



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 113 of 2015

BETWEEN

TERESIA KAMENE KING'OO..... APPELLANT

AND

HARUN EDWARD MWANGI..... RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court

at Nairobi (Gacheru, J.) dated 13th March, 2015 in ELC No. 519 of 2008)

JUDGMENT OF THE COURT

1. The appellant is deceased. **Mr. Anthony Kilonzo King'oo** and **Mr. Fredrick Matee King'oo** were substituted on 24th January 2018 to prosecute the instant appeal in their capacity as duly appointed administrators of the Estate of the deceased.

BACKGROUND FACTS

2. The dispute between the parties relates to Nairobi LR No. 12661/27 situated in Karen area in Nairobi County and hereinafter referred to as the suit property. The appellant together with her deceased husband **Mr. Alphi King'oo Kioko** purchased the suit property in 1984. Adjoining the suit property is Nairobi LR No. 12661/27 which was also owned and registered in the name of the appellant and her deceased husband.

3. During the lifetime of both the appellant and her deceased husband, they borrowed money from one **Mr. Jayantkumar Jamnadas Ruparel**, an estate agent and a family friend. As security for the monies loaned, the suit property was charged to **Mr. Ruparel** and was duly registered at the lands office. From this point on, the rest of the facts are disputed.

4. In this appeal, the appellant contends that at all material times, she was entitled to ownership of the suit property.

5. The respondent contends that by a sale agreement dated 24th October 1995, the appellant and her deceased husband, as vendors, sold the suit property to the respondent; that the terms and conditions for sale as per the sale agreement were as follows:

(a) The purchase price was agreed to be Ksh. 3,000,000/=.

(b) The property was sold in vacant possession.

(c) The parties' joint advocates in the sale transaction was Mr.

Kembi & Muhia Advocates who were authorized to make necessary payments to Mr. J. J. Ruparel (deceased) from the deposits paid by the 1st respondent so as to have the charge on the property discharged by the said Mr. Ruparel and original title documents released.

6. The respondent contends that upon signing the sale agreement, he paid a deposit of Ksh. 300,000/= to the joint advocate who used Ksh.

150,000/= to clear the outstanding debt due to Mr. Ruparel; upon paying the loan balance, the joint advocate obtained from Mr. Ruparel the original title documents and a duly executed discharge of charge. The discharge was registered on 21st December 1995 and transfer in his favour registered on 22nd December 1995.

7. The respondent averred he paid the consideration of Ksh. 3,000,000/= as follows:

i. Ksh. 300,000/= deposited with the joint advocate out of which Ksh. 150,000/= was paid to Mr. Ruparel as balance of outstanding loan to secure discharge of charge and release of the original title documents.

ii. Ksh. 2,000,000/= paid by Bankers cheque No. 055385 to the appellant and her deceased husband. The cheque was forwarded to the appellant and her deceased husband by letter dated 28th February 1996.

iii. Ksh. 600,000/= agreed to be utilized by the respondent on repair of road of access leading to the appellant's adjoining property and the suit property as agreed vide letter dated 29th May 1997 and as authorized in a letter signed by appellant dated 14th July 1997.

iv. The balance was legal fees for the advocate.

8. Stressing that he lawfully acquired title to the suit property, the respondent prayed for damages for trespass to be awarded against the appellant.

9. The appellant denied and repudiated ever signing and executing the sale agreement dated 24th October 1995; she denied ever selling the suit property to the respondent; she averred that she is the one who paid the outstanding loan to Mr. Ruparel; she denied receipt of the purchase price of Ksh. 3,000,000/= as alleged.

10. In furtherance of her claim to the suit property, the appellant alleged that the transfer of title to the respondent was procured through fraud, forgery and or unlawful misrepresentation; the particulars of fraud and misrepresentation were stated to include preparing a fake transfer; fraudulently misrepresenting that payments had been made; fraudulently falsifying the instrument of transfer; fraudulently presenting that the appellant and her late husband had disposed of the suit property.

11. In the alternative, the appellant prayed for an order for adverse possession against the respondent on the basis that she has been in physical and actual possession and occupation of the suit property since 1984 and has been cultivating vegetables, beans and sweet potatoes without any interruption; and that she has been paying land rates due to the City Council of Nairobi.

12. During the hearing, two handwriting experts were called to testify. One supported the appellant's contention that the signature on the sale agreement dated 24th October 1995 was different from her known signature; the other stated the signatures were similar. Faced with conflicting expert opinion, the trial court rejected both opinions and made her decision based on evaluation of the material and evidence before the court. Upon taking viva voce evidence, the trial judge dismissed the appellant's suit and awarded damages for trespass in favour of the respondent in the sum of Ksh. 3 million.

13. In dismissing the suit, the judge expressed herself as follows:

"I find that the documents on record clearly shows that there was a transfer to the defendant and I find that the plaintiff herein and her husband sold the land to the defendant in the year 1995....."

The third issue did DW, the defendant pay the purchase price of Ksh. 3,000,000/= to the vendors? There was evidence adduced that after the sale agreement was executed, the defendant paid 10% of the purchase price. Thereafter, the said amount was used to pay Jamnadas Ruparel and Jamnadas thereafter executed a discharge of charge. The Plaintiff denied that her husband nor (sic) herself ever received the purchase price. I have seen the letter dated 23rd February 1996 addressed to King'oo Kioko which was forwarding a Bankers Cheque No. 055385 being proceeds for sale of LR No. 12661/28. There was no evidence produced to show that Bankers Cheque No. 055385 did not exist and that the King'ooos were not the beneficiaries. As it is now, the advocate who allegedly acted for both parties forwarded the Bankers Cheque to the vendors. Further, it was stated that the balance was to be used to repair the access road leading to the suit plot. There are two letters dated 29th May 1997 and 14th July 1997 which deals with the same issues. It is the court's findings that indeed the plaintiff, the defendant and Mr. Karingu Advocate deliberated for long on the issue of repairs of the access road through correspondences. I find and hold that the purchase price was indeed paid to the vendors...."

The court finds the defendant is the lawful proprietor of the suit land... He is therefore entitled to damages for trespass. Accordingly, the court awards the defendant damages for trespass in the tune of Ksh. 3,000,000/=...

The plaintiff has claimed that she is entitled to ownership by adverse possession. However, the court finds that she is not entitled to a claim for adverse possession. A vendor cannot fail to give vacant possession and thereafter claim for ownership of the same land through adverse possession. The court accordingly dismisses the said claim of ownership by adverse possession as alleged by the plaintiff."

GROUND OF APPEAL

14. Aggrieved and miffed by the judgment of the trial court, the appellant has lodged the instant appeal citing the following abridged grounds in his memorandum of appeal:

- i. The judge erred in finding the respondent had purchased LR No. 12661/28 from the appellant and her deceased husband and that the appellant and her husband executed the disputed Sale Agreement dated 24th October 1995.*
- ii. The judge erred in finding the respondent had paid the impugned purchase price of Ksh. 3,000,000/=.*
- iii. The judge erred in finding that the respondent's disputed claim to the suit land was not debarred by the Limitation of Actions Act.*
- iv. The judge erred in finding that the impugned Bankers Cheque No. 055385 existed.*
- v. The judge erred when he dismissed the expert evidence adduced by Mr. Martin E. Papa.*
- vi. The judge erred in finding the respondent paid the debt owed to Mr. Jamnadas Ruparel by the appellant and her deceased husband.*
- vii. The judge erred in finding the appellant had trespassed to the suit land*
- viii. The judge erred in dismissing the appellant's alternative claim of adverse possession.*
- ix. The judge erred in finding the respondent was entitled to damages of Ksh. 3,000,000/= for trespass together with costs of the suit.*

15. At the hearing of the appeal, learned counsel **Ms Julia N. Munyua** appeared for the appellant while learned counsel **Mr. Muturi Kamande** appeared for the respondent. Both counsel filed written submissions and lists of authorities.

APPELLANT'S SUBIMSSIONS

16. The appellant repeated her position that the suit property was never sold to the respondent; that she never executed the sale agreement dated 24th October 1995; that at all material times she has been in possession and occupation of the suit property and her alternative claim to adverse possession should have been allowed; she avowed that she is challenging the respondent's root of title; she did not see the sum of Ksh. 2,000,000/= allegedly paid by banker's cheque; that she cannot testify whether her deceased husband ever received the cheque; that she knew nothing about the alleged road repairs; that as far as she knows, her title deed to the suit property got lost at the Lands Office; that she sold a portion of the suit property to a one Mr. Mark Sang who has built a structure thereon; and that the trial judge erred in not according Mr. Mark Sang a hearing.

17. Counsel submitted that since the respondent's root of title is under challenge, **Section 112** of the **Evidence Act** imposes a mandatory duty on the respondent to prove how he got registered and acquired title to the suit property; that the respondent did not discharge the evidentiary burden as he failed to produce a copy of the alleged banker's cheque for Ksh. 2,000,000/=; that no bank statement was tendered in evidence to prove payment of any monies; and that there is neither a copy of deposit slip nor receipt nor instrument of acknowledgment from the firm of Kembi & Muhia Advocates that they received deposit of Ksh. 300,000/=. Further, there is no acknowledgment from Mr. Jamnadas Ruparel that he received any monies from the respondents; there is no evidence of client advocate instructions authorizing the firm of Kembi & Muhia Advocates to act for the parties in the sale transaction; and that the original letters dated 14th July 1997 and 28th February 1996 were never produced.

18. It was submitted that due to non-production of the original items of evidence as stated above, the Judge erred in holding that the sum of Ksh. 3,000,000/= had been paid as purchase price for the suit property; the judge also erred in finding that the sale agreement dated 24th October 1995 was valid; the judge failed to be guided by the probative weight of evidence on record adduced by the appellant and arrived at a wrong decision that the purchase price was paid; and that the respondent failed to discharge the evidentiary burden of proof and to prove he had acquired a valid and legal title to the suit property. (See **Samuel Kamere -v- Lands Registrar, Kajiado, Civil Appeal No. 28 of 2005**).

19. At the risk of repetition, counsel submitted that the judge hypothetically and without plausible explanation arbitrarily found the appellant and her deceased husband had received the sum of Ksh. 3,000,000/-; the judge erred in shifting the evidentiary burden of proof to the appellant and further erred in violating the appellant's constitutional inalienable right to fair trial; that the judge erred in relying on uncorroborated evidence contained in the impugned letters dated 29th May 1997 and 14th July 1997 to conclude that the purchase price had been paid to the appellant; and that the judge ignored the testimony of the land registrar as relates to the entries on time for discharge of charge and transfer of the suit property. For the foregoing reasons, counsel submitted that the respondent's purported purchase of the suit property was fraudulent, falsified and fabricated.

20. On limitation of actions, the appellant contends that the Judge erred in failing to find the respondent's claim to the suit property had been extinguished by limitation period; that the respondent has never been in possession of the suit property and if indeed the respondent acquired title in 1995, any claim to the suit property was extinguished after 12 years; that before 1995 to date, the appellant has been in possession of the suit property and consequently, the respondents impugned ownership of the suit property is subject to the appellant's overriding interest.

21. Counsel further submitted that the judge erred in concluding that the appellant had failed to deliver vacant possession of the suit property without considering the appellant's claim to adverse possession and overriding interest and that from 1995, the appellant has been in adverse

possession of the suit property and this evidence was not rebutted.

22. On damages for trespass awarded in the sum of Ksh. 3,000,000/= in favour of the respondent, the appellant contends the judge erred as the respondent's claim for trespass had been extinguished through adverse possession and limitation of actions. Moreover, damages for trespass should be assessed and computed and there is no basis in law as to how the judge computed and arrived at the sum of Ksh. 3,000,000/=; that it was not open to the judge to randomly come up with an unexplained figure of Ksh. 3,000,000/= and award the same as damages for trespass. The appellant concluded her submissions urging the respondent is not entitled to costs as the cause of action is debarred by the limitation period.

RESPONDENT'S SUBMISSIONS

23. In his submission, the respondent urged the trial judge did not err as she conducted a careful analysis of the evidence and material before court; that advocate Peter Karingu of the firm of Kembi & Muhia advocates testified that he was the advocate for both parties in the sale transaction pursuant to the sale agreement dated 24th October 1995; he testified that the appellant by letter dated 14th July 1997 authorized release of Ksh. 600,000/= to the respondent for repair of the road of access; that the document examiner **Emmanuel Kenga** testified that the vendor's signature appearing in the sale agreement was the same as King'oo Kioko's (deceased) signature appearing in his identity card; and that indeed the deceased vendor Mr. Kioko executed the sale agreement. Counsel submitted that the judge did not err in finding the appellant jointly with her deceased husband sold and transferred the suit property to the respondent.

24. Submitting on allegations of fraud and misrepresentation, it was urged that it is not enough merely to list allegations of fraud and misrepresentation, cogent evidence must be led to prove the same and the appellant failed to do so. On burden of proof, it was submitted that the respondent discharged the evidentiary burden of proof and demonstrated how he acquired title to the suit property through transfer and payment of Ksh. 3,000,000/= as valuable consideration.

25. On damages for trespass awarded in the sum of Ksh. 3,000,000/=, the respondent urged us not to interfere with the award. Counsel submitted that the appellant has been in continuous possession and occupation of the suit land and this is trespass to land; that the respondent is entitled to mesne profits for the unauthorized use of the land. Counsel urged that in any event, the sum of Ksh. 3,000,000/= as damages for continuing trespass is on the lower side.

26. On the claim for adverse possession, it was urged that a vendor cannot sell land and refuse to deliver possession to a purchaser then claim adverse possession.

27. On the contestation that a Mr. Mark Sang was not given a fair hearing, the respondent submitted the said Mr. Sang was never enjoined in the suit; there is no evidence indicating he had acquired title to the portion of land that was allegedly sold to him; there was no obligation on the part of the trial judge to give a hearing to a person who was not a party to the proceedings; and that if at all Mr. Sang had any evidence to offer, it was incumbent upon the appellant to call him to testify.

28. Counsel for the appellant in response reiterated the contested facts, points of law and authorities cited in support of the appeal. In particular, counsel submitted that trespass to land is a tort and an action for trespass has a limitation period of 3 years and thus the respondent's alleged action in trespass was extinguished by **Section 4 (2)** of the **Limitation of Actions Act** which provide a 3-year limitation period for actions founded on tort.

ANALYSIS

29. We have considered the grounds of appeal, submissions by counsel and the authorities cited. As was stated in **Abok James Odera t/a A. J Odera & Associates -v- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, we remind ourselves of our primary role as a first appellate court namely to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the trial judge are to stand or not and give reasons either way. The test in deciding whether to uphold the trial court's conclusions on fact is set out in the quotation from Lord Simon's speech in **Watt v Thomas [1947] AC, 484 at p 485** as follows:

"...an appellate court has, of course, jurisdiction to review

the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but his jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight..."

30. In the instant matter, there is need to consider the appellant's contention that Mr. Kembi & Muhia Advocates had no authority to act for her in the sale transaction or at all; that no letter of client-advocate instruction was produced to prove the said firm of advocates had authority to act jointly for the vendor (appellant) and purchaser (respondent) in relation to the suit property.

31. **Mr. Peter Karing'u** (DW1) testified that in the year 1995, he was working at the law firm of Kembi & Muhia Advocates; that he is the advocate who dealt with all transactions relating to the suit property; he prepared the sale agreement dated 24th October 1995; that subsequent to execution of the sale agreement the respondent paid a deposit of Ksh. 300,000/= out of which Ksh. 150,000/= was to be paid to Mr. Jamnadas Ruparel to discharge the suit property. DW1 also testified that the appellant visited their offices and discussed the balance of

Ksh. 600,000/= that was to be used for road repairs; that the appellant as vendor wrote the letter dated 14th July 1997 authorizing release of money to the respondent to repair the road; that the appellant signed the letter dated 14th July 1997 in his presence.

32. We have considered the testimony of DW1 and the learned judge's evaluation of the same. The appellant in her submission reiterates the position that the firm of Kembi & Muhia Advocates had no instructions on the matter. The appellant contends the original the letter dated 14th July 1997 and allegedly signed by her was never produced in court. She denied having instructed the firm of Kembi & Muhia Advocates.

33. We have scrutinized the record, there is nothing that impugns the veracity and credibility of DW1. We do not doubt his testimony. There is no personal conflict of interest in DW1's testimony. We find the trial judge did not err in believing that the firm of Kembi & Muhia Advocates were instructed as the joint advocate for the appellant and respondent in relation to sale of the suit property.

34. Another ground put forth is that the judge erred in failing to accord Mr. Mark Sang a fair hearing. In her oral testimony, the appellant indicated she sold a portion of the suit land to a one Mr. Mark Sang. The said Mr. Sang was not called to testify hence the contestation that the trial court erred in determining the suit without according any hearing to Mr. Sang.

35. In civil proceedings, it is the plaintiff (the appellant in this case) who is solely responsible for deciding how to present her case and choosing which witnesses to call. (See **Dabbah -v- Attorney-General for Palestine (1944) AC 156; Whitehorn -v-R (1983) 152 CLR 657**). A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court cannot call any witness. If the appellant is of the view that Mr. Sang was a relevant and crucial witness, it was incumbent upon her (and not the court or the respondent) to call him to testify. Without drawing any inference on failure of Mr. Mark Sang to testify, in **Bukenya and Others -v- Uganda [1972] EA 549**, it was stated a court may infer that the evidence of an uncalled witness would tend to be adverse. In **Mann Holdings Pte Ltd and another -v- Ung Yoke Hong [2018] SGHC 69**, the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify. In **Elgin Finedays Ltd -v- Webb 1947 AD 744**, it is stated at 745:

“... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...”

36. Recalling it is the appellant who has the legal and initial evidentiary burden to adduce evidence and call any witnesses in support of her case, we are convinced the trial court had no obligation to call Mr. Mark Sang to adduce evidence. As correctly pointed out by the respondent, the said Mr. Sang was not a party to the suit before the trial court. For the foregoing reasons, the trial judge did not err in failing to accord Mr. Sang any hearing. We hasten to add that any proprietary interest that Mr. Sang acquired, shall acquire or shall not acquire over the suit property, depends on whether the appellant had any legal interest and entitlement to the suit property capable of being transferred to Mr. Sang. A purchaser can only acquire a good title as that which inheres or is vested upon the vendor. This is represented by the latin maxim *nemo dat quod non habet*, literally meaning "no one gives what they don't have."

37. An auxiliary contestation is that the trial judge erred in failing to find that the respondent did not tender cogent evidence to prove he paid the purchase price of Ksh. 3,000,000/=. At the risk of repetition, the appellant submitted that the respondent failed to produce a copy of the alleged banker's cheque for Ksh. 2,000,000/=; that no bank statement was produced to prove payment of any monies; there was neither a copy of deposit slip nor acknowledgment from the firm of Kembi & Muhia Advocates that they received a deposit of Ksh. 300,000/=; there is no acknowledgment from Mr. Jamnadas Ruparel that he received any monies from the respondent; and there is no evidence of client advocate instructions authorizing the firm of Kembi & Muhia Advocates to act for the parties in the sale transaction; and the original letters dated 14th July 1997 and 28th February 1996 were never produced.

38. It is not disputed that the appellant and her deceased husband owed some money to Mr. Jamnadas J. Ruparel. It is not in dispute there was a charge against the suit property in favour of Mr. Ruparel. There is no dispute Mr. Ruparel had original title documents to the suit property. It is disputed a banker's cheque for Ksh. 2,000,000/= was paid to the appellant. The letter dated 28th February 1996 written by the firm of Kembi & Muhia Advocates and addressed to Mr. King'oo Kioko of P. O. Box 24741 reads:

“RE: SALE OF LR No. 12661/28 to H. E. MWANGI

We write further to our letter to you of 7th December and now enclose herewith Ksh. 2,000,000/= by way of bankers cheque number 055385 in your names. The total balance of the purchase price less our charges will become payable upon compliance by you of special condition (1) of the agreement for sale i.e. the road repair works which were to be undertaken by you before completion.”

39. The record reveals that when the appellant testified, her testimony exposed scanty personal knowledge or simpliciter repudiation of facts relating to sale and transfer of the suit property to the respondent. The appellant testified she could not say whether her husband received the banker's cheque for Ksh. 2 million; she did not see the money; and that the access road was repaired by her late husband. The appellant gave bare denial of authenticity and contents of letter dated 14th July 1997 which is signed by herself as Mrs T. K. King'oo and addressed to M/s Kembi & Muhia Advocates.

