

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 176 OF 2018

ABRAHAM SYKES.....PLAINTIFF

VERSUS

ARAF ALLY KLEIST SYKES.....RESPONDENT

JUDGMENT

21/9/2021 & 8/12/2021

Masoud, J.

The plaintiff, namely, Abraham Ally Sykes, is suing his younger sibling, Araf Ally Kleist Sykes. He is claiming for a declaration that he is the lawful owner of the plot No. 456 Block "F" Mbezi Medium Density having title No. 34182, Dar es Salaam, a declaration that the caveat deposited on the title is unlawful and be vacated, loss of USD 50,000.00 per month as overdraft for business operation of the plaintiff and general damages to the tune of Tshs 15,000,000/-.

It is the plaintiff's allegation that the suit property was transferred to him in 2011 from the defendant for love and affection. In support of the allegation, the plaintiff brought with his plaint copies of a deed of gift,

deed of surrender, and application for approval and title deed. He contended that since the transfer of the suit property, he has been enjoying the ownership of the suit property in which he has, without any problem from anyone, been residing.

In relation to the transfer, the plaintiff contended that it was commended by their father. The plaintiff also added that the transfer was done by the defendant pursuant to directives of their father. The transfer was undertaken in such a manner as their father was the one who obtained and signed the ownership of the defendant when the defendant was under age. Copies of relevant email dated 12/4/2012 on the transfer and passport of the defendant were shown in support.

In a bid to facilitate his company's business (i.e Sykes Travel Agency) where he is a director and a majority shareholder, the plaintiff released the suit property to guarantee an overdraft facility of USD 50,000.00 for the company extended by NIC Bank Tanzania Ltd. As a result, the bank filed a notice of deposit of the certificate of title at the land registry. The overdraft could not, however, be issued unless the notice is completed by the registrar of titles. The relevant copy of the notice was shown in the plaint in support of the allegation.

The plaintiff told the court in his plaint that the defendant was the original owner, and was thus knowledgeable of the plaintiff's ownership of the property. The defendant was also, as a family member, knowledgeable of the overdraft. As such, the defendant was concerned with the overdraft, the ownership of the suit property and responsibility over the loan as is evident in his emails to the plaintiff. The relevant emails were shown in the plaint by the plaintiff.

Despite the defendant's knowledge as afore stated, the defendant with ill motive and intention misinformed the bank to block the facility and lodged a caveat at the registrar of titles office in respect of the suit property (i.e Title No. 34182) which claimed the defendant to be the lawful owner. In relation to the allegation, copies of the letter and the caveat were shown in the plaint. Eventually, and upon the plaintiff's follow up, he was informed of the caveat and the fact that the overdraft could not be granted. Copies of the email and letter informing the plaintiff of the caveat and that the overdraft could not be granted were shown in the plaint.

As a result, the plaintiff's company was not able to facilitate its business, and the ongoing operation with Airlines under IATA as no bills were remitted to the IATA as required. A notice of default and termination of

sales agency agreement by 30/6/2015 was thus issued and was to take effect if the bills were not settled. Copies of the relevant notices were attached to the plaint in support of the allegation. It was further contended that the plaintiff's business, thus, suffered a loss of USD 50,000.00 per month as IATA ceased to do business with his company.

On the other hand, the defendant disputed the claims. He denied to have signed conveyance documents to transfer the suit property. He maintained that he is the owner of the suit property. He only allowed the plaintiff to reside in the suit property. He considered the plaintiff's averment on matters relating to Sykes Travel Agency as irrelevant in the present suit since the company is not claiming ownership of the suit property, and is neither a party in this suit nor have any cause of action against the defendant.

In relation to communication relied upon by the plaintiff, the defendant stated that the communication entailed series of emails whose thrust was that the defendant never transferred the suit property to the plaintiff as is explicit in email print out of 22/09/2011. One of such emails was meant by the defendant to stop the plaintiff from using the defendant's suit property as a collateral for a loan. In relation to the alleged transfer, he

further stated as follow: He never surrendered his title deed for the suit property to the plaintiff as alleged, the signatures in the alleged conveyance documents were not his, and the signatures were falsified by the plaintiff as he wanted to conclude the illegal transaction himself and this was communicated to the plaintiff in one of the emails' communications.

In so far as email communication concerning the signatures is concerned, the defendant relied on email communication dated 22/09/2011, whose copy was accompanied with the defendant's written statement of defence. The defendant stated that the email reflected his complaint about the forged signatures which he conveyed to the bank and the insurer. He admitted to have lodged the caveat in respect of the suit property with the registrar of titles.

It was the defendant's further averment that since he was not responsible with operations of the plaintiff's company, any banking facility which used the suit property was wrongful and fraudulent. It was likewise the defendant's averment that the transfer devised by the plaintiff into his own name was fraudulent as it was done without the defendant's knowledge and by forging the defendant's signature.

By way of counterclaim, the defendant reiterated his averments in his written statement of defence. He maintained his claim of being the lawful owner of the suit property, and his claim that the transfer of the suit property by the plaintiff (defendant in the counterclaim) into his own name was fraudulent. The defendant (plaintiff in the counterclaim) also reiterated that the plaintiff (defendant in the counterclaim) resides in the suit property on his consent.

As to how the title deed got into the hands of the plaintiff (defendant in the counterclaim), the defendant (plaintiff in the counterclaim) stated that when he relocated to Dar es Salaam from South Africa where he was working, he discovered that the title deed was missing from the safe custody of his late father Mzee Ally Kleist Sykes. Upon investigation, he learnt that the suit property had been purportedly transferred into the plaintiff (defendant in the counterclaim).

The defendant (plaintiff in the counterclaim) stated in relation to the transfer that upon his search in the land registry, it became clear that (i) there were conveyance documents purporting to transfer the suit property to the plaintiff (defendant in the counterclaim) which were not executed by him; (ii) there was an indorsement as to transferring the suit

property to the plaintiff (defendant in the counterclaim) which transfer was fraudulently done by the plaintiff;(iii) there was affidavit on marital status of the plaintiff purporting to have been affirmed by the defendant (plaintiff in the counterclaim) before one, Mwita Waisaka, a Commissioner for Oath, whilst he had never before appeared before the said Mwita Waisaka for making such affidavit; (iv) there was no spousal consent of the defendant's wife (plaintiff in the counterclaim's wife); and there was also affidavit for change of signature purporting to have been affirmed by the defendant (the plaintiff in the counterclaim).

It was also the defendant's (plaintiff in the counterclaim) averments that he applied for a certified copy of Land Form No. 35 which was purportedly executed in February 2008 by him. The same was supplied and was shown in the counterclaim in support of the allegation. The defendant (the plaintiff in the counterclaim) then went further to particularize allegations of fraud. In so doing, the defendant (plaintiff in the counterclaim) contended that, the plaintiff (the defendant in the counterclaim) forged his signature in the conveyance documents, and that the affidavit of the signature was neither executed with his knowledge nor was it signed by him.

As a result of the fraudulent actions by the plaintiff (the defendant in the counterclaim), the defendant (the plaintiff in the counterclaim) suffered mental anguish and his reputation tarnished, and hence entitled to damages. The defendant (the plaintiff in the counterclaim) therefore claimed for declarations that, the transfer was unlawful, and the defendant (plaintiff in the counterclaim) is the lawful owner of the suit property; an order striking out the name of the plaintiff (the defendant in the counterclaim) from the register of titles and restoring the name of the defendant (the plaintiff in the counterclaim) with immediate effect; and payment of USD 50,000.00 for damages suffered, interests and costs.

In his reply to the written statement of defence and answer to the counterclaim, the plaintiff (the defendant in the counterclaim) stated that he is the lawful owner, the defendant (the plaintiff in the counterclaim) was aware of the transfer and had no issues with it, the title deed was in the possession of and in the signature of their father as in the respect of the latter the defendant (plaintiff in the counterclaim) was a minor when it was acquired by their father. And with respect to transfer, it was their father who arranged and supervised the transfer. The defendant (the plaintiff in the counterclaim) could not therefore say that the transfer was obtained by forgery.

The allegation as to failure to find the title deed was dismissed for the absence of police loss report so is the allegation that the plaintiff in the counterclaim was residing in the suit premise with the consent of the defendant (the plaintiff in the counterclaim). It was in relation to the transfer stated that the procedure relating to transfer was duly adhered to in respect of the transfer of the suit property. The court was called upon to dismiss the counterclaim and enter judgment in the plaintiff (defendant in the counterclaim).

Issues which were recorded for determination were threefold. The first was whether the transfer of ownership from the defendant to the plaintiff in regard to the suit property was lawfully conducted. The second was who is the lawful owner of the suit property. The third was whether the plaintiff has suffered specific damages following registration of caveat on the suit property by the defendant. And the fourth was to what reliefs are parties entitled.

Both parties were ably represented by learned counsel at the trial. While the plaintiff was represented by Mr Henry Kishaluli, learned counsel, the defendant was represented by Mr Erick Mhimba, learned Counsel. The plaintiff testified for his case as PW.1 and had Mr Wazir Masoud Mganga,

law officer with the office of the registrar of titles, as PW.2, whereas the defendant was the only defence witness who testified as DW.1.

The evidence adduced by the above witnesses for the plaintiff and the defendant is on the record as are the exhibits tendered and admitted in evidence. The exhibits were the deed of gift in respect of the suit property, the deed of surrender of the right of occupancy for the suit property, and the application for approval of disposition all collectively tendered by PW.1 and admitted by the court as Exhibit P.1.

There was also Email from the defendant admitted as Exhibit DP.1; Copy of the caveat deposited by the defendant (the plaintiff in the counterclaim) and admitted in evidence as Exhibit DP.2 which were all tendered by PW.2 during cross-examination. There was likewise Exhibit P.3 which is a certified copy of the title deed tendered by PW.2. In addition, there was a letter from the defendant's (plaintiff in the counterclaim) advocate admitted in evidence as Exhibit DP.3, transfer deed admitted in evidence as Exhibit DP.4, and affidavit of change of signature admitted in evidence as Exhibit DP.5 which were all tendered by PW.2 during cross-examination. All these exhibits were examined and considered in my deliberations for this judgment.

From the pleading and evidence, it is not in dispute that the suit property was acquired way back in 1987 by the late father of the parties, namely, Ally Kleist Sykes, in the name of the defendant when the defendant was still a minor. This is apparent in the certificate of title for the suit property (Exhibit P.2) which bears the name of the defendant, that is, Araf Ally Kleist Sykes, as the registered owner of the suit property.

The issue is whether the property was acquired as the property of the father of the parties herein or as the property of the defendant. In his testimony the plaintiff had it that it was the property of their deceased father as there is nothing shown by the defendant suggesting otherwise. It was in this respect the argument of the counsel for the plaintiff in his final submissions that the defendant should have produced evidence to show that the property was indeed acquired by their father for him. This position is backed by the argument that the defendant was still a minor who could not acquire a property by then. On the other hand, the defendant had in his testimony that the property was acquired for him by his father when he was 13 years old. He was once shown the title deed by his father. He appeared to bank on his name as appearing in the title deed and not the name of his father who could have done so when the property was acquired in 1984.

On my part, I am settled that there was nothing else shown by the plaintiff or the defendant other than the title deed which would give a clue as to whether the deceased acquired the property as his own property as testified by the plaintiff or as the property of the defendant as testified by the defendant. The Court has thus to rely on the title deed, the testimonies given and the pleadings on the record. With this context, I undertook to examine the pleadings in relation to the title deed, and testimonies given.

Starting with the plaint, there was no paragraph in which it was emphatically stated that the deceased, namely, Ally Kleist Sykes, acquired the property as his own property in the name of his son, Arif Ally Kleist Sykes. Rather, the plaint is emphatic that the defendant, that is, Arif Ally Kleist Sykes, was the original owner of the suit property and was the one who allegedly transferred the suit property. The following paragraphs of the plaint tell it all loud and clear:

4.....The plaintiff is the lawful owner of ...(the suit property)...which was transferred to him in 2011 on natural love and affection from ARAF ALLY KLEIST SYKES. We attach the copies of the deed of gift, Deed of Surrender and Application

for approval and Title Deed as ANNEXURE "A" collectively to form part of the plaint.

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12. ..The Defendant [Arif Ally Kleist Sykes]been the original owner, had all the knowledge of the ownership of the property by the Plaintiff and also been one of the family member of the Plaintiff, knew about the bank facility and he was concerned on that, which made him to clarify on the ownership.....

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19...the transfer of the title to the plaintiff was well known and lawful done, and the father of the Defendant commended on that. We attach email correspondence of 2nd October 2011 from Defendant, a letter from NBC of 26th October 2011 and search dated 21/3/2012 as ANNEXURE "I".

20....the transfer and all documents are well known by the Defendant who under the directions of our father, he transferred it, since our father was the one who obtained and signed the ownership of the Defendant when the Defendant was under age, so that is why Defendant confirmed it....

There is as such nothing on the plaint suggesting that having acquired the suit as his property, the father of the parties herein, Ally Kleist Sykes, the deceased, signed the transfer documents in the favour of the Plaintiff (defendant in the counterclaim). The title deed which is relied upon by both parties is to me in the favour of the defendant's case (plaintiff in the counterclaim) as is against the plaintiff (the defendant in the counter claim). In other words, the title deed supports the view that the deceased acquired the property for the defendant.

I subscribe to the afore mentioned finding and position because of the following: One, the title deed is in the name of the defendant, namely, Arif Ally Sykes, and not Ally Kleist Sykes. Two, there was no plausible explanation given by the plaintiff as to why the deceased named Ally Kleist Sykes would use one of his several children in the title deed instead of his own name or any of his other sons. Three, the assertion by the plaintiff (PW.1) that the property was acquired as the property of the plaintiff and not the defendant contradicts the pleadings which as shown above is apparent that the property was acquired for the defendant (the plaintiff in the counterclaim) by the deceased.

In view of above, there was no room for evidence and submission that the suit property was the property of the deceased because such undertaking was not supported by the plaint. It is settled law the parties are bound by their pleadings. Therefore, the assertion that the defendant should have led evidence showing that the property was acquired for him by the deceased is without relevance in the circumstances of the present case. I am mindful that counsel for the defendant brought my attention to the settled principle of law that parties are bound by their own pleadings and the principle that allegations of fact cannot be supplemented by the testimony of a witness.

In the absence of such foundation in the pleading, I am prepared to hold that the deceased acquired the property for the defendant who was then a minor. The argument in the final submission by the counsel for the plaintiff which suggested misrepresentation as the defendant was a minor when the property was acquired is in my view an afterthought and a mere argument from the bar as it was not pleaded by the plaintiff in his plaint and no evidence was specifically led on the matter. In any event, the argument contracts the whole framework within which the suit was brought and attended.

With the foregoing finding, I am settled that the transfer of ownership from the defendant to the plaintiff in regard to the suit property would have been lawfully conducted if it involved the defendant and conducted in accordance with the law. It is apparent from the foregoing that the transfer documents were not signed by the deceased, that is Ally Kleist Sykes. According to the plaintiff, the transfer documents were duly signed by the defendant under the directive of the deceased. The defendant however disputes to have signed the transfer documents. In his testimony PW1 appears to have admitted that the documents were indeed not signed by the defendant. It was his testimony that they were signed by his father.

In my scrutiny of the transfer documents, I was not in doubt that the crucial document was the alleged deed of gift. This is disputed by the defendant. It is this document that started it all. It was made on 07/11/2008 when the defendant (plaintiff in the counterclaim) undisputedly born in 1974 was already of the age of majority. In the evidence led by the plaintiff the deed of gift was made by the deceased. As earlier shown, and contrary to the evidence adduced, the plaintiff had in his plaint that the deed of gift was made by the defendant.

The defendant faulted the transfer on the ground of forged signatures. The signature appearing in the deed of gift purportedly made between the defendant and the plaintiff on 07/01/2008 is clearly different from the signatures appearing in the title deed purportedly signed by the defendant on 04/03/1987, transfer deed (Form No. 35) purportedly signed by the defendant on 02/02/2008, and affidavit of signature purportedly signed by the defendant on 4/11/2011, and caveat signed by the defendant on 01/12/2014.

Of all these documents, it is only the caveat that the defendant admitted to have made and signed. A close look at the signatures appearing in the caveat, I was satisfied that it was different from the rest of the signatures so to speak. I recalled the pleading which had it that the transfer documents were signed by the defendant, while the testimony of PW.2 maintained that they were all signed by the deceased, namely, Ally Kleist Sykes for he was the owner of the property, which he acquired using the defendant's name.

As a result of the foregoing, I am of the finding that with regard to the first issue that the transfer of ownership from the defendant to the plaintiff

with regard to the suit property was not lawfully conducted. I am equally of the finding that the defendant is the lawful owner of the suit property as there is nothing suggesting that the suit property was not acquired for him by the deceased and further that the purported transfer was unlawful for not involving the defendant who was already of the age of majority when the same was purportedly undertaken. In view of the findings herein, the plaintiff's claim for specific damages has no legs to stand on. The same should equally fail.

In the conclusion, the plaintiffs suit fails and is hereby dismissed with costs. On the other hand, I find merits in the counterclaim and proceed to enter judgment and decree as sought therein, save for general damages which, as the defendant in his evidence did not clearly testify as to how he suffered injury in his reputation whilst he testified to have allowed the plaintiff to reside in the suit premise, I only award him Tshs 40,000,000/-

It is so ordered.

Dated and Delivered at Dar es Salaam this 8th day of December 2021



B. S. Masoud

Judge