that the applicant did not have *locus standi* to bring this application to this court. He states that the applicant ought to have brought the application through the State who is a party to the appeal. He further stated that the orders sought by the applicant could not be granted by this court during the pendency of the appeal. He contended that the procedure applicable to civil process could not be applied in criminal proceedings. The State did not file any papers either supporting or opposing the application.

At the hearing of the application, Mr Karanja learned counsel for the applicant submitted that the applicant was properly before the court and had made a proper application which could be granted by this court. He submitted that **Section 178(6) of the Criminal Procedure Code** allowed a party who is aggrieved by a decision of a subordinate court when it makes an order concerning the restitution of property that was the subject matter of a criminal case. He argued that the appeal filed by the appellant was not properly before this court. He submitted that this court should order the Compressor machine which was produced as an exhibit in the subordinate court to be released to the applicant who had proved and established that he was the owner. He urged the court to allow the application.

Mr. Ikua, learned counsel for the appellant opposed the application. He submitted that **Section 178 of the Criminal Procedure Code** is meant to deal with disposal of property which is subject to criminal proceedings. He submitted that the subordinate court had ordered that the said compressor be released to the applicant but the appellant was dissatisfied with the decision and had appealed to this court. He submitted that the applicant had hijacked the appeal filed by the appellant by filing this application to preempt the decision that would be rendered by this court after hearing the appeal. He submitted that the applicant lacked the requisite *locus standi* to make the application to this court in this appeal. It was his further submission that the only party who could have made such an application was the Attorney General who had the legal capacity to do so as provided by **Section 26 (7) & (8) of the Constitution**. He submitted that this court lacked jurisdiction to hear and determine this application and make a decision based on it. He however conceded that the lower court had jurisdiction to grant the order of restitution. He urged this court to disallow the application.

Mr Gumo for the State submitted that the Attorney General had no interest in the matter in dispute. He however urged the court to determine the issues in dispute by invoking its jurisdiction as provided by **Section 362 of the Criminal Procedure Code**.

I have carefully considered the submissions which were made before me by the parties to this application. The appellant in this case was charged in the subordinate court with handling stolen property contrary to **Section 322(2) of the Penal Code**. He denied the charge. After a full trial, he was acquitted but the trial magistrate made an order restituting the Compressor which was the subject matter of the criminal proceedings to the complainant – the applicant in this case. The appellant was aggrieved by the said order of restitution and filed an appeal to this court. However since the appeal was filed on the 14<sup>th</sup> of August 2002, the appellant has made no effort to list the appeal for hearing despite of the fact that the appeal was admitted to hearing on the 17<sup>th</sup> of February 2003. I suppose that frustrated by the appellant's indolence, the applicant filed the current application before this court.

Having perused the proceedings of the lower court and heard the submissions made before me, the issues for determination by this court are two fold; firstly, whether the applicant has *locus standi* to bring this application before this court in the manner that he did. Secondly, whether the applicant is entitled to the order sought in this application. As regard the first issue, in normal criminal cases, there are only two parties to the case, *i.e.* the accused and the prosecution represented by the State. It is only these two parties who can file an appeal to the High Court if they are aggrieved by a decision of a subordinate court (*See Sections 347-350 of the Criminal Procedure Code*). There is however an exception to this general rule which is provided for by **Section 177(a) of the Criminal Procedure Code** which grants jurisdiction to a court which heard a criminal case to make an order of restitution of the property which was the subject matter of the criminal case to a person whom it appears to the court to be entitled to the said property. Such a person may not necessarily be an accused person or the State. It could be the complainant or a witness in the criminal case or a different person altogether.

In the instant application, the trial court considered the exhibits that were produced by the witnesses and reached the determination that the said Compressor machine belonged to the complainant (*i.e. the applicant in this case*). I have similarly perused the proceedings of the subordinate court, including carefully going through the exhibits that were produced in evidence, and have reached the same conclusion as the trial magistrate that the applicant in this case proved that the said Compressor machine belonged to him. The applicant exhibited documents which established that he had imported the machine and had used it for a long period of time. The appellant was dissatisfied by the said decision of the trial magistrate and appealed to this court.

However as stated earlier in this ruling, the appellant made no effort to prosecute his appeal. He cannot therefore blame the applicant if he approaches this court for orders to have the said compressor restored to him. I therefore find no merit in the objection by the appellant that the applicant lacked the requisite *locus standi* to bring this application before this court. The procedure adopted by the applicant is unorthodox. But the law cannot shut out an aggrieved party who brings to the attention of the court an injustice which is being perpetrated against him by a party sitting on the order which was issued in his favour pending the hearing of an appeal.

In the premises therefore, I will invoke this court's jurisdiction as provided for under **Section 362 of the Criminal Procedure Code** and set aside the order which was issued on the 17<sup>th</sup> of September 2003 by the subordinate court whereby it ordered the stay of the earlier order issued on the 1<sup>st</sup> of August 2002 releasing the Compressor machine to the applicant in this case. It would be the height of injustice if the applicant is prevented from taking possession of a property which he has established to be his pending the hearing of an appeal which the appellant in this case appears not to be anxious to have it heard and determined. I therefore order that the compressor machine Serial Number 15368 NM 21368/83 which was the subject matter of Nakuru CM Criminal Case No. 500 of 2002, and which had been produced as an exhibit in the said case, to be released forthwith to the applicant in this case. The appellant can take his own sweet time to have his appeal listed for hearing. He cannot however do so at the expense of the applicant. It is so ordered.

**DATED at NAKURU this 12<sup>th</sup> day of May 2006.**

**L. KIMARU**

**JUDGE**