40. In relevant excerpts, the letter dated 14th July 1997 allegedly signed by the appellant reads:

“RE: SALE OF LR No. 12661/28 TO H. E. MWANGI

“I refer to the above matter and to the various discussions between Mr. Mwangi, yourself and me.

I hereby authorize you to release the balance of the money to Mr. Mwangi so that he can commence construction of the road.....”

41. We have pondered whether the appellant had scanty knowledge of the facts or merely denied and repudiated the sale transaction. How on earth could the respondent have known that the original title documents were with Mr. Ruparel if there was no transaction relating to the suit property between the appellant, her deceased husband and the respondent? Why would the appellant be writing a letter to Ms Kembi & Muhia Advocate if the said advocates were not acting for and on her behalf in the transaction? The appellant's consistent testimony is that all documents tendered in evidence bearing her signature or that of her deceased husband are forgeries. Is it plausible that everyone was forging her signature? These questions have baffled our minds. The trial judge who had the benefit of examining the witnesses and determining their credibility was better placed to separate the wheat from the chaff.

42. We have reassessed the record. There is no scintilla of evidence pointing towards fraud, forgery and misrepresentation in the transfer and registration of title in the name of the respondent. The fundamental question is whether indeed the sale agreement dated 24th October 1997 was executed by the appellant and her late husband. Other than mere denial, there is sufficient corroborative facts that lend credence to due execution of the sale agreement by the vendors.

43. The first corroborative item is the discharge of charge signed Mr. Ruparel. We doubt that the discharge would have been signed if the balance of the outstanding loan had not been paid. DW1 counsel for the parties testified he paid Ksh. 150,000/= to Mr. Ruparel to obtain the original title documents and instrument of discharge. The appellant contends there is no acknowledgment of receipt of any monies by Mr. Ruparel. Indeed, this may be so but the arrangement between the parties was *a quid pro quo* – you pay Mr. Ruparel the balance and he releases the original title documents and executes the instrument of discharge. We are convinced Mr. Ruparel would not have discharged the property without payment.

44. The second corroborative item is the fact that there is no way the respondent would have known of the existence of Mr. Ruparel and the outstanding loan if this fact was not disclosed by the appellant as vendor of the suit property. This knowledge lends credence to and corroborates the appellant's testimony that indeed the title documents were with Mr. Ruparel.

45. The third corroborative fact is the letter dated 14th July 1997 signed by the appellant which excerpt has been reproduced above. The letter corroborates the respondents' evidence that there was a sale transaction between the parties. The letters refer to sale of the suit property to the respondent.

46. The appellant's response to these corroborative items of evidence is an averment that in the absence of the original letter and banker's cheque, everything is a forgery.

47. In our mind, the existence or non-existence of the banker's cheque for Ksh. 2 million is pivotal. The respondent tendered in evidence a copy of the letter forwarding the banker's cheque; the serial number of banker's cheque is given as No. 055385. The appellant contends that she was not aware of such payment and a copy of the banker's cheque and or bank statement ought to have been produced in evidence. It is contended the trial judge should have placed the burden on the respondent to prove that indeed the banker's cheque existed and it was paid to the appellant and her husband; and that the mere mentioning a cheque number and its forwarding letter is not sufficient proof of payment.

48. We have considered the appellant's submission on the banker's cheque. The respondent put in evidence corroborative items that show the terms of the sale agreement and how the mode of payment was performed. Upon the respondents tendering such evidence, the evidentiary burden shifted to the appellant to rebut (not to repudiate) performance of the terms of the sale agreement. In this matter, the appellant rebutted and repudiated performance of the sale agreement and denied in entirety the existence and validity of the sale agreement. The appellant would also have tendered her bank statement (s) to show the banker's cheque was never deposited or credited to her (their) account.

49. Our reflection of the appellant's submissions reveals the foundation of her case is denial of existence and validity of the sale agreement dated 24th October 1995. Such a denial excludes possibility of asserting that the terms of the sale agreement were not performed; nothing can be lawfully performed if there is no agreement to perform the same. On what basis was payment to be made or the access road to be repaired if there was no sale agreement? In our mind, the trial judge properly evaluated the evidence on record to find that indeed, there was a sale agreement signed between the parties and payment was made.

50. A ground raised in the appeal is that the judge erred in ignoring expert opinion of Mr. Martin Papa. In rejecting the expert opinion, the judge expressed herself thus:

“... In this case, there is a conflict of opinion by the experts called by both sides and I will therefore not be bound by their opinion and I reject their evidence. I will therefore consider the other evidence adduced and form my own conclusions.”

51. In **Stephen Kinini Wang'ondou -v- The Ark Limited [2016] eKLR**, it was stated that expert evidence does not “trump all other evidence”. A judge is not bound by expert evidence. The weight and probative value to be given to expert opinion is a matter of discretion for the trial court. Where there is conflicting expert opinion, a judge should test it against all other evidence. In this matter, the trial judge evaluated the cogency and probative of the conflicting expert opinions and exercised his discretion to reject in entirety the conflicting expert opinions.

52. The appellant is challenging the discretion exercised by the trial court in rejecting the expert opinion of Mr. Martin Papa. An appellate court should be very hesitant to assume jurisdiction where a litigant is challenging the exercise of discretion by another court. The limitation to an appellate court's interference with the exercise of judicial discretion is well expressed in **Daniel Kimani Njihia -v- Francis Mwangi Kimani & Another SC Application No. 3 of 2014; [2015] eKLR**. In **Francis Wambugu -v- Babu Owino & others, SC Petition No. 15 of 2018**, it was stated:

“[76] In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court’s decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court’s judicial independence and exercise of discretion.”

53. In this matter, the appellant has not demonstrated to our satisfaction that the trial judge in rejecting the expert opinion of Mr. Martin Papa did so injudiciously, whimsically, capriciously or failed to take into account a relevant factor. We see no reason to fault the judge in rejecting the two conflicting expert opinions.

54. We now consider the propriety of the appellant’s contestation that the respondent’s claim to the suit property as well as damages for trespass had been extinguished by limitation period. This is tied to the appellant’s claim for adverse possession over the suit property.

55. The trial judge in dismissing the appellant’s claim for adverse possession expressed herself thus:

“The plaintiff has claimed that she is entitled to ownership by adverse possession. However, the court finds that she is not entitled to a claim of adverse possession. A vendor cannot fail to give vacant possession and thereafter claim for ownership of the same land through adverse possession. The court accordingly dismisses the said claim of ownership by adverse possession as alleged by the plaintiff.”

56. **Section 7** of the **Limitation of Actions Act**, provides that;

“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

57. In this appeal the appellant reiterates that even if the respondent is the registered proprietor to the suit property, his claim for trespass and ownership of the property was extinguished by lapse of 12 years as the appellant has continuously been in possession of the property since 1995.

58. In **Wambugu -v - Njuguna, [1983] KLR 172** this Court held that under the Limitation of Actions Act, adverse possession contemplates two concepts: dispossession and discontinuance of possession and the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period. (emphasis supplied)

59. In this appeal, appellant claims adverse possession on the basis she has been in continuous possession of the suit property from 1995 when the respondent was registered proprietor thereof. The appellant’s claim is founded on a misconception that possession *per se* for a twelve-year period entitles a claimant to adverse possession. For adverse possession to succeed, there must be a dispossession of the registered owner or discontinuance of his possession *nec vi, nec clam and nec precario* (openly, by claim of right and uninterrupted).

60. There is no evidence that the respondent as registered owner of the suit property was dispossessed or that his possession was discontinued. The trial judge held that the appellant, as vendor, never put the respondent in possession of the suit property. This is the basis of the trial judge’s holding that a vendor cannot refuse to put a purchaser in possession and then claim adverse possession in respect of the same property. In her testimony, the appellant affirmed she has been in continuous possession since 1984, this corroborates the fact that as vendor, she never gave possession to the purchaser.

61. This Court in **Wambugu -vs- Njuguna [1983] KLR 172** referred to the case of **Wallis Cayton Bay Holiday Camp Ltd. -vs- Shell Mex and B.P. Ltd. [1975] Q.B. 94** with approval and cited the following passage therefrom:

“The next question, therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh vs. Jack (1879) 5 Ex D 264) said at 273, that to defeat a title by dispossessing the former owner ‘acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

62. In this appeal, the appellant has not demonstrated to our satisfaction and there is no evidence on record the respondent was dispossessed of the suit property for a claim on adverse possession to succeed. There is no evidence the possession of the suit property by the respondent was discontinued. The pre-conditions for a successful claim on adverse possession as stated in **Wambugu -vs- Njuguna, [1983] KLR 172** is not established. Accordingly, we find the trial judge did not err in finding the appellant’s claim for adverse possession had no merit.

63. A ground of appeal put forth is the judge erred in finding the Commissioner of Lands had issued consent to transfer the suit property when there was no evidence of the written consent produced in court. The judge in considering the issue expressed herself as follows:

“Though PW4 alleged that there was no consent to transfer from the Commissioner of Lands, the Deed file was missing and the court cannot rule out with certainty that as at 22nd December 1995, there was no consent from the Commissioner of Lands or the other statutory documents. The lands office is the custodian of the said documents and their shortcomings should not and cannot be visited on any party who does not work in the said registry. It is probable that the said consent and other statutory documents are in the Deed and correspondence files which are missing at the lands office. That possibility cannot be ruled out and without any evidence to the contrary given by a witness from the lands office. The court therefore finds and holds that there was indeed a

lawful transfer.”

64. It is contended failure by the respondent to produce the written consent to transfer by the Commissioner of Lands means the transfer of the suit property to the respondent was a nullity. We have considered the submission. There is a rebuttable presumption in law that all official acts are done properly and all procedures were lawfully followed. This is the presumption of regularity of the performance of official acts and it is presumed official duty has been regularly performed. This is rendered with some classical flourishes or latinism as „*Omnia praesumuntur rite et solemnitate esse acta*’ –all things are presumed to be done in proper and regular form. (See **United States -v-Chem. Found., Inc.**, 272 U.S. 1, 15 (1926)).

65. The “presumption of regularity” has never been an obstacle to a court’s consideration of evidence showing that a public official acted with an improper purpose or that due procedure was not followed. Nevertheless, evidence must be led to rebut the presumption. Unless the presumption is rebutted, the decision challenged is *prima facie* lawful and the evidentiary burden of proof is on he/she who assert the contrary. (See **Funzi Island Development Limited & 2 others -v- County Council of Kwale & 2 others [2014] eKLR**).

66. In the instant case, the evidentiary burden lay on the appellant to rebut the presumption of regularity. There is no evidence on record rebutting or negating the presumption and consequently, we find the judge did not err in holding the transfer of the suit property to the respondent was lawfully and procedurally done.

67. In penultimate, we consider whether the trial judge erred in awarding Ksh. 3,000,000/= (Three million shillings only) as general damages for trespass in favour of the respondent. Damages for trespass must be proved and a claimant must lead evidence on the measure for damages. This Court in **Peter Mwangi Muthia & another -v- Samow Edin Osman [2014] eKLR** expressed that it is upon a party to place evidence before the court upon which an order of mesne profits (trespass) could be made. In **Dr. J K Bhakthavasala Rao -v- Industrial Engineers, Nellore AIR 2005 AP 438** it was held that mesne profits (trespass) by its very nature, involves adjudication of a pure question of fact. The onus of proving the measure of mesne profits or damages for trespass lies upon the party claiming the same. Although trespass to land is actionable *per se*, the quantum or measure of damages for trespass must be proved.

68. In this matter, the trial judge did not explain how she arrived at the sum of Ksh. 3,000,000/= as the quantum for damages for trespass. This makes the sum arbitrary with neither factual nor legal foundation. Likewise, the respondent did not lead any evidence on the measure of damages for trespass. In the absence of any explanation by the judge, we are duty bound to set aside the sum of Ksh. 3,000,000/= awarded in favour of the respondent as damages for trespass. Consequently, we vary the judgment of the trial court and set aside the award of Ksh. 3,000,000/= as damages for trespass.

69. Subject to variation of the judgment setting aside of the award of Ksh. 3,000,000/= as general damages for trespass in favour of the respondent, we uphold the judgment of the High Court date 13th March 2015. This appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 10th day of May, 2019

P.N. WAKI

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR