



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

**Petition 503 of 2009**

**JOSEPH MUNYIRI MUNENE.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT NAIROBI.....2<sup>ND</sup> RESPONDENT**

**RULING**

This ruling relates to an application that has been brought through Chamber Summons under Rules 20, 21 and 32 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the individual) High Court Practice Procedure Rules 2006.

The same prays for the following orders:

- (a) An interim conservatory order be issued to stay any further hearing of the Chief Magistrates Criminal Case No. 900/2008 in so far as it relates to the petitioner pending the determination of this petition.***
- (b) An interim conservatory order be issued to excuse the petitioner from attending the Chief Magistrate's Court in relation to the Chief Magistrate's Criminal Case No. 900 of 2008 pending the determination of this petition.***
- (c) An early date be appointed for the hearing of the petition.***

In his submissions, Mr. Fred Ngatia stated that the petitioner has filed a petition in which he is complaining of violation of his constitutional rights. Further to the above, he also submitted that the petitioner was employed by ICDC and used to attend meetings of Uchumi Supermarket as a Director. According to Mr. Ngatia, the directors of Uchumi Supermarket called a regularly constituted board meeting in which they decided to dispose of immovable properties. Subsequently, four years after that decision, a criminal case was instituted in the Chief Magistrate's Court, Nairobi against the applicant and other directors. Apart from the above, the learned Counsel also submitted that prior to the commencement of the case, the applicant was retired by the ICDC when he was 60 years old and hence he migrated to Canada. Despite the above, the applicant came back freely and voluntarily to take a plea at his own expense. In addition to the above, the applicant has since then, attended each and every session at his own expense. The learned Counsel took issue with the fact that on at least three if **not** four occasions, the trial never proceeded because the trial magistrate had other engagements despite having

given the hearing dates. Though the applicant had requested in early July, 2009 that the case be adjourned to October, 2009 the same was rejected. Thereafter, the case never took off despite the fact that the applicant traveled all the way from Canada on 14<sup>th</sup> July, 2009. That was on the ground that the trial Magistrate had other duties. The learned counsel has complained of inertia on the part of the Attorney-General and **secondly**, that after about one and half years only two witnesses have testified. On the other hand, Mr. Mungai, State Counsel, submitted that he has been unable to prepare a replying affidavit to the petition explaining why the directors were charged and why it took close to four years to have the case filed in court. The learned Counsel prayed for more time to file their pleadings so that the petition can proceed to hearing. Besides the above, Mr. Mungai conceded that he has **no** objections to the Court certifying the petition as urgent and suitable for immediate hearing. Apart from the above, the learned Counsel was candid that the applicant had been charged with eleven other Directors and hence it would **not** be possible to stay the criminal case in relation to one person alone.

From the record, it is apparent that the case has been adjourned on four occasions due to various reasons. On the 7<sup>th</sup> July, 2008, the Court heard one witness Viz, Mary Wairimu Ngari and thereafter, the prosecutor applied for an adjournment on the ground that his witness was having an examination at around 5.00 p.m. There is no indication on the record that any of the counsels objected to the above. **Secondly**, on 11<sup>th</sup> August, 2008, the SPM, Mrs. Githua indicated on the file that the trial Magistrate was engaged in other official duties. Unfortunately, she never gave any further details. On 24<sup>th</sup> November, 2008, the defence counsel for Accused 11 applied for an adjournment on the ground that his client had traveled to Dubai. At that stage, the prosecutor intimated to the Court that he had two witnesses present in Court. Fourthly, on 16<sup>th</sup> January, 2009 the trial Magistrate adjourned the case on the ground that he was engaged in another hearing.

From the above analysis it is apparent that the case was only adjourned twice due to the fact the trial Magistrate was engaged in other official duties. Unfortunately, those official duties were **not** specified. On the other two occasions, the case was adjourned because a witness was due to sit examinations and also because the 11<sup>th</sup> Accused had traveled to Dubai. Obviously, the trial Magistrate **cannot** fairly be blamed for the above. Apart from the above, the court also wishes to point out that though Mr. Ngatia submitted that only two witnesses have given evidence in one and half years, the record shows otherwise. According to the record, there are three witnesses who have given evidence. These are:

***PW1 – Mary Wairimu Ngari***

***PW2 – Peter Mumo Mutisya and***

***PW3 – Charles Kanau Migwo***

I am sure that the learned Counsel may have overlooked the fact that PW3 had given his evidence. While the Court notes that the accused persons appeared in the subordinate Court about 15 months ago (from June, 2008), I also have to appreciate what is reflected on the record. No doubt, more witnesses could have been heard if the four adjournments could have been avoided. Given the above facts, I hereby direct the trial Magistrate Viz, Mr. Gilbert Mutembei to give priority to this case so that the same is heard expeditiously. Since the applicant has filed a Chamber Summons under Section 84(1) of the Constitution of Kenya, I hereby certify the same to be urgent. In the same breath, I hereby grant the State, 14 days to file a replying affidavit and any other relevant papers. However, I hereby reject prayers of an interim conservatory order to stay any further proceedings in Criminal Case No. 900 of 2008. I also reject the application for interim conservatory order to be issued to excuse the petitioner from attending the above case. I am of the considered opinion that since Uchumi Supermarkets Ltd is a public Company, it will be in the public interest that the case is heard fully so that the truth may be known about the allegations made against the accused persons. No doubt, the accused are presumed innocent unless proved otherwise. One of the advantages of subjecting the Directors to the due process of the law is that it will instill trust and confidence to the large number of shareholders in the Company.

The presiding Judge, Criminal Division is at liberty to place the file before the Hon. Chief Justice to

constitute an appropriate bench to hear the petition. Those are the orders of the Court.

**MUGA APONDI**

**JUDGE**

Ruling read signed and delivered in the presence of

*Mr. Fred Ngatia* for Applicant

*Ms Ruto* for State

**MUGA APONDI**

**JUDGE**

**15<sup>TH</sup> SEPTEMBER, 2009.**

**Ngatia:** I pray for leave to appeal against your decision. I also pray for a stay of the order that the magistrate should move quickly and hear the matter expeditiously. I also pray that I be supplied with a copy of the proceedings within a week.

**Ms. Ruto:** I have nothing to state in reply.

**Court:** I hereby grant the applicant leave to appeal against my decision. I also direct the Principal Deputy Registrar to supply both counsels with a copy of my ruling expeditiously and in any event within the next 15 days.

**MUGA APONDI**

**JUDGE**

**15<sup>TH</sup> SEPTEMBER, 2009.**