IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Apaloo JJA & Masime Ag JA)

CIVIL APPEAL NO 131 OF 1984

BETWEEN

SPECIALISED ENGINEERING COMPANY LTD..... APPELLANT

AND

KENYA COMMERCIAL BANK LTD..... RESPONDENT

(Appeal from an Order of the High Court at Nairobi, Aganyanya J)

JUDGMENT

March 11, 1988, **Platt JA** delivered the following Judgment.

I have had the advantage of studying the judgment of Apaloo JA in draft and I agree in the result. As we are differing from the opinion of the learned judge, I add a few comments of my own.

I agree with the underlying approach of the learned judge that the Court ought to be very careful before finding that an order on an interlocutory matter is metamorphosed into a final decree. That can however happen if there is a compromise of the suit by the parties in the shape of a consent order which ends the dispute. As Apaloo JA has demonstrated with the support of comments in *Halsbury's Laws of England* vol 22 3rd Edn p 765:

> "A consent judgment or order may be taken on the hearing of an action commenced by writ or on some interlocutory application therein such as a motion for injunction."

There are then the further steps to be taken under order 24 rule 6 of the Civil Procedure Rules. But of course there must truly be a consent order, which has the effect of a compromise of the issues in the suit. Again it is well for the court to be fully satisfied that that is the position. The High Court was not sure that that was the position and gave the parties the opportunity to have the case determined on its merits. The burden of this appeal is whether the situation was so clear that the plaintiff had forfeited his right to put evidence before the court, that the High Court had exercised its discretion wrongly, (however desirable it may be in general to lean towards a trial on the merits, where there is doubt that all the issues have been resolved by the consent order). The appellant/defendant claims that the judgment by this court dismissing an appeal from an order of Harris J had the effect of determining the issues on the plaint.

What then were the issues, and what were the terms of the consent order and the subsequent orders in this case?

The plaintiff bank, which is the respondent to this appeal was owed money by Morris & Company. To secure itself, the bank took a registered charge over the land of Morris & Company being LR 209/8201, dated May 13, 1977. Morris & Co had also charged its assets to the bank by a debenture dated February 15, 1977. The bank appointed a receiver under the debenture on January 18, 1978.

Pausing there for a moment, the charge and the debenture are not before the Court. But generally speaking, the land and buildings and all things affixed to the land would stand to fall under the charge, which belonged to Morris & Company; and the debenture would provide for a charge over the assets and the movables and chattels of Morris & Company.

The difficulty in the case arises from the fact that the defendant, Specialised Engineering Company Ltd, who now appeals to this Court, took a lease of part of the premises owned by Morris & Co. According to Mr. Page Morris, a director of the latter company, Specialised Engineering Co Ltd, occupied a certain workshop and office premises on LR 209/8201 as a monthly tenant of Morris & Co, and during this tenancy Specalised Engineering Co Ltd erected certain temporary structures and fixed certain fixtures and fittings in the said workshop and offices, at its own expense and with the knowledge and consent of Morris & Co Ltd. The tenant, Specialised Engineering Co Ltd, considered these fittings and fixtures to belong to it, so entitling it to remove them as it wished. Accordingly Morris and Co and the tenant declared that the charge in favour of the bank did not cover the tenant's fixtures and fittings, and the debenture did not cover the movables and chattels belonging to the tenant, when the debenture charge cystallised.

There was therefore an ostensible division of property. The land and its fixtures belonging to Morris & Co, and the latter's movables and chattels on the one hand; whilst on the other hand, there were the fixtures and fittings as well as the chattels and movables belonging, so it was said, to the tenant, Specialised Engineering Co Ltd.

The tenant's lease lasted until May 31, 1979. It was on this very day that the respondent bank sued the tenant, Specialized Engineering Co Ltd. Paragraphs 6 and 7 of the plaint explain why:-

> "6. After the premises on the charged land had been erected the debtor leased part of the premises to the defendant.
>
> 7. The defendant is in the process of moving out of the premises, and has started to remove fixtures charged to the plaintiff from the premises."

So the bank asked for an injunction restraining the defendant tenant from severing or removing any fixtures from the premises. Secondly it asked for damages in respect of fixtures removed and damage done to the premises. It must be emphasized that the plaint only concerned fixtures which by their nature had to be severed to be removed. It was not concerned with movables which were unattached.

It is useful to be clear what is at stake. Following the statement of the law in *Woodfall's Landlord and Tenant* 27th Edn vol 1 page 695 *et sec*, the word fixtures is applied to articles of a personal nature which have been affixed to land. In general, whatever has been fixed to the freehold becomes part of it, and is subjected to the same rights of property as the land itself. But this presumption may be rebutted by circumstances showing the intention of the parties to the contrary, depending on the degree of annexation. As between landlord and tenant, fixtures may be divided between tenant's fixtures and landlord's fixtures. Tenant's fixtures are personal chattels annexed to the freehold by the tenant during the term, either for the purpose of his trade or business or agriculture, or for mere ornament and convenience, and which he has a right to sever and remove during the term, in the absence of any express stipulation or local custom to the contrary. On the other hand, landlord's fixtures are chattels which are put up by the landlord and affixed to the structure, before or during the term, or by any previous owner or tenant, or by any other person, but do not form part of the structure. This term includes such fixtures put up by the tenant during the term as the tenant has no right to remove. All these constitute part of the freehold, and also part of the premises demised. The basic idea is that the article in question has been let into or united with the land, or to some substance previously connected with the land. The general rule as to annexation is that once a tenant has

affixed an article to the demised premises, he can never sever it without the consent of the landlord; it becomes the property of the freeholder, and the tenant is considered to abandon all future right in it, so that it would be waste in the tenant to remove it. But there are general exceptions, for the purpose of trade, for ornament and convenience, and for agricultural purposes. The greatest latitude, it is said, has always been allowed in favour of the tenant, who claims that particular articles are personal chattels as against the claims of the freeholder.

Applying these principles to the facts of this case, whatever fixtures Morris & Co had affixed to the premises in question, would be landlord's fixtures and subject to the charge and presumably had to be protected by the receiver. Secondly, any fixtures made by the tenant, Specialised Engineering Co Ltd, which became landlord's fixtures, and could not be severed, were subject to the charge. These fixtures were the subject matter of the plaint. The bank would be able to class as part of the premises charged, fixtures put in by the tenant which became landlord's fixtures in the hands of Morris & Co Ltd. While the principles are thus quite clear, the bank has not put on record clearly what fixtures in particular it claims.

It is this ambiguity which perturbed the learned judge. He said he could not say whether "any fixtures" referred to in the plaint, were the same as those given in Exhibit A aforesaid. The judge was referred to the consent order, which concerned "fittings, fixtures and chattels" as per particulars given in Exhibit "A" attached to the affidavit of JAP Morris dated August 3, 1979. That brings me to the defence by Specialised Engineering Co Ltd.

The latter company pleaded that in the course of its tenancy with Morris & Co, it had erected certain temporary structures and fixed fixtures and fittings in the workshop and offices it occupied. The defendant company claimed that these were tenant's fixtures and fittings, which it was entitled to remove. It also owned other chattels absolutely. The tenant's fixtures and fittings were never charged to the plaintiff and consequently formed no part of the charge mentioned in the plaint. Therefore the bank was not entitled to an injunction or damages; indeed it denied having removed or having intended to remove any fixtures.

As a further consequence, the bank having obtained a temporary injunction restraining Specialized Engineering Co Ltd from removing any fixtures and fittings, and having thereby locked up the premises, the defendant, Specialised Engineering Co, claimed that it had been wronged and attached a list of tenant's fixtures and fittings and other chattels wrongly detained.

This list was marked Ex A. The detention continued and therefore as the defendant, Specialised Engineering Co Ltd had been deprived of its chattels it had suffered loss. It claimed that any damages to which the bank wasentitled would be set off against the defendant company's loss, and over and above that, the defendant counterclaimed for the return of the tenant's fixtures and other chattels, or their value and damages for their detention.

The injunction granted on May 31, 1979, the last day of the tenancy is not actually before the Court. But there was an application to discharge or set aside the *ex parte* injunction dated August 6, 1979. The result of this application was the consent order, which is the foundation of the present appeal. I need not set it out in full, as Apaloo JA has done so. The order was given on November 9, 1979 and varied the *ex parte* order of May 31, 1979 to the extent that the fittings, fixtures and chattels as per the particulars in Exhibit A were to be released to the defendant forthwith, and the defendant was to be given free access to the premises to remove the fittings, fixtures and chattels.

Two matters immediately attract attention. The first is that one wonders why one is concerned with any chattels outside the fixtures which were the subject of the plaint. The second is why the order of May 31, 1979 was only "varied."

On the first query a glance at Exhibit A reveals that most of the items were not fixtures at all. It is in fact difficult for the non-engineer to spot which of these twenty-seven items could have been fixed; but I take it that some were. Nevertheless most were chattels like dismantled cranes, ladders, articles of equipment and spare-parts, articles of furniture, welding regulators, two vehicles and an oil stove. It may be, at a

guess, that the main switchboard had been fixed; but I do not know. There is nevertheless such a preponderance of chattels, that one can see that they lay outside the plaint, and the difficulty is to know what fixtures are in dispute. I presume that it was this ambiguity which at first led Harris, J to accept that the consent order he entered, only "varied" the *ex parte* order, in case there were any landlord's fixtures and tenant's fixtures still outstanding. It is certainly this partial lifting of the injunction that must have caused trouble for the learned judge in this case. The later view of Harris J is still more perplexing.

A little later the bank sought to rid itself of the consent order. On January 16, 1980, Harris J refused to do so. He held that whatever mistakes had been made by the advocates, the bank was bound by the actions of the advocates, who had had implied general authority to enter into the "compromise," and who had not acted against any negative instruction from the bank. The latter appealed against this refusal to set aside the consent order, and this court dismissed the appeal. It held that the advocate had had both implied and ostensible general authority to bind the bank "in effecting the compromise," and this Court adopted the judgment of Harris, J.

That is the next aspect of this problem. Here is a partially discharged injunction by a consent order which was said by this Court to effect a compromise. I have now to discover what was compromised.

By the application filed on May 11, 1983; Specialised Engineering Co Ltd applied by motion under order 24 rule 6 of the Civil Procedure Rules all other enabling provisions of law, and section 3A of the Civil Procedure Act for orders that:-

> "1. The consent order recorded by Justice Harris on November 9, 1979 (and which he refused to discharge, set aside or vary by his further order of January 16, 1980, and which refusal was confirmed by the Court of Appeal at Nairobi on May 6, 1981 in Civil Appeal No. 43 of 1980 against it) effectively extinguishes and determines the allegations and substratum whereof has gone and the same should be dismissed with costs;
>
> 2. Alternatively, the plaintiff's suit be marked "adjusted wholly" and "satisfied;"
>
> 3. That the defendant's counterclaim be listed for hearing on a date convenient to the court; and
>
> 4. That the plaintiff be ordered to return forthwith the fixtures and chattels forming the subject matter of the aforesaid consent order; ..."

This motion was supported by an affidavit of Mr Ambalal Jiwabhai Patel. He swore to all the steps in this action set out above. All that emerges is that the consent order of November 9, 1979 was based on Exhibit A annexed to the affidavit of Mr Page Morris, and had not been complied with. But this consent order, he asserted, after the refusal to set it aside by both Harris J and the Court of Appeal, had the effect of discharging "finally" the *ex parte* injunction of May 31, 1979. Yet these articles in Exhibit A had not been given back.

The interest now lies in how the "varied" injunction order became "finally discharged." The key to this problem is the ambiguity in the bank's case as to what fixtures it alleged had been covered by its charges, or had been added to the premises of the defendant company, and then removed or were about to be removed by the defendant company. It is extraordinary that Mr Ambalal Jiwabhai Patel's affidavit was not answered, as far as the record of appeal is concerned. At an early stage of the hearing of this appeal, Mr Le Pelley complained that the record of appeal was not complete. But he had the right under Rule 89 of the Court of Appeal Rules to put in a supplementary record of appeal containing the documents he added. The result of his not having done so, is that the matter has to be judged from what is on the record of appeal as it now exists.

If this Court in appeal No 43 of 1980 adopted Harris J's judgment of January 16, 1980 as its own, then we are now bound by the findings of Harris J. He explained that the receiver, Mr Sinclair had sworn the affidavit upon which the *ex parte* order had been made on May 31, 1979. Mr Sinclair again came to the bank's aid in trying to get the consent order of November 9, 1979 set aside. He swore that considerable

damage would be done to the premises if the fixtures referred to in the injunction were removed. He admitted, however, that with the exception of some articles which he had been unable to find, all the movables referred to in the affidavit of Mr Morris dated August 3, 1979 were in his possession as receiver of Morris & Co. These were substantially the articles referred to in both the defence and the consent order. Two items were claimed by Morris & Co from the defendant company and the dispute was then still unresolved. But apparently that did not affect the real issues. Harris J held that the bank had brought within the jurisdiction what it described as "fixtures charged to the plaintiff," and the defendant company, Specialised Engineering Co.Ltd had brought within the suit, what it had described as the "tenant's fittings and fixtures" and also the "tenant's other chattels." All the items in the consent order fell within the ambit of the suit, (which I suppose must mean the plaint and counterclaim). But the crucial finding now appears:

> "The only items comprised in the injunction are such of the fixtures as are charged to the plaintiff, the discharge of which by the consent order the plaintiff now suggests should be left undisturbed. The issue is as to whether there exists any reason for interfering with so much of that order as relates either to fixtures which are not so charged to the plaintiff or to fittings and chattels which are not fixtures."

That I am afraid ends the matter. Whatever Harris J meant by the consent order varying the *ex parte* injunction, he has now sated that the only items comprised in that injunction were such of the fixtures as were charged to the bank, and that the bank had suggested that the discharge of the injunction regarding these fixtures by the consent order should be left undisturbed. He went on to differentiate fixtures not so charged and fittings and chattels which were not even fixtures. How Harris J arrived at this conclusion is far from clear now. There may, of course, have been material upon which he made that statement, and which explains the approval of this court. Once the bank, according to Harris J agreed that the consent order had discharged the injunction to the fixtures charged to the bank, there was nothing left.

It seems a surprising and unexpected conclusion when the order was simply "varied;" but of course there was no need to vary or discharge the consent order in these other circumstances described by Harris J. The consent order gave back to the defendant company what belonged to it. In addition it is said that the bank decided to leave undisturbed the discharge of the injunction concerning what belonged to the bank. The most logical basis for the statement of Harris J would be that there were no such landlord's fixtures in reality, and that Mr Sinclair only held the items in Exhibit A which did not apparently qualify. Mr Sinclair certainly never made out a claim to any particular landlord's fixtures. Harris J declared that he did not know whether Mr Sinclair was lawfully in possession of anything, and throughout the case, no landlord's fixtures had ever been specified, as far as the record of appeal goes, by anyone at all. The conclusion to which one is driven in the end is that there were no landlord's fixtures, that the bank's case must have been misguided, and that the bank could not claim any damages. The warrant for this conclusion is Harris J's explanation that the bank gave up on the protection of its injunction, and there were no other fixtures which the bank could claim. This seemingly has been approved by this Court which called the consent order a "compromise."

So then I have no alternative; I must agree with the defendant company, who has appealed, that the order of Harris J as confirmed and adopted as the judgment of the Court of Appeal, finally disposed of the cause of action of the bank against the defendant/appellant company. I agree that the appeal must be allowed and with the orders proposed by Apaloo JA in this event; and as Masime Ag JA also agrees it is so ordered.

Apaloo JA. The main controversy in this suit has received the consideration of both the High Court and this Court before. In dismissing the appeal on the 6th May 1981, this Court characterised this litigation as unfortunate, protracted and a largely unnecessary one. In view of what has since transpired and the rival arguments presented to us on this appeal, this Court's description of the nature of this litigation was peculiarly apt.

The facts are simple. The plaintiff bank (hereinafter called the bank) at sometime prior to May 1979, granted a Company called Morris & Co Ltd a loan. To secure the repayment of the loan, the Company charged to the bank, a piece of land described as LR 209/8201. There was a building on the charged land.

Morris Company leased part of the charged land to the appellant whose name suggests that it is an engineering company. The appellant occupied a workshop and office premises on the land as a monthly tenant. It appeared to have erected certain structures and also brought on the land with the consent of its landlord, certain fittings and fixtures apparently for its own business purposes.

In addition to charging the land to the bank, Morris Company also executed a debenture on its movable properties to the bank. In January 1978, the bank appointed a Receiver in respect of the Morris Company with the result that the floating charge crystallised on the movable properties. It appears that upon entering into the duties of his office, the Receiver noticed that the appellant was in the process of removing certain fixtures and fittings from the charged property.

So the bank brought a suit against it claiming an injunction to restrain it from "severing or removing any fixtures from the premises." The appellant's position was that the fittings and fixtures belonged to itself and was not charged with the rest of the property to the bank. It says, it was entitled to remove them and for its part, counterclaimed against the bank for an injunction restraining it from preventing it from removing'"tenants fixtures, fittings and chattels" and damages. Although the bank did not specify or provide any description or identification of the fixtures it seeks to enjoin the respondent from removing, the latter provided a rather comprehensive list of the fixture and fittings which it said it owned and which it claimed it was entitled to remove.

As is usual in this cases, the bank obtained an *ex parte* injunction against the appellant restraining it from removing the fixtures and fittings. Upon being served with the order, the appellant, for its part, sought to have the *ex parte* order discharged. This application came before Harris J on the 9th November, 1979. Instead of making an order on the motion, Counsel for both parties requested the Judge to make an order by consent. The Judge obliged and proceeded to record as follows:-

> "Order by Consent": -
>
> > (1) The defendant – (applicant) to have released to it forthwith the fittings fixtures and chattels as per particulars given in Exhibit–"A" attached to the affidavit of J.A.P. Morris dated 3rd August 1979 and for this purpose the defendant (Applicant) to have free access to premises LR 209/8201 Mogadishu Road to remove the said fitting, fixtures and chattels without any interference by the plaintiff and or its agents.
> >
> > (2) Order dated 31st May, 1979 varied to the said extent.
> >
> > (3) Costs of this motion to the defendant (applicant).

It is to be noticed that apart from damages, this was precisely what the appellant sought by its counterclaim. The position was that the action was compromised and in a very real sense, the bank must be held to submit to judgment for the reliefs the appellant sought. Such a course is permissible as a matter of procedure. At page 765 of *Halsbury's Laws of England* vol. 22 3rd Edn. in foot note (b), the learned Author states under Judgment by consent:

> "A consent judgment or order may be taken on the hearing of an action commenced by writ or on some interlocutory application therein such as a motion for injunction".

Here, the consent order was obtained in a motion to set aside an *ex parte* injunction. Furthermore, rule 6 of order 24 of the High Court Rules obliges a Court when it is shown to its satisfaction that a suit has been adjusted wholly or in part by lawful agreement or compromise, on the application of any party to record and enter judgment in accordance with that agreement or compromise. In this case, according to the Judge, the application to make the consent order was jointly sought by both parties.

It seems clear that the bank or their legal advisers must have appreciated that this consent order or judgment practically knocked the bottom of the bank's suit against the appellant. So they sought to have it set aside or varied. The bank failed both in the High Court and before this Court. I think there is some

point as to whether this was a judgmentjudgment or order. It does not seem to me to matter a great deal by what name it is called. Its legal effect seems to me to be the same.

In declining to disturb the High Court, this Court said: -

> "We will take the unusual step of dismissing this appeal without writing considered judgments of our own but adopting as the judgment of this Court the order of Harris J dated 16th day of January 1980."

It is to be noted that what the parties consented to was described by them as an order, this Court gave a judgment affirming the correctness of that order. It seems therefore that this Court conceived, that at any rate, on the facts of this case, the words consent "order" or consent "judgment" were interchangeable.

In view of the points taken by the respondent bank on this appeal and the view expressed by the learned Judge in the Court below, one must look at the situation posed by this case carefully. One must ask the question; on the pleadings what issues were joined between the bank and the appellant in the Court below? If I appreciate them right, they were;

> *1. Who was entitled to the possession of the fittings and fixtures in dispute?*
>
> *2. And has the party so entitled a right to remove them without let or hindrance from the other party?*
>
> *3. If he is, what is the measure of damages to which he is entitled by reason of the interference with such right by his opponent?*

The vagueness which characterized the *res litigosa* in bank's plaint was put right by the appellant which provided a full inventory of them in Exhibit A. It seems to me that the consent order concludes the first two issues in the appellant's favour. And subject to formalizing them in a decree, the appellant can apply to the Court under rule 6 of order 24 to have them enforced by execution. But the fact that the appellant did not draft a formal decree to make the order enforceable by execution, did not make the consent order any less binding. It seems to me that it is the judgment or order that determined the rights and obligations of parties not their formalization into a decree. In my opinion, the only outstanding issue between the parties is the consequential issue of damages which the appellant could pursue or abandon as it chose.

When the bank's attempt to get rid of the consent order finally failed, the appellant seems to have been desirous of proceeding with its counterclaim. But in order to do so untroubled by the bank's claim which had not formally been dismissed, it applied to the Court for a number of orders. The most crucial of it was one which was formulated as follows: -

> "that the consent order recorded by Justice Harrison the 9th November, 1979 ….. and which was affirmed by the Court of Appeal …… effectively extinguishes and determines the allegations and pleas contained in the plaint the substratum whereof has gone and the same should be dismissed with costs."

Notwithstanding the consent order, the bank apparently declined to release the fittings and fixtures covered by the order so, the appellant also sought an order that: -

> 4. "The Plaintiff be ordered to return forthwith the fixtures and chattels forming the subject matter of the aforesaid order"

These orders were opposed by the bank and in the result, successfully. I will consider the grounds urged by the bank presently. The learned Judge, persuaded by the bank's contention, dismissed the motion. As I read his ruling, his grounds for so holding seem to be the following: -

> 1. A civil suit can only be dealt with summarily in certain specified grounds, like want of

> jurisdiction, limitation, lack of reasonable cause of action and "so forth". Otherwise a decision on an interlocutory application "has never been known to dispose of the issues in the main suit".
>
> 2. The Court cannot say whether any fixtures referred to in the plaint are the same as those in Exhibit "A""……"
>
> 3. It is not possible to find at the conclusion of the case that the defendant tampered with the fittings and fixtures on the disputed premises other than those in Exhibit "A"…."
>
> 4. Order 24 rules 6(1) & (2), Order L and section 3A of the Civil Procedure Act "are not relevant to the present argument."

With great respect to the learned Judge, not one of the four grounds on which he dismissed the motion hold water. As to ground 1, the Judge concedes that a civil suit can be disposed of summarily on grounds which he specifically named and others which he did not name. Those are covered by his expression "and so forth". In my opinion, a civil suit can be compromised and that done, litigation in so far as the issues compromised are concerned, is at an end. The common law position is stated at page 403 paragraph 756 of vol 30 of *Halsbury's Laws of England* 3rd Edn as follows: -

> "All or any of the questions in dispute in an action may be settled between the parties by compromise without trial, and if such compromise is *bona fide* and validly entered into, the Court does not allow the question so settled to be again litigated between the parties to the settlement."

As I have endeavoured to show, the main question in controversy between the bank and the appellant was, which of them was entitled to the furniture and fittings in dispute. Counsel for both parties having discussed this matter, reached an agreement. They therefore prepared and signed a consent order which they asked the Court to adopt. The Court did so and that compromise shows that the bank accepted that the appellant was entitled to the possession of those items and they conceded their right to remove them without interference.

The Judge also thought the issue which the appellant raised, cannot as a matter of procedural law, be raised by an interlocutory application. He must be wrong because I have already shown that a consent order can properly be taken on an interlocutory application. If it can be taken at that stage, it can also be asserted in interlocutory application.

With regard to the Judge's second ground, he seems to imagine some disparity between the *res litigosa* when the parties themselves found none. The bank merely sought an injunction restraining the appellant from severing or removing some non-descript fixtures. The appellant said those fixtures belonged to itself and was entitled to remove them. It then provided a detailed list of these. On seeing them, the bank capitulated and consented to an order against itself. In the present motion, the appellant merely sought the return of those fixtures that formed the subject of the consent judgment. What possible doubt can there be about this? Indeed even the bank did not have any doubt about the fixtures whose delivery the appellant sought. Mr. Le Pelley for the bank, is recorded to have submitted to the Judge below that the appellant having already got that order, the application was unnecessary.

He said: -

> "How can defendant get order for return of chattels once more? This Court has no jurisdiction to make fresh order on that issue."

This shows quite plainly that the parties were *ad idem* on the furniture and fittings sought in the chamber summons and the Judge was in error in thinking there was any difficulty in identifying them.

The Judge's third reason is even less defensible than the second. He says, it is not possible to find that the defendant tampered with the fixtures besides those shown in Exhibit "A". But the fixtures shown in

Exhibit”“A” are those whose return was sought in the motion and it was in respect of them that the bank submitted to judgment or to a consent order. The Judge cannot have known of any other fittings because the bank did not identify by affidavit or otherwise any one else.

At all events, Harris J thought that both the fixtures contemplated by the bank and those specifically described by the appellant were covered by the consent order. He said: -

> “The plaintiff has brought within the jurisdiction of the Court in this suit what he described as““fixtures charged to the plaintiff” and the defendant by its counterclaim has brought within the suit what it has described as the tenant’s fittings and fixtures and also the tenant’s “other chattels”. It is clear therefore, that all the items comprised in the consent order, are quite apart from that order within the ambit of the suit”.

I think therefore that the Judge’s third reason which implies that the appellant’s motion sought some other fittings and fixtures beyond those specifically described in the consent judgment is unsound.

Lastly, the learned Judge considered that Order 24 rule 6(1) and (2) are not relevant to the motion before him as well as order 50 and the cited section 3(A) of the Civil Procedure Act. I am inclined to agree that the object of invoking the omnibus section 3(A) does not appear obvious. But Order 50 dealt with motions and this application was made by notice of motion. I am not clear what other rule properly applies. The ruling is unenlightening under what order an application such as this can otherwise be brought.

But unlike the Judge, I am clearly of opinion that order 24 Rules 6(1) and (2) govern this application. It is the rule that empowers a Court to record and enter judgment in accordance with a lawful agreement or compromise, and it is this same subrule that enables a Court to make an order for the implementation or execution of a consent judgment or order. And the order in respect of which the appellant seeks direction is a consent one. Beyond the bald statement that order 24 rules 6(1) and (2) are not relevant, the Judge ventured no opinion as to what order or rule applies to a case like the present and gave no reason for summarily rejecting that order as irrelevant. I respectfully differ. The correct order and rules are the ones the appellant invoked.

If the view I formed of the learned Judge’s reasons for rejecting the motion is right, then I am impelled to hold that all those reasons are invalid. In my opinion, the appellant set on foot a proper application firmly bottomed on order 24 rules 6(1) and (2) of the Civil Procedure Rules. If that is right, it is entitled to the orders which it sought on the motion.

With regard to the orders numbered 1 and 4 which relate to the effect of the consent order and the return of the furniture and fittings listed in the inventory, my opinion is that the consent order estops the bank from denying that those furniture or fittings belong to the appellant or that it was entitled to their peaceable return. Since that was the basis of the bank’s action, I should hold that the substratum of the action disappeared and that the appellant was entitled to an order for return of the items shown in the inventory. The only issue joined between the parties which was not the subject of the consent order, is the appellant’s right to damages against the bank for detention of its chattels. No principle of *res judicata* can be invoked in relation to that claim. So, I would hold that the appellant was entitled to have that part of its counterclaim listed for hearing.

In view of my holdings, I should conclude that the learned Judge’s contrary decision was wrong and that the appellant must succeed on this appeal. But Mr. Le Pelley who appeared for the respondent bank, has sought to defend that conclusion by argument which I must briefly examine. First, Counsel says, the consent order is not a decree and cannot be drawn as such and a consent order should not be turned into a consent judgment. Second, he submits that there is no evidence that the bank agreed to release the goods, nor is there evidence who was in possession of the fixtures or who should hand them over. Third, he submits, one should look at the application on which the consent order was based and fourth, he asks if this is a consent judgment why was it not executed? I hope, I have done justice to Mr. Le Pelley’s careful contentions.

With regard to Counsel's first contention, I think the matter of substance is whether the right to possession of the fixtures and their return to the appellant were two of the questions in dispute between the parties and if they were, whether they were covered by the compromise which culminated in the consent order. If they were, the bank was estopped by it. The fact that it was not drawn subsequently as a decree does not matter a bit. After all, a decree is a mere formal expression of the judgment and must conform with it. What estops the parties, is not the decree but the actual decision whether or not the decree accurately reflects it. In the context of this case, the difference between a consent order or a consent judgment is a distinction without a difference. Both have the same legal effect of precluding the bank from seeking to re-open the question who was entitled to the possession of the fixtures and fittings covered by the consent order and whether such party should have peaceable possession of them.

With regard to the second submission that there is no evidence that the bank agreed to release the fixtures and who had possession of them at the time, my view is, this contention is not now open to the bank. Rightly or wrongly, the bank submitted to these orders and whether there was evidence on which the appellant would have succeeded if the matter had gone to trial, is not relevant so long as the consent order stood. It is to be remembered the bank's attempts to relieve of those orders failed.

In my opinion, the answer to the third contention that one must look at the nature of the application which resulted in the consent order is equally, irrelevant. A consent order can be obtained in an interlocutory application for injunction and the order was mutually sought and obtained at one such motion. That is the end of the matter. The nature of the application which culminated in the consent order, is for present purposes, of no moment. Then lastly, Counsel for the bank asked the rhetorical question why this so-called consent judgment was not executed?

If indeed the consent order has the same legal effect as a consent judgment, as I believe it has, then the fact that the judgment creditor did not take steps to execute it, does not impair its legal quality as estoppel per *rem judicatam.* But order 24 rule 6(2) makes special enforcement provisions for judgments or orders obtained by compromise.

It says:-

> *The Court, on the application of any party may make any further order necessary for the implementation and execution of the terms of the decree.*

The mechanics appears to be that the consent order must be framed in the form of a decree and executed as any other decree, or if there should be difficulty in executing it because of its special nature as a compromise judgment, the judgment creditor or decree holder is authorized to return to the Court and seek any order that may aid the implementation and execution. And the Court is empowered to make any such order. In this particular case, had the appellant drafted the consent order as a decree in the form laid down by rule 6 of order 20 and thereafter sought the Court's aid to execute it, I cannot see how such aid could have been denied. But the fact that the appellant did not seek to execute it, provides no assistance to the bank in its contention that it is entitled to re-agitate the issue of the right to the possession and surrender of the fixtures which form the subject of the consent order.

While I acknowledge Mr. Le Pelley's full and courteous submissions, I think, on the whole Mr Guatama's contention is the right one and I agree with him. It follows that I would allow the appeal and set aside the ruling appealed from. In lieu of it, I would make the several orders sought in paragraphs 1, 3 and 4 of the appellant's notice of motion with costs here and below.

Masime Ag JA. I have had the advantage of reading in draft the judgments of my lords Platt and Apaloo JJA. I agree with them that this appeal should be allowed and that the ruling of Aganyanya J should be set aside and be substituted with the orders prayed for in the Notice of Motion dated 11th May 1983. The costs of this appeal and the superior court should go to the appellants.

Date and delivered at Nairobi this 11th day of March , 1988

H.G. PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OF APPEAL