**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT OF GHANA**
**ACCRA- GHANA, A.D.2014**

**CORAM: ATUGUBA, J.S.C. (PRESIDING)**
**DOTSE, J.S.C.**
**GBADEGBE, J.S.C.**
**BENIN, J.S.C.**
**AKAMBA, J.S.C.**

**CIVILMOTION**
**NO.J5/27/2014**

**22ND JULY 2014**

**THE REPUBLIC**

**VRS**

**HIGH COURT, ACCRA**
(FAST TRACK DIVISION)

**EX-PARTE: DEBORA ATAKORAH … RESPONDENT / APPLICANT**
(FAST TRACK DIVISION)
UNNUMBERED HOUSE AT KASOA
OFFICIAL TOWN, NEAR MAMA T

AND

**BILLY CUDJOE ... INTERESTED PARTY**
UNNUMBERED HOUSE AT KASOA
OFFICIAL TOWN, NEAR MAMA T

# RULING

## ATUGUBA, JSC:-

The applicant moves this court for:

"(i) an order of Certiorari to quash the decision of His Lordship Justice L.L. Mensah (hereinafter called "the Judge") sitting at the High Court (Fast Track Court 1) which was made on 2nd April, 2014,

(ii) an order of Prohibition restraining the said Judge from proceeding to take evidence and determine the substantive suit in respect of case entitled **DEBORA ATAKORA v. BILLY CUDJO SUIT NO. AC 128/2012** as having been made in excess of his jurisdiction,

(iii) an order directing the said Judge to adopt the terms of settlement signed by the parties and their solicitors and filed on 25th March, 2014 by the parties in the said suit, and

(iv) any further or other Order(s) as this Court may deem fit.

- - - - - - - - - grounds for the application are as follows:

(i) That the judge acted without jurisdiction when he set aside the terms of settlement validly executed by the parties and their counsel.

(ii) That the judge acted in excess of jurisdiction when he ordered that the suit be heard on its merits despite the compromise reached by the parties."

The facts of this case are as stated in paragraph 1 of the applicant's supporting statement of case dated 24/4/2014 as follows:

"--------the Plaintiff/Applicant (hereinafter called "the Plaintiff") caused a Writ of Summons to be issued against the Defendant/Respondent (hereinafter called "the Defendant) for the following reliefs:

i. A refund of the sum of USD 28,000.00 or its equivalent in Ghana cedis being monies spent on carrying out works on the defendant's house,

ii. Interest on the above sum from December, 2006 till date of final payment,

iii. Costs, including Plaintiff's legal costs, and

iv. An order of injunction restraining the Defendant from removing the Plaintiff from the premises until final determination of the suit.

---------- when the suit came up for hearing the parties together with Counsel agreed, pursuant to the admonishment of the Judge, to settle the matter out of court. The parties to the suit together with Counsel subsequently voluntarily compromised the action, executed the terms of settlement and filed the same at the Registry of the Court below. On 2nd April, 2014 just before Counsel for the Plaintiff was to move the Court below for the adoption of the terms as a Consent Judgment the Defendant announced to the Court below that on second thought he would like to resile from the compromise and have the case heard on its merits.

---------- in the face of teething objection by Counsel for the Plaintiff to the purported resilience by the defendant on the grounds that the terms of settlement was a binding contract between the parties therein; and further that the Interested party could not by that means set aside the terms, the Judge dismissed Counsel's objection, adjourned the matter to 14th April, 2014 for hearing and awarded costs to the Plaintiff."

## Terms of settlement simpliciter and consent judgment

When parties settle an action whether in or out of court simpliciter, the cause of action involved in such settlement is gone and is replaced by such settlement. Upon breach of the settlement the innocent party's remedy is not to reopen the litigation so settled but to bring an action to enforce the settlement, it being an enforceable contract between the parties involved.

Where however the terms of settlement by consent of the parties are entered by the court a consent judgment then it becomes, like any other judgment an executable judgment of the court if it contains executable orders.

This legal position has been lucidly stated by the great Lord Denning M.R in *McCallum v Country Residences Ltd*. (1965) IWLR 657 C.A. The headnote thereof is as follows;

> "A legally aided plaintiff brought an action in August, 1963, in respect of work done for the defendants. They denied the claim and counterclaimed alleging negligence in the work done. On June 5, 1964, the defendants' solicitors initiated a correspondence "without prejudice" with a view to compromise by payment of a stated sum and costs to date. Negotiations continued by letters between the parties solicitors until, on September 28, the plaintiff's solicitors accepted an offer of £900 on condition that the defendants paid the plaintiff's costs to date, and proposed taking out a summons "that terms of settlement had been reached" in order to obtain the necessary order as to costs required for a legally aided client. *A summons was duly taken out asking that all proceedings in the action be stayed save for the purpose of carrying into effect the terms that the defendants should pay the plaintiff £900* within seven days and also his party and party costs, to be taxed on a common fund basis, pursuant to Schedule 3 to the Legal Aid and Advice Act, 1949.
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> When the summons came before the official referee, *the defendants' representative, a solicitor's clerk, indicated that he was not happy about the position as to the costs,* but he did not expressly object to the making of the order asked for. The official referee read the letters, found that there was a concluded agreement to settle for £900 and costs, and made the order asked for in the "Tomlin" form.
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> On appeal by t he defendants:-

*Held,* allowing the appeal (Danckwerts L.J. dissenting), that as the defendants had not consented to the making of a Tomlin order, there was no jurisdiction to make it, for *where an action had been compromised by a settlement on terms, the compromise gave rise to a new cause of action and its terms could be enforced only by starting new proceedings.* Unless *the defendants consent to the making of a Tomlin order*, a plaintiff is not entitled to obtain the equivalent of judgment on the compromise by means of a Tomlin order."

At 660 Denning M.R expatiated on the legal distinction between a compromised action simpliciter and a consent judgment as follows:

"*When an action is compromised* by an agreement to pay a sum in satisfaction, *it gives rise to a new cause of action*. This arises since the writ in the first action, and must be the subject of a new action. *The plaintiff*, in *order to get judgment, has to sue on the compromise*. That is *the only course which the plaintiff can take* in order to enforce the settlement, *unless of course he can go further and get the defendant to consent to an order of the court*. In the *absence* of *a consent to the order, as distinct from a consent to the agreement*, I do not think the court has jurisdiction to make an order. I think that is borne out by the decision to which Winn L.J. referred – *Green v. Rozen*. Of course, if there could have been found a consent to the order being made, it would have been a different matter. But there was none."

**Authority of Counsel**

It is settled law, that but for limited exceptions, when counsel is instructed by his client to settle an action and he does so, his authority so to do cannot afterwards be arbitrarily withdrawn by the client. This legal position can be distilled from numerous authorities. In *Asahin Industries v. Kofifoh Boat Building Co. Ltd*. (1984-86) 1 GLR 453 C.A at 457 Francois JSC delivering the ruling of the court said thus:

"The last ground for rejecting the settlement is in effect a criticism of the applicants own counsel for ineptitude. But there is good sense and good reason for the rule that you take your counsel as you find him. *At law, where a client induces by his conduct, his solicitor to believe that he is authorized to make a compromise on his behalf, he is bound by it*: see *Little v Spreadbury* [1910]2 KB 658. Also illustrative of the principle is the passage from the dissenting joint judgment of Lord Guest and Lord Devlin in *United Engineering Workers' Union v Devanayagam* [1968] AC 356 at 390, where their lordships stated:

> "*A court of law has no doubt the formal power of refusing to make an order in accordance with a settlement reached by the parties, but it is a power which is exercised only in exceptional cases,* as, for example, when one of the parties is under the protection of the court. Otherwise the court does not inquire whether the proposed settlement achieved a just result; it assumes that it does. *It assumes also that counsel has authority to make a settlement on behalf of his client; if he has not, it is a matter that they must settle between themselves."*(e.s)

Again in *Harvey v. Croydon Union Rural Sanitary Authority* (1884) 26 Ch. D 249 C.A the headnote states as follows:

"*Consent Order –Facts not mentioned to Court – Withdrawal of Consent.*

An action was brought against a local board to restrain them from pulling down certain houses of the Plaintiff's, and for damages. *On a motion for an injunction coming on, the Defendants' counsel, by the authority of his clients, consented to an order for a perpetual injunction, with costs, and an inquiry as to damages, and such order was taken by consent without opening the case to the Court. Before the order had been passed, the Defendants formally withdrew their consent*, and the Registrar thereupon declined to pass the order without the direction of the Court. The Plaintiff moved that he might be directed to proceed to perfect the order. *The*

*Defendants alleged that their instructions to consent had been given under a misapprehension,* but did not enter into any evidence in support of that allegation :-

*Held* by *Pearson*, J., that up to the time of a consent order being passed, any party can withdraw his consent, except where he consents to a decree of the Court after the case has been before the Judge, and that the application must be refused:

*Held* on appeal, that *where counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, and that the Registrar must be directed to proceed to perfect the order, without prejudice to any application which the Defendant might make to the Court below to be relieved from their consent, on the ground of mistake or surprise or for other sufficient reason."*(e.s)

It is quite clear therefore that in this case **the trial judge erred in thinking that the** interested party could, **after the entry into and execution by all the parties and their counsel of the terms of settlement which included a term that those terms of settlement shall be adopted by the court as a consent judgment, resile from the same arbitrarily**.

**<u>Conclusion</u>**

From all the foregoing it is clear that the decision of the trial judge to proceed with this case on its merits is clearly a grave jurisdictional error. This is because a court has jurisdiction over causes and matters litigated before it. However, as aforesaid when a cause or matter is settled by the parties there is no longer a subsisting *causa* or *res litigiosa* before the court for determination on the merits. By way of emphasis I would refer to *Green v Rozen and others* (1955)1 WLR 741 which was approved by the Court of Appeal in *McCallum v. Country Residences Ltd*. supra. The headnote of *Green v Rozen*, as far as relevant is as follows:

> "*An action* claiming the return of moneys lent *was settled before trial*, there being written on the front of the brief of counsel for the plaintiff "By consent, all proceedings stayed on terms indorsed on briefs, Liberty to apply and on the back the agreed terms signed by counsel on either side whereby the defendant was to pay to the plaintiff a certain sum of money by installments and the costs of the action, the "whole debt and costs" to become "due and payable at once" on any installment being in arrear. *When the action was called on for hearing the court* was informed of the settlement and what the terms of the settlement were, but no order was made by the court. Subsequently an order for taxation was made by a master. The defendant failed to pay one of the installments and the plaintiff applied to the court for judgment for the balance due under the terms of the settlement, an order for the costs as taxed and the costs of the application:-
>
> *Held*, that judgment could not be given, for the court had made no order and *the original cause of action had been superseded by the new agreement between the parties comprised in the terms of settlement, and the court had no further jurisdiction in the matter*; if the terms of the new agreement were not complied with *the remedy of the injured party was not by application to the court but by action upon the new agreement."*

The parties' terms of settlement are binding upon them because they are contractual. That being so we find it difficult to see how when one of the terms of such settlement is that they be made a consent judgment, such a term should not also have contractual binding effect. By allowing the interested party to overthrow that term the trial judge in effect granted him a dispensation to break his own contract arbitrarily. A court has no such jurisdiction.

Even if the trial judge were to be right in refusing to enter the terms of settlement as a consent judgment, he would still be wrong to proceed with the case on its merits because in view of the principles herein stated, the terms of settlement alone were sufficient to divest the court of its jurisdiction to proceed further on a trial of the case on its merits.

It was for these reasons that we quashed the decision of the trial judge to continue the trial of this case on its merits and ordered him to enter the aforementioned terms of settlement as a consent judgment.

**(SGD) W. A. ATUGUBA**
**JUSTICE OF THE SUPREME COURT**

**(SGD) J. V. M. DOTSE**
**JUSTICE OF THE SUPREME COURT**

**(SGD) N. S. GBADEGBE**
**JUSTICE OF THE SUPREME COURT**

**(SGD) A. A. BENIN**
**JUSTICE OF THE SUPREME COURT**

**(SGD) J. B. AKAMBA**
**JUSTICE OF THE SUPREME COURT**

**COUNSEL**

CHARLES TETTEH ESQ. WITH HIM EUGENE ABLADE ONINKU FOR THE APPLICANT.

K. A. OWUSU-ANSAH FOR THE INTERESTED PARTY.