



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 83 OF 2003

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

SPECIALISED ENGINEERING COMPANY LIMITEDRESPONDENT

(Appeal from a decree of the High Court of Kenya at Nairobi (Ringera, J) dated 3rd day of May, 2002

In

H.C. C. C. No. 1728 of 1979)

JUDGMENT OF THE COURT

This is the third appeal to this Court in respect of a dispute between the appellant **Kenya Commercial Bank** and the respondent **Specialised Engineering Company Limited** which started way back in the month of May, 1979. In one of the previous appeals, this Court and particularly Apaloo, J.A (as he then was) set out the facts of the entire dispute so admirably that we would only need to give a brief summary of them here in so far as is relevant in respect of this judgment. In doing so, we must also note that the judgment of Ringera, J (as he then was), the subject of this appeal, also sets out the same facts clearly.

Briefly, the appellant advanced monies to a company known as **Morris & Company Limited** (hereinafter referred to as the debtor.) The debtor charged to the appellant its land L.R. 209/8201, 1R 27981 by a charge dated 13th May, 1977. It also charged its moveable assets to the appellant by a debenture dated 15th February, 1977. The debtor failed to repay the debt and the appellant appointed a receiver on 18th January, 1978. The charge over all the movable assets of the debtor thus crystallized. Earlier, the debtor had rented out part of its premises to the respondent and the respondent occupied the same as a tenant on month to month basis. During the tenancy, the respondent erected temporary structures and had certain fixtures and fittings on the said premises which it used as a workshop and offices. It also had some other chattels in the workshop and claimed those as solely belonging to it and the debtor had no claim over them at all. In the month of May, 1979, the respondent wanted to move out of the premises. The appellant moved to the superior court and filed a plaint against the respondent dated 31st May, 1979 in which it prayed for injunction to restrain the respondent from

severing or removing any fixtures fittings or chattels from the premises and for damages in respect of fixtures removed and damages done to the premises. Together with that plaint, the appellant also filed an application for an interlocutory injunction to restrain the respondent from severing or removing any fixtures from the portion of the premises leased to the respondent by the debtor. The court issued an ex-parte injunction to that effect pending further orders of the court on that day i.e. 31st May, 1979. The respondent filed defence and counterclaim dated 20th July, 1979 on the same date. In its defence, the respondent stated that it was a tenant of the debtor and the alleged fittings, fixtures and chattels were its own property and were not the subject of chattels mortgage by debenture as they never belonged to the debtor. It also stated that it had not removed, or intended to remove or was removing any fixtures belonging to the debtor or charged to the appellant as alleged in the plaint. Further, the respondent stated in the defence that the appellant had, wrongfully and contrary to the ex-parte order, prevented it from removing its fixtures and fittings illegally. In the counterclaim, the respondent stated inter alia :-

“7. The Defendant repeats paragraph 3 and 5 of the Defence and claims from the plaintiff a return or release of the Tenants fixtures and fittings and the Defendant’s said chattels or their value and damages for their detention.”

In its prayers to the court, the respondent sought dismissal of the appellant’s suit with costs; vacation of the ex-parte injunction order made on 31st May, 1979; an injunction to restrain the appellant, its servants and/or agents from preventing the respondent from removing its fixtures, fittings and chattels, damages and any other relief deemed fit to grant. It annexed a list.

The appellant filed a reply to that Defence and Defence to the counterclaim on the subject fixtures, fittings and chattels. On 6th August, 1979, the respondent filed a notice of motion in which it sought the discharge or setting aside of the ex-parte injunction order dated 31st May, 1979. It also sought costs of that application. The application was supported by an affidavit sworn by John Anthony Page Morris, one of the company’s directors. A list of the subject properties was again attached to that affidavit. The application came up for hearing before Harris, J (as he then was) on 9th November, 1979. Counsel for both parties were present. At their invitation, Harris, J entered an order by consent of the parties. That order read as follows:-

“Order by Court

- 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 30th August, 1979 and for this purpose the defendant (applicant) to have full access to premises L.R. 209/8201, Mogadishu Road, Nairobi, to remove the said fittings, fixtures and chattels without any interference the plaintiff (sic) and/or its agents.***
- 2. Order dated 31st March, 1979 varied to the said extent.***
- 3. Costs of this motion on notice to the defendant (applicant.)”***

Later, the appellant felt unhappy with the consent order, much as it was an order made in the presence, and at the invitation of both counsel. On 20th November, 1979, the appellant moved to the superior court and applied for an order:-

“1. That the consent order herein made on 9th November, 1979 be revised or discharged and set aside or varied.”

