



REPUBLIC OF KENYA  
IN THE HIGH COURT KENYA  
AT NAIROBI  
JUDICIAL REVIEW DIVISION  
JUDICIAL REVIEW MISC APPLICATION NO. 212 OF 2015  
IN THE MATTER OF: A DECISION OF THE HON. THE CHIEF MAGISTRATE KIBERA  
TO PROCEED WITH A PRIVATE PROSECUTION OF THE APPLICANT  
IN CASE NUMBER P/1/14 CHIEF MAGISTRATE'S COURT AT KIBERA  
AND  
IN THE MATTER OF: THE CONSTITUTION OF KENYA  
BETWEEN  
REPUBLIC.....APPLICANT  
VERSUS  
THE CHIEF MAGISTRATE KIBERA.....RESPONDENT  
THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> INTERESTED PARTY  
PRAFULCHANDRA BHARMAL SHAH.....2<sup>ND</sup> INTERESTED PARTY

EX-PARTE

SHURISHCHANDRA BHARMAL SHAH

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Shurishchandra Bharmal Shah**, moved this Court by way of a Notice of Motion dated 15th July, 2015, seeking:

1. The Prerogative Order of Certiorari do issue to remove into this Honourable High Court and quash the order of the Hon. the Chief Magistrate Kibera to permit one **PRAFULCHANDRA BHARMAL SHAH** to prosecute the Applicant herein for an alleged offence of Forgery contrary to section 345 and 349 of the Penal Code.
2. The Prerogative Order of Certiorari do issue to remove into the Hon. the High Court and to quash the charge Sheet and the Charge of Forgery signed by the Hon. the Chief Magistrate Kibera.
3. The Prerogative Order of Certiorari do issue to remove into this Honourable Court and to quash all the proceedings and decisions made in the Chief Magistrate's court at Kibera in Private Prosecution Case Number 1 of 2014.
4. An Order of Prohibition do issue directed at the Chief Magistrate Kibera or any other Magistrate to prohibit

the prosecution of the Applicant **SHURISHCHANDRA BHARMAL SHAH** in Private Prosecution No. 1 of 2014 or any charge relating to a document dated 23<sup>rd</sup> January 1990, signed by Mr. Bakrania Advocate, on the 23 January 1990 save with an order of this Hon. Court.

5. Such further or other Orders as this Honourable Court deems appropriate.

6. Costs of and incidental to this Application.

#### Applicant's Case

2. According to the ex parte applicant, **Prafulchandra Bharmal Shah**, the 2nd interested party herein (hereinafter referred to as "the Prosecutor"), is his elder brother with whom he has enjoyed close familial relations for several years and they ran a company carrying on the business of selling curios and artwork under the name Praful's Limited with a shop on Mama Ngina Street and office in Jubilee Exchange Building. He averred that in or about 1991, the Prosecutor emigrated from Kenya permanently leaving the applicant to run the business. However, in or about 1996, the Prosecutor formed the notion that the applicant had defrauded him of some of the profits of the business and proceeded to transfer to himself substantial sums of monies lying in the applicant's Bank Accounts in the U.K. He also attempted fraudulent but unsuccessfully to transfer monies lying to the credit of the applicant and the applicant's wife elf with a bank in Switzerland since the Prosecutor had Powers of Attorney to operate the accounts in the U.K.

3. The applicant averred that they agreed to submit all of their disputes to arbitration by their family elders, who gave their decision and ordered the applicant to pay to the Prosecutor the sum of 140,000 pounds sterling which the applicant duly honoured in full and final settlement of all the Prosecutor's monetary claims against him and hoped that the arbitration award and payment of the sum awarded would put to an end the Prosecutor's attempts to obtain monies from him but to no avail. According to the ex parte applicant, the Prosecutor is determined to extract monies from him by any means possible.

4. He disclosed that on the 8 April 2002, the Prosecutor filed a suit against him to recover additional monies in H.CCC 422 of 2002 which suit was dismissed by a judgement delivered by the **Hon. Kimaru J.** on 22nd October 2010. He added that on or about 17th December 2002, the Prosecutor caused brokers to proclaim his personal property in distress for rent and he was compelled to file Case No. 1831 of 2002 for an injunction to restrain the sale thereof and pursuant thereto, **Hon. Mutitu J.** granted the order sought on the basis that he could not be required to pay rent for a property which he co-owned albeit as a tenant in common. Since, in his view the suit served no purpose, he withdrew the same without acceding to pay the said rent. This was based on the fact the Prosecutor had filed HCCC 114 of 2013 in which the applicant filed a defence and counter claim similar to his claim in HCCC 1831 of 2002. hence retaining the suit would have created unnecessary duplication

5. It was averred that on the 18th October 2004, the Prosecutor filed HCCC 1105 of 2004 in which he sought an Order that the partnership in respect of the properly known as Land Reference Number 209/11/6 Nairobi be dissolved and that the same property be sold for the best possible price. This suit was however withdrawn in the year 2005 in response to the applicant's application seeking to have the same dismissed for want of prosecution. Subsequently, on or about 23rd January 2013, the Prosecutor filed ELC 114 of 2013 in which he *inter alia* sought orders that the co-ownership in LR No. 209/11/6 be dissolved and the said property be sold and the proceeds thereof be shared between the Plaintiff and the Defendant as per the shares and that the accounts of the rents derived or which ought to have been derived in the said property be taken and the Defendant be ordered to pay the Plaintiff ½ share of the said rents.

6. To this suit, the applicant responded by way of a defence and counterclaim wherein he averred that the Prosecutor held one half of the property in trust for him, based on inter alia on an agreement made by **Mr. Bakrania Advocate** on the 23rd January 1990 (the Bakrania Document) whereby the Prosecutor agreed to transfer his half share in the said property to the applicant. According to the applicant, in the said agreement, which could not be traced until November 2012 drawn his father's advocate **Mr. Bakrania**, his father had instructed the said advocate to do so as the Prosecutor was emigrating to the United Kingdom with his family and advised the applicant that it was important to formalise the transfer as the Prosecutor might deal with the property so as to deny his parents and the family a home.

7. According to the applicant, after the departure of the Prosecutor and his family to the U.K, he continued to reside with his family and their parents on the said property LR. No. 209/11/6. After the passing away of his mother in or about April 1992, the applicant and his wife looked after their father and provided for his every need as senility set in. However, the Prosecutor returned to Kenya in or about 2001 after the business he had commenced in the U.K collapsed and left him in financial distress and took up residence in a flat in Parklands and did not challenge the exclusive occupation and enjoyment of the said property by the applicant and his family. However, the Prosecutor made a complaint against him at Gigiri Police Station alleging that his signature on the Bakrania Document had been forged and the applicant was summoned by the first investigating officer to report to the said Police Station where he recorded a statement and provided a copy of the Bakrania Document as requested.

8. According to the applicant, on the 11th April 2013 before the file was submitted to the Director of Public Prosecutions (D.P.P), the said first investigating officer at the instigation of the Prosecutor went to the applicant's home in a convoy of police vehicles with several armed police officers and proceeded to humiliate him by arresting him and taking him away from his home in the presence of his wife, grandchildren and neighbours whose attention had been drawn by the large police presence at the home. He was thereafter taken to the Gigiri Police Station where the first investigating officer advised him to withdraw the Bakrania Document and to compromise the case with the Prosecutor and was released on cash bail of 20,000/- and told to report again on the 17th April 2013. He was however advised by his advocates to lodge a complaint with the Director of CID for further investigations which he did. When he reported back to Gigiri Police Station on 17th April, 2013 as directed, he was asked by the first investigating officer if he had withdrawn the said Bakrania Document and was again advised to reconsider his stand and report back again on 23rd April, 2013.

9. The applicant averred that the matter was taken over by CID headquarters for thorough investigations and he was asked to provide the original of the Bakrania Document, the report of a forensic Document Examiner appointed by his advocate on record and known specimen signatures of himself and the other signatories including those of the Prosecutor, all of which he provided and made a further statement when he was summoned to the CID headquarters by Senior Superintendent of Police (SSP) **John N. Kariuki** who had been appointed the investigator in the matter, from the 1st investigating officer. After the investigations the said documents were returned and he was later informed that the matter had been closed on the advice from the DPP.

10. According to the applicant, the Criminal Investigation Department made an independent investigation and made a finding that they ought not to prosecute him on account of two conflicting reports from Document Examiners and as the matter was essentially of a civil nature. Upon the file being placed before the Hon. the DPP for advice and directions, the DPP, based on a professional and lawful evaluation of all the relevant evidence and a consideration of all the circumstances directed that the file be closed. That notwithstanding, the Prosecutor decided to file a complaint before the Magistrate at the law Courts in Kibera alleging that the applicant had forged his signature on the Bakrania Document and the Hon. Magistrate granted the order and summoned to appear before the Court.

11. The applicant averred that upon objection being raised by his counsel with respect to the ex-parte proceedings which had resulted in a breach of the rules of natural justice, the Hon. Senior Resident Magistrate **Hon. B. Khaemba** condemned the Hon. the DPP for "culpable" conduct in deciding not to prosecute the applicant and on 10th June, 2015, granted the Prosecutor herein leave to commence the Private Prosecution against the applicant for an alleged forgery of the Bakrania Document and compelled the applicant to plead to the Charge drawn by the Prosecutor and released him on a cash bail of 100,000/-.

12. The applicant contended, based on legal advise that the Hon. Magistrate failed to appreciate that a Criminal Private Prosecutions ought not to be encouraged, supported or undertaken in the prevailing circumstances. To the applicant, the conduct of the Prosecutor over these 15 years has caused him to suffer physical injury as his health has deteriorated with the anxiety of the never ending pursuit of the Prosecutor and he is now dependant on insulin injections to regulate his diabetes.

13. The applicant disclosed that ELC No. 114 of 2013 was part heard and was due for further hearing on the 19th October 2015 and that the Prosecutor had called his first witness in the said suit one **Nahum Muli**, (the First Investigating Police Officer).

14. It was the applicant's case that the Hon. the Magistrate had taken it upon himself to intermeddle in the civil dispute between the Prosecutor and himself and was aiding and abetting the oppression he had suffered and continued to suffer in consequence of the Prosecutor's conduct since 1999. To him, the prosecution is intended to intimidate him and ruin his reputation as the Prosecutor caused publication of the same in the media. He further was of the view that the aim of the prosecution was to harass him into paying him monies not lawfully due and to cause him pain and anguish and compel him to settle the Prosecutor's claim. He denied the Prosecutor's claim that he had defrauded him of monies from Praful's Limited. In support of this position, the applicant exhibited a copy of the proceedings in High Court civil Suit No 422 of 2002 in which he averred the Prosecutor stated on oath on the 8th April 2002 that he "... had no dispute in connection with the official business of Prafuls Ltd", which suit was dismissed as his claims had been settled at arbitration by family elders.

15. Suffice it to note that the applicant's case was corroborated by his advocate **Mr Mutinda** who filed an affidavit in support thereof.

16. In his submissions the ex parte applicant contended that his prosecution for an alleged criminal offence of forgery is motivated by a desire to punish and oppress him by brandishing the sword of Damocles over him and to coerce him to settle the civil suit in favour of the Prosecutor. To him, the decision of the Magistrate was irrational and denied him his Constitutional right to defend a suit which is part heard by a Judge of this Court in ELC No 114 of 2013 free from pressure of whatsoever nature.

17. According to the applicant, the said decision was made without due consideration for the principles of equality and just treatment of the Applicant in all the circumstances.

18. It was submitted that The Jurisdiction of this Hon. Court to intervene and provide relief by writs of certiorari and prohibition, to a person accused of criminal acts, where the purpose of the charge(s) is to further some ulterior purpose is well established. The ex parte applicant in support of his submissions relied on **R vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee KLR 2002.**

19. On the issue of prejudice, the applicant relied on **Stanley Munga Githunguri v. R [1986] eKLR** in which the former **Madan, CJ** expressed himself as follows:

**"Mr Chunga argued that the applicant acquiesced in his own prosecution. The applicant appeared in Court in answer to the summons, perhaps he was taken there under escort. He pleaded not guilty to the charges. No accused person acquiesces in his own prosecution on a criminal charge, not even for riding a bicycle without light. An accused person goes into a criminal Court trembling. He comes out somewhat shredded and shorn. He has no other option. It is not acquiescence, it is submission to the power of the law."**

20. The applicant submitted that the Constitution protects the right of equality before the law and equal protection of the law hence every decision maker has a duty to act fairly. He relied on Article 157 (11) of the Constitution which provides that the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process and cited **R vs Director of Public Prosecutions and Anor. Exp Manning [2001] QB 330** where it was held that:

**“..Crown Prosecutors must be satisfied that there is enough evidence to provide “realistic prospect of conviction”.....They must consider what the defence case may be and how that is likely to affect the prosecution case”.**

21. The Applicant submitted that he had been condemned to stand trial on a false allegation of forgery by a party whose predominant interest is to secure an ulterior motive, notwithstanding the fact that the Applicant has produced evidence that the allegation made against him is false. By his failure to adhere to the norms and standards of the constitution the learned Magistrate, **Hon. Khaemba**, the applicant claimed had given the Prosecutor the upper hand and placed him in a dominant position in the dispute where the Prosecutor expects to recover 100 million Kenya Shillings or thereabouts, hence gravely undermined the Applicant's right to defend himself in the civil suit where the validity of the Bakrania Document ought to be determined by a Judge of the High Court.

### **1<sup>st</sup> Interested Party's Case.**

22. According to the 1st interested party, the DPP received a police file vide a letter dated 24th May, 2013, that was an inquiry into a complaint by the Prosecutor herein against the *ex parte* applicant and upon perusal of the same, it was found that the dispute was between two siblings and was pending in civil courts. Further, there were conflicting handwriting experts reports and based on the prosecution policy, the DPP resolved that the criminal inquiry be closed. This decision according to the 1st interested party was made in the exercise of the powers conferred on the DPP pursuant to Article 157 of the Constitution.

23. Based on the decision in **Floriculture International Limited and Others High Court Misc. Appl. No. 114 of 1997**, the 1st interested party's position was that the *ex parte* applicant ought to have appealed if it was dissatisfied with the Court's decision.

### **2<sup>nd</sup> Interested Party's Case.**

24. According to the 2nd interested party herein, the Prosecutor, on 5<sup>th</sup> March 2013, his lawyers, **Kinyua Murriithi & Company Advocates**, received a copy of the agreement dated 23<sup>rd</sup> January 1990 indicating that the Prosecutor had transferred his share in property LR No. 209/1/06 to the *ex parte* applicant, which agreement was purported to have been signed by the Prosecutor on 23<sup>rd</sup> January 1990, yet on the said date he was not in Kenya as he had travelled out of Kenya on 21<sup>st</sup> January 1990 and returned on 24<sup>th</sup> January 1990.

25. It was averred that the Prosecutor made a complaint of forgery at Gigiri police vide OB 16/25/03/13 and an investigator (the 3<sup>rd</sup> interested party) was appointed to deal with his case and all the necessary witnesses recorded their statements and investigations were conducted and concluded. The 2<sup>nd</sup> interested party's specimen signatures and known signatures together with the said agreement were referred to a Government Forensic Document Examiner for examination who made a report confirming that the same was a forgery.

26. It was averred that the *ex parte* applicant was arrested on 11<sup>th</sup> April, 2013 and given a Police Bond, on the instructions of the DCIO, and to appear in court on 18<sup>th</sup> April 2013. However, on the said date, the *expert* applicant was not brought before court to be charged. Thereafter, the Prosecutor's advocates followed up the case with the relevant authorities and indicated that there were some officers at the C.I.D Headquarters who were trying to stifle the criminal proceedings against the *expert* applicant. Subsequently, the DPP called for the file from the Director of Criminal Investigations and upon receiving the file, wrote a letter dated 19<sup>th</sup> July 2013 to the Prosecutor stating that the dispute was of civil nature between siblings and should be pursued through the pending civil proceedings. To the Prosecutor, however, forgery is not a civil matter and he requested the DPP to prosecute the *ex parte* applicant but without any success though in his view, there were no good reasons for failing to do so.

27. According to the Prosecutor, it was this refusal to prosecute the *ex parte* applicant that informed his decision to file an application dated 11<sup>th</sup> December 2013 in Kibera Magistrates court seeking leave to commence private prosecution against the *expert* applicant which application was granted as the same was not opposed by the DPP and the Prosecutor proceeded to prepare a charge sheet and Criminal Case No. P (1 of 2014) commenced whereby plea taking was scheduled for 11<sup>th</sup> June 2014. However, on that date the *ex parte* applicant did not attend court and but through his advocate he requested the plea taking to be deferred and the same was differed to 17<sup>th</sup> June 2014 on which date the *ex parte* applicant through his advocate raised objection to the proceeding on the ground that the leave to prosecute was granted in the absence of the *expert* applicant. The Honourable Magistrate made his ruling on 26<sup>th</sup> September 2014 and directed the Prosecutor to file a fresh application to allow the *ex parte* applicant to participate in hearing of the application seeking leave to commence private prosecution which the Prosecutor did and after hearing all the parties, the Prosecutor was granted leave to prosecute the *expert* applicant. On the same day a charge sheet was signed by the Magistrate (**Honourable Khaemba**) and the *ex parte* applicant took plea and pleaded “not guilty”. It was this turn of events that led to the filing of these proceedings.

28. It was submitted on behalf of the Prosecutor that judicial review proceedings are not concerned with the merits but with the decision making process and that judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review.

29. Based on Article 157 (6) of the Constitution 2010 and section 88 of the **Criminal Procedure Code**, the Prosecutor submitted that a magistrate trying a case may permit prosecution to be conducted by any person with permission of the court if they are not a public prosecutor or an officer authorized by the DPP. In his view, this court only needs consider whether the Chief Magistrate acted without jurisdiction or contrary to the law in granting the permission to the 2<sup>nd</sup> interested party to

prosecute the ex parte applicant but ought not to interfere with the decision of the Honourable Magistrate as that will amount to sitting on appeal. To the Prosecutor, the Honourable Magistrate acted within his power under the provisions of Section 88 of the **Criminal Procedure Code**.

30. On whether the private prosecution should be discontinued, the Prosecutor relied on **Republic vs. Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii [2014] eKLR**, **Thomas Nyakambi Maosa vs. Kibera Chief Magistrate & 3 Others [2015] eKLR** and **Republic vs. Director of Public Prosecutions & 3 Others Ex-Parte George Peter Opondo Kaluma [2015] eKLR**.

31. The Prosecutor reiterated that as the ex parte applicant had not demonstrated or tendered any evidence to court to prove the allegations made, his application ought to be dismissed with costs to the Prosecutor.

### **3<sup>rd</sup> Interested Party's Case**

32. The 3<sup>rd</sup> interested party, **Nahum Muli**, on her part denied that she had using the criminal process to force the *ex parte* applicant to compromise with the 2<sup>nd</sup> Interested Party and averred that her intention was to attain criminal justice and not any other purpose. According to her it was not true that she demanded the *ex parte* applicant to withdraw the Bakrania document since she had no interest whatsoever in him withdrawing the said document. She further denied that she intimidated or harassed the *ex parte* applicant as alleged but asserted that she did work applicant in accordance with the law.

33. In her view, she did her investigations and upon establishing a reasonable suspicion arrested the *ex parte* applicant hence was not compromised by the 2<sup>nd</sup> Interested Party. It was her view that the issues raised by the ex parte applicant ought to be raised at the trial court so as to form part of the *ex parte* applicant's defence during the trial.

34. According to her, she gave her evidence-in-Chief in the ELC but the *ex parte* applicant's advocate indicated that he would not cross-examine her because he had not read the police file. When the matter was fixed for a hearing on a later date, she was in court but was unwell. On 19<sup>th</sup> October 2015, the matter came up for hearing again but she was on official duty and had indicated so to the 2<sup>nd</sup> Interested Party's advocate. She was however ready and willing to give her full evidence in ELC No. 114 of 2013 and denied that she had refused to give evidence as alleged.

35. According to the 3<sup>rd</sup> interested party, the ex parte applicant's allegations against her were unsubstantiated by any evidence.

### **Determination**

36. It is important to first deal with the circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.

37. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.

38. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

**“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”**

39. In Meixner & Another vs. Attorney General [2005] 2 KLR 189, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

40. In this case, it is clear that the whole dispute between the parties herein rests on the Bakrania document. It is this document that the Prosecutor relies on to found a cause of action for his private prosecution in which he alleges that the ex parte applicant herein is guilty of forgery. It is the same document which is the subject of the ELC 114 of 2013 in which he *inter alia* sought orders that the co-ownership in LR No. 209/11/6 be dissolved and the said property be sold and the proceeds thereof be shared between the Plaintiff and the Defendant as per the shares and that the accounts of the rents derived or which ought to have been derived in the said property be taken and the Defendant be ordered to pay the Plaintiff ½ share of the said rents. The unravelling of this suit may well depend on the determination the Court makes on the authenticity of the said Bakrania document.

41. **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

42. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute”.

43. The Court went further to hold that:

“It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued

that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings....”

44. It is therefore clear that this Court has the power and indeed the duty to bring to a halt, criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. In Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi (supra) it was held:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

45. In Meixner & Another vs. Attorney General (supra) it was held:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

46. The mere fact that criminal proceedings have been commenced does not bar the court from halting them as long as the same have not been determined. In my view, it is only where the decision in question is complete that the Court cannot stay the same. However where what is sought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings. In criminal proceedings the mere fact that the proceedings are ongoing does not bar the Court from staying the same at any stage of the proceedings before they come to an end. Accordingly this Court still has jurisdiction to stay the prosecution of the criminal proceedings.

47. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case, in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, Waki, J (as he then was) relying on the decision of Kuloba, J in **Vincent Kibiego Saina vs. The Attorney General HC Misc. Appl. 839 and 1088 of 1999** held:

**“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved...If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by this court... It seems to me, whichever way I look at it, that the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in”**

48. As rightly submitted by the ex parte applicant here were remarkable resemblance in the above case to the particulars of the instant case. Just like in the instant case, the prosecuting authority had declined to undertake prosecution when the complainant took it upon himself to institute private prosecution. In the said case, the parties were also formerly close businessmen just like the siblings in the instant case.

49. It was similarly held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that:

**“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”**

50. The role of police in criminal process was recognised in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

**“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.**

51. However, it was similarly appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

**“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.**

52. In this case the ex parte applicants' case is that there exists a civil suit in which the issues are being canvassed. However, the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not *ipso facto* amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In other words the prosecutor must be actuated more by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose in such circumstances would be to further

that ulterior motive and that is when the High Court steps in. In this case the criminal process had already commenced and it is not contended that in the course of the said proceedings an event took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. It must be remembered that justice must be done to both the complaint and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.

53. In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings. Similarly the mere fact that there are pending civil proceedings on the same subject matter does not *ipso facto* warrant the halting of otherwise *prima facie* proper criminal proceedings. It is however upon the person seeking that the criminal proceedings be halted to justify the grant of such orders.

54. In the instant case there are two sets of evidence in form of document examiner's reports which seem to paint conflicting versions.

55. In light of such conflicting versions, there is a real probability that the outcome of the criminal proceedings may be in conflict with the outcome of the civil proceedings. Such a probability ought to be avoided by all means in order to maintain the dignity of the legal process and in order not to portray legal proceedings as a circus.

56. In these proceedings however, I am not satisfied with the position taken by the ex parte applicant that he is unlikely to receive a fair trial simply because the Respondent Court gave the Prosecutor the green light to proceed with the private prosecution.

57. The criminal justice system in Kenya is structured such that every accused person has a right to a fair trial and this is a guaranteed right enshrined in the Constitution. I therefore do not see any reason to apprehend that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial. As was appreciated by this in **Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR:**

**“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”**

58. Taking into account the manifest conflict in evidence emanating from the two experts, it is my view that in the instant application the prosecutor has not demonstrated that he has a reasonable and probable cause for mounting a criminal prosecution at least before the authenticity of the said Bakrania document is determined. My decision herein is similarly informed by the need to avoid apparently conflicting decisions in light of such conflicting versions. As was held in **Githunguri vs. Republic (1985) KLR 91:**

**“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”**

### **Order**

59. In the premises, without determining the merits of the criminal proceedings, it is my considered view that the criminal proceedings ought to be halted for the time being. Accordingly, I grant the following orders:

**1. An order of prohibition is hereby issued directed to the Chief Magistrate Kibera or any other Magistrate to prohibit the prosecution of the Applicant SHURISHCHANDRA BHARMAL SHAH in Private Prosecution No. 1 of 2014 or any charge relating to a document dated 23<sup>rd</sup> January 1990, signed by Mr. Bakrania Advocate, on the 23 January 1990 pending the hearing and determination of the said HCCC 114 of 2013 which pending before the Environment and Land Court.**

**2. As the determination of the real question in controversy is yet to be resolved there will be no order as to costs.**

60. It is so ordered.

**Dated at Nairobi this day 20<sup>th</sup> day of May, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Mutinda for MrRebello for the Applicant**

**Mr Mwangombe for 2<sup>nd</sup> interested party**

**Mr Mwangi for the 3<sup>rd</sup> interested party**

**Cc Mutisya**