



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & GATEMBU, J.J.A)

CIVIL APPEAL NO. 70 OF 2017

BETWEEN

**PRAFULCHANDRA BHARMAL .....APPELLANT**

AND

**THE CHIEF MAGISTRATE KIBERA.....1<sup>ST</sup> RESPONDENT**

**SHURISHCHANDRA BHARMAL SHAH.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....3<sup>RD</sup> RESPONDENT**

**NAHUM MULI.....4<sup>TH</sup> RESPONDENT**

*(An Appeal from judgement and order of the High Court of Kenya at Nairobi (Odunga, J.) dated and delivered on 20<sup>th</sup> May 2016*

in

**NRB JR. Misc .Appl. No. 212 of 2015)**

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**JUDGMENT OF THE COURT**

1. At the centre of the dispute in this appeal are two brothers, ***Prafulchandra Bharmal*** (the appellant) and ***Shurishchandra Bharmal Shah*** (the 2<sup>nd</sup> respondent). They have been entangled in a long ragging dispute over the ownership of a property known as **Land Reference No 209/11/6** situated within Parklands Nairobi (suit property). The record shows the dispute has procrastinated for more than two decades. The parties have attempted to engage arbitrators and some matters were also filed in court to resolve the issue of ownership of the suit property and currently there is a civil suit before the Environment and Land Court being **civil case No 114 of 2013**. In the said suit, the appellant has sued the 2<sup>nd</sup> respondent seeking *inter alia* orders that the co-ownership in the suit property be dissolved and the property be sold and the proceeds thereof be shared between the appellant and 2<sup>nd</sup> respondent as per the shares; that accounts of the rents derived or which ought to have been derived in the suit property be taken and the 2<sup>nd</sup> respondent be ordered to pay the appellant 1/2 share. As the hearing of the said suit is still proceeding, we wish to say no more.

2. The matters that gave rise to the instant appeal were triggered by a complaint filed by the appellant at Gigiri Police Station against the 2<sup>nd</sup> respondent. The appellant accused the 2<sup>nd</sup> respondent of forging his signature in an agreement dated 23<sup>rd</sup> January, 1990 drawn by Bakarania advocate, (**Bakarania agreement**). The police seemed to have moved with gusto against the 2<sup>nd</sup> respondent, by subjecting him to a dramatic arrest. The police nonetheless gave the 2<sup>nd</sup> respondent a police bond but did not charge him, although he accused the 4<sup>th</sup> respondent (a police officer) of threatening and using arm-twisting tactics to force him to withdraw the said Bakarania agreement, which purported to settle the ownership dispute in regard to the suit property so that he was not charged with the offence of forgery. In this respect the 2<sup>nd</sup> respondent complained that he was made to appear at the police station for mentions when the 4<sup>th</sup> respondent repeated the threats.

3. Ultimately the advocate for the 2<sup>nd</sup> respondent wrote letters to the Director of Criminal Investigations (DCI) and to the Office of Director of Public Prosecutions (ODPP), accusing the police of misuse of power in arresting the 2<sup>nd</sup> respondent in connection with an offence of forgery of an agreement in respect of the suit property. The advocate asserted that the dispute over the suit property was a civil matter, involving siblings and not a criminal offence. He further pointed out that the same dispute was pending before the High Court, for hearing

and determination. By a letter dated 26<sup>th</sup> July, 2013 the DCI indicated that after they forwarded the investigation file to ODPP, the police were directed to close their file and to advise the parties to continue seeking a civil remedy as per the court case.

4. Undeterred, the appellant made an application before the Chief Magistrate's Court at Kibera seeking leave to institute private criminal proceedings against the 2<sup>nd</sup> respondent for an alleged offence of forgery. The appellant was granted leave by the Chief Magistrates' (Brian Khaemba, SPM) permitting him to prosecute the 2<sup>nd</sup> respondent for an alleged offence of forgery contrary to **Section 345 and 349** of the Penal Code. The 2<sup>nd</sup> respondent challenged the said criminal proceedings before the High Court by way of a judicial review, where he sought orders of *certiorari* to quash the order by the Chief Magistrate permitting the appellant to prosecute the 2<sup>nd</sup> respondent for an alleged offence of forgery contrary to **Section 345 and 349** of the Penal Code; an order of *certiorari* to quash the charge sheet and all the proceedings and decisions made by the Chief Magistrates' Court in Private Prosecution **Case No 1 of 2014** and an order of prohibition against the prosecution of the 2<sup>nd</sup> respondent in regard to the said private prosecution or any charge relating to a document dated 23<sup>rd</sup> January, 1990 signed by **Mr. Bakrania Advocate** on the 23<sup>rd</sup> January, 1990 save with an order of the High Court.

5. Upon hearing the parties, and by a judgment dated the 20<sup>th</sup> May, 2016 Odunga J., made the following orders;

***“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 SHRUSHCHANDRA 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<sup>rd</sup> January, 1990 pending hearing and determination of HCCC 114 of 2013 which is 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”***

6. The appellant was aggrieved by the said order and he therefore filed the instant appeal which is predicated on some six grounds of appeal. The appellant contends that the learned Judge erred in law and fact for; holding that Judicial Review proceedings are not concerned with the merits, but decision making but went ahead to dwell on the merits of the private prosecution case **No 1 of 2014**; that despite holding that the facts disclosed both a criminal offence and civil liability, which did not entitle the court to bring to a halt criminal proceedings, the Judge nonetheless halted the private prosecution pending the hearing of **HCCC 114 of 2013** which is pending before Environment and Land Court (ELC); that the 2<sup>nd</sup> respondent did not bring evidence to show that the private prosecution case was meant to force him to settle the High Court case; that the order of prohibition was issued against the weight of the evidence and decided cases and finally that the Judge usurped the powers of the trial court by holding that the prosecutor in the private prosecution matter did not demonstrate a reasonable and probable cause to support private prosecution. The appellant therefore prayed that the said judgment be set aside and in its place an order to issue dismissing the judicial review application be issued with costs to the appellant.

7. The 2<sup>nd</sup> respondent did not take the matters lightly, so he filed a notice of cross-appeal challenging the same judgment on the grounds that the Judge erred in law; in not finding that the order by 1<sup>st</sup> respondent was made without jurisdiction; that the intended prosecution of the 2<sup>nd</sup> respondent by the appellant was oppressive, malicious and undertaken in bad faith; the intended prosecution was directed at securing personal vendetta and vindictiveness; that the intended prosecution was undertaken for purposes not permitted by law hence unjustified, unlawful and against public policy; that private prosecution was demeaning and a challenge to the authority of the High Court which is seized of the dispute in **HCCC No 114 of 2013** and this Court which is handling an appeal between the appellant and the 2<sup>nd</sup> respondent and having found that the appellant had no reasonable or probable cause for mounting a criminal prosecution failed to issue an order totally prohibiting the prosecution of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent therefore prayed that we grant orders as prayed in the cross-appeal and dismiss the appeal with costs.

8. During the hearing, **Mr. Mwangombe**, learned counsel appeared for the appellant. However, the **Chief Magistrate Kibera**, the **Director of Public Prosecutions** and **Nahum Mule**, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively did not appear although they were duly served with the hearing notice, while learned counsel **Mr. Rebelo** appeared for the 2<sup>nd</sup> respondent.

9. **Mr. Mwangombe** wholly relied on the written submissions filed on 3<sup>rd</sup> November, 2017 and 9<sup>th</sup> October, 2019. In his submissions counsel gave a brief overview of the history of the dispute that can be traced to an agreement dated 23<sup>rd</sup> January, 1990 which indicated that the appellant had allegedly transferred his share of the suit property to the 2<sup>nd</sup> respondent. The appellant complained to the police that his signature was forged and filed a forgery case at the Gigiri Police Station. The police started investigations leading to the arrest of the 2<sup>nd</sup> respondent. However, the 2<sup>nd</sup> respondent was not charged as his advocate protested vide letters written to the ODPP claiming that the dispute was of a civil nature. The 2<sup>nd</sup> respondent went on to file a judicial review application challenging the private prosecution which was allowed thereby giving rise to the instant appeal.

10. Expounding on the grounds of appeal which were collapsed into one, counsel for the appellant submitted that the Judge contradicted himself in the said judgement when he first cited relevant authorities on the principles that are applicable in granting orders of *certiorari* and *prohibition* as stated in the case of **Kenya National Examination Council (Exparte) Geoffrey Gathenju Njoroje Civil Appeal No. 266 of 1996**. This Court stated that an order of *certiorari* can be issued to quash a decision already made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. Therefore, the prerogative orders are issued to stop an inferior tribunal or body from continuing with proceedings that are in excess of jurisdiction or in contravention of the laws; that an order of prohibition does not issue to correct a wrong decision on the merits of the proceedings. According to counsel, the Chief Magistrates' Court had jurisdiction to grant leave to institute private prosecution in accordance with the provisions of **Section 88** of the **Criminal Procedure Code**.

11. Counsel for the 2<sup>nd</sup> respondent made reference to a portion of the Judgment where he contended that the Judge contradicted himself by agreeing that the evidence disclosed both elements of criminal and civil liability. He cited paragraphs 54-56 of the impugned judgment where the Judge stated as follows: -

***“In the instant case there are two sets of evidence in form of document examiner’s reports which seem to paint conflicting versions***

***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.***

***In these proceedings however, I am not satisfied with the position taken by the exparte 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”***

Counsel therefore urged us to allow the appeal with costs and dismiss the cross- appeal.

12. The appeal was opposed by **Mr. Rebelo**, who he relied on his written submissions filed on 3<sup>rd</sup> April, 2019 and made some oral highlights. Counsel begun by attacking the competency of the appeal which he submitted was filed out of time. The order was issued on the 30<sup>th</sup> May, 2016 and the appeal was supposed to have been filed by 30<sup>th</sup> July, 2016 but instead it was filed on 17<sup>th</sup> March, 2017, which was eight (8) months late as there was no certificate of delay issued, or an order extending time to file the appeal out of time. Counsel urged us to dismiss the appeal on that ground. Further, counsel pointed out that the record of appeal was incomplete for failure to include the trial Judges’ notes as provided under **Rule 87 (1) (d) of the Court of Appeal Rules**. On the merits of the appeal, counsel submitted that the judicial review order was directed at the Chief Magistrate, Kibera or any other magistrate and none of them has appealed.

Therefore, the appellant had filed the appeal merely to deny the 2<sup>nd</sup> respondent his right to fair and just treatment and to obtain an upper hand in a civil suit as he was not a primary party in the Chief Magistrates’ Court. Counsel supported the High Court judgment which he argued was buttressed by the fact that it has wide ranging discretionary and supervisory powers over the magistrate’s court.

13. On the cross-appeal, counsel for the 2<sup>nd</sup> respondent submitted that it was not opposed by the appellant, who did not file any response thereto, which in his view was an admission that it is merited. Counsel faulted the Judge nonetheless for not answering one critical question on the purpose of the private prosecution which was obvious, that the appellant was trying to gain an upper hand in the civil suit. Counsel further submitted that both the magistrate and the Judge failed to appreciate how the flawed process of dragging the 2<sup>nd</sup> respondent through a criminal trial caused him pain and anguish. That the evidence was clear that the appellant abused the legal process so as to arm twist the 2<sup>nd</sup> respondent to settle the civil case. Thus, counsel faulted the Judge for misinterpreting the dicta in **Githuguri vs. Republic, Cri. App. No. 271 of 1985** as it was demonstrated that the prosecution was bad from the start of the judicial process, it was aimed at securing private vengeance and vindictiveness which is contrary to public policy and public interest. This is spelt out in **Article 157 (11)** of the Constitution where it states: -

***“In exercising the powers conferred by this Article 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”***

According to counsel for the 2<sup>nd</sup> respondent, the dispute between the appellant and 2<sup>nd</sup> respondent over ownership of the suit property is a purely civil matter between siblings and that is why the DPP ordered the police to close the file as no public interest would be served by the prosecution of the 2<sup>nd</sup> respondent. Counsel urged us to allow the cross- appeal.

14. By the appellant’s supplementary submissions which we will consider as a reply, counsel has given a chronology of how he applied for proceedings on 3<sup>rd</sup> June, 2016 to enable him file an appeal, the letter bespeaking the proceedings was served on counsel for the 2<sup>nd</sup> respondent but his office declined to acknowledge receipt; that he paid a deposit fee of Ksh. 5700 for the typed proceedings and was issued with a receipt; the court file went missing until the matter was mentioned before the trial Judge on 1<sup>st</sup> March, 2017 and the Judge ordered the registry to reconstruct a skeleton file but as the registry took time, counsel for the appellant was forced to file the record of appeal without the judge’s notes. He obtained a confirmation from the registrar of the High Court that the court file went missing and therefore no proceedings were prepared. Moreover, counsel argued that the 2<sup>nd</sup> respondent has not suffered any prejudice nor has he complied with the provisions of **Rule 84**, especially the proviso thereto that requires an application to strike the appeal be made within thirty (30) days from the date of the service.

15. On cross-appeal, counsel submitted that the High Court Judge properly considered the guiding principles but erred in issuing a prohibition against the prosecution of the 2<sup>nd</sup> respondent over the agreement dated 23<sup>rd</sup> January, 1990; That judicial review proceedings are not concerned with the merits of the case but decision making process thus the Judge erred by finding that in granting the leave to prosecute, the magistrate acted in excess of jurisdiction. Counsel reiterated that the magistrate has power under the provisions of the Criminal Procedure Code to grant leave once satisfied on a *prima facie* basis that a cognizable offence had been committed and that the police or the DPP had failed to take action. Counsel urged that we dismiss the cross-appeal and allow the appeal with costs to the appellant.

16. We have considered the record of appeal and deliberated on both written and oral submissions and authorities cited. We have discerned the following three issues for determination: - Whether the appeal should be struck out for the inadequacies pointed out by counsel for the 2<sup>nd</sup> respondent; whether the Judge erred in granting the order of prohibition against prosecution of the 2<sup>nd</sup> respondent in **Criminal Private Prosecution No. 1 of 2014** before the Chief Magistrate Court at Kibera and whether the cross appeal should be allowed in the manner sought or at all.

17. It is common ground that the appellant did not include some documents in the record of appeal which are provided for under **Rule 87** of the **Court of Appeal Rules**. Key among them is a certificate of delay to demonstrate that the appeal was filed within time and the record of proceedings before the court below. It is also common ground that the High Court file went missing. What is quite significant for us to consider is the proviso to **Rule 84** which provides that if the 2<sup>nd</sup> respondent desired to make an application to strike out the record of appeal that ought to have been done within thirty (30) days from the date of service of the record. That was not done and there is no explanation offered. We also need to say, that there has been a paradigm shift by virtue of the provisions of **Article 159** of the Constitution. The Court's focus is on the goal of administering substantive justice such that the circumstances such as loss of court file, the 2<sup>nd</sup> respondent's failure to apply for striking out as provided by the Rules so that perhaps the appellant would be given another chance to remedy the situation and the fact that under **Rule 92**, the 2<sup>nd</sup> respondent had an opportunity also to file a supplementary record of appeal which he did not do, convinces us that this appeal should not *ipso facto* be for dismissal but should be heard on merit.

18. On whether the order of prohibition was properly issued, it is necessary for us to mention that, judicial review orders are discretionary in nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it is imperative for the appellant to demonstrate that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.

19. Having examined the substance of the Judicial review application, it is our view that the crux of the matter is whether there was abuse of power by the appellant when he sought leave, which was granted to institute private criminal prosecution against the 2<sup>nd</sup> respondent. It is common ground that a civil suit which was filed on 23<sup>rd</sup> January, 2013 to determine the issues of ownership of the suit premises was pending in the High Court. The suit was filed by the appellant and the key issue therein is whether the **Bakarania** agreement is valid and it is the same document that was the centre of the private criminal prosecution case. In determining this issue, the learned trial Judge considered the principles that guide the DPP in determining whether to prefer criminal such as **Article 157(11)** which provides that: -

**“In exercising the powers conferred by this Article, 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.”**

He further cited and drew a parallel from many decided cases among them, **Francis Kirima Míkunyua & Others vs DPP [2017] eKLR** where Majanja, J. pronounced himself as follows: -

**“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 in 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”.**

20. In answering whether there was abuse of power, the Judge too discussed at length the safeguards that exist under criminal law in regard to an accused person to ensure a fair trial which is also a guaranteed right enshrined in the Constitution. He also appreciated that **Section 193 A** of the **Criminal Procedure Code**, allows concurrent litigation of civil and criminal proceedings arising from the same issues but cautioned that the prerogative of the police to investigate crime must be exercised according to the laws of the land and in good faith. What we understand the Judge to be saying in this regard is that the mere fact that leave was granted to the appellant to institute private criminal prosecution, this *ipso facto* did not mean that the 2<sup>nd</sup> respondent would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Having said that, the Judge went further to infer the unique circumstances prevailing in this matter, and posited that, if the private prosecution were to proceed, it would amount to an abuse of process. He pointed out and rightly so in our view, that if both the civil and the private criminal prosecution cases which were all centred on the **Bakarania** agreement were to proceed for hearing in both courts, there was a likelihood of the two processes giving rise to two different outcomes as there were also two sets of evidence in form of document examiners' reports. To us this was not a merit determination but a commentary on the process. We do not also see any contradictions as the Judge was restating the well-established principles of a fair trial.

21. Was there abuse of process to warrant an order prohibiting the criminal charge? In **Jago v District Court (NSW) 168 LLR 23, 87 ALR 57** Brennan, J. said in part at p. 47-48: -

**“An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.”**

We are aware that the categories of abuse of process are not limited. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In **Walton v Gardener [1993] 177 CLR 378**, the High Court of Australia said at para 23 –

**“The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartiality may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.”**

21. It is not lost to us that both the appellant and 2<sup>nd</sup> respondents are siblings; they have been involved in a dispute over the suit property for a long time; the appellant is the one who filed a civil suit, a defence was filed and when the civil suit was still pending, he instituted a private criminal prosecution. At the backdrop of all this, even the appellant's complaint against the 2<sup>nd</sup> respondent was subjected to police investigations and the DPP directed the police file be closed. We are on our part persuaded that in the circumstances of this matter, an order of prohibition was justified to protect the court process from being used to settle a civil dispute which was pending and that allowing the criminal process was likely to embarrass the courts. To us, this order was appropriate as the Judge had to navigate carefully so as not to make far reaching pronouncements that would embarrass the pending civil trial.

22. On the cross-appeal, counsel for the appellant urged that the Judgement should be varied or reversed to the extent that the Judge erred in law in not finding that the learned Magistrate acted in excess of jurisdiction when he granted leave to institute private prosecution; that the said prosecution was malicious and undertaken in bad faith; directed to secure personal vendetta and vindictiveness; unjustified, unlawful and demeaning the authority of the High Court that was seized of **ELC No. 114 of 2013** and against public policy. Counsel for the 2<sup>nd</sup> respondent submitted that the dispute is a commercial one over the ownership of property between two brothers. That it is not a case involving abuse of public office or loss of public funds, or assets and there is no strong public interest in the institution of the private criminal proceedings.

23. We have considered these grounds within the parameters set out in in the case of **MBOGO vs. SHAH [1968] E.A. 93: -**

**“....A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.**

It is also undeniable that the constitutional prosecutorial power of the DPP is reviewable by the High Court as **Article 165(2)(d)(ii)** of the Constitution ordains. The DPP ordered the police file to be closed; the appellant did not challenge that decision in the High Court but pursued a similar complaint by way of private prosecution. The correct procedure in view of the Constitutional mandate given to the DPP, would have been for the appellant to seek review of the order by the DPP if he felt that it was unreasonable. Circumventing the DPP's order by instituting private prosecution would appear as an attempt to usurp the mandate given to the DPP without first establishing, that the exercise of discretion by the DPP was unlawfully done by; *inter alia*, failing to exercise his own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual. We find that it was unprocedural for the appellant to have instituted private prosecution, before challenging the order by the DPP. Nonetheless we find this whole process was halted by the order granted by the Judge that prohibited the prosecution of the 2<sup>nd</sup> respondent in private prosecution case **No. 1 of 2014** or any charge relating to the document dated 23<sup>rd</sup> January, 1990 signed by **Mr. Bakrania** advocate pending the hearing and determination of the civil suit.

24. Is the cross-appeal merited? As stated above, the order of prohibition was comprehensive enough to stop any abuse of the court process; besides that, it is apparent to us that the prayers sought in the cross- appeal were not sought in the notice of motion the subject of this appeal. These are the prayers sought by the 2<sup>nd</sup> respondent; -

**“1. The prerogative order of certiorari do issue to remove into this honourable High Court and quash the order of the Hon. Chief Magistrate Kibera to permit Pratulchandra Bharmal Shah to prosecute the applicant herein for the alleged offence of forgery contrary to section 345 and 349 of the Penal Code.**

**3. The prerogative order of certiorari do issue to remove into the Honourable High Court and to quash the charge sheet and the charge of forgery signed by the Chief Magistrate Kibera.**

**4. The prerogative order of certiorari do issue to remove into this Honourable court to quash all the proceedings and decisions made in the Chief Magistrates' court at Kibera in Private Prosecution case No 1 of 2014.**

**5. An order of prohibition do issue directed at the Chief Magistrate Kibera or any other magistrate to prohibit the prosecution of the applicant in Private Prosecution No 1 of 2014 or any charge relating to a document dated 23<sup>rd</sup> January, 1990 by Mr. Bakrania advocate, on 23<sup>rd</sup> January, 1990 save with an order of this Hon. Court. ...”**

There are no prayers seeking declarations such as lack of jurisdiction, illegality, malice, usurpation of powers and so forth as sought in the cross -appeal. In the circumstances we are not persuaded that it would be appropriate to make pronouncements first in matters that were not pleaded, and secondly that would have far reaching implication on the pending civil matter.

25. In conclusion, we find no merit both in the appeal and the cross- appeals. We accordingly order both dismissed with no order as to costs.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of May, 2020**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb.**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original*

***Signed***

**DEPUTY REGISTRAR**