The respondent opposed that application. Harris, J., after full hearing of the application, in what he termed as an “order”, dated and delivered on 16th January, 1980 dismissed it with costs to the respondents. The appellant felt aggrieved and filed an appeal to this Court - the first of such appeals. This Court, composed of Law, Miller and Potter, JJ.A, heard the appeal and in their judgment delivered on 6th

May, 1981 stated inter alia:-

“In order to obviate any further delay in this unfortunate, protracted and (in our view) largely unnecessary litigation, 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 of January, 1980 which is the subject of this appeal, and with which we are in such full and complete agreement that we would not usefully add anything to it. We hope it will be reported.”

Thus, the consent order recorded on 9th November, 1979 remained as the decision of the Court on the issue of the prayers sought in the plaint and the release of the subject fixtures, fittings and chattels in the debtors premises to the respondent. The record shows that the respondent’s advocates wrote a number of letters to the appellant’s advocates seeking the release of the properties but in vain. Close to two years after this court’s decision cited above, the respondent moved to the superior court again by way of notice of motion filed on 6th May, 1981. It sought four orders, which were that the consent order recorded by Harris, J on 9th November, 1979, which the Judge refused to discharge, set aside or vary in his order of 16th January, 1980 and which refusal was confirmed by this Court, effectively extinguished and determined the allegation and pleas by the appellant and as the substratum of the appellant’s case had gone, the appellants case be dismissed; that alternatively, the appellants case be marked “adjusted wholly” and satisfied, that the respondents, counterclaim be listed for hearing on a date convenient to the court, and that the appellant be ordered to return forthwith the fixtures and chattels, the subject matter of the consent order. That notice of motion was opposed and Aganyanya, J. (as he then was), heard it and dismissed it. The respondent was dissatisfied and this time it was its turn to appeal to this Court. It did by way of Civil Appeal No. 131 of 1984. This Court, composed of Platt, Apaloo, JJ.A (as they were) and Masime, Ag. J.A. (as he then was), allowed the appeal in terms of prayers 1, 3 & 4 of the respondents notice of motion dated and filed on 6th May, 1981. It did so in judgments delivered by each Judge on 11th March, 1988. Although we have set out in brief the prayers that were set out in that application, for clarity, those prayers in terms of which the appeal was allowed were as follows:-

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

We observe at this juncture that vide that judgment, the appellant’s case as set out in the plaint was extinguished. Further that the appellant was ordered to return the subject properties and that in the respondent’s counterclaim, which was pleaded at paragraph 7 the return or release of the respondents fixtures, fittings and chattels or their value and damages for their detention was ordered by this Court to be set down for hearing. In short, such a decree having been issued in respect of the dismissal of the appellant’s suit and return of the respondents fixtures, fittings and chattels, the question as to the value of the same properties, if not returned, still remained to be the subject of further hearing for the claim as made in the counterclaim which vide the judgment, was to be set down for hearing. We also note that the identity of the subject fixtures, fittings and chattels was never in doubt as they were listed and that list was annexed to the various affidavits and pleadings in the record.

After this Court’s judgment above, over four years passed without any apparent action on the matter until 6th August, 1993, when the appellant filed a notice of motion seeking an order to dismiss the counterclaim for want of prosecution. That application was opposed and the court rejected

it. The counterclaim was then set down for hearing before Ringera, J (as he then was). After hearing the defence witnesses and one plaintiff's witness, he visited the scene and received submission from counsel. In his judgment delivered on 3rd May, 2002, he took the view that the decision before him was limited to an assessment of the value of the respondent's fixture, fittings and chattels if the same had not been returned to the respondent as ordered by the Court of Appeal and damages for their wrongful detention. Proceeding on that approach, he rejected the claim of damages as that was not specifically pleaded and strictly proved. However, as to the value of the subject properties, his judgment in the end is as follows:-

“The upshot of this trial is that there will be judgment for the defendant against the plaintiff in the sum of Kshs.9,998,000/- together with interest thereon at court rates from the date hereof until payment in full.”

He reserved costs until later and ordered submissions to be made on the same by both counsel. After submissions on costs, he awarded costs of the counterclaim to the respondent together with interest thereon at 14% per annum on a simple interest basis until satisfaction of the decree.

That is the judgment that the appellant is challenging in this appeal. Although fifteen grounds of appeal were cited in the memorandum of appeal dated and filed on 25th April, 2003, a proper perusal of these grounds reveals that only six substantial grounds were raised, other grounds being reasons supporting these six grounds. These grounds were in summary that the learned Judge of the superior court erred in law and in fact in holding that the value of the goods was to be assessed at current value; that as the respondent had earlier obtained the decree it required, all that was left for the learned Judge to do was to assess the damages, notwithstanding that this Court had ordered that the counterclaim be listed for hearing; that the Judge should have assessed the value of the chattels as at 9th November, 1979; that the Judge erred in rejecting the appellant's evidence on the value of the gantry crane, that the Judge erred in holding that the appellant produced no evidence of the value of the subject fixtures, fittings and chattels and that as the respondent had not proved how it worked from 1980, and what it purchased in substitution for the chattels withheld, the award in favour of the respondent should not stand.

In his address before us, Mr. Murugara, without abandoning the other grounds concentrated on two main grounds. These were first, that some damages were awarded which damages were special in nature but had not been pleaded. On that ground he submitted that in prayers made in the counterclaim, there was no claim for value of the subject properties as all the respondent claimed was damages. In his view, this was a claim for detinue and in such a claim one would seek the release of the goods detained or in the alternative, seek the value of the goods so detained and such a claim is akin to a claim for special damages. Thus, in Mr. Murugara's view, the learned Judge was wrong in making an award which was in nature of special damages without any prayer for and proof of the same. Secondly, Mr. Murugara contended that the learned Judge erred in assessing the value of the subject properties as at 29th September, 2000. His view was that as the Court of Appeal adopted Harris, J's order as its judgment, and a decree issued pursuant to that order, the date of the consent order, i.e. 9th November, 1979 should have been the effective date for purposes of the assessment of the value of the subject properties as that is the date when the release of the goods was ordered. Mr. Murugara, however, conceded that Ringera, J at page 8 was right when he said he understood the exercise before him as the assessment of damages, but he said that as the respondent had omitted to plead the value of the goods, there was nothing before the learned Judge for assessment. He referred us to several authorities and asked us to allow the appeal and dismiss the counterclaim with costs to the appellant. On his side Mr. Gautama, the learned counsel for the respondent, referred us to the appellant's prayers in the memorandum of appeal and invited us to note that, therein, the appellant asked this Court to allow the appeal and to order re-assessment of damages by the High Court and not the dismissal of the counterclaim. He submitted that the case before the superior court was not based on contract but on the allegation that the appellant was a tortfeasor. Further there was an order of this Court that the value of goods be assessed and as the appellant had not released the goods, it was proper that the value of those goods be assessed. Mr. Gautama submitted that as a tortfeasor, the appellant had to compensate the respondent which is the victim. He also referred us to a few authorities and contended that the learned Judge was fully aware of what was required of him as was demonstrated

by this Court's earlier decision and the judgment of the superior court was unassailable. He sought dismissal of the appeal.

We have anxiously considered the record, the submissions of counsel and the law. As we have stated, Ringera, J appreciated that this Court's decision allowing the respondent's appeal against Aganyanya, J's ruling limited his exercise to an assessment of the value of the respondent's fixtures, fittings and chattels (if the same had not been returned to the respondent as ordered) and damages for their wrongful detention. In our view, he was plainly right on that aspect. In Civil Appeal No. 131 of 1984, the three Judges who heard the appeal against Aganyanya's J's ruling wrote separate judgments but reached the same conclusion. Apaloo, J.A wrote the lead judgment. He stated in that judgment inter alia:-

“In my opinion, the appellant set on foot a proper application firmly bottomed on OR 24 rules 6 (1) and (2) of the Civil Procedure Rules. If this is right, it is entitled to the orders which it sought in the motion.”

We have set out hereinabove, the orders it sought in motion the main ones being that the respondent's counterclaim be listed for hearing as the appellant's case had lost its substratum and thus had been extinguished, and that the appellant be ordered to return the fixtures, and chattels forming the subject matter of the court order. The counter-claim that the judgment of this Court allowed to be set down for hearing sought return or release of the respondent's subject goods or their value and damages for their detention. By the time Ringera, J at page 8 was hearing the counterclaim as ordered by this Court, the goods had not been returned to the respondent despite the consent order of 9th November, 1979. This was over 20 years later. The respondent's application which was reinstated, on appeal as we have stated, was made pursuant to **Order 24 Rules 6 (1) and (2)** of the Civil Procedure Rules. Apaloo, J.A relied on **Order 24 Rule 6 (2)** which states:-

“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.”

In our view, Ringera, J at page 8 cannot be faulted in assessing the value of the subject properties, which had been ordered to be returned to the respondent in a consent order which was confirmed by this Court way back on 11th March, 1988, but had not been complied within at the time the matter came up before him for hearing. We are of the view that although the value of the goods was pleaded as an alternative to the return of the goods, when the return was not effected by the appellant, the claim for the value in the counterclaim as alternative did not fizzle out. That is the situation that necessitated reliance on **Order 24 Rule 6 (2)** by Apaloo, J.A, and asking us to decide otherwise is seeking that we sit on appeal on this Court's decision. That cannot be proper in law. In any case, the record shows that both parties clearly understood the exercise that was before Ringera, J to be assessment of the value of the fixtures, fittings and chattels and to that effect, the items allegedly detained were listed and that list attached to the defence and in the defence to counterclaim to which we shall refer later in the judgment, the claim for value of the goods was mentioned. In the proceedings the main witnesses for the parties gave evidence on the value of the subject fixtures, fittings and chattels. We are certain in our minds that the issue of the value of the subject goods remained alive and pursuant to the decision of this Court in the Civil Appeal No. 131 of 1984, Ringera, J's conclusion that he was required to assess the value of the subject goods was well founded.

The next issue raised by Mr. Murugara, is as we have stated, that the value of the disputed goods was not pleaded and so should not have been awarded by the superior court. It is true that there was no prayer specifically for the fixtures, fittings and chattels in the counterclaim. However, in the body of the counterclaim, the value of the goods was pleaded. We have reproduced the relevant part of the counterclaim hereinabove. Further, in the defence to counterclaim the appellant stated:-

“DEFENCE TO COUNTERCLAIM

3. The plaintiff repeats paragraphs 1 and 2 of the Reply to Defence and denies that the defendant is

entitled to a return or release of any fixtures , fittings, or chattels or their value, or damage for their detention or at all and puts the Defendant to strict proof of each and every allegations set out in paragraph 7 of the Defence and counter claim.” (underlining supplied)

Further, the list of the fixtures, fittings and chattels that were the subject of the dispute was attached to the Defence and counterclaim. When the matter came up for trial as ordered on appeal, both parties took part and the main part of the trial was assessment of the value of the detained goods. In his submission before the Court, Mr. Le Pelley, the learned counsel then appearing for the appellant, contended before the superior court, inter alia, that:-

“8. The only issue therefore which can be before the court and is before the court is the value of those chattels on the 9th of November, 1979, when this value should have been included in the decree.”

It would appear from the record and from the above that Mr. Le Pelley did not dispute the assessment of the value of the chattels, as such. All he was disputing was the actual value of some of the goods, particularly that of the “gantry” crane and the effective time at which the value should have been assessed. Thus, whereas the question of the claim of value of the goods as alternative to retention of the goods is pleaded in the main body of the counterclaim but not prayed for, there is ample evidence that that issue was fully canvassed, before the trial court – evidence given on it, and submissions made on it such that the issue was left to the court to decide upon. In the well known case of **Odd Jobs v. Muhia (1970) EA**. This Court held:-

“(i) a court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.

(ii) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.”

The argument advanced by Mr. Muragara, has with respect, no merit and we hold that here, the issue of the value of its goods was pleaded in the counterclaim, and although not sought specifically in the prayers, the matter fully canvassed and the learned Judge was left to decide it as he did.

The last issue is that the learned Judge assessed the value of the goods as at an arbitrary date and not the 9th November, 1979 when the consent order was made. The learned Judge considered this issue at length. At page 7 of the judgment in the record before us, he set out the appellant’s argument on the issue. At page 8, he set out the respondent’s argument on the issue and thereafter he considered both arguments fully and concluded that in principle, the effective date of assessment of value of such matters was the date of the decree. In this case, however, he was of the view that the decree that issued upon the consent order of 9th November, 1979 having dealt with the appellant’s case relating to the return of the subject goods, did not deal with the value of the goods as that issue of the goods became an issue long after the consent order had been recorded following the failure by the appellant to return the subject goods. Thus, he found that his judgment which was the one on the value of the fixtures, fittings and chattels, was the relevant judgment upon which the assessment was to be based. In any event the Court of Appeal in its judgment did not treat the consent as a decree in favour of the respondent on the respondent’s counterclaim. The learned Judge then stated:-

“I will therefore proceed to assess the value of the detained goods not as it stood in 1979 but as it stands today.”

In effect, on legal principles, the learned Judge agreed with the appellant’s counsel that the assessment should, in law be done as at the date of judgment. The only point of departure is that in this case, whereas the appellant’s view was that the decree issued on the consent recorded on 9th November, 1979, should determine the effective date of assessing the value of the goods, the learned Judge held that for purposes of the undetermined counterclaim seeking the assessment of the value of goods, the effective date of the decree in favour of the respondent would be the date of his judgment. We agree with the learned Judge’s approach on the issue. We think the appellant, in seeking to have the date of consent

judgment as the date of the assessment of the value of the goods is not being realistic and is, with respect, seeking to reap from its delay or refusal to return the goods to the respondent. It is clear that the order made necessitating assessment of the value of the goods was made because the first option of returning of the subject goods did not materialize and that is why the provisions of **Order 24 rule 6 (2)** was involved. The relevant decree as far as assessment of value of goods is concerned, is the decree issued from the learned Judge's judgment. His judgment proceeded from the evidence that was adduced before him. The main evidence in assessment is given by Peter Henry Huth (DW2). That witness stated in evidence:-

“As at 29.9.2000, the market value was Kshs.9,998,000/-“

And in cross-examination by Mr. Le Pelley, he said :-

“The values indicated at column C represent the market value of equivalent items duly depreciated as at 29.9.2000.”

That is the effective date given in evidence before the learned Judge. The appellant did not challenge that evidence by adducing a different value at a different date although one would have expected it to do so, this being a civil case. In the circumstances, the date 29.9.2000 cannot be said to be an arbitrary date. It is the date put forward in evidence as the last date when the values for the subject goods were effectively assessed and this was the relevant date for the purpose of the judgment of the superior court. There is no merit on this complaint.

As we stated at the beginning of this judgment, although many grounds of appeal were cited, Mr. Murugara only raised three in his arguments before us but did not abandon the others, some of which were in fact only explanations to highlight the main grounds we have dealt with above. We were not for instance told that the assessment by the Judge was excessive. In any event as to the complaint about the assessment of the value of “gantry crane”, the learned Judge saw the witness, considered the reports availed and in arriving at his conclusion gave cogent reasons for that conclusion. We are not persuaded to interfere with his decision which we find, was founded on sound reasoning.

In conclusion, we find no reason to disturb the learned Judge's decision. It will stand. This appeal lacks merit. It is dismissed. The respondent will have costs of the appeal.

Dated at delivered at Nairobi this 16th day of July, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL