

TANZANIA / JUDGMENT

abraham sykes vs araf ally kleist

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7 February 2024

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM {CORAM: KOROSSO. J.A., RUMANYIKA. 3.A.. And MGONYA, J-A/I CIVIL APPEAL NO. 226 OF 2022 ABRAHAM SYKES..... APPELLANT VERSUS ARAF ALLY KLEIST SYKES..... RESPONDENT (Appeal from the decision of the High Court of Tanzania (Land Division) at Dar esSalaam) fMasoud, J.) dated the 8th day of December, 2021 in Land Case No. 176 of 2018 JUDGMENT OF THE COURT 25th September 2023, & 7Ul February, 2024 KOROSSO, 3.A.; In the High Court of Tanzania at Dar es Salaam, Abraham Sykes, the appellant herein had lodged a suit against the respondent, his younger brother. He claimed for the following; a declaration that he is the lawful owner of plot No. 456 Block "F" Mbezi Medium Density with Title No. 34182, Dar es Salaam (suit property); a declaration that the caveat deposited on the title was unlawful and be vacated; damages for monthly loss of USD 50000.0 as overdraft for frustrating his business operations; general damages amounting to Tshs. 15,000,000/-; corresponding interests and costs. It was the appellant's case advanced mainly by the appellant who testified as PW1 that the suit property was acquired in 1987 by their father (who died in 2013) who registered it in the name of the respondent who was at the time thirteen (13) years old. It was contended further that all the documents related to its acquisition were executed by their father who before his death for love and affection gave the suit property to the appellant through a deed of gift. The appellant tendered documents which were collectively admitted as exhibit PI to support his assertion. According to the appellant thereafter, the process to transfer the suit property to his name from that of the respondent was initiated and effected in 2009. The dispute between the parties on ownership of the suit property arose in 2014, when the appellant, a businessman, offered the suit property to guarantee an overdraft facility of USD 50000.0 for his company extended by NIC Bank Tanzania Ltd, which prompted the bank to file a notice of deposit of the certificate of title of the suit property at the land registry. The respondent, upon being notified of the same, raised his concern about the overdraft facility sought and thus filed a caveat at the office of the Registrar of Titles and claimed to be the lawful owner of the suit property offered as a guarantee of the sought facility. With the said development, the bank refrained from granting the overdraft facility to the appellant. According to the appellant, being denied the overdraft facility was a setback to his business operations which were impacted negatively and in addition precipitated the loss of trust of his business partners and led to the

cessation of cooperation between the International Air Transport Association (IATA) and Sykes Travel Agency, one of his companies. Thus his companies suffered substantial losses. On his part, in his filed written statement of defence (WSD), the respondent disputed the claims and contended that he is the lawful owner of the suit property. He contended that the appellant's use of the suit property was as an invitee, having been authorized by him. On the claims by the appellant of having suffered losses in his business operations and the trust of his partners, the respondent controverted this arguing that since the said business partners were not party to the present suit, any prayer that addresses this should be considered to be misconceived. The respondent countered having signed any documents linked to the transfer of the suit property and urged us to find any such documents tendered to have been forged and thus false. The respondent also filed counterclaims seeking a declaration that the transfer of the suit property by the appellant to his name was unlawful since he, the respondent, was its lawful owner. He also sought an order striking out the name of the appellant from the register of titles and restoring his name; damages of USD 50000.0, interests and costs. When determining the instant suit, the trial court framed the following Issues: one, whether the transfer of ownership of the suit properly from the appellant to the respondent was lawful. Two, who is the lawful owner of the suit property and three, whether the plaintiff has suffered specific damages following registration of the caveat, and to what reliefs are parties entitled. On the first issue, the trial court found in favour of the respondent in the counterclaim stating that there was no evidence to prove that the deceased father for the parties did approve the transfer of the title to the appellant as claimed. It further held that the title deed failed to support the appellant's claims and that there was no evidence to show that at any time, the suit property belonged to their deceased father. The trial court was of the view that the evidence on record led to the conclusion that the suit property was acquired by their father for the respondent, a minor at the time. It was therefore held that the transfer of the suit property to the appellant was unlawful in the absence of the respondent's involvement who at the time the process was initiated was above the age of majority. On the second, issue, the trial court concluded that the respondent is the lawful owner of the suit property. The suit was thus dismissed, and the respondent was awarded Tshs. 40,000,000/- against the counterclaim as general damages. 4 The decision aggrieved the appellant, who hence filed a memorandum of appeal premised on five grounds. Three of the said grounds were abandoned by the counsel for the appellant on the day of hearing the appeal and he then proceeded to argue the two remaining grounds; three and five which paraphrased fault the trial court and read thus:

3. For awarding Tshs. 40,000,000/= as general damages to the respondent without considering legal factors for granting general damages in the counterclaim.
5. Failure to hold and declare that the appellant is the lawful owner of the property in dispute considering the evidence adduced by the appellant's witnesses. At the hearing, Dr. Chacha Bhoke Murungu, learned counsel represented the appellant while the respondent enjoyed the services of Mr. Jerome Msemwa, learned counsel. Dr. Murungu commenced his submissions by praying to abandon grounds one, two and four and thus remain with the third and fifth grounds to argue the appeal. Amplifying on the third ground, he challenged the general damages awarded to the respondent by the trial court contending that it

contravened the general principles governing awarding such damages. He argued further that, the Tshs, 40,000,000/= awarded as general damages was upon the trial court making a finding that the respondent did not provide any reasons for granting the award. He argued that there was no evidence adduced by the appellant (DW1) to show his alleged suffering, or injury to entitle him to such an award, and therefore the trial court had no justification to grant him such general damages. In the alternative, the learned counsel for the appellant argued that even if the trial court in its discretion was of the view that the respondent was entitled to general damages, in the circumstances the amount of Tshs. 40,000,000/= awarded was too excessive and was without justification. He thus prayed for the Court to set aside the said finding and hold that the respondent was not entitled to any such award. In respect of ground five, faulting the trial court for failure to hold and declare that the appellant is the lawful owner of the property in dispute considering the evidence of PW1 and PW2, he insisted that the appellant provided sufficient evidence to justify his claims of ownership such as exhibit PI, P2 and P3 and other exhibits which were admitted without objection and proved that the appellant was the owner of the disputed property. The learned counsel also invited the Court to consider the fact that the respondent failed to prove there was any fraud in the transfer of the right of occupancy to the appellant as claimed by the respondent as required by the law, that the one who alleges must prove the alleged fact. He thus prayed for the appeal to be allowed. On the other part, in response, to ground three, Mr. Msemwa contended that the general damages awarded to the respondent were fair and justified under the circumstances. While conceding that the trial court did not provide reasons for granting the same, he argued that consideration should be on the fact general damages were pleaded by the respondent and the trial court relied on prayers sought and the evidence on record to grant the said award. He thus implored us to find the ground unmeritorious. Regarding ground five, the learned counsel for the respondent urged us to find the decision of the trial court to be proper since its holding was based on the evidence adduced in court by PW1, PW2, and the defence witnesses. He went on to address the issues framed by the trial court and argued that, in determining issue number one the trial court considered the fact that the disputed property was transferred from the respondent to the appellant and that PW1's evidence clearly stated that the one who made the transfer was their father, That such evidence he contended, differs from what the plaint alleged as seen on page 115 of the record of appeal. He contended further that there was evidence that the documents that facilitated the transfer of the disputed property were effected by their father and not the respondent, who at the time of the transfer was an adult and no longer a child. He urged us to find that this was improper as the respondent was not involved in the transactions related to the suit property which was in his name and referred us to the case of Tanzania National Roads Agency and Another v. Abdallah Megabe Sindoma and Another, Civil Appeal No. 307 of 2021 (unreported). In that case, it was held that when the transfer of land is questioned, courts must warn themselves whether it was lawfully obtained. Furthermore, the learned counsel challenged the import of the emails tendered by the appellant to the issue in question, challenging their authenticity and whether they should be accorded any weight under the circumstances. He finalized his submissions imploring us to dismiss the appeal

for find it to lack merit. The rejoinder by the counsel for the appellant concerted on cementing what he had stated in his submission in chief. Regarding ground three, he reiterated the fact that what was awarded was neither grounded on any reasons provided by the trial court nor adduced evidence and thus unwarranted. He contended further that the Court should take account of the fact that the relief sought by the respondent was not general damages but compensation and that legal principles guiding the granting of general damages were not followed by the trial court. On ground five, he argued that the trial court failed to properly analyze evidence before it since the appellant had proved ownership of the suit property through adduced and tendered evidence. He challenged the assertion that to prove the case essential witnesses were not called saying that section 143 of the Evidence Act, Cap 6 (Evidence Act) is clear, and there was no need to call more evidence to prove the alleged facts since they were proved to the standard required. The tendered documents were not objected and it is the father who signed the relevant transfer document and his signatures have not been disproved and there is ample evidence to show that the said signatures are authentic. He also invited us to find since the respondent failed to prove fraud on the part of the tendered documents, then he should be estopped from advancing his claims. He concluded by imploring us to find that the appellant did prove ownership of the suit property on balance of probability. Considering the evidence on record and submissions of the contending learned counsel as found by the trial court, we are of the view that the following facts remain undisputed. One, the suit property was acquired in 1987 by Ally Kleist Sykes, the deceased father of the parties to the suit, in the name of Araf Kleist Sykes, the respondent. The testimonies of the witnesses for both parties and exhibit P2 testify to this fact. Two, it is not disputed that at the time the disputed property was acquired in 1987, the respondent was around 13 years of age and therefore a minor. We are also constrained to remind ourselves that this being a first appeal, the Court is duty-bound to subject the evidence on record to a fresh analysis and arrive at its own conclusions understanding that such revaluation of evidence must be done cautiously since the trial court was in a better position to see, hear and appreciate the adduced evidence, (see, *Tanzania Sewing Machine Co. Ltd. v. Njake Enterprises Ltd*, Civil Appeal No. 15 of 2016 and *Philipo Joseph Lukonde v. Faraji Ally Saidi*, Civil Appeal No. 74 of 2019 (both unreported)). In determining the appeal on hand, we shall begin by addressing ground five which centers on ownership of the disputed property between the contending parties. Each party contends to be its lawful owner. Suffice it to say that it is well settled that, the one who alleges has a burden to prove the contended fact in terms of sections 110 (1), (2) and 111 of the Evidence Act. In civil cases like the instant one, the standard of proof is on the balance of probabilities. It is also elementary that parties are bound by their pleadings (see *Barclays Bank (T) Ltd v. Jacob Muro*, Civil 10 Appeal No. 357 of 2019 (unreported)) and *National Insurance Corporation v. Sekulu Construction Company* [1986] T.L.R. 157). It is on record that, when determining the issue of ownership of the suit property, the trial court held that there was no evidence presented in court to prove that the deceased father did transfer the title to the appellant as claimed. The trial court reasoned that the evidence on record failed to support the appellant's claim as the evidence on record showed that the suit property was

acquired by the party's deceased father for the respondent. It thus concluded that since the process to transfer the suit property to the appellant was initiated when the respondent was of the age of majority with the legal capacity to transact, the said transfer of the title to the appellant was unlawful. Our perusal of the record of appeal has discerned that in paragraphs 4 and 5 of the plaint the appellant asserts to be the lawful owner of the suit property after it was transferred to him from the respondent through natural love and affection in 2011 and that since then he has enjoyed the right to the suit property without disturbance from anyone including the respondent. Paragraphs 19 and 20 of the plaint allude that the transfer of the title of the suit property to the appellant was well-known and lawfully concluded and spearheaded by their deceased father. In paragraph 20 of the plaint, he states: ii " That, the transfers 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 underage, so that's why defendant confirmed it, we attach email dated 12th April, 2012 from the defendant on transfer..." However, paragraph 12 of the plaint states that the respondent was the original owner of the Title to the suit property. The respondent on the other hand disputes having been in any way involved during the transfer of the suit property to the appellant. He categorically denied having signed the transfer documents found in exhibit PI. Having perused the record, we are of the view that the respondent's assertion is essentially not disputed by the appellant who testified as PW1, This is because PW1 testified that the transfer documents were indeed signed by their deceased father and not the respondent. Our perusal of some of the documents tendered to show the alleged transfer, such as the deed of gift (exhibit PI) which was made on 7/11/2008, reveals that the respondent was born in 1974. That being the position, it is thus evident that at the time the deed of gift was issued, the respondent was well and above the age of eighteen years and thus capable of transacting himself including effecting the deed of gift of the suit property since the title to the suit land before the transfer was in his name. A scrutiny of the gift deed relied upon in the transfer of the suit property to the appellant, shows it is the respondent Araf Ally Kleist Sykes who transfers the suit property to the appellant Abraham Sykes out of love and affection. The certificate of occupancy of land with Title No. 34182 (the suit property) found on page 173 of the record of appeal shows that it was issued on 22/7/1988 in the name of the respondent and was admitted as exhibit P3 tendered by Waziri Masoud Mganga, a land officer from the Office of the Registrar of Titles (PW2) and was a witness for the appellant. The fact that the suit property was registered in the name of the respondent was also supported by the evidence of PW2. PW2 testified that from year 2011 the suit property was registered in the name of the appellant while before that from 1988, it was registered in the name of the respondent. Therefore, we cannot fault the finding of the trial court that the transfer of the suit property was unlawful where the deed of gift relied upon to effect the transfer was improper, having been issued by the deceased father who had no right to issue such a deed without shown authority from the respondent who was at the time capable of transacting such deeds. Suffice it to say that we have also considered the contradictions in the evidence of the appellant on this issue. Whereas in the plaint it is alleged that the deed of

gift was made by the respondent, the appellant's testimony states otherwise asserting that the same was made by their deceased father. We find such a contradiction create doubts on the genuineness of the deed of gift. We have also considered the concern raised by the appellant's counsel on the failure of the respondent to object to the admissibility of exhibit PI and the fact that he was aware of the transfer and remained complacent should lead us to find that he has no justification to query it at this juncture. The position on this issue is as stated in *Joseph Mkumbwa and Another v. Republic*, Criminal Appeal No. 94 of 2007 (unreported), that "admissibility of the evidence is one thing; its weight or probative value is another". Nevertheless, we are also alive to the settled position of the law that the contents of an exhibit admitted without any objection are effectually proved. However, it is important to also take cognizance of the fact that each case should be considered in its particular circumstances. In the instant case, the deed of transfer was not objected to but as stated above, since it cannot be relied upon having been issued by an inappropriate person without title to the suit property, we agree with the trial court's findings on it and cannot accord it any weight. Having revisited the cited emails apart which were referred by the learned counsel for the appellant, 14 they -essentially involve communication related to the bank and business transactions of the parties, which we find do not address the issue of ownership of the suit property which is the subject matter of this appeal. We thus find them not material to the determination of the instant appeal. For the foregoing, we align ourselves with the holding of the trial judge when sustaining the counterclaim and the reasons advanced therein on page 154 of the record, stating thus: "I subscribe to the aforementioned finding and position because of the following: one the title deed is in the name of the defendant, namely Araf 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 (PW1) 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." As stated earlier, we are of the firm view that while the appellant failed to prove that the transfer of the suit property to his name was proper, on the balance of probability the respondent proved that he was 15 at the time of the alleged transfer the owner of the suit property and he had not initiated such transfer of the suit property to the appellant. Before we venture to address the third ground, we noted that the respondent's counsel when submitting invited us to find that the transfer of the suit property to the appellant was also tainted with fraudulent acts. Having analyzed the evidence on record we have failed to find any evidence by the respondent to prove the allegations of forgery against the appellant. There are a plethora of decisions of the Court that guide us on proof of fraud in civil proceedings insisting that such allegations must be specifically pleaded and proved on a higher degree of probability than that which is required ordinarily in civil cases. In *Omari Vusufu v. Rahma Ahmed Abdulkadir* [1987] T.L.R. 169 we held: "... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on a higher degree of

probability than that which is required in ordinary civil cases..." (See also, *City Coffee Ltd v. The Registered Trustee of Xlolo Coffee Group* [2019] 1 T.L.R. 182 and *Bilali Ally Kinguti v. Ahadi Lulela Said and 4 Others*, Civil Appeal No. 500 of 2021 (unreported)).¹⁶ We thus are of the firm view that there was no proof of fraud presented in the trial court to warrant us to consider such allegations in our deliberations on this ground. For the foregoing, ground five is unmeritorious. The third ground of appeal addresses the propriety of the grant of general damages of Tshs. 40,000,000/= to the respondent by the trial court. We kick start by restating the settled position of the law on the grant of general damages. There are numerous decisions of the Court on this, and the principle is that general damages are awarded at the court's discretion and need not be specifically proved. In the case of *Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited*, Civil Appeal No. 21 of 2001 (unreported), the holding in the case of *Bolag v. Hutchison*, 8 [1950] A.C. 515 was adopted, stating that general damages are such as the law will presume to be the direct, natural or probable consequence of the action complained of. In *Anthony Ngoo and Another v. Kitinga Kimaro*, Civil Appeal No. 25 of 2014 (unreported), the Court held that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify such an award and that in exercising the discretion to grant general damages, reasons must be assigned for granting the same (see also, *Cooper Motor Corporation v. Moshi/Arusha Occupational Health Services* [1990] T.L.R. 96). Therefore, from the cited cases above and many others, the trial court's discretion to grant general damages cannot be overstated. However, the trial court is also expected to assign reasons that led it to grant the award. The learned counsel for the appellant challenged the amount of general damages awarded to the respondent by the trial court arguing that general principles governing such an award, such as assigning reasons for granting the same were controverted. He further stated that there was no evidence provided by the respondent to show his suffering, injury or otherwise to prompt the trial court to grant him general damages and in the alternative added that the amount of Tshs. 40,000,000/= granted is too excessive under the circumstances. Understanding the fact that the grant of general damages is discretionary and exercised by the trial court, having perused the record of appeal, we have however failed to find reasons advanced by the trial court justifying the grant of the award. This anomaly was conceded by the learned counsel for the respondent although he was quick to argue that the general damages awarded to the respondent were fair and just. Mr. Msemwa argued further that we should consider the fact that general 18 damages were pleaded and that the trial court relied on the respondent's prayers and evidence on record to grant the same. Flowing from above, it is imperative to address the powers of the appellate court to interfere with the general damages awarded by a trial court. The law is well settled. In the case of *Reliance Insurance Co. T. Ltd & Others v. Festo Mgomapayo*, Civil Appeal No. 23 of 2019 (unreported), the Court held: "It is trite law that, interference of the award of damages is only permissible if it will be seen that the magistrate or judge assessed the said damages by using a wrong principle of law. If it happens so, the appellate court should disturb the quantum of damages awarded by the trial court. In *Davies v. Powell* (1942) 1 All ER 657 which was approved by the Privy Council in *Nance v. British Columbia Electric Rail Co. Ltd* (1951) AC 601 at page 613 it was

stated as follows: "Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case... before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage." The import of the above holding leads us to question whether the general damages sought by the respondent in his pleadings and granted by the trial court, were direct, natural or probable consequences of the actions complained of against the appellant. Having revisited the record, we accept the invitation by the learned counsel for the appellant and find this a fit case for us to interfere for the reason that the trial court applied the wrong principles of law in granting general damages to the respondent. We are aware of the fact that the standard of proving general damages is not the same as the one demanded for proving special damages which requires them to be strictly claimed and proved. Indeed, in assessing general damages, the duty of the trial court was to determine whether such general damages are direct, natural, and a probable consequence of a wrong complained of against the appellant. The purported transfer was unlawful, as per our earlier holding, however, in considering whether to award general damages and the amount concerned the trial court should have assigned reasons for finding that the award was deserved and for the amount of Tshs. 40,000,000/= awarded. In the absence of the same, we find no plausible cause for granting the same. We thus find the ground has merit. In the final analysis, as alluded to above, the appeal is partially allowed to the extent shown. Having found the fifth ground to be unmeritorious, we dismiss it with costs. For the avoidance of doubt, we allow the third ground of the appeal finding it meritorious. In consequence, the order granting general damages of Tshs. 40,000,000/= to the respondent is hereby set aside. DATED at DAR ES SALAAM this 30th day of January, 2024. W. B. KOROSSO JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL L. E. MGONYA JUSTICE OF APPEAL The Judgment delivered this 7th day of February, 2024 in the presence of Dr. Chacha Bhoke Murungu, learned counsel for the appellant and Mr. Jerome Msemwa, learned counsel for the respondent is hereby certified as a true copy of the original.

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Prepared on 14 October 2026 · Esheria