



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CRIMINAL APPLICATION NO. 59 OF 2018

KIRIT BHAGWANDAS KANABAR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 55 OF 2019

HITESH PRAVIN DAVE.....APPELLANT

VERSUS

REPUBLIC.....1ST RESPONDENT

KIRITKUMAR BHAGWANDAS KANABAR.....2ND RESPONDENT

CONSOLIDATED RULING

1. This is a consolidated ruling in respect of three applications. The first was filed in Misc. Criminal Application No. 59 of 2018 and two subsequent others in Criminal Appeal No. 55 of 2019. The first application by is a Notice of Motion by **Kirit Bhagwandas Kanabar** filed on 13th July, 2018 and brought under Section 81 of the Criminal Procedure Code praying that the court be pleased to order that the Kiambu Chief Magistrate **Criminal Case No. 1554 of 2017** be removed from the said court and transferred to the Chief Magistrate Civil Court at Milimani for hearing and determination.

2. The application is premised on the grounds that sometimes in 2015, the complainant in the subject criminal case, one **Hitesh Pravin Dave** and the Applicant entered into a written agreement by which the Applicant was to undertake certain renovations on the said complainant's property; that subsequently, the project's commencement was frustrated and stalled due to delayed statutory approvals; that as a consequence, the complainant filed a criminal complaint against him, rather than a civil claim. **Kirit Bhagwandas Kanabar** swore an affidavit in support of the motion. To the effect that around the year 2015, he had entered into a written Memorandum of Understanding (MOU) with the **Hitesh Pravin Dave**.

3. Under the terms of the MoU, the deponent was to undertake renovations on a property owned by **Hitesh Pravin Dave** and that due to delays in procuring necessary statutory approvals, the latter party started making false allegations against the Applicant, intimating intentions to terminate the MoU. He contended that under the terms of the MoU, the said complainant ought to have referred any dispute arising from the agreement to arbitration but that he instead filed a criminal complaint against the Applicant, as a consequence of which the Applicant was arrested and was charged before the Chief Magistrate's court at Kiambu in connection with what is essentially a civil dispute, in what is alleged to constitute an abuse of the process of the court. He expressed apprehension that justice could not be done in the trial court handling the criminal charges. Hence the application to transfer the case to the Chief Magistrate's Civil Court at Nairobi.

4. **Joseph Ondoro**, the investigating officer of the criminal case before the lower court swore a replying affidavit on behalf of the DCI (Republic). He deposed that a report was received at the Directorate of Criminal Investigations (DCI) from **Hitesh Pravin Dave** who alleged that, the Applicant had failed to carry out agreed renovations on the complainant's property despite receiving the consideration amounting to Kshs. 210,000,000/-He asserted that pursuant to investigations and based on the evidence collected, he resolved to charge the Applicant with criminal charges. He contended that the Applicant has not demonstrated that the DCI has acted in excess of the powers conferred upon them by the law or has acted in bad faith. He contended that there was no factual justification to warrant the High Court to interfere with the independent decision of the DCI.

5. For his part, **Hitesh Pravin Dave**, the complainant in the lower court case and Interested party herein filed a replying affidavit on 5th

October, 2018. He deposed that he entered into an exchange agreement with the Applicant by which he was to convey to the Applicant three properties registered in Mombasa and Kajiado being the agreed consideration for the Applicant to undertake renovations of his apartments in **Nyali**; that after discovering that the Applicant could not deliver, he lodged a complaint with the police who commenced investigations leading to criminal charges against the Applicant. He contended that the Applicant had not demonstrated that the Respondent acted in excess of its powers in charging the Applicant and moreover, that the agreements were executed within Kiambu County.

6. In canvassing the motion, the parties filed written submissions. The Applicant's submissions emphasize his apprehension of bias by the trial court in the criminal case before the lower court. Reiterating the circumstances of the dispute, he alluded to inadequacy of evidence in support of the criminal charges preferred against in the lower court. Reliance was placed on the case of **Kamande & 3 others v Republic (2014) e KLR** where it was held that in considering an application for transfer of a case, the court will assess whether the Applicant's apprehension was reasonable and founded on sufficient material. It was further submitted that the Complainant has not demonstrated what loss he stands to suffer as a result of an order being made to transfer of the criminal case.

7. Counsel for the **Hitesh Pravin Dave** for his part argued that the Nairobi Chief Magistrate's Civil Court has no pecuniary jurisdiction to hear and determine the subject matter. It was submitted that the Applicant has not demonstrated what difficulties he has encountered before the lower court. Concerning the nature of the dispute the court was referred to the case of **Republic vs Attorney General & 4 others Ex-parte Kenneth Kariuki Githii (2016) eKLR** for the holding that the facts giving rise to criminal proceedings may similarly be a basis for a civil suit.

8. The second application was filed on 20th June, 2019 by **Hitesh Pravin Dave** on 20th June, 2019 in **Criminal Appeal No. 55 of 2019** and is expressed to be brought under Section 356 (1) of the Criminal Procedure Code, Article 50(9) and Article 159(2) of the Constitution of Kenya. The live prayer therein seeks that pending the hearing and final determination of the appeal the Court be pleased to stay the orders of **Nyangena SPM** (delivered by **Atambo SPM**) on 17th June, 2019 in **Kiambu CM's Criminal Case No. 1554 of 2017, Republic vs Kiritkumar B. Kanabar**, releasing Passport No. **C020761**, to the Accused therein.

9. The application is premised on the grounds on the face of the motion and the affidavit of **Hitesh Pravin Dave** the Applicant therein and also complainant in the criminal case in the lower court. He deposed that the subject passport belonging to Kirit Kumar Kanabar had been deposited in court pursuant to bail terms imposed by the court in the criminal case facing him; that despite his opposition to a subsequent application by **Kirit Kumar Kanabar** seeking release of the said passport to enable the holder travel to Dubai the application was allowed. Aggrieved with the order he had filed the instant appeal and motion, the latter seeking that this Court stays orders of the lower court, pending appeal so that the appeal is not rendered nugatory and that the appeal which he asserts has high chances of success.

10. **Kirit Kumar B. Kanabar** opposed the motion through his replying affidavit wherein he deposed that that the Applicant has not demonstrated that the how failure to grant the order for stay will render the appeal nugatory. Besides, his view is that the appeal has no chance of success. He also filed a Notice of Preliminary Objection raising among other objections the Applicant's legal standing allowing the filing of the appeal and application.

11. **Jacinta Nyamosi** a Senior Assistant Director of Public Prosecutions also swore a replying affidavit in opposition to the motion. She swore that the Director of Public Prosecutions had reviewed the criminal case and directed that it be withdrawn under Section 87(a) of the Criminal Procedure Code, which application had been argued and the ruling pending before the lower court and the subsequent application for release of the passport was allowed.

12. The third application was filed on 15th August 2019 and is expressed to be brought *inter alia* under Section 5(1) of the Judicature Act and Articles 159 and 50(9) of the Constitution. The live prayers seek that this Court be pleased to issue a Notice to Show Cause against **Kiritkumar Bhagwandas Kanabar** and the Executive Officer, Kiambu Chief Magistrate's Court, to show cause why they should not be committed to serve 6 months imprisonment for disobeying the High Court Order issued by this Court on 21st June, 2019 in Criminal Appeal No. 55 of 2019 and that in addition to being so committed, **Kiritkumar Bhagwandas Kanabar** and the Executive Officer, Kiambu Chief Magistrate's Court be ordered to pay a fine in their personal capacity.

13. The application is premised on the grounds on the face of the motion and supported by the affidavit of **Hitesh Pravin Dave**. To the effect that the passports deposited in the criminal case against **Kirit Kumar B. Kanabar** and his co-accused, both of whom were a flight risk, had been released by the Executive Officer in spite of being aware of this Court's order staying such release. That the said parties having colluded to defy the Court's order should be held in contempt and punished.

14. **Kirit Kumar B. Kanabar** swore an affidavit in opposition to the motion. Depositing therein, that the application is incurably defective and that he had been discharged by the lower court upon the withdrawal of the criminal case in the lower Court. Hence the release of his passport. He denied the allegation that he had colluded with the Executive Officer. He also filed a Preliminary Objection to the effect that the application is defective as leave of court was not sought and that the reference to so-called contemnors in the application presupposed that the cited parties had been tried and found guilty of contempt.

15. The 2nd and 3rd applications and preliminary objections were argued together through oral submissions. Regarding objections raised, Mr. Murage for the Applicant in both applications opened his address by asserting that a preliminary objection could only be based on pure points of law. It was his position that the preliminary objections herein raised matters of facts. He cited the case of **Mukisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696**. He urged the Court to consider its jurisdiction to supervise subordinate Courts by dint of Article 165 of the Constitution. With regard to the rights of the victims of crime to participate in criminal matters, counsel placed reliance on the decision of the Court of Appeal in the case of **Republic v Joseph Lentrix Waswa [2016] eKLR**.

16. On the substance of the second application it was asserted that the Applicant being the victim in the criminal case in the lower court was seeking to stay the lower court's order granting accused access to his passport. It was further submitted that the appeal herein has high chances of success and could be rendered nugatory if the accused is allowed to travel.

17. Concerning the contempt application, Counsel for the Applicant submitted that the Respondents ought to be summoned by this court to show cause why they should not be punished for breaching the court orders staying release of the passports. He argued that all the Respondents were aware of the order issued by the High Court and that the order had not been waived. In regard to the preliminary objection to the 3rd application, he contended that with the exception of the issue of leave, other grounds therein raise matters of fact. He cited the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others (2014) eKLR** for the proposition that leave was no longer necessary to an application for contempt.

18. Mr. Kyalo for **Kirit Kumar B. Kanabar** submitted that the accused has not been convicted or sentenced in the lower court as anticipated in Section 347 of the Criminal Procedure Code hence the appeal and application do not lie. Further, he asserted that the Applicant being an alleged victim could only approach the court with leave to file an appeal and without such leave, the appeal was incompetent, and that in any case the appeal not being arguable, refusal to grant the order for stay will not render it nugatory.

19. In opposing the 3rd the application submitted that the prayers therein prematurely refer to the respondents as contemnors there by presupposing that they have been found guilty of contempt. Citing the ruling of the lower court allowing for termination of the lower court case he asserted that a basis existed for release of the passports. He highlighted the allegation that his client had since the release of his passport travelled out of the country on two occasions and returned to the jurisdiction and is therefore not a flight risk as alleged by the Applicant. It was his argument that the release of the passport was based on a proper order of a competent court and he therefore urged this court to decline the application, there being no contempt disclosed.

20. The court has considered the material canvassed in respect of the three motions which are the subject of this ruling. The court considers it pertinent to set out the undisputed context of the three applications, which will serve to resolve the first and second applications, before delving into the merits of the third. In or about 2017 **Hitesh Pravin Dave** (herein after **Hitesh**) filed a complaint with the Directorate of Criminal Investigations (DCI) against **Kirit Bhagwandas Kanabar** (hereinafter **Kirit**) regarding certain commercial transactions executed between the parties in 2015.

21. By his report, **Hitesh**, the complainant reported to have been defrauded by Kirit. Following investigations by officers of the DCI, Kirit was arraigned before the Chief Magistrate's Court Kiambu in Criminal Case Number 1554 of 2017. He was charged with obtaining credit by false pretence contrary to section 316 (a) of the Penal Code. The particulars of the charge stated that:

“On diverse dates between 30th July 2015 and 13th November 2015 in Nairobi... incurring a debt to Hitesh Pravin Dave, (the Accused) obtained credit to the amount of KShs.210,000,000/= [Two Hundred and Ten Million Shillings) from the said Hitesh Pravin Dave by falsely pretending that you were in a position to undertake renovation of apartments in Nyalia a fact you knew to be false.”

21. Having denied the charges **Kirit** was released on bail terms that required him *inter alia* to deposit his passport into court. **Kirit** was released on bond upon complying with the bail requirements. On 13th July 2018 **Kirit** approached this court *via* his motion in **Misc. Criminal Application No. 59 of 2018** seeking an order to stay the proceedings in **Cr. Case 1554 of 2014** pending *inter partes* hearing and a further order to transfer the criminal case to the Chief Magistrate's Civil Court at Milimani. The main ground supporting the motion was that the dispute giving rise to the criminal charges was civil in nature and that it amounted to an abuse of the process of the court for the DPP to prefer criminal charges in respect of the civil dispute between **Hitesh** and **Kirit**.

22. Meanwhile, on 29th January, 2019 **Kirit** moved the lower court seeking the temporary release of his passport to enable him travel to Dubai allegedly on business. The application though opposed by **Hitesh** was allowed *via* a ruling delivered on 17th June 2019 by **Atambo, SPM** on behalf of the trial magistrate, **Nyangena S.P.M.**. The DPP had by the time indicated that he intended to withdraw the case against the **Kirit**. The ruling granting temporary release of Kirit's passport prompted the filing of **HCRA 55 of 2019** by **Hitesh**, on 20th June 2019. Filed contemporaneously was the motion seeking to stay the orders emanating from the ruling of the lower court, pending the hearing of the substantive prayer to stay the said orders pending determination of the appeal filed.

23. On 20/6/19 this court granted *ex parte*, the prayer to stay the release of the passport pending *inter partes* hearing of the motion. By that date, an application had been filed by the DPP in the lower court to withdraw the criminal case pending against **Kirit**. The said application was opposed by **Hitesh** but supported by **Kirit**. It was argued on 16th May 2019. By her brief ruling delivered on 5th August 2019, the trial magistrate allowed the withdrawal of the case before her under Section 87(a) of the Criminal Procedure Code. She also granted the request made by the defence, but opposed by the complainant's counsel, to release the cash bail deposited in court.

24. From the available record of the lower court proceedings, it appears that on 8th August 2019, the 1st Accused appeared in person before the trial magistrate and sought the “*discharge of sureties and release of passports,*” explaining that he had been released not on cash bail, as earlier adverted but on recognizances by sureties. (It seems that a second Accused person, namely, **Harit Kumar Kanabar** had since been enjoined as a 2nd Accused person). The court prosecutor was absent during the brief proceedings. The request by **Kirit** was allowed. The passport was subsequently released to him by the Executive Officer of the lower court.

25. This development sparked a flurry of objections by Hitesh's counsel and the filing of a second Petition of Appeal in HCRA 55 of 2019, on 14th August 2019, and the application filed on the same date. The live prayers in the said motion seek that this court be pleased to issue a notice to show cause against **Kirit** and the Executive Officer, Kiambu Chief Magistrate's Court, to show cause why they should not be punished by imprisonment for disobedience of this court's order of 20th June 2019 which stayed the lower court order to release Kirit's passport.

26. On his part, counsel for **Kirit** wrote a letter dated 13th August 2019 to the Deputy Registrar of this Court to the following effect:

“RE: HCCRA NO.55 OF 2019 HITESH PRAVIN DAVE VS REPUBLIC AND KIRIT BHAGWANDAS KANABAR

We refer to the above matter which is pending the Ruling of the court on 11th December 2019.

As requested by the court, we write to inform you that the case before the lower court i.e. Criminal Case No. 1554 of 2017 R v Kirit Bhagwadas Kanabar and Another was terminated vide a ruling delivered on 5th August 2019. In the premises we pray that orders issued on 17th June 2019 be vacated.

Please oblige, expedite and confirm”.

27. The reference to an order issued on 17th June 2019 must be an erroneous reference to this court’s order of 20th June 2019 in HCRA 55 of 2019. Secondly, while the parties had on 10/7/2019 adverted to the pending application by the DPP to withdraw the lower court charges, no request in the terms stated in the above letter is recorded in the day’s proceedings before this court. That said, it is beyond disputing that in view of the withdrawal of the lower court criminal case, the merits of the withdrawal order notwithstanding, the objects of motion filed on 13th July 2019 in Misc. Cr. Application No. 59 of 2018 has been overtaken by events. The criminal case which was the subject of the motion having been withdrawn the motion was rendered otiose.

28. Similarly, both the appeal and application filed on 20th June 2019 were premised on the continued subsistence of the Criminal Case No. 1554 of 2017. The passport belonging to **Kirit** had been released on a temporary basis ostensibly to enable the said holder to travel to Dubai. It has to be recalled that the said passport had been deposited into court in compliance with bail terms imposed in the criminal case facing **Kirit**. No purpose could be served by going into the merits of the motion and appeal filed on 20th June 2019 when the substratum thereof has clearly disappeared with the withdrawal of the criminal case against **Kirit**.

29. This brings me to the motion filed on 14th August 2019.

Other than raising an objection regarding the reference in the said application to the Respondents as contemnors, which the counsel for **Kirit** views as premature, another objection in the preliminary objection filed on 3rd September 2019 is to the effect that, leave of the court should have been sought before bringing the contempt motion. This objection was apparently abandoned as it was not argued during the hearing of the application. Advisedly so, as the decision of the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans and 11 Others (2014 e KLR)** has settled the question.

30. In that case, the Court of Appeal held that the Civil Procedure (Amendment No.2) Rules 2012 of England apply to contempt proceedings in this country by dint of Section 5 of the Judicature Act. The Court of Appeal stated *inter alia* that:

“It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12 – Committal “for interference with the due administration of justice” and 81.17 – Committal for making false statement of Truth or disclosure statement” where leave or permission is required.

31. The court proceeded to state that:

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order.”

32. The court pointed out that in punishing for contempt the court exercises ordinary criminal jurisdiction. In **Stewart Robertson v Her Majesty’s Advocate, 2007 HCAC 63** it was held that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

And according to **Blacks Law Dictionary (Ninth Edition)**, contempt of court is **“Conduct that defies the authority or dignity of a court.”**

33. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another (2018) e KLR** stated that:

“ [24] In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 *Ibrahim J* (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another* Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *HADKINSON v. HADKINSON* (1952) 2 All E.R. 567, it was held that: *It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.*”...

[26] The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”...

[28] It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the *standard of proof* in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutiika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

34. The Supreme Court proceeded to explain the rationale for the high standard in the following terms:

“ [29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order. (emphasis added)

[30] The question that begs an answer, thus, is: **did the applicant willfully disobey this Court’s Orders?”**.

35. That too is the question in this case, that is, whether the Respondents proposed to be cited willfully disobeyed the order of this court. The circumstances in which the passport belonging to **Kirit** was released are clear in this case and have been further explained in the Replying affidavit of **Kirit**. Primarily, the case in the lower court had terminated by the date of the said release at the request of the **Kirit** who had been the Accused therein.

36. It follows from the undisputed history of this matter that the order made by this court on 20th June 2019 could only subsist and remain efficacious so long as the criminal case in the lower court subsisted. True, for the sake of good order in the administration of justice, the lower court having become aware of this court’s order of 20/6/2019, ought to have deferred to the High Court concerning the release of the passport to the discharged accused persons. That is not to say that the release order was an illegality. A similar duty bound **Kirit** and his counsel to defer to this Court.

37. The second and more disturbing aspect relating to the issuance of the passport release order, to my mind is that the proceedings of the day (8th August 2019) do not reflect the presence of the representative of the DPP or any other parties such as **Hitesh**, who had vigorously participated in opposing the application by the DPP to withdraw the criminal case against **Kirit**. Significantly, the withdrawal was made under Section 87(a) of the CPC which potentially does not result in a bar to further prosecution.

38. Prima facie, the contents of the letter by Kirit’s counsel to the Deputy Registrar of this court dated 13th August 2019, appear to anticipate and to attempt to smoothen the rough edges attending the proceedings and order of 8th August 2019 before the lower court. Indeed, the letter remarkably seeks the setting aside of the order of 20/6/2019. Neither **Kirit**, nor Counsel appearing for him have bothered to explain why an application to raise this court’s own order was not made before it. In my view therefore the letter represents no more than a mischievous attempt to sanitise the actions of defence side after the fact. As officers of the court, advocates representing clients have an obligation to facilitate good order in the administration of justice.

38. That said, once the order to release the passport had been made in the lower court, the Executive Officer of the lower court though aware of the stay order by this court could not be expected to have the temerity to quibble with its propriety. His sole duty was to comply with the order and I therefore cannot find any justification for summoning such an officer to show cause for effectively obeying what was patently a lawful order by the lower court. Secondly, in order to find such an officer liable to show cause, the court would of necessity have to first find that the trial court that issued the order was liable to show cause for its actions. The trial magistrate has not been cited in the contempt application.

39. The most obvious reason for that omission being that the release of the passport though resulting from an administrative mis-step by the trial court, but arising as a consequence of the withdrawal of charges against **Kirit**, was on the face of it not a deliberate affront to or disobedience of the orders of this court. As I said, for the sake of good order, the trial court ought to have deferred to this court. As such, I am not persuaded that the application filed on 14/8/2019 rises up to the requisite high threshold to justify citing of the Respondents for contempt of this court’s order of 20th June 2019. The application is accordingly dismissed.

40. Now turning to the appeal itself, I notice that after counsel for **Hitesh** filed a notice of withdrawal in respect of the application filed on 23rd July 2019, he filed a fresh Petition of Appeal in respect of the withdrawal of the charges in the lower court, without first withdrawing the earlier and clearly overtaken Petition of Appeal filed on 20th June 2019, regarding the order of the lower court allowing the temporary release of passport to **Kirit**. Nevertheless, as I have indicated earlier in this ruling, the said earlier Petition had now been overtaken by events pursuant to the withdrawal of the criminal case against **Kirit**.

42. While opposing the application filed on 20th June, 2019, counsel for **Kirit** had taken objection to the legal standing or capacity of **Hitesh**

to initiate and prosecute the appeal relating to the release of the passport and the related application. In view of the dissipation of the substratum of the said application and appeal, the court did not find it useful to delve into the said object

43. However, as matter now stand there is on record and subsisting the appeal filed on 14th August 2019, to challenge the ruling of the lower court allowing withdrawal of the primary case, and an application filed on 27th September 2019 both by **Hitesh**, the latter which seeks *inter alia* an order that **Kirit Kumar B. Kanabar** and **Harishkumar B. Kanabar** deposit their respective passports into this court pending the hearing and determination of the appeal. This court therefore directs that prior to the setting down of the motion or the appeal for hearing, the parties herein do address the court on a date to be taken hereafter, on the question of **Hitesh**'s legal standing or capacity and/or leave granted or to be granted to the said Appellant/Applicant to initiate and prosecute the appeal filed on 14th August 2019.

44. A copy of this ruling is to be placed in Misc. Cr. Application No. 59 of 2018 and HCRA 55 of 2019.

DELIVERED AND SIGNED AT KIAMBU THIS 12TH DAY OF MARCH 2020

C. MEOLI

JUDGE

In the Presence of :

Mr. Murage for Hitesh Pravin Dave Applicant /Respondent

Mr. Kasyoka for the DPP

Mr. Kyalo for Kirit B. Kanabar absent

Court Assistant - Kevin/Nancy