IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 223 OF 2009

JOSEPH MUNYIRI MUNENE ……..……....……..…… APPELLANT

AND

ATTORNEY GENERAL ....…….....……. 1ST RESPONDENT

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

(Appeal from an interlocutory ruling and order of the High Court of Kenya at Nairobi (Apondi, J) dated 15th September, 2009

in

H. C. Petition No. 503 of 2009)

****

JUDGMENT OF THE COURT

This appeal is from the decision of the superior court (Apondi, J) dated 15th September, 2009. The applicant in that matter, ***Joseph Munyiri Munene*** (the appellant) sought interim conservatory orders, pursuant to ***Rules 20, 21 and 32*** of the Constitution of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights & Freedoms of the Individual) High Court Practice & Procedure Rules 2006, to stay any further hearing of the Chief Magistrate Criminal Case No. 900 of 2008 ("the criminal case") and to excuse the applicant's attendance at the criminal case, pending the determination of a Petition filed by the appellant in the superior court.

In the criminal case, the appellant and 13 others were jointly charged with one count of conspiracy to defraud contrary to ***section 317*** of the Penal Code. The appellant was also charged, along with six others, of a second count of breach of trust against the public contrary to ***section 127*** of the Penal Code.

By a Petition filed in the superior court being No. 503 of 2009, the petitioner (the appellant in this appeal) sought, pursuant to ***section 84 (i)*** of the Constitution, orders to quash the indictment in the criminal case, and sought interim conservatory orders of stay of the criminal case. The superior court declined to grant the same. After analyzing the facts giving rise to the complaint that the appellant's criminal case had been unduly delayed, the learned Judge came to the conclusion that there had been no undue delay in the prosecution of the criminal case, and rendered himself thus:

"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 learned judge then directed that the criminal case against the appellant be heard expeditiously, thus provoking this appeal.

Five grounds of appeal have been preferred, as follows:

"1. The learned trial Judge erred in law and in fact in exonerating the 2nd respondent from the blame at an interlocutory stage and despite the fact that the complaint was to be argued at the hearing of the Petition.

2. The learned trial Judge erred in law and in fact in refusing to grant the interim conservatory orders sought and further erred in justifying the refusal on grounds which were not raised before him.

3. The learned trial Judge erred in law and in fact in issuing orders which were not sought by the parties.

4. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that the expedited hearing of the criminal trial would render the Petition nugatory.

5. The learned trial Judge erred in law and in fact in making erroneous factual findings that the 2nd Respondent had adjourned the criminal trial on 2 occasions due to "other official duties" and that 3 witnesses had concluded their testimony."

Mr. Kyalo Mbobu, learned counsel for the appellant, argued grounds 1, 2, 4 and 5 together, while making submissions separately on ground 3. With regard to grounds 1, 2, 4 and 5, the thrust of Mr. Mbobu's argument was that the superior court erred in "ignoring" that both the parties had "consented" to the grant of the interim conservatory orders, and issued orders that were not sought in the application before the superior court. Indeed, in declining to grant any interim orders, the learned Judge ordered the expeditious disposal of the criminal cases. Citing ***Mulla*** – The Code of Civil Procedure Vol. 1 Page 53, Mr. Mbobu submitted that **"Counsels and advocates have an implied authority to compromise in all maters connected with action and not merely collateral to it."** (***Mulla Vol. 1 at page 53)***. He argued that the court could not possibly ignore a valid consent entered into by the parties. Mr. Mbobu further argued that in reaching its conclusion that the prosecution of the criminal case had not been unduly delayed, the superior court made factual errors in finding that the said trial had been adjourned only two times, and that three witnesses had testified, when in fact the trial had been adjourned five times, and that the third witness had not concluded his testimony.

With regard to ground 3, Mr. Mbobu complained that the superior court made orders that were not sought in the application – the order to expedite the criminal trial.

Mr. Mungai Warui, learned Principal State Counsel, representing the Attorney General did not oppose the appeal, and referred the court to the consent

order dated 15th October, 2009 and filed in this Court's registry on 16th October, 2009 wherein the parties agreed to the grant of the interim conservatory orders.

Mr. Njagi, learned counsel representing one of the interested parties, Mr. Kirubi, opposed the appeal, arguing that his client wanted the criminal case heard expeditiously. He submitted that the few factual errors made by the learned Judge were no grounds to allow the appeal.

Given that the Attorney General has not opposed this appeal, and is agreeable to the grant of interim conservatory orders, it is important to look at the facts and circumstances of the matter before us. The genesis of the issue before us is the indictment preferred against the appellant and 13 others in Chief Magistrate Criminal Case No. 900 of 2008. That case, which we previously said is referred to herein as "the criminal case" began in earnest before the Nairobi Chief Magistrate on 7th July, 2008 when the prosecution's first witness gave testimony. It was then adjourned to enable the witness write examinations, and was re-fixed for hearing on 11th to 15th August, 2008. On that date, it was adjourned on account of the trial magistrate's absence from office because of other official duties. Similarly, there were four other adjournments, for one reason or the other, resulting in considerable expenditure to the appellant who had to travel from Canada, having emigrated there as a permanent resident on 29th February, 2008. The criminal case still remains un-determined, and is slated for further hearing on 18th January, 2010. However, on 19th August, 2009, the appellant filed a Petition in the superior court seeking orders *inter alia* to quash the indictment in the criminal case on the grounds, essentially, that his constitutional rights to a fair and speedy trial had been denied. That Petition is yet to be heard. However, it was the superior court's refusal to grant interim stay of further proceedings that prompted the appeal before us, **and the only issue before us at this time is whether the interim orders sought by the appellant should have been granted**. As we said before, the appellant's central argument is that as both the parties had consented to the grant of interim orders, the superior court ought not to have ignored the same. The issue then is: where parties have entered into a consent, is the court automatically obliged to accept and enter the same as an order of the court? We do not think so. Mr. Mbobu, for the appellant, relied on ***Mulla (supra)***. He cited the relevant passage on page 53, which we have reproduced earlier in this judgment. However, while ***Mulla*** talks of the counsel's authority to compromise cases, it also states as follows at p. 54:

"In some cases, court have refused to inquire if there is such a limitation, and have refused to set aside a compromise entered into by counsel, but, the true rule seems to be that the court has power to interfere, and the House of Lords has held that the court is not prevented by agreement of counsel from setting aside or refusing to enforce a compromise, that it is a matter for the discretion of the court and that, when in the particular circumstances of the case grave injustice would be done by allowing the compromise to stand, the compromise may be set aside even though the limitation of counsel's authority was unknown to the other side."

Clearly, whether to accept the consent entered into by parties as an order of the court is a matter of discretion given to the court.

We would also note that ***Mulla's*** commentary as aforesaid was based on the civil case that was before the relevant court. However, we very much doubt if the same could be said of "consents" in criminal cases. We shudder to think that the parties could enter into bizarre "consents" if the courts had no authority to disregard such consents. A criminal case, once before the court, ceases to belong to any particular party. It belongs to the people, and the court, as the custodian of the people, must act in the best interest of the people. If public policy demands that the court ignore the consent entered into between the parties, then the court should have the authority to do so. That is exactly what the learned judge said, and did, in this case, and we cannot fault him on that. Clearly, the learned judge took into consideration that it was also in the public interest that the criminal case be dealt with expeditiously, and he so ordered. It cannot be said that such an order was irregular because it had not been sought. That is what justice required, and the learned Judge rose to the occasion. The few factual errors he made in his ruling regarding the number of adjournments do not constitute, in our view, a serious ground of appeal. Finally, we agree with Mr. Njagi's submission, that at least one interested party, and we presume there might be others, wants an expeditious conclusion of the criminal case. To grant a stay to one party may be prejudicial to others not before us in this appeal.

Accordingly, and for reasons stated, we disallow this appeal with no order as to costs.

Dated and delivered at Nairobi this 12th day of February, 2010.

P. K. TUNOI

……

JUDGE OF APPEAL

E. O. O'KUBASU

……..

JUDGE OF APPEAL

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR