

**SUPREME COURT OF NIGERIA**

4TH MAY, 2001. SC. 67/1995

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, S. O.  
UWAIFO, A. O. EJIWUNMI, JJSC.**

VULCAN GASES LIMITED ..... APPELLANT  
AND  
GESELLSCHAFT FUR INDUSTRIES ..... RESPONDENT  
GASVERWERTUNG A.G. (G.I.V.)

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**ACTIONS** - Amendment - Effect - An order of amendment takes effect - Not from the date when the amendment is made or granted - But from the date of the commencement of the action (H 4)

**ACTIONS** - Commencement - By an agent - Without the authority of the purported plaintiff - Such a plaintiff can ratify the act (H 2)

**ACTIONS** - Power of attorney - Commencement of action pursuant to such power - The donee must sue in the name of the donor (H 3)

**AGENCY** - Creation - How the relationship of principal and agent may arise (H 1)

**JUDGMENTS** - Consent judgment - Effect - No consent judgment has any operation whether by way of estoppel or otherwise - Against any non consenting party - But it is binding between consenting parties and their privies (H 14)

**JUDGMENTS** - Consent judgment - How reached - The parties must reach a complete and final agreement - On the vital issue in their terms of settlement (H 7)

**JUDGMENTS** - Consent judgment - Initiated by fraud - Can be set aside - But by a fresh action (H 8)

**JUDGMENTS** - Consent judgment - Limitation of the authority of counsel - Where such limitation is unknown to the other side - The court has jurisdiction to set aside the judgment (H 13)

**JUDGMENTS** - Consent judgment - Mistake of counsel - Where counsel agreed to a consent order being made under misapprehension - The court will not hold him or his client to the agreement (H 11)

**JUDGMENTS** - Consent Judgment - Non disclosure of material facts - Consent judgment reached in such circumstance - Cannot be allowed to stand (H 16)

**JUDGMENTS** - Consent judgment - Setting aside - Grounds for setting aside such judgment (H 5)

**JUDGMENTS** - Consent judgment - Unauthorized terms - In the purported settlement - Where it is detrimental - It would be wrong to allow the consent judgment to stand (H 17)

**JUDGMENTS** - Null order - Setting aside - Outside the appellate procedure - An order can be set aside if it is a nullity (H 6)

**LEGAL PRACTITIONERS** - Authority of Counsel - At the trial of an action - Extends when it is not expressly limited - To the whole of the court action - But it does not fetter the discretion of the court (H 9)

**LEGAL PRACTITIONERS** - Consent judgment - Authority of Counsel - Limitation - Where the authority of counsel has been expressly limited by the client - And if the limitation of authority is known to the other side - Consent of counsel outside the limits of his authority - Is of no effect (H 12)

**LEGAL PRACTITIONERS** - Consent judgment - Withdrawal of consent

- *Where counsel by the authority of his client consents to an order - The client cannot arbitrarily withdraw such consent (H 10)*

**WORDS & PHRASES** - "*Fraud*" - *What it connotes (H 15)*

### **FACTS**

In the Federal High Court, Sokoto Judicial Division, the respondent commenced a proceeding by way of originating summons through its lawful attorney, one Olaniyi Okunola Esq., a Barrister and Solicitor in the Chambers of Beatrice Fisher & Co. By the said Originating summons, the respondent as the applicant sought for, inter alia: a declaration that the consent judgment dated 27th July, 1987 and given by the Honourable court in suit No. FHC/KD/3/82 was given under a mistake of fact and misrepresentation, and is therefore a nullity; and a consequential order setting aside the said consent judgment. This proceeding arose because following an agreement between the parties sometime in 1978, the respondent, a foreign company with its headquarters in Geneva, Switzerland, shipped some quantities of oxygen and acetylene producing machines to the appellant at a total contract price of U.S. \$606,852.00. The goods were cleared by the appellant from the Nigerian Ports Authority in Lagos without the production of the original Bill of lading and it thereby avoided payment for the said machines.

With a view to recovering from the appellant the aforesaid contract price, the respondent commenced a winding-up proceedings in suit NW.FHC/KD/3/82 against the appellant at the Sokoto Judicial Division of the Federal High Court. In the course of the proceedings, the parties went into negotiation with a view to reaching an out of court settlement and the learned trial judge was duly informed of this development. The negotiation was between counsel for the two parties. However, the respondent, through its solicitors in Geneva, drew up its terms of settlement and got the same delivered to its counsel in Nigeria with clear instructions to settle the case strictly on the conditions therein stipulated. Notwithstanding the above, the respondent's counsel in Nigeria on the 6th November, 1986 purported to agree to terms of settlement with the

appellant's counsel which were at variance with those which his client had authorized. When the respondent became aware of this unauthorized development, it wrote to both its counsel in Nigeria and to counsel for the appellant stating categorically that it did not authorize the settlement on the terms in question and as such did not recognize the validity of the transaction entered into by its counsel. These letters were dated the 18th December, 1986. In reply, however, the appellant's counsel asserted that the authority of the said respondent's counsel to bind his client could not be questioned and that he would therefore insist on the recognition of the disputed terms of settlement of the claim.

For his own part, the respondent's counsel in Nigeria wrote to the Registrar, Federal High Court, Sokoto on the 14th day of May, 1987 conveying his client's rejection of the disputed terms of settlement. The immediate reaction of the appellant's counsel was to address their letter of the 25th may, 1987 to the respondent's counsel stating that they had since filed a copy of the Terms of Settlement in court and that they would proceed to seek judgment based on the said terms of Settlement. Contrary to the representation by the appellant's counsel, it was not until two months thereafter, that is, on the 27th July, 1987 that the appellant's counsel went ahead to file the alleged Terms of Settlement in court. And on the same day, the appellant's counsel moved the court in the absence of the respondent and its counsel to enter judgment in the suit in terms of the disputed Terms of Settlement. The learned counsel for the appellant did not bring to the notice of the court that there was a dispute as to the said Terms of Settlement. It was under such circumstance that the learned trial judge, in the mistaken belief that the purported Terms of Settlement represented the true agreement between the parties entered a consent judgment in respect thereof. Hence, the respondent commenced the present proceeding seeking the aforesaid reliefs.

At the hearing of the originating summons, the appellant raised a preliminary objection to the competence of the action, on the ground that the said Mr. Okunola had not obtained a Power of Attorney at the time he filed the action authorizing him to institute the proceeding for and on behalf of the respondent. In his ruling, the learned trial judge considered

the arguments in respect of the preliminary objection and dismissed the same. Upon a careful consideration of the prayers in the originating summons the court granted the reliefs, holding that the consent judgment was given under misrepresentation and mistake of fact. Accordingly, it set aside the consent judgment. Dissatisfied, the appellant lodged an appeal at the Court of Appeal, Kaduna Division. The appeal was unanimously dismissed by that Court. The appellant has further appealed to the Supreme Court raising four issues while the respondent raised three issues. The court considered issues 1 and 2 set out in the respondent's brief of argument as sufficient for the determination of the appeal.

**ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was correct in affirming the decision of the Federal High Court that it had jurisdiction to entertain the suit of the Respondent.*

*2. Whether the Court of Appeal was correct in affirming the decision of the Federal High Court that set aside the consent judgment in Suit No. FHC/KD/3/82 in the entire circumstances of the case."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **IGUH JSC**)

***Agency - Creation***

1. Usually, the relationship of principal and agent may arise in any one of five ways, namely:-

1. By express appointment whether orally or by a letter of appointment or, indeed, by a Power of Attorney. Under this heading, no formality, such as writing is required for the valid appointment of an agent except, for instance, where the authority of the agent is to execute a deed on behalf of a principal, in which case, the agency itself must be created by deed.

2. By ratification of the agent's acts by the principal. See for example Bird v. Brown (1850) 4 Exch 786, Firth v Staines (1897) 2 Q.B. 70 etc. This mode of creation of agency is sometimes expressed in the maxim omnis ratihabitio retrotrahitur et priori mandato aequiparatur.

3. By virtue of the doctrine of estoppel.

4. By implication of law in the case of agency of necessity and
5. By presumption of law in the case of cohabitation.(p. 1457 C)

***Actions - Commencement***

- B 2. I am therefore prepared to hold that if an action is commenced without the authority of the purported plaintiff and is therefore not properly constituted, such a plaintiff can ratify his solicitor's act and it may then not be open to the defendant to object that the action is not properly before the court.(p. 1460 A)
- C

***Actions - Power of attorney***

3. The donee of a Power of Attorney or an agent in the presentation of a court suit or action pursuant to his powers must sue in the name of the donor or his principal and not otherwise. See Timothy Ofodum v. Onyeacho 1966/67 10 E.N.L.R. 132.(p. 1461 E)
- D

***Actions - Amendment***

- E 4. An order of amendment takes effect, not from the date when the amendment is made or granted but from the date of commencement of the action. In other words, once ordered, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. See Grace Amanambu v. Alexander Okafor & Another (1966) 1 All N.L.R. 205, Warner v. Simpson (1952) 2 W.L.R. 109. Accordingly, having regard to the amendment of the 24<sup>th</sup> February, 1997, it must be deemed that it was the respondent itself that commenced this action in its own name ab initio and all arguments relating to whether or not Mr. Okunlola had locus standi at the time he commenced the proceeding as a donee of a Power of Attorney automatically go to no issue.(p. 1461 F)
- F
- G

***Consent judgment - Setting aside***

- H 5. It is long settled that a consent judgment or order made by a court to give effect to the compromise of a legal claim by the parties may be set aside, not only on the ground of fraud, but for any other reason which would afford a good ground for setting aside the agreement on which the

judgment or order is based, e.g. on the ground of a common mistake, fraudulent misrepresentation or misconception. See Attorney-General v. Tomline (1877) 7 Ch. D. 388.(p. 1467 D)

***Null order - Setting aside***

B

6. An order, be it by consent or otherwise, which is a nullity is something which the person affected thereby is entitled to have set aside ex debito justitiae. The court in its inherent jurisdiction has definite jurisdiction or power to set aside its own order or decision made without jurisdiction if such order or decision is in fact a nullity and an appeal in such circumstance cannot be said to be necessary. It can thus be said that outside the appellate procedure, a judgment or order can be set aside if it is a nullity or where a court was misled into giving the judgment by some mistake, believing that the parties consented to its being given, whereas, in fact, they did not. See Craig v. Kansen (1943) K.B. 256 or (1943) 1 All E.R. 108 at 113.(p. 1467 F)

C

D

***Consent judgment - How reached***

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7. In order to have a consent judgment, therefore, the parties must reach a complete and final agreement on the vital issue in their terms of settlement. They must be ad idem as far as the terms of their compromise agreement are concerned and their consent must be free and voluntary. The consent judgment emerges the moment the court on the application of the parties enters such compromise agreement as the judgment of the court.(p. 1469 B)

F

***Consent judgment - Initiated by fraud***

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8. Where, however, a purported consent judgment is vitiated by fraud, mistake, misconception or by any other vice which would afford a ground for setting aside the compromise agreement on which the order was based, no true consent judgment binding on the parties would have emerged. The result, in such a case is that the so called consent judgment can be set aside but by a fresh action. See Talabi v. Adesoye (1972) 8-9 S.C. 20.(p. 1469 E)

H

***Legal Practitioners - Authority of Counsel***

9. The general principle of the law is that at the trial of an action, the authority of counsel extends, when it is not expressly limited, to the whole of the court action and all matters incidental to it and to the conduct of the trial. See Sourendra Nath Mitra v. Srimati Tarubala Dasi (1930) 46 T.L.R. 191 PC. This general principle, however, does not and has not fettered the discretion of the court where it deems it fit so to exercise the same.(p. 1470 A)

***Consent judgment - Withdrawal of consent***

10. It cannot be disputed that where counsel by the authority of his client and with full knowledge of the facts consents to an order, there being no mistake or surprise in the case, the client cannot arbitrarily withdraw such consent, and the court may proceed to perfect the order but without prejudice to any application which the other side might make to the court to be relieved from his consent on the ground of fraud, mistake, misrepresentation or surprise or for other cogent and sufficient reason.(p. 1470 C)

***Consent judgment - Mistake of counsel***

11. If it is established that counsel agreed to the consent order being made under some misapprehension, the court will not hold him or his client to the agreement. See Shepherd v. Robinson (1919) 1 K. B. 474, C. A.(p. 1470 E)

***Consent judgment - Authority of counsel***

12. Where the authority of counsel has been expressly limited by the client and counsel has in defiance consented to an order or judgment contrary to his client's clear instructions, various considerations would appear to arise. If the limitation of authority is known or communicated to the other side, consent of counsel outside the limits of his authority and in breach of the express instruction of his client will be inconsequential and of no effect. See Strauss v. Francis (1866) L.R. 1 Q. B. 379 at 382.(p. 1470 F)

***Consent judgment - Limitation of authority of counsel***

13. It therefore seems to me that the court has ample jurisdiction to interfere with or to set aside a judgment or order based on a compromise even though the limitation of the authority of counsel was unknown to the other side. This jurisdiction being discretionary must be exercised judiciously and with extreme caution having regard to the injustice or otherwise of allowing an order to stand.(p. 1474 B)

***Consent judgment - Effect***

14. No consent judgment or order has any operation or effect whether by way of estoppel or otherwise against any of the parties who is not shown to have consented to it; but, as between consenting parties and their privies, a consent judgment or order is as effective in respect of the matters which are thus settled as any judgment given after the matters are fully fought out to the end. See Talabi v. Madam Adeseye (1972) 1 All N.L.R. (Part 2) 255.(p. 1474 G)

***Words & Phrases - Fraud***

15. Actual fraud takes either the form of a statement which is false or a suppression of what is true. The partial statement of fact and the withholding of essential qualifications may make that which is stated absolutely false and fix it under the head of suggestio falsi.(p. 1478 E)

***Consent judgment - Non disclosure of material facts***

16. On the whole, it is clear to me that the compromise agreement was reached as a result of a grievous mistake, misrepresentation and/or misconception. The question of the non-disclosure of material facts to the court surrounding the compromise agreement on the date the disputed terms of settlement were entered as consent judgment was patently wrongful. It is also apparent that the trial court was misled into entering the consent judgment believing that the parties consented to its being given when, in point of fact, respondent did not. All these, in my view, are enough grounds to set aside the consent judgment in issue. I think it would amount to a serious act of injustice to the respondent to allow the same to

**1446** Vulcan Ltd. v. Gesellschaft Fur Industries (2001) 5 KLR  
stand.(p. 1478 H)

***Consent judgment - Unauthorized terms***

17. The unauthorised terms in the purported settlement were as deposed  
B to, detrimental to the interest of the respondent. In such circumstance, it  
would be wrong to allow the consent judgment to stand. (p. 1479 E)

**NOTABLE POINTS OF INTEREST**

**IGUH JSC**

C *1. Fraud that is capable of setting aside a consent judgment*

Reverting once more to the question of fraud, it cannot be disputed that  
this, in most cases, involves dishonesty. It is however right to say that the  
courts do not appear to have ventured to lay down, as a general proposi-  
D tion of law, what constitutes such fraud that is capable of setting aside a  
consent judgment or order.(p. 1478 C)

*2. Misconduct of counsel*

E It seems to me that whether or not dishonesty can be imputed to the gen-  
eral conduct of counsel for the appellant in this matter, one serious act of  
misconduct stands out. This is the failure of counsel for the appellant to  
disclose to the trial court that the terms of settlement he represented as the  
mutual agreement of the parties and on the basis of which the court was  
F obliged to enter a consent judgment had been rejected and/or repudiated  
by the respondent on the ground of want of authority on the part of the  
respondent's counsel. I think this conduct must be regarded as  
unfortunate.(p. 1478 F)

G

**UWAIFO JSC**

*3. When the Federal High Court can recourse to the High Court of  
Lagos (Civil Procedure Rules)*

H There is no direct rule for this under the Federal High Court (Civil Proce-  
dure) Rules. But by virtue of section 9 of the Federal High Court Act  
recourse can be made to the High Court of Lagos (Civil Procedure) Rules.  
The said s.9 reads:

*“The jurisdiction vested in the Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this Act or any other enactment or by such rules and orders of court as may be made pursuant to this Act or, in the absence of any such provisions, in substantial conformity with the practice and procedure for the time being in force in the High Court of Lagos State.”*(p. 1489 B)

#### 4. What an agency is

The law is that the one on whose behalf an act is to be done is called the principal; and the one who is to act is called the agent. Agency therefore exists between two persons when one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents to so act. The authority thereby created is called actual authority, express or implied. It is said that the simplest way in which agency arises, both between principal and agent and as regards third parties, is by an express appointment, whether written or oral, by the principal.(p. 1494 B)

#### 5. How to create an agency

In general, no formalities are required for the creation of agency. So unless otherwise provided by or pursuant to any statute, or by the terms of the power or authority under which the agent is appointed, an agent may be appointed by deed, by writing, or by word of mouth. See in general page 1, para.1-001; page 6, para.1-011; page 51, para.2-028; pages 55-56, para.2-034 of *Bowstead & Reynolds on Agency*, 16<sup>th</sup> edition.(p. 1494 F)

#### 6. What a power of attorney is

“A power of attorney is ‘a formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes.’ It may confer general or particular powers.” See page 57, para.2-038 *Bowstead & Reynolds on Agency* (supra). At page 58, para. 2-040 it is said that: “Certain acts must by law be performed by deed, notably conveyances and many leases. In these cases authority to an agent to ex-

ecute such a deed must itself be given by deed, usually called a power of attorney.” It is further explained at page 111, para.3-011 that:

“The term ‘power of attorney’ is usually applied to a formal grant of power to act made by deed or contained in a deed relating also to other matters. There was in fact no rule that agency must be created by deed, except where the agent himself is to be empowered to execute a deed, and it seems that such a power could at common law be granted by simple writing.” (p. 1495 E)

7. A power of attorney for an agent to sue or defend on behalf of his principal need not be by deed

I am not aware of any statutory requirement applicable in this country that a power of attorney for an agent to sue or defend on behalf of his principal should be by deed. But there are specific circumstances requiring a power of attorney such as section 85 of the Registration of Titles Law (Cap.166) Vol.7, Laws of Lagos State, or as contemplated by the definition in section 2 of the Land Instruments Registration Law (Cap.111) vol.5, Laws of Lagos State, or as provided under sections 46-48 of the Conveyancing and Law of Property Act, 1881 of England, applicable in Lagos State or such other statutory provisions stipulating for it. These circumstances invariably concern dealing in land: see *Dada v. Oshinkanlu* (1995) 5 NWLR (pt.398) 755.(p. 1496 A)

8. It is not necessary for the claimant to prove a negative assertion

It is not in law for the respondent to prove a negative assertion. The burden is on the appellant who has made a positive assertion to prove it by evidence.(p. 1501 A)

9. Procedures for challenging a judgment obtained by fraud

In a situation like this, it has been observed per Lord Diplock in *H de Lasala v. de Lasala* (1979) 2 All E.R. 1146 at 1155 that: “Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him

are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside.” The respondent in the present case chose the latter procedure.(p. 1502 H)

**REPRESENTATION**

A. Oyeyipo Esq., with him, Messrs R. Oguneso and O. A. Falade for appellant.

Dr. B. O. Babalakin, with him, O. Akoni Esq. for the respondent.

**CASES REFERRED TO**

Green v. Green (1987) 3 NW.L.R. (part 61) 480

Madukolu v. Nkemdilim (1962) 1 ALL N.L.R. 581

Chief Efiiong Duke v. Etuborn Henshaw (1940) 6 W.A.C.A. 200

Timothy Ofodum v. Onyeacho 1966/67 10 E.N.L.R. 132

John Agbim v. Mallam Garuba Jemeyita (1972) 2 E.C.S.L.R. 365

Warner v. Simpson (1952) 2 W.L.R. 109

Col. Rotimi v. Mc Gregor (1974) 11 S.C. 133 at 152

Mosheshe General Merchant Ltd. v. Nigerian Steel Products Ltd. (1987) E 1 N.W.L.R. (part 55) 110

Adewunmi v. Plastex Limited (1986) 2 N.W.L.R. (part 32) 767

Marsden v. Marsden (1972) 2 ALL E.R. 1162

**BOOK REFERRED TO**

Halsbury's Laws of England, 4th Edition, Volume 3, para 11 82

**LEAD JUDGMENT BY IGUH JSC**

This is an appeal against the Judgment of the Court of Appeal, Kaduna Division, delivered on the 3<sup>rd</sup> day of June, 1992 wherein the Court of Appeal affirmed the decision of R. D. Muhammed, J., as he then was, sitting at the Federal High Court of the Sokoto Judicial Division. The appellant being dissatisfied with the said decision of the Court of Appeal has further appealed, with leave, to this court.

I think it is necessary for a better appreciation of the issues that arise for decision in this appeal to give a background history of the

dispute between the parties.

Following an agreement between the parties sometime in 1978, the respondent, Gesellschaft Fur Industries Gasverwertung A.G. (G.I.V.), a foreign company with its headquarters in Geneva, Switzerland, shipped  
B some quantities of oxygen and acetylene producing machines to the appellant at a total contract price of U.S. \$606,852.00. The goods were cleared by the appellant from the Nigerian ports Authority in Lagos without the production of the original Bill of Lading and it thereby avoided payment  
C for the said machines. When the appellant failed to pay the purchase price of the goods, the respondent was obliged to commence a winding-up proceedings in suit No. FHC / KD / 3 /82 against the appellant at the Sokoto Judicial Division of the Federal High Court. This was with a view to recovering from the appellant the total contract price of U.S. \$606,852.00  
D for which the goods were sold.

In the course of the proceedings, the parties went into negotiation with a view to resolving their differences out of court and the learned trial Judge was duly informed of this development on the 8<sup>th</sup> day of June, 1983.  
E The negotiation was between counsel for the two parties. In particular, the respondent, through its solicitors in Geneva, drew up its terms of settlement and got the same delivered to its counsel in Nigeria on the 22<sup>nd</sup> November, 1983 with clear instructions to settle the case strictly on the  
F conditions therein stipulated.

For some undisclosed reasons, however, the respondent's counsel in Nigeria on the 6<sup>th</sup> day of November, 1986 purported to agree to terms of settlement with the appellant's counsel which were at complete variance with those which his client had authorised. When the respondent  
G became aware of this unauthorised development, it wrote to both its counsel in Nigeria and to counsel for the appellant stating categorically that it did not authorise the settlement on the terms in question and that it unequivocally rejected the same. This is on the ground that its counsel in  
H Nigeria had exceeded the express written instructions and authority given to him by the respondent. These letters were both dated the 18<sup>th</sup> day of December, 1986. The respondent in those letters made it clear that it did not recognise the validity of the transaction entered into by its counsel.

In reply, however, the appellant's counsel asserted that the authority of the said respondent's counsel to bind his client could not be questioned and that he would therefore insist on the recognition of the disputed terms of settlement of the claim.

For his own part, the respondent's counsel in Nigeria wrote to the Registrar, Federal High Court, Sokoto, on the 14<sup>th</sup> day of May, 1987 conveying his client's rejection of the disputed Terms of Settlement. The immediate reaction of the appellant's counsel was to address their letter of the 25<sup>th</sup> May, 1987 to the respondent's counsel stating that they had since filed a copy of the Terms of Settlement in court and that they would proceed to seek judgment based thereunder. This was in spite of the fact that they had been affected with actual notice that the said Terms of Settlement were in dispute and unacceptable to the respondent on the ground that they were reached by the respondent's counsel without authority and contrary to his instructions.

Although the appellant's counsel by their letter of the 25<sup>th</sup> May, 1987, to the respondent's counsel claimed that a copy of the Terms of Settlement had been filed by them in court, it is instructive that this representation was in fact incorrect. It was not until two months thereafter, that is to say, on the 27<sup>th</sup> July, 1987, that the appellant's counsel went ahead to file the alleged Terms of Settlement in court. Strangely enough, it was on the same day, that is to say, the 27<sup>th</sup> July, 1987, that the appellant's counsel moved the court in the absence of the respondent and its counsel to enter judgment in the suit in terms of the disputed Terms of Settlement. The fact that there was a dispute as to the said Terms of Settlement was, however, not brought to the notice of the court by learned counsel for the appellant. It was under such circumstance that the learned trial Judge, Ofili, J., in the mistaken belief that the purported Terms of Settlement represented the true agreement between the parties entered a consent judgment in respect thereof. He observed:-

*"..... I am satisfied that the terms of settlement constitute the mutual agreement of the parties and I therefore enter judgment on terms of the settlement in Exhibit A. No order as to costs."* (Underlinings supplied)

In consequence of this development, the respondent engaged the services of the law firm of Beatrice Fisher and Company, Legal Practitioners and instructed them to apply for the consent judgment to be set aside. This fresh proceeding which was commenced at the Federal High Court, Sokoto Judicial Division, by way of Originating Summons is the origin of the present appeal. The originating summons was commenced by the respondent by its lawful attorney, one Olaniyi Okunlola Esq., a Barrister and Solicitor in the chambers of Beatrice Fisher and Co.

By the said Originating Summons dated the 27<sup>th</sup> day of June, 1988, the respondent, as the applicant, sought for the following orders:-

*“1. A declaration that the consent judgment dated the 27<sup>th</sup> day of July, 1987, and given by this Honourable Court in Suit No. FHC/KD/3/82, was given under a mistake of fact and misrepresentation, and is therefore a nullity.*

*2. A consequential order setting aside the consent judgment dated the 27<sup>th</sup> day of July, 1987.*

*3. An order directing that any amount of money that has been paid or which remained to be paid under the terms of Settlement dated 6<sup>th</sup> November, 1988, Exhibit “2” herein, be paid to this Honourable Court, pending the final determination of the actual liability of the Respondent to the petitioner in Suit No. FHC/KD/3/82.”*

At the hearing of the originating summons, the appellant herein raised a preliminary objection to the competence of the action. This was on the ground that the said Mr. Okunlola had not obtained a Power of Attorney at the time he filed the action authorising him to institute the proceeding for and on behalf of the respondent. It was his submission that before a party could commence an action, it must be shown that he had locus standi in the matter.

In his ruling delivered on the 25<sup>th</sup> January, 1989 the learned trial Judge considered the arguments in respect of the preliminary objection and dismissed the same. Upon a careful consideration of the prayers in the originating summons, the court granted reliefs 1 and 2, holding that the consent judgment was given under misrepresentation and mistake of fact. Accordingly, it set aside the said consent judgment made on the

27<sup>th</sup> day of July, 1987. The learned trial Judge, however, refused to grant prayer 3 but ordered instead that the sum of N247,625.53 paid to the respondent's solicitors by the appellant for delivery to the respondent which amount the former held on to, be returned to the appellant forthwith. In his view, the money was paid under a mistake in that there was no agreement between the parties in respect of the payment and no useful purpose would, therefore, be served by paying the same into court pending the determination of the appellant's actual liability as prayed for. Said he:-

*"The application succeeds and accordingly I make the following orders:-*

*1. The consent judgment dated 27<sup>th</sup> July 1987 and given by this court in Suit No. FHC/KD/3/82 is a nullity because there was no agreement between the parties.*

*2. The said consent judgment dated 27<sup>th</sup> July 1987 is hereby set aside. I do not think it is just and equitable to order the money paid under the terms of settlement to be paid to this court pending the determination of the respondent's actual liability. There was no agreement between the parties, therefore, any money paid pursuant to the said agreement was money paid under a mistake and it should be returned to the defendant. I therefore order that the sum of N247,625.53 paid by the Defendant to the Plaintiff's Solicitors be returned to the defendant forthwith."*

Dissatisfied with this decision of the trial court, the appellant lodged an appeal against the same to the Court of Appeal, Kaduna Division. That court in a unanimous decision dismissed the appeal, holding that in-as-much-as the parties were not ad idem in respect of the terms of settlement upon which the trial court erroneously acted, they could not form the basis of or sustain a consent judgment as known to law. It was therefore of the opinion that the trial court was right to have set aside the said consent judgment.

Aggrieved by this decision of the Court of Appeal, the appellant has further appealed to this court.

Six grounds of appeal were filed by the appellant against this

decision of the Court of Appeal: It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The four issues distilled from the appellant's grounds of appeal set out on their behalf for the determination of this appeal are as follows:-

*"(1) Whether a person who had no locus standi at the time he commenced proceedings as a donee of a power of attorney can continue the action as such based on a power of attorney issued after the commencement of the action.*

*(2) Whether the provisions of Order 20 Rule 5(4) of the English Supreme Court Rules and the cases of*

*a. GBOGBOLULU OF VAKPO V. CHIEF HADO OF ANFOEGA AKUKOME (1941) 7 W.A.C.A. 165*

*b. AZUIKE UME & OTHERS V. ALFRED EZE EKI & ORS delivered on 30<sup>th</sup> December, 1957 are authority for regularising otherwise null proceedings.*

*(3) Whether the Court of Appeal was right when it affirmed the decision of the Federal High Court which set aside the consent judgment in Suit No: FHC/KD/3/82 entered and based on the terms of settlement agreed upon by the Appellant's and Respondent's solicitors.*

*(4) Whether the Court of appeal can suo motu determine the Naira equivalent of U.S \$306,853 in 1986 and proceed to give judgment on such finding when the rate of exchange was never made an issue before the court, no evidence was led as to the applicable rate, and the Court of Appeal did not give the parties any opportunity to address it on the issue."*

The respondent, on the other hand, submitted three issues in its brief of argument as arising in this appeal for determination. These are couched thus:-

*"1. Whether the Court of Appeal was correct in affirming the decision of the Federal High Court that it had jurisdiction to entertain the suit of the Respondent.*

*2. Whether the Court of Appeal was correct in affirming the decision of the Federal High Court that set aside the consent judgment in*

*Suit No. FHC/KD/3/82 in the entire circumstances of the case.*

3. *Whether, in the entire circumstances of this case, the Court of Appeal was wrong to have held that “payment of US \$306,852 American Dollars in 1986 could not be in anyway equivalent to N247,625.53 and whether any miscarriage of justice was occasioned to the Appellant thereby.”* B

There can be no doubt that the set of issues identified in the respondent’s brief of argument fully covers those set out in the appellant’s brief of argument. However, issue 3 formulated in the respondent’s brief which corresponds with the appellant’s issue 4 does not seem to me relevant in the determination of this appeal. The central question before the court below was whether the parties were in concensus ad idem on the essential terms that were entered as consent judgment by the trial court and, if not, whether the said consent judgment is liable to be set aside. In my view, therefore, issues 1 and 2 set out in the respondent’s brief of argument are amply sufficient for the determination of this appeal. D

At the oral hearing of the appeal, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submission in amplification thereof. E

The main contention of learned counsel for the appellant, A. Oyeyipo Esq. in respect of issue 1 is that as at the 27<sup>th</sup> June 1988 when Mr. Olaniyi Okunlola commenced the present action at the Federal High Court, he had no Power of Attorney authorising him to institute the same for an on behalf of the respondent company. He pointed out that from the reliefs claimed, it is apparent that Mr. Olaniyi Okunlola had no personal or proprietary interest in the subject matter of the action. He therefore argued that Mr. Okunlola had no locus standi to commence or prosecute the action. He referred to the decisions of this court in Green v. Green (1987) 3 N.W.L.R. (Part 61) 480 and Madukolu v. Nkemdilim (1962) 1 All N.L.R. 581 and submitted that the respondent’s originating summons was incompetent and that the court had no jurisdiction to entertain the same. He called in aid the decision of the West African Court of Appeal in Chief Efiong Duke v. Etubom Henshaw (1940) 6 W.A.C.A. 200 and submitted that failure by Mr. Okunlola to establish his authority to sue as the ac- F G H

credited agent or attorney of the respondent company as at the 27<sup>th</sup> day of June, 1988, when the Originating Summons was filed, is fatal to this proceeding. He stressed that it was not until the 18<sup>th</sup> July, 1988 that the Power of Attorney constituting Mr. Okunlola the respondent's agent and  
 B authorising him to prosecute the proceeding for and on behalf of the respondent was executed. He submitted that once the originating summons was filed without authority, it remained a nullity and no amount of subsequent ratification could cure the defect.

C Learned counsel for the respondent, Dr. B. O. Babalakin, in his reply, referred to the provisions of Order 20 Rule 5(4) of the Rules of the Supreme Court of England which state as follows:-

*"An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which the  
 D party had at the date of the commencement of the proceeding or has since acquired."*

Learned counsel made reference to the statements of the law on the subject by the learned authors of Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. E 37, page 209, Para. 276 and Note 3 to Para. 115 at page 88 as well as to The Supreme Court Practice (The White Book), 1997 Edition, Vol. 1, Para. 20/5 at pages 356-357, Para. 20/58/17 at page 366-367. He noted, citing the decision in Chief Gbogbolulu of Vakpo v. Head Chief Hodo of Anfoega  
 F Akukome (1941) 7 W.A.C.A. 164, that the reasoning of the court below with regard to the point in issue was the overriding need to do substantial justice to the parties rather than adhere to strict technicalities that may result in defeating the ends of justice. He stressed that Mr. Okunlola did not purport to sue for himself but that he sued expressly on behalf of the  
 G respondent. He also pointed out that it was never disputed that Mr. Okunlola was the lawful attorney of the respondent. The complaint of learned counsel for the appellant is that the Power of Attorney issued to Mr. Okunlola was executed a few days after the originating summons was filed. This is  
 H in spite of the fact that the respondent had expressly deposed on oath as far back as on the 14<sup>th</sup> April, 1988 that the firm of Beatrice Fisher and Co. in which Mr. Olaniyi Okunlola was a partner had been instructed and authorised to institute an action to set aside the consent judgment entered

at the Federal High Court on the 27<sup>th</sup> July, 1987. He urged the court to resolve this issue in favour of the respondent.

As already indicated, the appellant's complaint under issue 1 is that the Federal High Court had no jurisdiction to entertain the respondent's case because when the action was commenced by Mr. Olaniyi Okunlola, B he purported to act as agent or Attorney of the respondent when in fact he did not have the requisite authority to do so. I think the question for resolution under this issue will be better appreciated if the basic principles governing the relationship of principal and agent are briefly considered.

**Usually, the relationship of principal and agent may arise C in any one of five ways, namely:-**

*1. By express appointment whether orally or by a letter of appointment or, indeed, by a Power of Attorney. Under this heading, no D formality, such as writing is required for the valid appointment of an agent except, for instance, where the authority of the agent is to execute a deed on behalf of a principal, in which case, the agency itself must be created by deed.*

*2. By ratification of the agent's acts by the principal. See for E example Bird v. Brown (1850) 4 Exch 786, Firth v Staines (1897) 2 Q.B. 70 etc. This mode of creation of agency is sometimes expressed in the maxim omnis ratihabitio retrotrahitur et priori mandato aequiparatur.*

*3. By virtue of the doctrine of estoppel.* F

*4. By implication of law in the case of agency of necessity and*

*5. By presumption of law in the case of cohabitation.*

The issue under consideration is only concerned with the first two of the five ways under which the relationship of principal and agent may arise. G

It cannot be seriously disputed that the respondent before the institution of the present proceeding did authorise and/or instruct the law firm of Beatrice Fisher and Co. to institute an action to set aside the consent judgment entered at the Federal High Court on the 27<sup>th</sup> day of July, H 1987 in suit No. FHC/KD/3/82. This is deposed to in the affidavit of one Rene Merkt, a director of the respondent company as far back as on the 14<sup>th</sup> April, 1988 well before the originating summons was filed. This is

per paragraph 21 of his said affidavit of the 14<sup>th</sup> April, 1988. It is not in dispute that Mr. Olaniyi Okunlola was at all material times a counsel in the firm of Beatrice Fisher and Co. It is also clear on the face of the originating summons itself that the action was brought by Mr. Okunlola as the  
 B lawful Attorney of the respondent company. He did not purport to sue for himself. The respondent repeatedly affirmed that it authorised Mr. Okunlola to be its agent in the matter of the present proceeding for the setting aside of the disputed consent judgment. I think, in these circum-  
 C stances that one may say without any fear of contradiction that the respondent, by express appointment, had constituted Mr. Okunlola its agent in the matter of the prosecution of the proceeding in issue.

Learned counsel for the appellant did, however, concede that the respondent subsequently executed a Power of Attorney formally constitut-  
 D ing Mr. Okunlola its lawful agent to represent the company in the litigation with the appellant. This Power of Attorney was executed on the 18<sup>th</sup> day of July, 1988, after the originating summons was filed. Learned counsel then contended that the originating summons having been filed by Mr.  
 E Okunlola as attorney of the respondent before the execution of the Power of Attorney, the proceeding was incompetent and null and void. This now brings me to the constitution of agency by subsequent ratification of the agent's acts by the principal.

The effect of ratification of an agent's act is to put the parties  
 F concerned in the same position as that in which they would have been if the act ratified had been previously authorised. Thus, even if an action is commenced without the authority of the purported plaintiff and is there-  
 G fore incompetent and improperly constituted, the plaintiff can ratify his solicitors act, so that it will no longer be open to the defendant to object that the action is not properly brought. See Danish Mercantile Co. v. Beaumont (1951) Ch. 680. It does not, therefore, seem to me a correct proposition of law as contended by learned counsel for the appellant that  
 H where an action is brought without the authority of the purported plaintiff, such an action is automatically rendered a complete nullity and that no amount of subsequent ratification can cure the defect. I think that view of the law, with respect, is totally erroneous, misconceived and it is

hereby rejected.

I should, perhaps, mention that this position of learned counsel for the appellant, Mr. Oyeyipo, was vigorously canvassed in the Danish Mercantile Co. v. Beaumont case (supra) by the learned defence counsel in that case, Mr. Shelley, Q. C. In this connection, Mr. Shelley referred to a number of decided cases which, in his opinion, supported his contention. The Court of Appeal in England after an exhaustive and painstaking analysis of the authorities referred to by the learned Queen's Counsel had no difficulty in rejecting this novel proposition of law. Dismissing the same in a unanimous decision of that court, Jenkins, L.J. Who delivered the leading judgment had this to say:-

*"I find nothing in any of these cases to constrain me to hold that the issue of writ and the commencement of an action without the authority of the purported plaintiff is a matter which admits of no validation by subsequent ratification of the act of the solicitor concerned. So to hold would be to introduce, as I see it, an entirely novel doctrine into the ordinary law of principal and agent and to make a new exception to the general rule that every ratification relates back and is deemed equivalent to an antecedent authority."*

In the absence of any decision compelling me to do so, I, speaking for myself decline so to hold. I agree with what was said by Roxburgh, J., and I think that he rightly took the view that to accede to Mr. Shelley's contention would be inconsistent with the authorities in which questions of this kind have arisen, particularly in relation to companies."

I need hardly add that Hodson, L. J. Was equally of the same view. Said he:-

*"I am prepared to assume, as did my Lord and the Judge, that the proceedings were instituted without authority ... I, like my Lord, would rest my judgment on the presence of ratification... I see no difficulty in Roxburgh, J's view, which I think is perfectly correct, that the act of the liquidator in this case has been sufficient to ratify such defect, if any, as previously existed."*

*For these reasons as well as for those given by my Lord, I agree that this appeal fails."*

I have given the above observations of Jenkins and Hodson, L.JJ. a most careful consideration and must gratefully endorse them as sound and well founded. **I am therefore prepared to hold that if an action is commenced without the authority of the purported plaintiff and is therefore not properly constituted, such a plaintiff can ratify his solicitor's act and it may then not be open to the defendant to object that the action is not properly before the court.**

Learned counsel for the respondent did concede that there is no doubt that a plaintiff ought ordinarily to be invested with the capacity in which he sues at the date on which the action is instituted. With this submission, I am in full agreement. However, he next submitted that the failure to do so need not be fatal to the action especially where the plaintiff acquires the capacity after the issue of the writ. With this proposition, I am again in complete agreement. But learned counsel tried to justify his position by reference to statements of the law in both Halsbury's Laws of England, 4<sup>th</sup> Edition and The Supreme Court Practice, 1997 already mentioned earlier on in this judgment. I need only mention that a close study of those citations reveals that they deal essentially with the amendments of writs and/or pleadings. In particular, they concern amendments to alter the capacity in which a party sues. The question that has arisen for consideration in this appeal has nothing to do with any amendments of whatever nature but with whether or not an action commenced without the authority of the named plaintiff and therefore incompetent may subsequently be saved by ratification by such a plaintiff. I have, with respect, therefore, not found the said citations of learned counsel very helpful in the determination of the issue under consideration.

As I have indicated, the only point raised by the appellant is that at the time Mr. Okunlola instituted these proceedings, he did not have the Power of Attorney pursuant to which he was acting. The records, however, abundantly show that not only did the respondent authorise him to institute the claim and for him to represent the company as its agent, the much talked about Power of Attorney was in fact executed and given to Mr. Okunlola before the hearing of the Originating Summons was commenced by the court.

One last word must be said before I am done with issue 1. This has to do with the submission of learned counsel for the respondent that the issue whether or not the suit was properly commenced and whether or not Mr. Okunlola had the requisite authority to commence the action is no longer a live issue in this proceeding. I find myself in total agreement with learned respondent's counsel in this regard. Before this court on the 24<sup>th</sup> February, 1997 upon an application brought by the respondent, the name of the said respondent, to wit, Gesellschaft Fur Industries Gasverwertung A. G. (G. I. V.) was substituted in place of Mr. Olaniyi Okunlola. This application was not opposed by the appellant. It was accordingly ordered that Mr. Okunlola who instituted the suit in his own name as the lawful attorney of the respondent be substituted by the respondent company, the donor of the Power of Attorney. It was further ordered that all the processes in the cause be amended accordingly to reflect the proper parties to the action.

I think I ought to observe, in the first place, that this amendment of the 24<sup>th</sup> February, 1997 which was not opposed in no small way helped to save this proceeding. This is because, **the donee of a Power of Attorney or an agent in the presentation of a court suit or action pursuant to his powers must sue in the name of the donor or his principal and not otherwise. See Timothy Ofodum v. Onyeacho 1966/67 10 E.N.L.R. 132, Jones v. Gurney (1913) W.N. 72, John Agbim v. Mallam Garuba Jemeyita (1972) 2 E.C.S.L.R. 365.** In the second place, it is beyond dispute that an amendment relates back to the commencement of a suit. **An order of amendment takes effect, not from the date when the amendment is made or granted but from the date of commencement of the action. In other words, once ordered, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. See Grace Amanambu v. Alexander Okafor & Another (1966) 1 All N.L.R. 205, Warner v. Simpson (1952) 2 W.L.R. 109, Col. Rotimi v. Mc Gregor (1974) 11 S.C. 133 at 152, Osita Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 N.W.L.R. (Part 135) 688.** Accordingly, having regard to the amendment of the 24<sup>th</sup>

**February, 1997, it must be deemed that it was the respondent itself that commenced this action in its own name ab initio and all arguments relating to whether or not Mr. Okunlola had locus standi at the time he commenced the proceeding as a donee of a Power of Attorney automatically go to no issue.** On the whole, it is my view that having regard to all that I have stated above, issue 1 must be resolved against the appellant.

Issue 2 poses the question whether the Court of appeal was correct in affirming the decision of the trial court that set aside the consent judgment in issue in all the circumstances of the case. It is the submission of learned counsel for the appellant that the court below was in error to have set aside the consent judgment entered by the trial court as the same had been agreed upon and signed on behalf of the parties through their respective counsel. He also contended that since he was not aware of any limitation to the authority of the respondent's counsel in the matter of settlement, the respondent must be bound by the agreement entered into by counsel on its behalf. Learned counsel made the point that it was not the parties that were negotiating but their respective counsel and that once they were ad idem on the terms of settlement, the views of their clients would not matter. In support of these submissions, counsel called in aid the decisions in Moseshe General Merchants Ltd. V. Nigerian Steel Products Ltd. (1987) 1 N.W.L.R. (Part 55) 110 and Adewunmi v. Plastex Limited (1986) 2 N.W.L.R. (Part 32) 767.

Learned counsel for the respondent, on the other hand, was prepared to accept that the general principles of the law in this regard are to the effect that counsel has authority, except expressly limited, over the whole of a court action and all matters incidental to it and to the conduct of the trial. It was, however, his submission that while these principles may be correct, they are still general statements of the law and that the court still has the discretion to examine the entire circumstances of the case in order to determine whether the compromise entered into should be sanctioned by the court. Learned counsel made reference to the case of Neale v. Gordon Lennox (1902) A. C. 465 where, he stated, that the House of Lords held that counsel has no authority to refer an action

against the wishes of his client or upon terms different from those which his client has authorised and that if he does so refer it, the reference may be set aside although the limit put by the client on his counsel's authority is not made known to the other side when the reference was agreed upon. He also relied on the decision in Marsden v. Marsden (1972) 2 All E.R. 1162. He stressed that as at the time the consent judgment was entered by the trial court, the parties were clearly not in agreement as to its terms and that this was to the knowledge of the appellant whose counsel failed to bring this material fact to the notice of the court. It is also instructive that the consent judgment was entered by the trial court in the absence of both the respondent and its counsel. He submitted that the court below rightly affirmed the decision of the trial court that set aside the consent judgment.

On the desirability of setting aside the consent judgment on the ground of nullity, the learned trial Judge had this to say:-

*"In this case, the client has rejected the terms of settlement, he did not only inform his counsel about the rejection, he also took the trouble to inform the defendant's counsel about the rejection. It is my opinion that it will be manifestly unjust to force the plaintiff to accept the terms entered into by his counsel without his authority. This is more so if we consider the plaintiff's solicitor's letter to the court dated 14<sup>th</sup> May 1987 i.e. Exh. 4 annexed to the plaintiff's affidavit. The letter was received by the court on 21<sup>st</sup> May 1987 in which they said:-*

*"We are reliably informed that a copy of the terms of Settlement reached by Solicitors in the above suit has been filed at the Federal High Court, Kaduna. Please take note that the said Terms of Settlement have been rejected by our clients, the Petitioner in this suit."*

*The consent judgment was given on 27<sup>th</sup> July 1987 i.e. about two months after Exhibit 4 was received by the court. Had the court adverted its mind to Exhibit 4, I am sure it wouldn't have entered judgment as per the terms of settlement filed. In the circumstance, I think this is a proper case to declare the consent judgment a nullity because there was no agreement between the parties."*

Now, before the Court of Appeal, the question is posed for itself

in the determination of the issue under consideration was couched thus:-

*“The vital question to ask is, are the parties ad idem in their agreement before the terms of settlement were filed in court?”*

After a close consideration of the facts as presented before the court, the  
B court below proceeded to proffer its answer to the above question as follows:-

*“Now from what I narrated above, is it correct to say that the appellants and the respondents were ad idem before Ofili J. made the Term of Settlement a consent judgment. It is crystal clear that the parties  
C were not ad idem over the Terms of Settlement registered in court by the counsel to the appellants. The learned counsel was quite aware of the fact that the respondents had rejected the terms agreed between Alayande and the Appellants.*

D It is quite plain that the compromise reached between Alayande and the appellants which they called Terms of Settlement was not a consent judgment.”

A little later in its judgment, the Court of Appeal added:-

E *“In view of the facts I have given above, it is quite clear that what Ofili J. entered as settlement Agreement between the Appellants and the Respondents and made as a judgment of his court was not a consent judgment. Thus, in my strong opinion, the judgment could be set aside. No  
F consent judgment can bind in any form a party who is not shown to have consented to it and if it is discovered that the consent judgment had been obtained by fraud or misrepresentation the judgment can be set aside by a fresh action... I do not entertain any doubt that if Ofili J had known that the respondents had not agreed to the Terms of Settlement presented  
G before his court, he would not have entered the consent judgment on 27/7/87. Since what the respondents filed was a fresh action before Rabiun Danlami Mohammed J. (as he then was) the decision of the learned judge whereby he set aside the consent judgment entered by Ofili J. is quite in  
H order.”*

I have given a very close thought to the above observations and conclusions of both courts below and confess that I find it difficult to fault them. Before, however, I deal further with the issue, it is necessary to set

out the grounds pursuant to which the respondent applied to the trial court to set aside the consent judgment in dispute. These are set out in the following paragraphs of the affidavit of Mr. Rene Merkt, a Director of the respondent company. They aver as follows:-

“11. That on the 22<sup>nd</sup> November, 1983 the Applicant through B  
their Solicitors in Geneva, Switzerland, Etude de Me Rene MERKT,  
Advocat au Barreau de Geneva, drew up a proposed settlement terms and  
had same delivered to Mr. Alayande with the instructions that the terms  
contained in the draft must be adhered to strictly. The said proposed terms C  
of settlement is attached hereto and marked Exhibit 1.

12. That contrary to the said limits of the Applicant’s instructions,  
Mr. Alayande exceeded the express instructions and introduced some  
clauses which were detrimental to the Applicant’s interest into the terms  
of settlement he entered into with the Respondent. That a certified true D  
copy of the terms of settlement as filed by the Respondent’s Counsel is  
attached herewith and marked Exhibit 2.

13. That immediately the Petitioner became aware of Mr. Bojude  
Alayande’s deviation from the Applicant’s instruction, the Applicant on E  
the 18<sup>th</sup> day of December, 1986 wrote to both Mr. Alayande and Messrs  
Abdulahi Ibrahim & Co. Counsel for the Respondent rejecting the  
settlement as per Exhibit 2 above.

14. The Applicant’s letters to both Counsel for the Respondent F  
and Mr. Alayande are attached hereto and marked Exhibits 2A and 3B  
respectively.

15. That on the 22<sup>nd</sup> day of December, 1986, Messrs Abdulahi G  
Ibrahim & Co. wrote to the Applicant insisting on recognising Mr.  
Alayande’s representation despite the withdrawal of the Applicant’s  
authority from Mr. Alayande to represent them.

16. That on the 14<sup>th</sup> day of May, 1987, Mr. Bolude Alayande  
wrote to this Honourable Court’s Registrar, bringing the fact of lack of the  
Applicant’s consent to Exhibit 2 to the attention of the Court. A certified H  
True Copy of the said letter is attached hereto and marked Exhibit 4.

17. That on the 27<sup>th</sup> July, 1987, unknown to the Applicant and  
without any authority in that behalf, the Respondent’s Counsel Mr. S. M.

ONEKUTU on behalf of Messrs Abdulahi Ibrahim & Co. filed the said Exhibit 2 and urged this Honourable Court on the same day to make Exhibit 2 a consent judgment of the court.

18. That the Court under a mistaken belief that Exhibit 2 represented the agreement of both Petitioner and Respondent entered a consent judgment based upon Exhibit 2.

19. That produced and showed to me is the certified true copy record of proceedings of the 27<sup>th</sup> day of July, 1987. It is attached herewith and marked Exhibit 5.

20. That produced and showed to me is a certified true copy of the drawn-up order based upon Exhibit 5. The drawn-up order is attached herewith and marked Exhibit 6.

21. That the Applicant has since instructed the Firm of Beatrice Fisher & Co. to apply for the consent judgment to be set aside by this Honourable Court.”

Although the appellant filed a counter-affidavit in which it only denied the facts deposed to in paragraphs 15, 17, 18 and 21 of the said affidavit, its main contention is that it was not privy to the instructions handed to the respondent’s counsel by its client, nor was it aware that the respondent’s counsel had any limited instructions to negotiate settlement. It is however indisputable that the respondents counsel had limited and written instructions, that the compromise agreement he reached with the appellant’s counsel was at variance with and contrary to his client’s clear instructions and that the said agreement was immediately repudiated by the respondent the moment it was communicated to it.

There is also no doubt that both the trial court and counsel for the appellant were advised in writing by the respondent that it had unequivocally rejected the purported terms of settlement as unauthorised and that the appellant responded by insisting on the recognition of the disputed terms of settlement. It was two months after the appellant received notice of the respondent’s repudiation of these disputed terms of settlement that it made good its threat by getting the trial court to make the rejected terms of settlement a consent judgment. This, the appellant did, in the absence of both the respondent and its counsel. It is also clear from the record of

proceedings that at no time did the appellant's counsel intimate the court that the said terms were not only disputed but that they had been rejected outright by the respondent and that the parties as at that date were not ad idem on the issue. On the contrary, the impression conveyed to the trial court was that the terms represented the mutual agreement between the parties. Indeed, it cannot be doubted that the trial court entered a consent judgment in the matter in the mistaken belief that the terms represented the genuine agreement between both parties. Said the learned trial Judge:-

*"I am satisfied that the terms of settlement constitute the mutual agreement of the parties and I therefore enter judgment on terms of the settlement in Exhibit A. No order as to costs."*

It is against the above background that I will now consider whether the court below was right in affirming the decision of the trial court which set aside the controversial consent judgment. And I ask myself, in the first instance, whether a consent judgment is liable to be set aside at all.

**It is long settled that a consent judgment or order made by a court to give effect to the compromise of a legal claim by the parties may be set aside, not only on the ground of fraud, but for any other reason which would afford a good ground for setting aside the agreement on which the judgment or order is based, e.g. on the ground of a common mistake, fraudulent misrepresentation or misconception. See Attorney-General v. Tomline (1877) 7 Ch. D. 388, Huddersfield Banking Company Ltd v. Henry Lister and son Ltd. (1895 – 99) All E.R. 868 (C.A.).**

Similarly, an order, be it by consent or otherwise, which is a nullity is something which the person affected thereby is entitled to have set aside ex debito justitiae. The court in its inherent jurisdiction has definite jurisdiction or power to set aside its own order or decision made without jurisdiction if such order or decision is in fact a nullity and an appeal in such circumstance cannot be said to be necessary. It can thus be said that outside the appellate procedure, a judgment or order can be set aside if it is a nullity or where a court was misled into giving the judgment by some mistake, believing that the parties consented to its being given, whereas, in fact, they did not. See Craig

**1468** Vulcan Ltd. v. Gesellschaft Fur Ind. (2001) 5 KLR Iguh JSC  
v. Kansen (1943) K.B. 256 or (1943) 1 All E.R. 108 at 113, Okoli  
Ojiako and others v. Onwuma Ogueze and ors. (1962) 1 All N.L.R.  
58, Ekerete v. Eke 6 N.L.R. 118.

It is thus clear that apart from fraud which, if established in any  
B judgment or order, necessarily invalidates the same, a consent judgment or  
order may be set aside for cogent and sufficient reason which in law would  
constitute a ground for setting aside the agreement on which such consent  
judgment or order was based. As Lindley, L.J. put it in Huddersfield  
C Banking Company Ltd. V. Henry Lister and Son Ltd. (supra) at Page 871:-  
“A consent order, I agree, is an order, and so long as it stands,  
it must be treated as such, and so long as it stands I think it is as good an  
estoppel as any other order. I have not the slightest doubt on that point.  
But that a consent order can be impeached not only on the ground of fraud  
D but upon any grounds which invalidate the agreement it expresses in more  
formal way than usual, I also have not the slightest doubt.”

I will now consider whether there are grounds, be they fraud or  
otherwise, which invalidate the agreement the consent judgment in question  
E expresses. This question is closely connected with two other issues. These  
concern the right of a party to a court proceeding to repudiate the actions of  
his solicitor and whether what Ofili, J. entered as a consent judgment based  
on the purported compromise agreement between the parties is truly a  
F consent judgment as known to law.

Dealing with the last question first, I think I ought to observe that  
if it was established that the parties in the present case had, with full  
knowledge of the alleged compromise agreement, freely and voluntarily  
agreed on the terms therein and proceeded to apply to the court to enter  
G judgment on those terms, the consent judgment of Ofili, J., in dispute would,  
without doubt, be a final judgment from which the parties could appeal only  
by leave of the court. As it was said by this court in Abel Woluchem v. Dr.  
Charles Wokoma (1974) 3 S.C. 153 per Ibekwe, J.S.C.:-

H “The rule is that actions may be settled by consent during the  
trial, usually, such settlement is a compromise and, in order to have a  
binding effect on the parties, it is imperative that it should have the  
blessing of the court. Settlement between the parties may be described as

*a contract whereby new rights are created between them in substitution for, and in consideration of, the abandonment of the claim or claims pending before the court. When the court moves and takes action as agreed upon by the parties, it becomes a consent judgment."*

**In other to have a consent judgment, therefore, the parties must reach a complete and final agreement on the vital issue in their terms of settlement. They must be ad idem as far as the terms of their compromise agreement are concerned and their consent must be free and voluntary. The consent judgment emerges the moment the court on the application of the parties enters such compromise agreement as the judgment of the court.** The position was explained by this court per Ibekwe, J.S.C. in Abel Woluchem v. Dr. Charles Wokoma (supra) as follows:-

*"As far as we can discern from the record of appeal, the parties never reached a complete and final agreement on the issue of settlement... In order to have a consent judgment, the parties must be ad idem as far as the agreement is concerned; their consent must be free and voluntary... when the court makes an order based upon such terms of settlement, there emerges a consent judgment, from which the parties could appeal only by leave of the court."*

**Where, however, a purported consent judgment is vitiated by fraud, mistake, misconception or by any other vice which would afford a ground for setting aside the compromise agreement on which the order was based, no true consent judgment binding on the parties would have emerged. The result, in such a case is that the so called consent judgment can be set aside but by a fresh action. See Talabi v. Adesoye (1972) 8-9 S.C. 20.** The court, therefore, has discretionary jurisdiction to examine the entire circumstances of a case in order to determine whether the alleged compromised agreement entered into by the parties should be sanctioned and made an order of court. It is this jurisdiction that the respondent in the present application invited the trial court to exercise, alleging that the consent judgment in issue was vitiated by mistake and misconception and that there was, in fact, no concensus ad idem between the parties in the terms of the compromise agreement

which were the basis of the consent judgment. I will now briefly dispose of the right of a party to repudiate the action of his solicitor.

**The general principle of the law is that at the trial of an action, the authority of counsel extends, when it is not expressly limited, to the whole of the court action and all matters incidental to it and to the conduct of the trial. See Sourendra Nath Mitra v. Srimati Tarubala Dasi (1930) 46 T.L.R. 191 PC. This general principle, however, does not and has not fettered the discretion of the court where it deems it fit so to exercise the same. See Adewunmi v. Plastex Ltd. (1986) 2 N.W.L.R. (Part 32) 767 at 785.**

In this regard, **it cannot be disputed that where counsel by the authority of his client and with full knowledge of the facts consents to an order, there being no mistake or surprise in the case, the client cannot arbitrarily withdraw such consent, and the court may proceed to perfect the order but without prejudice to any application which the other side might make to the court to be relieved from his consent on the ground of fraud, mistake, misrepresentation or surprise or for other cogent and sufficient reason.** See Harvey v. Croydon Union Rural Sanitary Authority (1884) 26 Ch. D. 249, C.A., Holt V. Jesse (1876) 3 Ch. D. 177. But **if it is established that counsel agreed to the consent order being made under some misapprehension, the court will not hold him or his client to the agreement. See Shepherd v. Robinson (1919) 1 K. B. 474, C. A. Where the authority of counsel has been expressly limited by the client and counsel has in defiance consented to an order or judgment contrary to his client's clear instructions, various considerations would appear to arise. If the limitation of authority is known or communicated to the other side, consent of counsel outside the limits of his authority and in breach of the express instruction of his client will be inconsequential and of no effect. See Strauss v. Francis (1866) L.R. 1 Q. B. 379 at 382. Where, however, the limitation of authority is unknown to the other side who enters into the compromise in the belief that the opponent's counsel has the ordinary unlimited authority of his client, the position would appear, to some extent, to be fluid and uncertain. In such situation the learned authors of**

Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 3, paragraph 1182 have formulated the applicable true rule under the circumstance as follows:-

*“But the true rule seems to be that in such case the court has power to interfere; that it is not prevented by agreement of counsel from setting aside or refusing to enforce a compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel’s authority was unknown to the other side, or where clear and unequivocal instructions of limitations have been given.”*

I confess that I have given the above passage a most careful consideration and must fully and most respectfully endorse the same as the correct position of the present law. It is my view, therefore, that the court possesses the discretionary jurisdiction to examine the entire circumstances of a particular case in order to determine whether or not the compromise entered into by counsel should be sanctioned by the court. The remedy, being discretionary, must be exercised with the utmost care and with regard to the injustice or otherwise of allowing an order to stand. It is this jurisdiction that both courts below invoked and exercised in favour of the respondent as plaintiff in the originating summons.

The above position of the law has received judicial approval in a number of decided cases. So, in Neale v. Gordon Lennox (1902) A.C. 465, (H. L.) or (1900 - 3) All E.R. 622, the plaintiff in an action for libel authorised her counsel to compromise on condition that all imputations on her character were publicly disclaimed in court. Her counsel who did not make this limitation of his authority known to the defendant’s counsel omitted in that compromise to extract the withdrawal of imputations on the plaintiff’s character as instructed. The House of Lords (England) in reversing the judgment of the Court of Appeal unanimously set aside the order as having been made in excess of authority and depriving the plaintiff of the opportunity of vindicating her character in public and the case was restored to the cause list for hearing. It may thus be said that where counsel has authority from his client to agree to a reference upon certain conditions and he disregards such limitations and agrees to an order of

reference unconditionally, the court has a discretion not to enforce such order against the wishes of the client although the limit put by the client on his counsel's authority is not made known to the other side when the reference is agreed upon. The court before whom the question of setting  
B aside the reference comes is not bound to sanction an arrangement made by counsel which is not, in the opinion of the court, a proper one.

Delivering the leading judgment of the House of Lords in Neale v. Gordon Lennox, (supra), the Earl of Halsbury, L.C. justifying the position  
C of the court in the clearest possible language had this to say:-

*"... and to suggest to me that a court of justice is so far bound by the unauthorised act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things  
D seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle....."*

A little later in his judgment the noble Lord, again in a rather strong  
E language, added as follows:-

*"... When two parties seek as a part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but  
F has in the most distinct form said that the consent to refer – to take it from the jurisdiction of the ordinary tribunal – shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the court itself, is a proposition which I certainly will never assent to".*

Lord Macnaghten in endorsing the judgment of the noble Lord  
G Chancellor succinctly explained the position as follows:-

*"I do not think that the court is entirely in the hands of counsel, and bound to give the seal of its authority to any arrangement that counsel  
H may make when the arrangement itself is not in its opinion a proper one. In the next place, I do not think that any counsel has authority to compel his client to refer an action which the client desires to try in open court."*

In the same case, Lord Brampton in a pungent contribution stated

thus:-

*“I have rarely heard anything more preposterous, to my mind, than the notion that a suitor can impose no effective veto upon a course proposed to be taken by his or her own counsel which rightly or wrongly in his or her judgment will operate most prejudicially to his or her interests in an action, and possibly to the ruin of his or her character. I quite agree, therefore, that this appeal ought to be allowed and the case restored to the paper.”*

There is finally the contribution of Lord Lindley in the same Neale case where he robbd in the same view of the law as follows:-

*“Unfortunately, the plaintiff here wishing to get rid of the order drew it up with the view of getting it set aside, and in form this is an application, not to prevent the drawing up of the order, but to have it set aside; but that is mere form – mere machinery. It would be absolutely wrong, to my mind, for the court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the court never would have dreamt of making if the court had known the facts. That view of the case seems to me to have been overlooked by the Court of Appeal, and to be fatal to the validity of the order”.*

So, too, in Marsden v. Marsden (1972) Fam. 280 or (1972) 2 All E.R. 1162, counsel had, contrary to the express instructions of his client consented to an agreement with counsel for the defendant who was not aware of the limitation of the authority of the petitioner’s counsel to compromise the divorce petition. The court held that the agreement could not stand in the circumstances of the case, the same having been entered into contrary to the express instructions of the petitioner. Turning to the circumstances in which the court should interfere to set aside an order based upon a compromise, Watkins, J. in Marsden v. Marsden, (supra) stated thus:-

*‘ With regard to the circumstances in which the court should interfere to set aside an order based on a compromise, I have been referred to a number of authorities. They all show that the court should view such applications as this with extreme caution and that a court will not grant*

*such an application except in a case which calls clearly for interference with the order made. It is a discretionary remedy to be exercised with care and with regard to the injustice or otherwise of allowing an order to stand."*

B I think, with respect, that the above represents the correct position of the present law on the subject. **It therefore seems to me that the court has ample jurisdiction to interfere with or to set aside a judgment or order based on a compromise even though the limitation of the authority of counsel was unknown to the other side. This jurisdiction being discretionary must be exercised judiciously and with extreme caution having regard to the injustice or otherwise of allowing an order to stand.** I will now return to the question whether or not the two courts below were right to have exercised their discretion in D favour of the respondent in all the circumstances of the case by setting aside the consent judgment in issue.

In this regard, it is necessary to point out that a consent judgment or order is as effective in law in respect of all the matters which are therein E settled as any other judgment or order arrived at after the matters are fully fought out to the end. As Lord Herschel, L.C. explained in In Re South America and Mexican Company, Ex Parte Bank of England (1895) 1 Ch. 37 at 50 :-

F *"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow G questions that were really involved in the action to be fought over again in a subsequent action."*

Such, therefore, is the binding force of a consent judgment. Accordingly, **no consent judgment or order has any operation or H effect whether by way of estoppel or otherwise against any of the parties who is not shown to have consented to it; but, as between consenting parties and their privies, a consent judgment or order is as effective in respect of the matters which are thus settled as any**

**judgment given after the matters are fully fought out to the end. See Talabi v. Madam Adeseye (1972) 1 All N.L.R. (Part 2) 255.** A court judgment is either by consent in which case it must have been passed with the mutual consent of the parties whose blessing it must receive or else it is one passed by the court after the action has been contested and fought out to the end. The question is whether the consent judgment of Ofili, J. in question is truly a consent judgment or whether in all the circumstances of the case it was a nudum pactum and consequently liable to be set aside. I will, at the risk of repetition, turn to the facts of this case once again with a view to determining whether this is a proper case for intervention by the courts.

It is plain from the records that the following facts are hardly in dispute, namely:-

(i) The counsel who acted for the respondent at the trial court when the compromise was struck had received very clear instructions from his client which expressly limited his authority to negotiate a settlement with the other side.

(ii) This limitation of the authority of the respondent's counsel to negotiate a settlement was not known to counsel for the appellant.

(iii) For some undisclosed reason, the respondent's counsel purported to reach terms of settlement dated the 6<sup>th</sup> November, 1986 with the appellant's counsel which were unauthorised and at complete variance with his instructions.

(iv) That the unauthorised terms of the settlement were grossly detrimental to the interest of the respondent and would occasion grave injustice to the said respondent if the compromise is allowed to stand.

(v) The respondent, the moment it became aware of the purported compromise wrote letters dated the 18<sup>th</sup> December, 1986 to both its counsel and counsel to the appellant informing them that it did not recognise the validity of the compromise which was contrary to its instructions to counsel.

(vi) On the 22<sup>nd</sup> December, 1986, counsel to the appellant replied the respondent insisting on the validity of the disputed terms of settlement which, it stressed, was accepted by the respondent's counsel.

(vii) On the 14<sup>th</sup> May, 1987 the respondent's counsel having been

misled by the appellant's counsel that the terms of settlement had been filed in court by the appellant's counsel wrote to the Registrar of the trial court advising him in clear terms that his client, the respondent, had rejected the said terms of settlement.

B (viii) By a letter dated the 25<sup>th</sup> May, 1987, the appellant's counsel insisted on the implementation of the purported settlement.

(ix) On the 27<sup>th</sup> July, 1987 the appellant's counsel without the prior consent of the respondent caused the disputed terms of settlement to be filed in court.

C (x) On the same 27<sup>th</sup> July, 1987 the appellant's counsel moved the court in the absence of both the respondent and its counsel for the entry of consent judgment in the case in terms of the disputed terms of settlement.

D (xi) On the said 27<sup>th</sup> July, 1987 the appellant's counsel significantly failed to inform the court that there was a dispute as to the said terms of settlement.

(xii) The court did not also advert its mind to the letter of the 14<sup>th</sup> May, 1987 in which it was advised that the purported terms of settlement were in dispute and had been rejected by the respondent.

F (xiii) That the trial court under the mistaken belief that the disputed terms of settlement represented the subsisting mutual agreement of both parties proceeded to enter consent judgment on the sole application of the appellant's counsel based on the said terms rejected by the respondent.

Now, upon a close study of the above facts, I ask myself whether it can reasonably be suggested with any degree of seriousness that the appellant and respondent were ad idem with regard to the terms of settlement in issue at the time Ofili, J. entered consent judgment in respect thereof. I also ask myself whether it can be said, again with any degree of seriousness, that the appellant's counsel acted bona fide when, at the height of the disagreement between the parties with regards to the purported terms of settlement, he went ahead unilaterally to file them in court and urged that the same be immediately entered by the court as consent judgment in the suit in the absence of both the respondent and its counsel. I think not.

Another serious point of note is that it does not appear from the court records that the respondent and its counsel were even served with

any hearing notice against the court hearing of the 27<sup>th</sup> July 1987 on which date the appellant purportedly reported amicable settlement of the suit by the parties to the court. The suit was on the 5<sup>th</sup> February, 1986 adjourned sine die for an out of court settlement. Thereafter the case was not called up again until the 27<sup>th</sup> July, 1987. On that date both the appellant and its B counsel were present in court. The respondent and its counsel were absent. There was no indication on record whether or not the latter were served with hearing notice in respect of the report of the alleged settlement. This state of affairs notwithstanding, the appellant's counsel still found C himself able to report the purported out of court settlement of the suit unilaterally. He further proceeded to press for the alleged terms of settlement which to his knowledge were rejected by the respondent to be entered as consent judgment of the parties in the suit.

Perhaps, more seriously, is the fact that the learned appellant's D counsel, whether deliberately or by inadvertence, failed to disclose to the trial court on the said 27<sup>th</sup> July, 1987 that the terms of settlement in issue were rejected by the respondent. Indeed, from the records, it does appear that the impression he conveyed to the trial court on that date was that the E said terms represented the mutual agreement of the parties. The minutes of the court proceedings of that date read inter alia as follows:-

*"Mr. S. M. Ojikutu for the respondent.*

*The Petitioner absent.*

*Mr. Ojikutu: The petitioner is not present in court, but I understand F he has written a letter to this Court to confirm if the terms of settlement have been filed. We have just filed the terms of settlement, hereby tendered and marked Exhibit A. We humbly urge the court to enter G judgment in accordance with the terms."*

The trial court, for its own part, consequently entered consent judgment in terms of the purported terms of settlement. It said:-

*" Judgement*

*I have hear Mr. Ojikutu for the respondents and I have examined H and read Exhibit A which a document embodying the terms of settlement between the Petitioner and the respondent dated 6<sup>th</sup> day of November, 1986 and subscribed by the Chamber s of Funso Alayande & Co. for the*

*petitioner and Abdullahi Ibrahim & Co. for the respondent, and duly filed in Court on the 27<sup>th</sup> day of July, 1987. I am satisfied that the terms of settlement constitute the mutual agreement of the parties and I therefore enter judgment on terms of the settlement in Exhibit A. No Order as to costs."*

It is plain to me that the trial court, if it had known the true and full facts surrounding the alleged terms of settlement, would never have described them as constituting the mutual agreement of the parties in the suit. In fact and in truth those terms were not the mutual agreement of both parties. On the contrary, they were terms which the parties violently disagreed upon from the onset and could hardly be described as terms mutually agreed upon by them.

Reverting once more to the question of fraud, it cannot be disputed that this, in most cases, involves dishonesty. It is however right to say that the courts do not appear to have ventured to lay down, as a general proposition of law, what constitutes such fraud that is capable of setting aside a consent judgment or order. See Lloyds Bank Ltd. V. Marcan (1973) 3 All E.R. 754 at 760 or (1973) 1 W.L.R. 1387 at 1392. **Actual fraud takes either the form of a statement which is false or a suppression of what is true. The partial statement of fact and the withholding of essential qualifications may make that which is stated absolutely false and fix it under the head of suggestio falsi; See Peck v. Gurney (1873) L.R. 6 H.L. 377 at 403, Aaron's Reefs v. Twiss (1896) A.C. 273 at 287 H.L. It seems** to me that whether or not dishonesty can be imputed to the general conduct of counsel for the appellant in this matter, one serious act of misconduct stands out. This is the failure of counsel for the appellant to disclose to the trial court that the terms of settlement he represented as the mutual agreement of the parties and on the basis of which the court was obliged to enter a consent judgment had been rejected and/or repudiated by the respondent on the ground of want of authority on the part of the respondent's counsel. I think this conduct must be regarded as unfortunate.

**On the whole, it is clear to me that the compromise agreement was reached as a result of a grievous mistake, misrepre-**

sentation and/or misconception. The question of the non-disclosure of material facts to the court surrounding the compromise agreement on the date the disputed terms of settlement were entered as consent judgment was patently wrongful. It is also apparent that the trial court was misled into entering the consent judgment believing that the parties consented to its being given when, in point of fact, respondent did not. All these, in my view, are enough grounds to set aside the consent judgment in issue. I think it would amount to a serious act of injustice to the respondent to allow the same to stand.

Reference may be made finally to paragraph 12 of the affidavit of the respondent sworn to by one of its Directors on the 4<sup>th</sup> April, 1988. This deposed as follows:-

*“That contrary to the said limits of the Applicant’s instructions, Mr. Alayande exceeded the express instructions and introduced some clauses which were detrimental to the Applicant’s interest into the terms of settlement he entered into with the respondent. That a certified true copy of the terms of settlement as filed by the respondent’s counsel is attached herewith and marked Exhibit 2.”*

That paragraph of the affidavit was not controverted by the appellant in its counter-affidavit of the 14<sup>th</sup> September, 1988 in reply to the said respondent’s affidavit. Only paragraphs 15, 17, 18 and 21 of the respondent’s affidavit were specifically denied. This, in effect, would mean that **the unauthorised terms in the purported settlement were as deposed to, detrimental to the interest of the respondent. In such circumstance, it would be wrong to allow the consent judgment to stand.** Issue 2 is accordingly resolved against the appellant.

In conclusion, I find no substance in this appeal and the same is hereby dismissed with costs to the respondent against the appellant which I assess and fix at N10,000.00.

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WALI JSC

I have had the privilege of reading in advance, a copy of the lead judgment of my learned brother Iguh, JSC and with which I entirely agree

and endorse same as mine.

The facts involved in this case have been adequately set out in the lead judgment of my learned brother Iguh, JSC and need no further reproduction by me in this concurring judgment.

B The two determinant issues raised and canvassed in this appeal, can be stated as follows:-

1. Whether the trial court had jurisdiction to entertain the originating Summons filed by Mr. Okunlola without prior authorisation by the Respondent but which authority was subsequently obtained.

C 2. If the court had jurisdiction, whether its decision to set aside the consent judgment obtained by the Appellant was valid.

It is common ground that the Respondent instructed the Law Firm of Beatrice Fisher and Co. to institute an action to set aside the consent judgment obtained in Suit No. FHC/KD/3/82 at the Federal High Court. It is also common ground that Mr. Olaniyi Okunlola was a counsel in the said law firm of Beatrice Fisher & Co. at the material time. As contended by learned counsel for the appellant, Mr. Okunlola had no power of attorney donated to him by the Respondent at the time he took out the originating Summons to get consent judgment set aside. But the Respondent eventually executed the power of attorney on 18/7/88 and filed in court on 3/8/88 in which Mr. Okunlola was conferred with the power to do so and an application to amend the Writ and all processes by substituting the name of Mr. Okunlola with that of the Respondent was granted by the court without objection. Whatever procedural defects there were as regards the filing of the originating summons, had been rectified by the order of amendment prayed for and granted on 24/2/77. It is an irregularity which could be cured without causing any injustice to the appellant, taking into consideration the stage of the proceeding at the time of the amendment and its nature. See NOTTAGE V. JACKSON [1883] 11 QB 6274, AMADI V. THOMAN APLIN & CO. LTD. [1972] 1 ALL NLR (Pt. 1) 409. The court possesses the discretionary power to grant an amendment to correct the name of a party even if doing so will have the effect of substituting a new party, provided the court becomes satisfied that the mistake sought to be corrected is a genuine one and not misleading. See S. T. SHOKUNBI

V. M. O. MOSAKU [1969] NMLR 403; JAMES V. SMITH [1891] 1 CH 348 and BOWLER V. JOHN MOWLEM & CO. LTD [1953] 1 WLR 603. Mr. Okunlola acted more or less as agent of the Respondent and the subsequent actions and conduct of the former validated the acts and steps taken by the latter to get the consent judgment set aside. See B DANISH MERCANTILE CO. V. BEAUMONT [1951] CH. 68. So the learned trial judge was right and on firm grounds when he held that the action filed was competent and that it had jurisdiction to entertain it. The Court of Appeal was equally right when it opined on the issue of jurisdiction and **locus standi** of Mr. Okunlola as follows:- C

*“In the case in hand the issue is whether Mr. Okunlola had capacity to sue as a lawful representative of the respondent. He had no capacity when he took out the writ but before the hearing of the action a Power of Attorney duly executed and showing that Mr. Olaniyi Okunlola, D a barrister and solicitor in the chambers of Messrs Beatrice Fisher & Co., had been invested with the power to represent the respondent, was filed before the court. It is without any doubt that Mr. Okunlola was the lawful attorney and representative of G.I.V. in this suit. What Mr. Okunlola E had not done was to apply, through a motion, to make the Power of Attorney an attachment to the Originating Summons. I believe that the Court would have readily done so if he had applied for it. Since the appellants are not disputing the genuineness of the Power of Attorney, it is my view F that the objection over the capacity of Mr. Okunlola to sue on behalf of G.I.V. is based on technicality. In the pursuit of justice, issues of technicalities should not be a hindrance to exercising substantial justice between the parties. I do not regard this lapse in procedure as a matter of G jurisdiction. Even if Mr. Okunlola had no capacity to sue on 27/6/86 it is without any doubt that he obtained the legal capacity to sue on 19/9/86 when he filed the Power of Attorney in court. Even if the court had no jurisdiction at the time the Originating Summons was filed it acquired H the jurisdiction before the judgment was passed.”*

Issue 1 is therefore answered in affirmative in favour of the Respondent.

As for the Issue 11, the contention of learned counsel for the Ap-

pellant that Mr. Alayande as counsel for the Respondent had full and unlimited powers to settle or negotiate settlement on behalf of the Respondent cannot be absolutely correct. In the case quoted and relied upon by the appellant to wit: MOSHESHE GENERAL MERCHANTS LTD. V. NIGERIAN STEEL PRODUCTS LTD. [1987] 1 NWLR (Pt. 55) 110, the statement made therein by Eso JSC particularly at 121, was qualified by the learned Justice's earlier statement in ADEWUNMI V. PLASTEX LTD [1986] 2 NWLR (Pt. 32) 767 AT 785 wherein he stated:-

C *"Of course the picture I have painted of the authority of the lawyer in this country is not meant to be one of an ombudsman vis-à-vis his client. He is not meant to be a lawyer at large.*

D *There are limitations to his authority. If this limitation is communicated to the other side, the counsel's action in breach of the limitation is of no effect."*

The position is made clearer by the passage in the 4<sup>th</sup> Edition of Halsbury's Laws of England, Vol. 3, paragraph 1182 as follows:-

E *"(1) "The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enters into a compromise believing that the opponent counsel has the ordinary unlimited authority of counsel, the courts have refused to enquire whether there was any such limitation, when it was not commu-*  
F *nicated to the other side and have refused to set aside a compromise entered into by counsel. But the true rule is that in such a case the court has the power to interfere; that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise; that it is*  
G *a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side, or where clear and unequivocal instructions of limitation have been given. It may*  
H *be, however, that the court will not interfere on this ground if the settlement or compromise has been embodied in an order of the court which has been perfected."*

Exhibit 4 in this case, on which the consent judgment was based

was addressed to the appellant by the Respondent on 21/5/87 while the consent judgment was entered on 27/7/87 about two months after Exhibit 4. In Exhibit 4 the Respondent rejected the terms on which the consent judgment was based. This is clear demonstration that the parties were not **ad idem** on the terms of settlement. Before there is said to be a valid and enforceable consent judgment, the parties to it must be **ad idem** to its terms and contents. See WOLUCHEM V. WOKOMA [1973] 3 SC 153. The court has inherent power to set aside its own judgment when:-

(i) *it was obtained by fraud. See LEONARD OKOYE & ORS. V. NIGERIAN CONSTRUCTION & FURNITURE CO. LTD. [1991] 6 NWLR 501 & NURUDEEN OLUFUMISE V. ABIOLA FALAE [1990] 3 NWLR 1.*

(ii) *which for any other reason is a complete nullity. See OJIAKO & ORS. V. OGUEZE & ORS. [1962] 1 ALL NLR 58; NWOSU V. UDEAJA [1990] 1 NWLR 180; HONG V. NEOTA [1918] AL 888 PC and STERN V. FRIEDMAN [1953] 1 WLR 965.*

The court has discretionary power to set aside its consent judgment when the circumstance of the case justifies that. See MARSDEN V. MARSDEN [1972] FAM 280 at 284 where Walkins J stated as follows:-

*“With regard to the circumstances in which the court should interfere to set aside an order based upon a compromise, I have been referred to a number of authorities. They all show that the court should view such applications as this with extreme caution and that a court will not grant such an application except in a case which calls clearly for interference with the order made. It is a discretionary remedy to be exercised with care and with regard to the injustice or otherwise of allowing an order to stand.”*

In affirming the decision of the trial court as regards the setting aside of the consent judgment, the Court of Appeal observed as follows:-

*“A comparison between the two terms will disclose that the two agreements are not **ad idem** at all. Taking one item out of the Agreement viz, payment of US \$306,852 American Dollars in 1986 could not be in anyway equivalent to 247,625.53. Thus, soon after the news of the settlement agreed between Alayande and the appellants reached the*

*respondents at Geneva, the company sent two lee letters, one to Alayande and the other to Abdullahi Ibrahim, dissociating themselves from the agreement reached with the appellants.”*

The Court of Appeal then concluded:-

B *“It is crystal clear that the parties were not **ad idem** over the Terms of Settlement registered in court by the counsel to the appellants. The learned counsel was quite aware of the fact that the respondents had rejected the terms agreed between Alayande and the Appellants.”*

C *“In view of the facts I have given above it is quite clear that what Ofili J. entered as Settlement Agreement between the Appellants and the Respondents and made as a judgment of his court was not a consent judgment. Thus in my strong opinion the judgment could be set aside.”*

D Issue II is also answered in affirmative. The appeal lacks merit. It is for these and the fuller reasons given in the lead judgment of my learned brother Iguh, JSC that I also hereby dismiss the appeal with N10,000.00 costs to the Respondent.

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E

### **OGUNDARE, JSC**

I agree entirely with the judgment of my learned brother Iguh JSC just delivered. My brother Iguh JSC has dealt with all the issues in depth that I need not add anything more.

F I, too, dismiss the appeal with costs as assessed by Iguh JSC.

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### **UWAIFO, JSC**

G I had the privilege of reading in advance the judgment of my learned brother Iguh JSC which he has given in great detail. I agree with him that the appeal lacks merit for the reasons he gives. I shall for emphasis, having regard to the nature of the case, express my views fairly fully in support of that judgment.

H In this case, Gesellschaft Fur Industries Gasverwertung A.G. G.I.V (simply referred to as GIV), was a creditor to Vulcan Gases Limited (referred to as Vulcan). The Vulcan was unable to pay its debt and

so GIV petitioned for a winding up. That is why it was referred to in some aspects of these proceedings as the petitioner. The amount involved in the winding-up proceedings as contained in the petition was US\$631,244. Eventually both GIV and Vulcan agreed to settle the matter out of court. Negotiations commenced between solicitors for each of the two parties. Agreement was apparently reached and terms of settlement were signed by the two solicitors on 6 November, 1986. When the draft terms of settlement was sent by Abdullahi Ibrahim & Company to Funso Alayande & Co., by letter dated 24 October, 1986, a bank draft for a sum of N247,625.53 accompanied it. That amount was supposed to be in final settlement of the debt. In the meantime GIV got wind of the alleged terms of settlement concluded on its behalf by its solicitor, Mr. Bolude O. Alayande of Funso Alayande & Company, Western House (3<sup>rd</sup> Floor) 8/10 Broad Street, Lagos. It considered the terms of settlement unacceptable because they were contrary to the proposed terms of settlement its solicitors in Geneva had drawn up and delivered to Mr. Alayande well in advance. The solicitor for Vulcan was Alhaji Abdullahi Ibrahim SAN of Abdullahi Ibrahim & Company, 27 Ali Akilu Road, Kaduna.

Following the objection raised and the rejection of the settlement by GIV, by a letter dated 18 December, 1986, a solicitor for GIV in Geneva, Mr. Oswald Bregy, wrote to Abdullahi Ibrahim & Company saying: "I learn that VULCAN GASES LIMITED has entered into an agreement with Mr. Alayande who seems to have acted on behalf of GIV. We have to inform you that GIV does not recognize the validity of the transactions." A letter of the same date was also sent to Mr. Alayande which reads: "In the name of GIV, I have to inform you that the shareholder of GIV contests the agreement you entered into with Vulcan Gases. It is clear in the eyes of our client that you went beyond the power you have - GIV does therefore not recognize the transactions which you signed on behalf of GIV and will hold you responsible for all damages arising out of it." In reaction, Alhaji Abdullahi Ibrahim SAN by letter dated 22 December, 1986 wrote to GIV thus: "We refer to your letter dated 18<sup>th</sup> December, 1986. Mr. Alayande has dealt with us in this matter throughout and we had no reason

to think that he was not acting for GIV. If, however, you have queries you may want to direct it to him as our clients are not in a position to determine the relationship between GIV and their counsel.” Abdullahi Ibrahim & Company wrote another letter dated 27 December, 1986 to B Funsho Alayande & Co. remonstrating against the objection and rejection by GIV to the terms of settlement. In the meantime Funso Alayande & Co. wrote to the Litigation Registrar, Federal High Court, Sokoto in their letter dated 14 May, 1987 (received at the Federal High Court on 21 May, 1987 as their official stamp indicates) as follows: “We are solicitors to C the petitioner in the above stated suit. We are reliably informed that a copy of the Terms of Settlement reached by solicitors in the above suit has been filed at the Federal High Court, Kaduna (sic). Please take note that the said Terms of Settlement have been rejected by our clients, the D petitioner in this suit.” It thus appeared that Funso Alayande & Co. had recanted, and had written to Abdullahi Ibrahim & Co. also on 14 May, 1987 implying that they had no authority to reach those terms of settlement. This led Abdullahi Ibrahim & Co. to react in their letter dated 25 E May, 1987, reminding them that they held out themselves as “having actual authority to prosecute, and much later, to negotiate settlement out-of-court on behalf of GIV” and that it was on that basis a bank draft for N247,625.53 was sent to them at their request. Eventually, the said F Terms of Settlement were filed at the Federal High Court, Sokoto on 27 July, 1987. On that same day in court one Mr. S.M. Onekutu of Abdullahi Ibrahim & Co. represented Vulcan (as respondent). But GIV referred to as the petitioner was absent. Judgment was entered that same day.

On the basis that the consent judgment was obtained irregularly, G GIV by its Lawful Attorney, Mr. Olaniyi Okunlola, filed an originating summons on 27 June, 1988 showing MR. OLANIYI OKUNLOLA (THE H LAWFUL ATTORNEY OF GESELLSCHAFT FUR INDUSTRIEGASVERWERTUNG AG GIV) as plaintiff AND VULCAN H GASES LIMITED as defendant for the following reliefs:

“1. A declaration that the consent Judgment dated the 27<sup>th</sup> July, 1987, and given by this Honourable Court in Suit No. FHC/KD/3/82, was given under a mistake of facts and misrepresentation, and is

therefore a nullity.

2. *A consequential order setting aside the consent Judgment dated the 27<sup>th</sup> day of July, 1987.*

3. *An order directing that any amount of money that has been paid or which remained to be paid under the Terms of Settlement dated 6<sup>th</sup> November, 1988, Exhibit '2' herein, be paid to this Honourable Court, pending the final determination of the actual liability of the Respondent to the Petitioner in Suit No. FHC/KD/3/82."*

The action was heard by R.D. Muhammad, J., who, in a carefully considered decision given on 25 January, 1989, declared the consent judgment a nullity and set it aside. The learned trial judge ordered that the sum of N247,625.53 paid to the solicitors of the plaintiff be returned to the defendant. The defendant, hereafter referred to as the appellant, appealed from that decision. The Court of Appeal, Kaduna Division, in a unanimous judgment delivered on 3 June, 1992, dismissed the appeal after also thoroughly considering the complaints against it. In this further appeal to this court, the plaintiff will hereafter be referred to as the respondent.

The appellant has set down four issues for determination in its appellant's brief of argument as follows:

"(1) *Whether a person who had no locus standi at the time he commenced proceedings as a donee of a power of attorney can continue the action as such based on a power of attorney issued after the commencement of the action.*

(2) *Whether the provisions of Order 20 Rule 5[4] of the English Supreme Court Rules and the cases of*

a. ***GBOGBOLULU OF VAKPO V. CHIEF HADO OF ANFOEGA AKUKOME [1941] 7 WACA 165***

b. ***AZUIKE UME & OTHERS V. ALFRED EZE EKI & ORS*** delivered on 30<sup>th</sup> December 1957, are authority for regularizing otherwise null proceedings.

(3) *Whether the Court of Appeal was right when it affirmed the decision of the Federal High Court which set aside the consent judgment in Suit No: FHC/KD/3/82 entered based on the terms of settlement agreed upon by the Appellant's and Respondent's solicitors.*

(4) *Whether the Court of Appeal can suo moto (sic) determine the naira equivalent of USD\$306,853 in 1986 and proceed to give judgment on such finding when the rate of exchange was never made an issue before the court, no evidence was led as to the applicable rate, and the Court of Appeal did not give the parties any opportunity to address it on the issue.*"

In the respondent's brief, the issues were considered to be three as follows (and arguments were canvassed along those issues):

"1. *Whether the Court of Appeal was correct in affirming the decision of the Federal High Court that it had jurisdiction to entertain the suit of the respondent*

2. *Whether the Court of Appeal was correct in affirming the decision of the Federal High Court that set aside the consent judgment in Suit No. FHC/KD/3/82 in the entire circumstances of the case.*

3. *Whether, in the entire circumstances of this case, the Court of Appeal was wrong to have held that payment of US\$306,852 American Dollars in 1986 could not be in anyway equivalent to N247,625.53 and whether any miscarriage of justice was occasioned to the appellant thereby.*"

I shall make three short remarks here. First, the arguments show that the issues formulated by the appellant and the respondent separately lead to the same end. My learned brother Iguh JSC took the respondent's issues. I have decided to take the appellant's issues. Second, there appears to be some confusion as to the original debt owing in dollars. The winding-up petition presented in the Federal High Court showed US\$631,244. In the terms of settlement filed it was US\$631,241 wherein US\$300,000 was agreed to be deducted which should have left a balance of US\$331,241. But in the terms of settlement authorised by the respondent from Geneva, the amount is US\$606,852 from which US\$300,000 was deducted leaving a balance of US\$306,852. I do not think it matters in the end. This can be sorted out by the parties in due course. In the meantime what will prevail is US\$306,852 which appears in the judgments of the two courts below and in the judgment of my learned brother Iguh JSC. Third, although the originating summons was brought in the

name of Mr. Olaniyi Okunlola (The Lawful Attorney of GIV) and remained so in the two courts below, on 24 February, 1997 an amendment was allowed by this court to make the plaintiff the respondent itself. This is because a donee of a power of attorney or an agent should sue in the name of the donor or principal. The authority for this is *Jones v. B Gurney* (1913) W.N. 72. The said amendment was possible since it was merely to correct the wrong person as plaintiff. This the Federal High Court would have been entitled to do. There is no direct rule for this under the Federal High Court (Civil Procedure) Rules. But by virtue of section 9 of the Federal High Court Act recourse can be made to the High Court of Lagos (Civil Procedure) Rules. The said s.9 reads:

*“The jurisdiction vested in the Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this Act or any other enactment or by such rules and orders of court as may be made pursuant to this Act or, in the absence of any such provisions, in substantial conformity with the practice and procedure for the time being in force in the High Court of Lagos State.”*

Order 14, rule 2 of the High Court of Lagos State (Civil Procedure) Rules provides the necessary practice and procedure to be adopted as follows:

*“Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge in Chambers may, if satisfied that it has been so commenced through a bona fide mistake and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.”*

Having stated the foregoing, it is still necessary, in my view, to resolve the issue of *locus standi* raised by the appellant.

### ***Issues 1 and 2***

Issues 1 and 2 were argued together on behalf of the appellant. The submission here by learned counsel for the appellant is that Mr. Olaniyi Okunlola commenced this action at the Federal High Court on 27 June, 1988, when he then had no power of attorney in existence empowering him to do so. Since, according to the submission, Mr. Okunlola had no

personal interest or connection with the subject-matter of the action, he could not have commenced the action in his name the way he did, citing *Green v. Green* (1987) 3 NWLR (pt.61) 480 in which this court held that a person entitled to commence a civil action is the person who has been wronged. Learned counsel therefore contends that Mr. Okunlola, as plaintiff, needed authority by way of a power of attorney to invest him with the right to commence an action against the appellant since he was not the person allegedly wronged. He concludes from this premise that without a power of attorney, Mr. Olaniyi Okunlola had no *locus standi* to bring this action and accordingly the action is incompetent and the court would have no jurisdiction to hear the suit, citing *Oloriode v. Oyebe* (1984) 1 SCNLR 390. I must remark here that learned counsel cited no authority in support of his proposition that a power of attorney was necessary before Mr. Okunlola commenced this action on behalf of the respondent.

As to the issue 2, learned counsel submits that, in determining the appeal on the improper commencement of this action, the lower court took into consideration that after the writ had been filed and the appellant questioned the competency of the action, the respondent executed a power of attorney authorizing Mr. Okunlola to represent the company, and held that by this, the irregularity had been cured. Learned counsel contends that reliance by the lower court on Order 20 r.5(4) of the Rules of the Supreme Court of England and the decisions in *Chief Gbogbolulu of Vakpo v. Chief Hado of Anfoega Akukome* (1941) 7 WACA 165 and *Ume v. Eki* FSC.38/1957 delivered on 30/12/57 was inappropriate. Learned counsel's view is that, in any case, want of *locus standi* was not a mere irregularity that could be corrected, but a fundamental vice which went to jurisdiction, citing *Nwabueze v. Okoye* (1988) 4 NWLR (pt.91) 664.

Learned counsel for the respondent argues, on the contrary, that the said Order 20, r.5(4) was properly relied on by the lower court. It is perhaps, necessary now to reproduce that rule which says:

*"An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which the*

*party had at the date of the commencement of the proceedings or has since acquired.”*

The submission therefore goes that the lower court recognised that Mr. Okunlola did not purport to sue for himself but was suing on behalf of the respondent as its lawful attorney, and that the power of attorney B eventually produced was not shown to be invalid or ungentine. I think there is merit in that submission of learned counsel and it is even clearer for the purpose of the present case if paras. (3) and (4) of Order 20, r.5 are read together. Para.(3) provides that:

*“An amendment to correct the name of a party may be allowed C under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the iden- D tity of the party intending to sue or, as the case may be, intended to be sued.”*

It was held in *Singh v. Atombrook Ltd* (1989) 1 All ER 385 that the court can allow a plaintiff to amend his writ even after final judgment in the E proceedings has been entered for the purpose of substituting a party’s correct name for the incorrect name, particularly having regard to RSC Order 2, r.1 whose purpose is to abolish the distinction between non-compliance with procedural rules which rendered proceedings a nullity and non-com- F pliance which merely rendered the proceedings irregular. As I have shown, however, the situation is adequately covered by our local Rule already cited and reproduced.

Learned counsel submits further that an amendment to alter the G capacity and/or the name a party sued or was sued was the rationale behind the decisions in *Chief Gboglobu of Vakpo v. Chief Hado of Anfoega Akukome* (supra) and *Ume v. Eki* (supra). He refers, in further oral submission, to *Afolabi v. Adekunle* (1983) NSCC (Vol.14) 398 where this court approved what the Court of Appeal did when it allowed an amend- H ment to reflect the capacity in which the 1<sup>st</sup> plaintiff prosecuted the case in line with the evidence, making it a representative action whereby the declaration of title obtained would enure to the benefit of the 1<sup>st</sup> plaintiff

and the rest of the children of J.F. Adekunle who was the father of all of them. I am not persuaded that *Afolabi v. Adekunle* (supra) which deals with representative action is a compelling reference here as I shall show although learned counsel, quite rightly, said he referred to it by way of a *B fortiori* illustration.

The first point to emphasise is that there can be no doubt that the respondent has a right to sue. In other words, it has *locus standi*. The second point is, if it has *locus standi*, can it as a principal act through an agent to sue? Third, if it can, must that agent necessarily have to have a formal power of attorney at the outset? Fourth, if such evidence or any evidence for the agent's authority is required, could it be given at a later stage of the proceedings and produced in court? Mr. Oyeyipo on behalf of the appellant seems to be of the view that the *locus standi* in question relates to Mr. Okunlola. I have no doubt that is a misconception. What is required of Mr. Okunlola, as I understand it, is his authority to act on behalf of the respondent. I will not even regard it that his so acting is tantamount to making the action a representative action properly so-called in the circumstances.

In the case of a plaintiff in a representative action, it is generally understood that he claims to represent numerous other persons having the same interest including himself, so that every person so represented though not named on the record is a party to the action. Rules of different Courts make adequate provisions for representative action. It is always the issue of *common interest*: see *Idise v. Williams International Ltd* (1995) 1 NWLR (PT.370) 142; *Ovenseri v. Osagiede* (1998) 11 NWLR (pt.572) 1. See also *De Hart v. Stevenson* (1876) 1 Q.B.D. 313; *Prestney v. Mayor & Corp. of Colchester* (1882) 21 Ch.D. 111; *Bedford (Duke of) v. Ellis* (1901) A.C.1. I think the issue involved in the present case is not one of a representative action. The lower court, with due respect, may not have appreciated this when it observed per Mohammed JCA:

“Under the High Court Rules if a plaintiff sues in any representative capacity it shall be expressed in the writ. Mr. Okunlola had expressed it in the writ, but at that time he had not been invested with the power to sue in the representative capacity. However, before the hearing

*of the case the learned counsel filed before the court the Power of Attorney which gave him the power to sue. The law is that the plaintiff ought to be invested with a representative capacity at the date of the issue of the writ in order to sue in the representative capacity.”*

It was thereafter the learned Justice made reference to RSC (of England) B Order 20, r.5(4). Then later, he observed further:

*“In the case in hand the issue is whether Mr. Okunlola had capacity to sue as a lawful representative of the respondent. He had no capacity when he took out the writ but before the hearing of the action a Power of Attorney duly executed and showing that Mr. Olaniyi Okunlola, a barrister and solicitor in the chambers of Messrs Beatrice Fisher & Co., had been invested with the power to represent the respondent, was filed before the court. It is without any doubt that Mr. Okunlola was the lawful attorney and representative of GIV in this suit.”*

As I said, the focus should have been on whether the respondent (GIV) had a right to sue and whether it could do so by its lawful attorney, and not (a) whether Mr. Okunlola had *locus standi* (as pressed by Mr. Oyeyipo) since Mr. Okunlola was not seeking a relief for himself either solely or in common with the respondent, or (b) whether there was a power of attorney or (c) whether this is a representative action (as the lower court appeared to have concerned itself with). It was simply a situation of agent and principal.

It is, I think, quite refreshing that Dr. Babalakin on behalf of the respondent in the respondent’s brief struck the right chord on the central issue of agency when he argued that:

*“There is no dispute that the Respondent (i.e. GIV) had a legal right to sue the Appellant herein and all that happened was that it chose to do so through the instrumentality of Mr. Okunlola. In short, what we have is the case of a disclosed agent acting for a disclosed principal. What was lacking in this particular case was therefore evidence of the capacity in which Mr. Okunlola was suing. This evidence was furnished before hearing began on the Originating Summons. It is therefore submitted that in the entire circumstances of the case, it would lead to manifest injustice if the Appellant were to successfully vitiate the suit of the*

*Respondent simply on the basis that the person who the **Respondent instructed** to sue on its behalf did not have the evidence of such instruction at the time he filed the action.”*

[Italics and parenthesis by me]

B This makes the real issue clearer. As I said, it is that of principal and agent. The question is, did Mr. Okunlola have the authority of the respondent to commence this action? It is not therefore whether Mr. Okunlola had *locus standi*, but the authority of his principal, the respondent.

C The law is that the one on whose behalf an act is to be done is called the principal; and the one who is to act is called the agent. Agency therefore exists between two persons when one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents to so  
D act. The authority thereby created is called actual authority, express or implied. It is said that the simplest way in which agency arises, both between principal and agent and as regards third parties, is by an express appointment, whether written or oral, by the principal. As said by Diplock  
E L.J. in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* (1964) 2 Q.B. 480 at 502:

“An ‘actual’ authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are  
F parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.”

G In general, no formalities are required for the creation of agency. So unless otherwise provided by or pursuant to any statute, or by the terms of the power or authority under which the agent is appointed, an agent may be appointed by deed, by writing, or by word of mouth. See in general page 1, para.1-001; page 6, para.1-011; page 51, para.2-028;  
H pages 55-56, para.2-034 of *Bowstead & Reynolds on Agency*, 16<sup>th</sup> edition.

In the present case, the originating summons filed on 27 July, 1987 shows that it was taken out by Mr. Olaniyi Okunlola, as the Lawful

Attorney of the respondent. The affidavit sworn by Mr. Okunlola that same day in support of it states in paragraphs 1, 2 and 3 as follows:

“1. That I am one of the Solicitors in the law firm of Beatrice Fisher & Co. of Plot 188, Gbagada I Phase II, Gbagada, Lagos and by virtue of this fact I am familiar with the facts of this case. B

2. That by virtue of paragraph 21 of the Affidavit sworn to (sic) by a Board Member of GESELLSCHAFT FOR (sic) INDUSTRIEGASVERWERTUNG A.G. GIV. (a Geneva Based Company hereinafter called ‘the Company’) in Geneva on the 14<sup>th</sup> day of April, 1988, the law firm of Beatrice Fisher & Co. were given authority to sue on behalf of the said Company for purposes of the prayers contained in the Originating Summons filed in this Suit. The said Affidavit is attached herewith as Exhibit GIV I. C

3. That as one of the Solicitors in the said law Firm of Beatrice Fisher & Co. I am suing as Plaintiff in this case under said authority in paragraph 2 above for and on behalf of the said Company.” D

It can be seen that the authority to sue was in writing as per the affidavit which was exhibited as GIV 1. That was express written authority which existed before the originating summons was taken out. There was therefore no need for a power of attorney properly so-called which is defined as follows: “A power of attorney is ‘a formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes.’ It may confer general or particular powers.” See page 57, para.2-038 *Bowstead & Reynolds on Agency* (supra). At page 58, para. 2-040 it is said that: “Certain acts must by law be performed by deed, notably conveyances and many leases. In these cases authority to an agent to execute such a deed must itself be given by deed, usually called a power of attorney.” It is further explained at page 111, para.3-011 that: E F

“The term ‘power of attorney’ is usually applied to a formal grant of power to act made by deed or contained in a deed relating also to other matters. There was in fact no rule that agency must be created by deed, except where the agent himself is to be empowered to execute a deed, and it seems that such a power could at common law be granted by simple writing.” G H

[Italics mine for emphasis]

I am not aware of any statutory requirement applicable in this country that a power of attorney for an agent to sue or defend on behalf of his principal should be by deed. But there are specific circumstances requiring a power of attorney such as section 85 of the Registration of Titles Law (Cap.166) Vol.7, Laws of Lagos State, or as contemplated by the definition in section 2 of the Land Instruments Registration Law (Cap.111) vol.5, Laws of Lagos State, or as provided under sections 46-48 of the Conveyancing and Law of Property Act, 1881 of England, applicable in Lagos State or such other statutory provisions stipulating for it. These circumstances invariably concern dealing in land: see *Dada v. Oshinkanlu* (1995) 5 NWLR (pt.398) 755. I therefore hold that Mr. Olaniyi Okunlola as the lawful Attorney of the respondent properly took out the originating summons in this case in that title and with full authority under common law; and that the suit was competently constituted *ab initio*. The only non-compliance, which was cured later by amendment of the record in this court as the justice of the case demanded was in respect of the wrong name of the plaintiff: see *Arase v. Arase* (1981) NSCC (Vol.12) 101 at 115. I therefore hold that issues 1 and 2 raised for determination by the appellant are misconceived.

#### **Issues 3 and 4**

I shall also resolve these two issues together. The argument of learned counsel for the appellant is first, that one Mr. Bolude Alayande who was counsel for the respondent had authority to settle the matter out of court. He took part in the negotiation which led to the terms of settlement arrived at; and having so acted, the terms of settlement are binding on his client, the respondent. Reliance is placed on the observation of Eso JSC in *Mosheshe General Merchants Ltd v. Nigerian Steel Products Ltd* (1987) 1 NWLR (pt.55) 110 at 121, and also his observation in *Adewunmi v. Plastex Ltd* (1986) 2 NWLR (pt.32) 767 at 784. Second, that there was no evidence before the lower court in respect of the exchange rate of the naira to the US\$ in 1986 and therefore the lower court was in error to have *suo motu* reached a finding that the amount of US\$306,852, the outstanding debt which was the subject of the compromise agreement,

could not be equivalent to the sum of N247,625.53 stated in that agreement as the entitlement of the respondent.

Learned counsel for the respondent in reply to the first point submits that it is true that the general principles are that a counsel has authority (except expressly limited) over the whole of a court action he conducts on behalf of his client together with all matters incidental to it. But he contends that those general principles have exceptions which enable a court to exercise its discretion in deserving cases, citing *Adewunmi v. Plastex Ltd* (supra), *Neale v. Gordon Lennox* (1902) AC 465 and *Marsden v. Marsden* (1972) Fam.280. In regard to the second point, learned counsel draws attention to the terms of settlement being relied upon by the appellant where the sum of US\$631,241 was stated to be equivalent to N824,508.00 and submits that the lower court used that as a guide as to whether N247,625.53 could possibly have been equivalent to US\$306,852.

I think the general principle is clear that a counsel who has instructions of his client to conduct a case is deemed to have full control of the same and can take all necessary steps in pursuit of those instructions. He may, where desirable, agree to a compromise of the case and the assumption is that he acts within the instructions of his client and in his best interest. If he exceeds his authority and the other party is unaware, he binds his client. But this is not invariably so particularly where there has been some unconscionable element, or impropriety; or where a compromise arrived at is such that if allowed to stand it would occasion grave injustice. In such a situation the court is not fettered. It is there to do justice as best it can. It has the power to interfere to set the compromise aside. It exercises that way, its discretion as a court of justice and equity. This court has approved the statement of law in *Halsbury's Laws of England*, vol.3 now contained in the 4<sup>th</sup> edition (Reissue) vol. 3(1) para.520, in the case of *Adewunmi v. Plastex Ltd* (supra) at page 785. As it is an important statement, I shall reproduce the whole of that para. as follows: H

*“Questions of difficulty have arisen where the authority of counsel to compromise a case has been expressly limited by the client, and counsel has entered into an agreement or consented to an order or judgment in*

*spite of the dissent of the client, or on terms differing from those which the client authorised.*

*If the limitation of authority is communicated to the other side, consent by counsel which exceeds the limits of his authority will be of no effect. The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the ordinary unlimited authority. Counsel has an apparent or ostensible authority, at least as wide as his implied authority, to compromise an action; and in some cases, where the matter is within the apparent authority of counsel, the courts have refused to inquire whether there was any limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel.*

*The true rule seems to be, however, that in such case the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside the compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even though the limitation of counsel's authority was unknown to the other side."*

It would appear that Abdullahi Ibrahim & Co. were entitled initially to insist on the compromise on the basis that they were not aware throughout the period of negotiation up to the time the terms of settlement were signed by both solicitors that the respondent's solicitors exceeded their authority. That is an argument the appellant might raise and which it has indeed raised in this case. But there are such strong extenuating circumstances which might equally be canvassed and which have been canvassed by the respondent against that argument. First, the appellant's solicitors were apprised early enough of the fact that the respondent's solicitors exceeded their authority. Second, it ought to have been obvious to the appellant that the respondent's solicitors could not have had authority to compromise for an amount of naira which was certainly far less than the equivalent of the outstanding debt in US dollars. Third, the way the consent judgment was subsequently obtained raised many questions.

In *Neale v. Gordon Lennox* (supra), a counsel had authority of his client in an action for defamation of character to consent to a reference on condition that all imputations on her character were publicly disclaimed in court. The limitation imposed by the plaintiff as to disclaimer of imputations was not made known by her counsel to the defendant's counsel by the time both agreed to refer the action without any such disclaimer. The House of Lords said that the court before whom the question of setting aside that reference came was not bound to sanction an arrangement made by counsel which was not in the opinion of the court a proper one. They then held that the counsel having exceeded his authority the plaintiff was entitled to have the agreement to refer set aside and the cause restored to the list for trial. The Earl of Halsbury L.C. observed at pages 469-470 *inter alia*:

*"The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard .... Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of the Court of justice to say that something shall or shall not be done, although one of parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer - to take from the jurisdiction of the ordinary tribunal - shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to."*

In the present case, the total amount originally owing to the respondent by the appellant was US\$631,244 as at January 24, 1978. The amount was not paid and a petition was filed in the Federal High Court, Sokoto to wind-up the appellant. Later the parties agreed to settle out of

court. Part of the terms agreed included a deduction of US\$300,000 from the debt. The balance was to be paid as stated in the settlement agreement made available on November 22, 1983 by the respondent to their counsel, Mr. Bolude O. Alayande, as follows:

B           “(B)    *The respondent shall pay to petitioner in full and final settlement of the petitioner’s claim as many naira as is necessary to cover the sum of US\$306,852 independently of the problem about how many naira are necessary to pay that sum.*

C           C)    *The said sum shall be paid en-bloc within 15 days from the filing of these terms of settlement with the Court by a bank certified cheque of GIV’s solicitor.*

D)    *The petitioner shall instruct within 10 days from the filing as per C) above Panalpina World Transport (Nig) Limited to release whatever sum they are holding for petitioner or respondent to respondent according to instructions given by petitioner’s solicitor.”*

The solicitors for the parties i.e. Bolude O. Alayande for the respondent and Abdullahi Ibrahim SAN for the appellant were able on 6 November, 1986 (after 3 years since the settlement agreement made available to Bolude O. Alayande) to draw up the terms of settlement in which they recited the original debt of US\$631,241 as being equivalent to N824,508.00. It was then agreed *inter alia* that:

F           *“The Respondent shall pay to the Petitioner the sum of N247,629.53 in full and final settlement of the Petitioner’s claim.”*

It is necessary to make some remarks here. Going by para.B of the instructions given to Mr. Alayande, I am of the view that emphasis was on the payment of the agreed US\$306,852. Although it was to be paid in naira, the naira must cover the US\$ equivalent. The appellant has argued before us that the court below speculated that the sum of N247,629.53 was not the equivalent if US\$306,852 at the material time when there was no evidence before them to arrive at that finding. The position of the appellant, at least by implication, is that they were both equivalent then hence that amount of naira was made a term of settlement. That is a positive assertion by the appellant. The respondent on the other hand says that the naira sum was not its US dollars equivalent. That is a negative asser-

tion. It is not in law for the respondent to prove a negative assertion. The burden is on the appellant who has made a positive assertion to prove it by evidence. That would clearly have vindicated its position. But it failed to do so. I do not think in any event it is right to say the court below speculated or acted *suo motu* on this point. Since the two solicitors who later drew up the terms of settlement computed the naira equivalent of US\$631,241 to be N824,508.00, I cannot imagine how US\$306,852 can be far less than half that naira equivalent. The sum of N247,629.53 appears to me to be about half of what the respondent would have expected to be paid. In any case, it cannot at all be the equivalent of US\$306,852. That was what the lower court found upon that fact before it upon which it could act without the assistance of counsel. The lower court, in my view, was absolutely right in the circumstances. The second remark is a question. How is it that it took 3 years from the time it was agreed to settle out of court to the time the so-called terms of settlement were drawn up when it was expected from para. C of the instructions that all matters would be concluded within a few days?

As soon as the respondent found that the terms of settlement so drawn up were unacceptable, it rejected them and wrote to both solicitors who were involved in preparing and executing the document. The chambers of Funsho Alayande & Co. and Abdullahi Ibrahim & Co. exchanged correspondence as a result, the latter insisting that the terms stood. Indeed, in the letter from them dated 25 May, 1987, they wrote in the concluding paragraph as follows:

*“Be informed that we have since filed a copy of the Terms of Settlement in the office of the Registrar, Federal High Court, Sokoto. We have further instructed the Registrar to revive this suit so we can duly inform the Court about settlement reached by parties to the above suit. We believe that Hearing Notice from the Federal High Court, Sokoto would be served on you in due course.”*

This takes me to the proceedings that eventually took place at the Federal High Court, Sokoto before Ofili, J. This was on 27 July, 1987. One Mr. S.M. Onekutu (of Abdullahi Ibrahim & Co.) represented the present appellant (there referred to as the respondent) while the respon-

dent (referred to as the petitioner) was absent and unrepresented. The record shows the following:

B *“Mr. Onekutu: The petitioner is not present in Court, but I understand he has written a letter to this Court to confirm if the terms of settlement have been filed. We have just filed the terms of settlement hereby tendered and marked Exh.A. We humbly urge the Court to enter judgment in accordance with the terms.”*

[Italics mine]

C There and then judgment was entered by the Court in these words:

D *“I have heard Mr. Onekutu for the respondents and I have examined and read Exh. A which is a document embodying the terms of settlement between the Petitioner and the respondent dated 6<sup>th</sup> day of November, 1986 and subscribed by the Chambers of Funso Olayande (sic) & Co for the respondent, and duly filed in Court on the 27<sup>th</sup> day of July, 1987. I am satisfied that the terms of settlement constitute the mutual agreement of the parties and I therefore enter judgment on terms of the settlement in Exh. A.*

E [Italics Mine]

F It seems clear from the above that both the Federal High Court and the solicitor for the respondent were misled. First, in the letter dated 25<sup>th</sup> May, 1987 written by Abdullahi Ibrahim & Co. to Funsho Alayande & Co., the impression was given that as at that date the terms of settlement had been filed in court. As it turned out filing did not take place until the very day judgment was given on 27 July, 1987. One cannot explain why filing was so delayed and why the indecent haste to get judgment that very day behind the back of the other party who had no notice of the proceedings. Second, the Chambers of Abdullahi Ibrahim & Co. knowing that the terms of settlement had been rejected by the respondent still went ahead to obtain the consent judgment in question. Third, the learned trial judge was not informed of the rejection by the respondent who was the other party G but it would appear he was led to believe that he could give judgment by the consent of the said party, on the basis that there was “mutual agreement of the parties.” H

In a situation like this, it has been observed per Lord Diplock in

*de Lasala v. de Lasala* (1979) 2 All E.R. 1146 at 1155 that: “Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside.” The respondent in the present case chose the latter procedure. I think it has been established that the judgment in question was not obtained with the consent of the respondent. The circumstances leading to it are enough to cause some concern. The two courts below were justified to have set it aside. Accordingly, for the reasons given in this judgment and those more elaborately contained in the judgment of my learned brother Iguh JSC, I also dismiss this appeal with N10,000.00 costs to the respondent.

D

### **EJIWUNMI JSC**

I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother Iguh JSC. In the said judgment the facts leading to this appeal were exhaustively reviewed and the issues raised thereon and the arguments of counsel were also carefully considered. I adopt the judgment as my own. However, I consider it necessary to add the following words of my own. This appeal in my respectful view has raised in no uncertain terms the unfortunate use to which technicalities can be employed to deny a party of its just rights.

Here is a case in which it is manifest that the respondent has been made to suffer unnecessarily because of the unfair tactics employed by counsel in the course of the hearing and purported out of court settlement of a dispute which the opposing party had timeously disclaimed. It would indeed be a great travesty of justice if Courts, as argued by learned counsel for the appellants, are not capable of correcting this palpable wrong done to the respondent as made manifest in these proceedings.

I would therefore also dismiss this appeal for all reasons given in the bad judgment of my learned brother Iguh JSC. I also abide with the order made as to costs.