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

Petition 503 of 2009

JOSEPH MUNYIRI MUNENE…….PETITONER

VERSUS

THE HON. ATTORNEY GENERAL…….1ST RESPONDENT

CHIEF MAGISTRATE'S COURT NAIROBI…..2ND RESPONDENT

RULING

The application before the court is brought by way of a petition dated 19th August, 2009, and expressed to be brought under Rule 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure rules. By the application, the petitioner seeks the following orders and declarations:-

(a) ***A declaration that the delay prior to filing the indictment against the petitioner was unreasonable and prejudicial to the petitioner's right to a hearing within a reasonable time.***

(b) ***A declaration that the delay between filing the indictment and the trial is unreasonable and in violation of the petitioner's right to a hearing within a reasonable time.***

(c) ***A declaration that due to the various acts committed by the respondents jointly and/or singularly, the petitioner's entitlement to a fair hearing has been compromised.***

(d) ***An order to quash the indictment against the petitioner in chief magistrate's criminal case No.900/2008: Republic V. Christopher John Kirubi & Others.***

(e) ***An order prohibiting the Respondents and/or any other person and/or curt subordinate to this Honourable court from entertaining and/or hearing chief magistrate's case No.900/2008 and/or any charges and/or complaints arising therefore as against the petitioner.***

(f) ***Costs of and incidental to this reference.***

The application is supported by the annexed affidavit of the Petitioner himself, Joseph Munyiri Munene, and is basically premised on the grounds that:-

(i) The prosecution statements were recorded after the petitioner was arraigned in court and therefore the decision to prosecute was made prior to the recording of the statements and in ignorance of the facts.

(ii) The decision made by the board of directors of Uchumi Supermarkets Ltd. was a commercial decision made by the authorized organ of a limited liability company and the 1st respondent (i.e. the authority – general) is attempting to criminalize a normal common day practice of decision making by the prayer organ of a limited liability company.

(iii) The charges presented to the 2nd respondent (i.e. the chief magistrate's court, Nairobi) relate to events which took place in 2003-2004, and no explanation has been tendered regarding the lengthy delay prior to commencement of the case, which delay has prejudiced the Petitioner in numerous ways.

(iv) The 2nd Respondent has shown unequal treatment to persons before the trial court.

(v) The Respondents are in breach of Section 77(1) of the constitution which confers upon the Petitioner the rights to a fair hearing, and a trial within a reasonable time; and they have also breached Section 77(2)(a) and Section 77(4) of the Constitution.

To these allegations, the Respondents reacted by a replying affidavit sworn by James Mungai Warui, a Principal State Counsel in the State Law Office who has the conduct of this matter on behalf of the Respondents to which affidavit I shall revert hereinafter.

Against this background, Mr. Chris John Kirubi, the chairman of the Board of Directors at the material time joined this matter as an interested party. During the hearing of the petition, Mr. Munene, the Petitioner, was represented by Mr. Macharia; Mr. Eliud Njoroge, Prof. Githu Muigai, Mr. Charles Njagi and Mr. Wetangula, all appeared for Mr. Kirubi, whereas Mr. James Mungai Warui appeared for the Respondents. The Petitioner and the Respondents, respectively, filed written submissions which were highlighted at length. After considering the pleadings and the respective submissions of the parties, the main issues for determination are whether the decision to prosecute was reached prior to recording of the statements and therefore in ignorance of the facts leading to the disposal of the immovable assets; whether there was delay in the filing of the indictment against the Petitioner and, if so, whether such delay was unreasonable and prejudicial to the Petitioner's right to a fair hearing; whether there was a delay between filing the indictment and commencement of the hearing and, if so, whether it was unreasonable and prejudicial to the Petitioner's right to a fair hearing; whether the Petitioner's entitlement to a fair hearing was compromised by the various acts committed by the various acts by the Respondents, jointly or singularly; and whether the decision of the board of directors was a commercial decision made by an authorized organ of the company.

One of the points raised by Mr. Macharia for the Petitioner was that the decision to dispose of LR No.209/7120

(the "subject property") was reached before the Petitioner joined the Board. In order to place this contention in context, it becomes necessary to screen the two charges against the petitioner and his co-accused. They read as follows:-

Count I – Conspiracy to defraud contrary to Section 317 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars of the offence were that the 14 named accused persons who included the petitioner:-

> ***"Between 27th March, 2003 and 30th November, 2004 in Nairobi within the Nairobi area conspired together to defraud Uchumi Supermarkets Ltd. by fraudulently (i) causing L.R.209/7120 Aga Khan Walk, Nairobi, the property of Uchumi Supermarket Ltd to be sold at One Hundred and Forty Seven Million Shillings (Kshs.147,999,000/=) to M/S Allgate Company Ltd and then leased back to Uchumi Supermarkets at a monthly rent of One million and Seven Hundred Thousand Shillings (Kshs.1,700,000/=) without;(a) a prior independent valuation;(b) following an open consultative process; (2) approving the said sale to M/S Allgate Company Ltd., a company associated with the core suppliers of Uchumi Supermarkets Limited."***

The 2nd count with which the Petitioner was charged was – Breach of trust against the public contrary to Section 127 of the Penal Code, Cap.63 of the Laws of Kenya. The particulars of the offence were that the Petitioner:-

> ***"On the 11th June 2004 at the Uchumi Supermarket Board Room in KNTC Building along Yarrow Road, Industrial Area within Nairobi area, being an officer employed in the public service to wit Director of Uchumi Supermarkets Limited and in breach of the trust bestowed on your office approved the sale of L.R.No.209/7120, Aga Khan Walk, Nairobi, the property of Uchumi Supermarkets Limited at a sum of Kshs.147 million without obtaining a valuation before the approval, an act that was not in the best interests of the said Uchumi Supermarkets Limited and its shareholders."***

Regarding count I, all the accused are alleged to have conspired together to defraud Uchumi Supermarkets Limited (hereinafter referred to as "Uchumi") between 27th March, 2003 and 30th November, 2004. The petitioner's background was that he was the Executive Director of the Industrial and Commercial Development Corporation (hereinafter referred to as "ICDC") which was a shareholder and Director of Uchumi. By virtue of that position which he held until 13th June, 2006, one of his responsibilities was to attend board meetings of Uchumi and represent the views of ICDC. It is not clear from the pleadings the exact date when he took over that responsibility, but it is clear that he attended his first meeting as a board member of Uchumi on 30th June, 2003. Since the 1st count alleges that the accused, including the petitioner, conspired to defraud Uchumi between 27th March, 2003 and 30th November, 2004, and the petitioner attended board meetings between June, 2003 and 13th June, 2006, it follows that he was a board member over the better part of the period of the alleged conspiracy.

Count two refers specifically to the 11th day of June, 2004, as the date on which the board members of Uchumi allegedly committed the breach of trust by approving the sale of the subject property. To the extent that the Petitioner

was a Board member from 30th June, 2003 to 13th June, 2006, and the record shows that he participated in the Board meeting of 11th June, 2004 at which the resolution to sell the property was passed, the contention that he was not a board member at the time of the alleged commission of the alleged offences does not bear any weight.

The next issue is whether the decision to prosecute was made before the recording of the statements and therefore in ignorance of the facts leading to the disposal of the subject property. The offences with which the petitioner and his co-accused are charged are alleged to have been committed between 27th march, 2003 and 30th November, 2004. According to uncontroverted evidence in the replying affidavit of Mr. Warui, the Principal State Counsel conducting this matter on behalf of the Respondents, the alleged events which preceded and the filing of the charges were a silent affair which never came to the public domain until after the then directors of Uchumi Supermarkets declared the company insolvent and closed the market's doors in May, 2006. This act did not endear itself to the shareholders of Uchumi who included the Government of Kenya. On 16th June, 2006, the Permanent Secretary, Ministry of Trade and Industry wrote to the Kenya Anti-corruption Commission requesting the Commission to undertake an investigation into the circumstances surrounding the collapse of the supermarket chain. After giving the mater due consideration and from the information availed to it, the Commission took the view that there were no corruption offences disclosed, and that any investigations undertaken by the commission would be outside the ambit of the Anti-corruption and Economic Crimes Act, No.3 of 2003. However, the Commission further advised that the circumstances surrounding the collapse of the supermarket could, depending on the evidence available, disclose a number of offences under such statutes as the Capital Markets Authority Act (Cap 485A of the Laws of Kenya); the Accountants Act (Cap.531 of the Laws of Kenya); and the Penal Code (Cap.63 of the Laws of Kenya).

As a result, by a letter dated 27th June, 2006, the Commission requested the Attorney General to direct the Criminal Investigations Department to carry out investigations into the matter. On 12th July, 2006, the Attorney General directed the Commissioner of Police to commence investigations, and requested a progress report on 18th September, 2006. Under cover of a letter dated 26th June, 2007, the Director of Criminal Investigations forwarded the investigation file to the Attorney General for perusal and further directions. After perusing the file, the Attorney General was of the view that the matter had not been fully investigated and on 19th October, 2007, he directed that further comprehensive investigations be undertaken. Under cover of a letter dated 18th March, 2008, the Director of Criminal Investigations re-submitted the investigation file to the Attorney General for further direction. By another letter dated 3rd June, 2008, the Attorney General directed that all the members of the Uchumi Supermarkets Limited Board of Directors who approved the sale of the company's subject property during the meeting held on 11th June, 2004should be arrested and charged with the offences of conspiracy to defraud and breach of trust. This was how the Petitioner came to find himself and his co-directors in criminal case No.900 of 2008 which is the subject matter of this petition.

Attached to Mr. Warui's replying affidavit was the investigations diary which he attached as exhibit No.7. After the Attorney General wrote to the Commissioner of Police on 12th July, 2006 directing him to commence investigations, the investigations diary shows that the first person was interviewed and recorded his statement on 21st July, 2006. Another three people recorded their statements in August, 2006. Although the Attorney General called for a progress report on 18th September, 2006, this was forwarded to him under cover of a letter dated 26th June, 2007 after another one more person had been interviewed and recorded a statement on 12th June, 2007. It was thereafter that by a letter dated 19th October, 2007, the Attorney General directed that further investigations be carried out. Following this directive, another 11 people were interviewed and recorded statements in November, 2007, and the file was finally forwarded to the Attorney General on 18th March, 2008, after which the Attorney General directed the prosecution of all the accused persons.

From the above account, it is certain that the Attorney General directed the prosecution of the directors and others after studying the investigations file which contained statements from more than 25 potential witnesses. The allegation that the decision to prosecute was made before the recording of the statements and therefore in ignorance of the facts leading to the disposal of the subject property cannot stand to reason.

The other issue is whether there was delay in the filing of the indictment against the petitioner and if so, whether such delay was unreasonable and prejudicial to the petitioner's right to a fair hearing. As outlined above, although the events complained of took place between March, 2003 and November, 2004, they did not provoke any adverse public-reaction from the shareholders and the public until the directors declared the company insolvent and closed its doors in May, 2006. That was when the hue and cry arose. The Permanent Secretary, Ministry of Trade and Industry wrote to the Kenya Anticorruption Commission on 27th June, 2006, who in turn wrote to the Attorney General on 27th June, 2006 requesting that the matter be investigated by the Criminal Investigations Department. On 12th July, 2006, the Attorney General wrote to the Commissioner, of the police on the matter and investigations commenced promptly. After ordering further and comprehensive investigations, it was not until March, 2008, that the investigations file was placed before the Attorney General, and in June, 2008 he directed that the Petitioner and his co-accused be charged and they were charged promptly. From that account, I find that there was no delay in the filing of the indictment of the petitioner, and if there was any delay, it was neither inordinate, non prejudicial to the petitioner's rights to a fare hearing.

The next issue is whether there was a delay between filing the indictment and commencement of the hearing and, if so, whether it was unreasonable and prejudicial to the Petitioner's right to a fair hearing. The Attorney General's letter directing that the directors of Uchumi supermarkets be arrested and charged with certain specified offences was dated 3rd June, 2008. The charge sheet was filed in court on 6th June, 2008. On the same day, the pleas of the 4th and 8th accused

were taken. The plea of the Petitioner, who was out of the country, was taken on 13th June, 2008. This was only one week after the filing of the charge sheet. Thereafter the matter came to court on 20th June, 2008 when the Petitioner was out of jurisdiction, and again on 2nd July, 2008, when the case was fixed for hearing on 7th July, 2008. On that date, the 1st prosecution witness took to the witness box. From that chronicle of events, I find that there was no inordinate delay between the filing of the indictment and commencement of the hearing.

The penultimate issue is whether the Petitioner's right to a fair trial was compromised by the various acts committed by the Respondents, jointly singularly. The Petitioner specifically complains that the hearing of the case was adjourned severally; that on one occasion he applied for an adjournment which the trial court declined; that on another occasion a co-accused was granted adjournment; and that on two occasions he travelled all the way from Canada to attend court but the trial did not proceed and the court did not inform him in advance that hearing would not take place.

With regard to the adjournments, it pays to appreciate that these are given at the discretion of the court. The first time tht the court adjourned the proceedings was to allow a witness to go and sit examinations at the University of Nairobi. Neither the witness nor the court had any control over the University examinations time table, and it is my considered view that the court did the right thing to allow the witness to go and sit examinations. Another adjournment was granted to accommodate an accused person who was stranded outside the country at Dubai. In such a situation, the court had no choice. The court simply cannot proceed with the trial of a person who is not present, as to do as would not only be prejudicial to the absent accused, but it would also render his trial a nullity. On some two occasions, it is said that the Petitioner attended court having traveled all the way from Canada, but the trial did not proceed as the trial court was attending to other official duties assigned to him. Without necessarily taking judicial notice of the practice, it is common knowledge that judicial officers are sometimes called upon to attend to many other duties outside the daily cause list. Such duties include attending meetings, seminars and workshops, both in and out of the country and sometimes at short notice. Whenever that happens, the officer would not be able to attend to his cause list for the day, and this affects all the cases listed for hearing on such a day. Any delay occasioned by such occurrences is sysmetic delay rather a deliberate dereliction of duty by the trial court, and is therefore excusable.

Finally is the question whether the decision to sell the subject property was a decision made by an authorized organ of the company. No doubt it was. But stripped of all its side issues, what is now at stake is not the decision per se, as it was no doubt made by an authorized organ of the company. As I understand it, however, the challenge is on the allegation that the decision was laced with conspiracy to defraud, which in turn led to a breach of trust. Where allegations of a criminal nature are levelled against the decision making process the company's board of directors, the only recourse would be to have the alleged criminal aspects probed to the bottom for the good of the company itself, its shareholders, its directors and the public at large.

Mr. Macharia referred the court to **JORAM MWENDA GUANTAI V. THE CHIEF MAGISTRATE,**

NAIROBI, CIVIL Appeal No.228 of 2003. This case involved an alleged abuse of office by the appellant by arbitrarily directing the immediate implementation of a contract without regard to Exchequer and Audit (Public Procurement) Regulations. The case is easily distinguishable from the present one. Firstly, the charge which the appellant faced was different as he was charged with contravening Regulations which, in the estimation of the Court of Appeal, were ***"badly drafted, sketchy, not well-thought out and do not appear to be likely to solved the perceived problems. For example, the penal regulations make no sense and are lamentably limited in scope and they lack clarity. Moreover, it is wrong jurisprudence to attempt to rescind lawfully executed contracts by criminally prosecuting the officials of a State Corporation who are deemed to have breeched the Regulations. In the instant case, the contract in issue cannot now be voided though the State is unhappy with its execution. To charge the appellant, therefore, with a criminal offence would in our view, appear to be improper and indeed malicious."***

In the context of the case before the Court of Appeal, the above sentiments were appropriate. The present case, however, is a different kettle of fish altogether, where the Petitioner is not charged under Regulations made under some Order, but with offences under the Penal Code. Therefore, reservations expressed by the Court of Appeal about the sanctity of the Regulations under which the appellant was charged cannot apply to this case. Even more importantly, in **Guantai's case**, there was no allegation of fraud, but in the instant case, it is the element of fraud which is very central to the entire case.

Against this background, the Petitioner is particularly concerned that only two witnesses have testified so far as the third one is yet to be cross-examined. He is apprehensive that at this pace, the trial will take another five years by which time he will have been drained of his financial resources on account of air fares which will be unfair to him, and in his view, he is not being accorded a fair trial, and that in itself is a breach of his constitutional right conferred under Section 77(1) as protected by Section 84(1) of the constitution. Section 77(1) of he constitution states as follows:-

> ***"If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time."***

The Petitioner's complaint is that it took about 4 years for him to be charged with the offence, and the pace of the trial is such that it will take another five years before the trial can be concluded, and therefore he is not being afforded a fair trial within a reasonable time as envisaged by Section 77(1) of the constitution. The alleged offences were committed between 2003 and 2004, and the petitioner was charged in 2008. Prima facie, this is a period of about 5 years. Was that too long a period as to render the prosecution of the petitioner unconstitutional?

It should be remembered that the fact of the transaction which precipitated this matter did not come to the public knowledge until May, 2006. That was about when investigations commenced. As a result of those investigations, the Petitioner first appeared in court in June, 2008. In my view, the period which ought to be taken into consideration is from 2006, when this matter first came to light, and not 2003 to 2008. That being the case, the Attorney General directed the

prosecution of the petitioner and his co-accused in June, 2008. That was a period of about 2 years. In **GITHUNGURI V. REPUBLIC [1986] KLR**, a three judge bench of the High Court held that there is no time limit for the prosecution of serious criminal offences except where a limitation is imposed by statute. The Attorney General therefore has an unfettered discretion to prosecute, provided that he does not offend the fundamental rights conferred on an accused by Section 77(1) of the Constitution. Therefore merely because the prosecution was instituted 5 years after the date of the alleged offence did not constitute a breach of the petitioner's constitutional rights since the matter never became known until after 2 to 3 years. Furthermore, the applicant in Githunguri's case had been publicly informed that he would not be prosecuted, which is not the case here.

The civil case of **IVITA V. KYUMBU [1984] KLR 441** was also referred to. The facts of that case briefly were that the suit was filed in March, 1971. The hearing dates were taken exparte, by the plaintiff's advocate in August, 1973, and the defendant's Advocate was duly served with a hearing notice for 29th and 30th July, 1974. In April, 1974, the case was taken out of the hearing list at the request of the Plaintiff's advocate without assigning any reason therefore, and the Defendant's Advocate was not informed of he request. In April, 1975, the Defendant filed and application for the dismissal of the suit under Order XVI rule 5 of the Civil Procedure Rules. It was held that the test to be applied for the dismissal of a case for want of prosecution is whether the delay is prolonged and inexcusable and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can be done to the parties the action will not be dismissed. In the instant case, the delay in the commencement of the proceedings was, in my view, adequately explained and I have no doubt that justice would still be done.

Both the Petitioner's counsel and counsel for the Respondents freely cited authorities from foreign jurisdictions, which authorities are not binding on this court. However, the thread of reasoning in those cases is that delay is to be perceived at two levels – pretrial delay in which the Government purposefully delays the trial in order to gain a tactical advantage, and in trial related prejudice involving the absence or unavailability of witnesses. In the instant cases the record shows clearly that the Attorney General moved with speed to ensure that investigations were completed and the court adjourned the hearing of the case on several occasions for good reason. Government agencies cannot therefore be indicted for any deliberate delay designed to harm anyone, let alone the Petitioner. Suffice it to refer to **UNITED STATES V. TRAMMELL [1998] USCA 10 55** in which the court observed:-

> ***"Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice."***

Every case should be considered on its own facts and circumstances. The fact that only two witnesses have testified so far is not a measure of how long this trial will take. In any case, the length of time it takes is dependent on many factors such as the complexity of the matter, the nature of the evidence, the cross examination e.t.c. It is therefore

unfair to speculate that this case will take another five years and then assert it conclusively as a fact. Many witnesses take a much shorter time than others. Only time will tell.

Finally, at this juncture in time, it would not be proper for this court to engage in an evaluation of the evidence given to date. That is the role of an appellate court, and this court is not sitting on appeal. I therefore find that the petitioner's constitutional rights have not been violated, and that this petition has no merit. It is accordingly dismissed with no order as to costs.

The Chief Magistrate is at liberty to continue with the trial.

Dated and **delivered** at **Nairobi** this 19th day of March, 2010.

L. NJAGI

JUDGE