

SUPREME COURT OF NIGERIA
13TH JULY, 2001. SC. 111/1996
CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,
A. I. IGUH, A. I. KATSINA-ALU, E. O. AYOOLA, JJSC.

ALBERT AFEGBAI APPELLANT

AND

1. ATTORNEY-GENERAL

EDO STATE RESPONDENTS

2. COMMISSIONER FOR

LAND AND SURVEY, EDO STATE

APPEALS - Concurrent findings of fact - The court will not lightly interfere with such findings - Unless they are perverse and unreasonable (H 6)

CONTRACTS - Fraudulent misrepresentation - Where a statement is true - In the sense in which it was meant - And it is understood in another sense which is untrue - The representor is not guilty of fraud (H 4)

CONTRACTS - Rescission - Cannot be based - On a misinterpretation of the representor's statement - Which is not false (H 5)

JUDGMENTS - Consent judgment - Setting aside on the grounds of fraudulent misrepresentation - The applicable principal is the same - As would apply for rescission of contract (H 1)

JUDGMENTS - Consent judgment - Setting aside on grounds of fraudulent misrepresentation - How to determine - Whether fraudulent misrepresentation was established (H 2)

JUDGMENTS - *Consent judgment - Setting aside - As fraudulent misrepresentation is a question of fact - The courts rightly held - That it had not been proved by evidence in this case (H 3)*

FACTS

The Government acquired part of the plaintiff's land at Isiohor near Ugbowo in Edo State but failed to pay compensation to the plaintiff. The plaintiff therefore sued in the court for compensation to be paid to him in respect of the land. While the case was in court, the defendants/respondents negotiated settlement with the plaintiff's solicitor to give another parcel of land to the plaintiff in lieu of monetary compensation. The plaintiff through his solicitor accepted this proposal and the defendants produced the certificate of occupancy in favour of the plaintiff. The court thereupon entered a consent judgment on the basis of the negotiated and settled agreement of the parties.

However, it transpired that while the case was still in court the plaintiff had applied to the defendants to make a grant to him out of their land at Etete in Benin City. The plaintiff's solicitor was not aware of this application and as such the same land granted to him by the defendants and which he paid for was the same land given to him in lieu of compensation for his acquired land. The plaintiff thereupon instituted this action claiming that the grant of the plot to him had nothing to do with the demand of compensation and if he had known this, he would not have agreed to the consent judgment.

The trial judge in resolving the issue upheld the validity of the consent judgment as a proper judgment of the court and held that the defendants were not guilty of fraudulent misrepresentation on the facts proved before him. The appeal of the plaintiff was dismissed on a split decision of the Court of Appeal and he has finally appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Did the Appellant fail to prove the essential ingredients of fraudulent misrepresentation against the Respondent?”

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

Consent judgment - Setting aside

1. A consent judgment will be set aside on any ground which may invalidate an agreement in which it is founded would be rescinded. When therefore, a consent judgment is sought to be set aside on the ground of fraudulent misrepresentation, the same principles apply as would apply were the action one for rescission of a contract. (p. 2720 C)

Whether fraudulent misrepresentation was established

2. In this case the appellant sought to invalidate the consent judgment on the ground of fraudulent misrepresentation. He did not allege common mistake. So we are concerned with the limited question whether fraudulent misrepresentation was established. In this well trodden area of law, the principles that apply in a claim for rescission of a contract for fraudulent misrepresentation need only be stated briefly. First, the representation must be a statement of existing fact. Secondly, the representation must be material and unambiguous. Thirdly, the representee must show that he has acted in reliance on the misrepresentation. Where there is no representation of an existing fact it will not be necessary to proceed to consider any question of falsity. Where there is misrepresentation it is essential for the purpose of relief to consider whether it is fraudulent or innocent and whether the representee had acted in reliance of the misrepresentation. (p. 2720 G)

Fraudulent misrepresentation is a question of fact

3. Whether there is a misrepresentation is a question of fact. In my opinion, the view held by the Chief Judge, confirmed by the unanimous view of the Court of Appeal, that fraudulent misrepresentation had not been proved cannot be faulted having regard to the evidence accepted by the learned Chief Judge. The parties agreed that land would be allocated to the appellant in lieu of compensation. Mr. Isilien and the appellant's solicitor agreed that plot 263 would be such land allocated. There was

neither representation made to the appellant's agent nor falsity in any representation that plot 263 had been allocated in lieu of compensation. If there was any falsity, it was in the claim of the appellant that there were two parallel and unrelated transactions. His error was, apparently, B that he did not realise that even if land was to be allocated to him in lieu of compensation, he still had to go through the process of allocation and documentation. He admitted with candour that his applying for allocation of land was suggested and initiated by the respondent's witness as C part of the negotiation to grant him land in lieu of the compensation for land which was compulsorily acquired, but he did not seem to have attached any consequence to that fact. (p. 2721 C/E)

Contracts - Fraudulent misrepresentation

D 4. Even if a statement is true in the sense in which the representor meant it but is so obscure that the representee understands it in another sense, in which it is untrue, the representor is not liable if his interpretation is the correct one. (See Mc Inerny v. Lloyds Bank Ltd (1994) 1 Lloyds Rep, E 246, 254) It has further been held that the representor is not guilty of fraud, even if the court holds that the representee's interpretation was the correct one. (See Akerhielm v. De Mare (19 59) A C 789; Gross v. Lewis Hillman Ltd. (1970) Ch. 445.) (p. 2722 B)

F ***Rescission - Misinterpretation***

5. It is evident in this case that the interpretation given by the appellant to any statement by any agent of the respondents that the appellant has been given plot 263 in lieu of compensation as meaning 'another plot other G than that allocated pursuant to his application' was sadly, of his own making, which, divorced from the antecedent negotiations and the surrounding circumstances, was erroneous. He appeared to have understood any such statement in a sense which was untrue. Rescission of a H contract cannot be based on a misinterpretation of the representor's statement which on its true interpretation is not false. (p. 2722 D)

Appeals - Concurrent findings of fact

6. This appeal, evidently, could have been shortly dealt with on the well established principle that this court will not lightly interfere with concurrent findings of fact made by the trial court and the Court of Appeal, unless such findings are perverse and utterly unreasonable. Such is not the case in this appeal. It is merely in deference to the fact that there was a split decision of the Court of Appeal that time has been taken to give a considered judgment. It is well to note that it being the unanimous finding of the Court below that there was no fraudulent misrepresentation, that should have been the end of the matter since that finding struck at the root of the action. The finding in the dissenting judgment that land claimed to be allocated in lieu of compensation was at the time of such allocation already the property of the appellant is, on the evidence, erroneous and was not the basis of the appellant's claim in the High Court. (p. 2722 H)

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE JSC

1. When a consent judgment is said to exist

There is a consent judgment where parties to an action in court have fashioned out an agreement as to how to settle their dispute out of court and apply to the court to give judgment on the terms they have agreed upon. Such judgment when given is called a judgment by consent and serves as a final determination of the dispute between the parties – See *N.W.R.D. v. Jaiyesimi* (1963) 1 All NLR.215 – See also *Woluchem v. Wokoma* (1974) 1 All NLR. 605 at p.617. (p. 2730 E)

2. A consent judgment is a final decision

A consent judgment is a final decision, since it finally determines the issues and dispute between the parties – See *N.W.R.D. v. Jaiyesimi* (1963) 1 All NLR.215. It is a final decision within S.241(1)(a) of the Constitution 1999. However, leave of the High Court or of the Court of Appeal is required for the exercise of a right of appeal. – See S.241(2)(c) of the Constitution 1999. A judgment of Court which finally settles the rights

of the parties in the subject matter of the claim in the sense that it was not given in default of a statement of defence is a final judgment – See Babajide v. Aisa (1966) All NLR.254. (p. 2730 G)

B 3. *When a consent judgment is said to be valid*

It is well settled law that to have a valid consent judgment the parties must be ad idem as to the agreement, and the terms of settlement must be filed in Court. It is the order of court based upon the terms of settlement that is the consent judgment – See Woluchem v. Wokoma (1974) 3 SC.153. An aggrieved party can appeal against the order of consent judgment with leave of the court – See S.241(2)(c) Constitution 1999. A consent judgment will not be set aside on grounds of unilateral mistake, unless the mistake was induced by fraud or misrepresentation. – See

D Akinwunmi v. Idewu (1969) 1 All NLR. 319. (p. 2731 A)

4. *Authority of counsel in absence of limitation by the client*

There is no averment in the statement of claim wherein the Plaintiff has placed any limitation in the scope of the exercise of authority of counsel whilst representing the Plaintiff either in the negotiation of the arrangement for allocation of another piece of land in lieu of monetary compensation for the piece of land compulsorily acquired or in the conduct of the trial in the suit. Counsel is therefore expected to use his discretion in the exercise of his professional skill to conduct the case of his client in the manner he thinks to be in the best interest of and beneficial to the client. (p. 2733 B)

G 5. *Legal relationship between counsel and client - Its implication*

The nature of the legal relationship between Counsel and his client, which exists in this case between Plaintiff and PW1, his counsel, is one of an Independent Contractor and not one of Principal and Agent – See Per-forming Right Society Ltd. v. Mitchell & Booker Palais de Danse Ltd. (1924) 1 KB.702 at p.365 per Mc Cardie J. It is not that of Master and Servant. Counsel is clearly not a servant of his client. It is accepted that where a client gives specific instruction to counsel, such instruction must

be adhered to. Where the nature of the specific instruction is in conflict with the manner of discharging his professional skills and interferes with his control of how to conduct the case of his client, Counsel is entitled to return the brief to his client. Counsel who is in law, the *dominis litis* is not bound to obey any such instructions. It is in the exercise of his apparent B general authority in the discharge of his professional duties to his client, to have complete control how such instructions are to be carried out, and over the conduct of the case. (p. 2733 F)

6. *Proper exercise of counsel's authority binds the client* C

Where there is the exercise of the apparent authority and Counsel acts within the scope of his actual authority without any express or implied limitation, the client is bound by the exercise of such authority. In Matthews v. Munster (1887) 20 Q.B.D.141, where Counsel in the ab- D sence of express authority assented to a verdict for the Plaintiff for L350 with costs on the understanding that all imputations against the Plaintiff were withdrawn, the objection of the Plaintiff against such arrangement in an application to the court to set aside the verdict on the ground that he E gave no authority to consent to the terms of settlement was rejected. The Court of Appeal in England held that Counsel had apparent general authority to consent to the terms of settlement which were accordingly binding. In this case Lord Esher, after stating the scope of the authority F of Counsel concluded at p.143 that,

“The duty of a counsel is to advise his Counsel out of Court and to act for him in Court, and until his authority is withdrawn, he has with regard to all matters that properly relate to the conduct of the case, un- G limited power to do that which is best for his client.” (p. 2734 B)

OGWUEGBU JSC

7. *What a plaintiff must prove to succeed in an action for fraudulent H misrepresentation*

In an action alleging fraudulent misrepresentation, the plaintiff must prove that the defendant made the false statement knowing it to be false, or reckless, neither knowing nor caring whether it was false or true. A

close study of the evidence has brought me to the conclusion that the courts below were right in their finding that the plaintiff failed to prove fraud. (p. 2739 C)

B

IGUHJSC

7. Remedies for fraudulent misrepresentation

A fraudulent misrepresentation, whereby the representor has induced the representee to alter his position by entering into a contract or transaction with the representor confers the right to the representee to either maintain an action for damages, or repudiate the contract or transaction. In such a case, the representee may institute proceedings for the rescission of the contract or transaction. He may also set up the fraudulent misrepresentation as a defence to any action instituted for the direct or indirect enforcement of the contract or transaction. It can therefore be said that the plaintiff in the present case, if he established fraudulent misrepresentation against the defendants as a result of which his counsel, acting on his behalf, was induced to alter the position of the said plaintiff by entering into a transaction with the defendants, the representors, consequent on which the High Court of the former Bendel State, holden at Benin City entered the said consent judgment in suit No. B/49M/82 between the parties, is entitled to institute the present proceeding for the repudiation and nullification of the said consent judgment on ground of the said fraudulent misrepresentation. (p. 2741 G)

G

REPRESENTATION

O. Ovurah (with him U. M. Yamah) for the Appellant.
Mrs. B. O. Kalu (Director, Civil Litigation Ministry of Justice Edo State) for the Respondent.

H

CASES REFERRED TO

Mc Inerny v. Lloyds Bank Ltd (1994)1 Lloyds Rep. 246, 254

Akerhielm v. De Mare (1959) AC 789

Gross v. Lewis Hillman Ltd. (1970) Ch. 445

Olufunmise v. Falana (1981) (1990) 3 NWLR 1361

Talabi v. Adeseye (1972) 8-9 SC. 20

Derry v. Peek (1889) 14 App. Cas. 337, 490-491

B

Adeleke v. Aserifa (1990) 3 NWLR (pt. 136) 941

N. W. R. D. v. Jaiesimi (1963) 1 All NLR 215

Woluchem v. Wokoma (1974) 1 All NLR 605 at p. 617

Babajide v. Aisa (1966) All NLR 254

C

Thanni v. Adeboyega (1971) 1 NMLR 369

Alomasojo v. Ibru (1973) 4 SC. 13

Akanbi v. Durosaro (1998) 12 NWLR 284

Enigbokan v. Baruwa (1998) 8 NWLR 96

Adewunmi v. Plastex Ltd. (1986) 3 NWLR (pt. 32) 767

D

LEAD JUDGMENT BY AYoolaJSC

The only issue on this appeal from the decision of the Court of Appeal dismissing an appeal from a dismissal of the appellant's claim by the High Court of Edo State, as formulated by counsel for the appellant, is whether the appellant had failed to prove the essential ingredients of fraudulent misrepresentation against the respondent. The facts which led to the appellant's claim in the High Court have been clearly and help-fully summarised in the judgment of Akpovi, C.J., Edo State who heard the case in the High Court as follows:

"The facts are simple. Government acquired part of the plaintiff's land at Isiohor near Ugbowo and the parcel of land remained acquired. The plaintiff went to court and sued for compensation to be paid to him in respect of the land. Compensation was not paid. While the case was in court the defendants negotiated settlement with the plaintiff's Solicitor to give another parcel of land to the plaintiff in lieu of monetary compensation. The plaintiff through his Solicitor acting as agent, accepted this proposal, the defendant produced the certificate of occupancy in favour of the plaintiff and delivered it to the court when the settlement

was regarded as completed, and the terms were filed in court enrolled as the judgment of the court. It was a negotiated and settled agreement which led to a consent judgment of the court. Between the defendants and the plaintiff's Solicitor, indeed the plaintiff himself, the matter was regarded as having been laid to rest. What then followed was that when the plaintiff's case was still in court he applied to the defendant to make a Grant to him out of the defendants land at their new layout land at Etete in Benin City. The plaintiff did not inform his Solicitor about this. The defendants agreed to make a Grant of the plot of the land to the plaintiff and use it to offset the compensation that the plaintiff had demanded on his acquired land at Isiohor.

The problem that has arisen is that the plaintiff is contending that the Grant of the plot to him had nothing to do with the demand of compensation for his land for which he sued the defendants, saying that if he knew that fact before the enrolment of the consent judgment he would not have agreed to it."

The trial judge in resolving the issue in the case held that the consent judgment to which the appellant's solicitor agreed was a proper judgment of the court. That the appellant's solicitor's consent was binding on him was an issue in the Court of Appeal but it is not one in this appeal. The trial judge having identified the main question to be: whether that "proper judgment" could be set aside as null and void for fraud, or, put otherwise, whether it can be said "from the facts before the court that the defendants were fraudulent or were guilty of misrepresentation", answered the question in the negative. He said:

"I must say that from the facts before me fraud on the part of the defendants has not been proved. I accept the evidence of the defence witness Mr. Izilien that the defendants issued a certificate of occupancy in respect of the land in Etete Layout and did so within two months of the application by the plaintiff in order to meet the terms of settlement in court."

Having adverted to the promptness with which land was granted to the appellant by the Government, the learned trial judge came to the conclusion which, indeed, amounted to a finding of fact, that in the cir-

cumstances in which the Government is not obliged to grant land to an applicant for an allocation of state land such grant is not a sale, and that "the Government is entitled to make a Grant of their land to an individual in lieu of compensation to him in respect of acquired land elsewhere."

Although not stated in so many words, it is clear that on the evidence before him the trial judge found as a fact that the allocation of plot 263 at Etete Layout in the New GRA was given to the appellant through the court to satisfy the settlement of the case in Court for compensation in the appellant's acquired land. That was the essence of the respondents' defence and of Mr. Izilien's evidence which the learned Chief Judge accepted.

It may well be noted that the evidence of the appellant's solicitor who negotiated the settlement of the claim for compensation in his behalf confirmed that the "*State party promised to give to plaintiff another position (sic: portion) of land in Benin City in line (sic : lieu) of compensation due to Plaintiff.*" Then he also said that he went into negotiation whereon Mr. Izilien identified to him plot 263 as the plot of land he had decided to allocate to the appellant. He accepted the allocation and an agreement which he signed was accordingly drawn up. The appellant's solicitor confirmed that he had authority to accept any suitable compensation. His only objection was that the appellant's property would not be a suitable compensation. The appellant himself admitted under cross-examination that he was advised to apply for an allocation of land when the acquisition of his land could not be rescinded. He therefore applied for land in October, 1984.

It seemed clear from the evidence on record and accepted by the learned Chief Judge that there was only one transaction, and not two as the appellant had misled himself into believing and had wanted the court to believe. That single transaction was one in which the main objective was to compensate the appellant in kind by allocation of another plot of land to him in lieu of his land acquired by the Government. The appellant's application for allocation of land and subsequent allocation of land to him were processes in the fulfillment of that objective. It was upon fulfillments of that objective, it would appear, that the matter

was closed by the entry of a consent judgment.

The appellant alleging fraudulent misrepresentation sought to set aside the consent judgment. The trial court did not find fraudulent misrepresentation proved and the Court of Appeal agreed with the trial court.

B Notwithstanding that the decision of the Court of Appeal was a split decision (Ige & Ubaezonu, JJ.C.A., dismissing the appeal, and Akpabio, J.C.A., dissenting) it is clear that they were all unanimous in holding that there was no fraudulent misrepresentation. Akpabio, JCA, said:

C *"My learned sister in the lead judgment has carefully reviewed all the ingredients that constitute the offence (sic) of fraudulent misrepresentation, and can find none in this Case, and I agree with her."* (Emphasis mine)

D **A consent judgment will be set aside on any ground which may invalidate an agreement in which it is founded would be rescinded. When therefore, a consent judgment is sought to be set aside on the ground of fraudulent misrepresentation, the same principles apply as would apply were the action one for rescission of a contract.** In Huddersfield Banking Co. Ltd. v. Henry Lister & Son, Ltd. (1895-9) ALL ER Rep. 868 it was held that a consent order made by the court to give effect to the compromise of a legal claim by the parties concerned can be set aside, not only on the ground of fraud, but for any reason which would afford a ground for setting aside the agreement on which the order was made for example, on the ground of a common mistake regarding a material fact. In that case Lindley, CJ, said:

G *"The only thing, to my mind, to be done on this point of setting aside a consent judgment is to see whether the agreement upon which it was based can be invalidated or not. If the agreement cannot be invalidated, the consent order is good. If the agreement can be invalidated, the consent order is bad."*

H **In this case the appellant sought to invalidate the consent judgment on the ground of fraudulent misrepresentation. He did not allege common mistake. So we are concerned with the limited question whether fraudulent misrepresentation was established. In this well trodden area of law, the principles that apply in a claim for**

rescission of a contract for fraudulent misrepresentation need only be stated briefly. First, the representation must be a statement of *existing fact*. Secondly, the representation must be material and unambiguous. Thirdly, the representee must show that he has acted in reliance on the misrepresentation. Where there is no representation of an existing fact it will not be necessary to proceed to consider any question of falsity. Where there is misrepresentation it is essential for the purpose of relief to consider whether it is fraudulent or innocent and whether the representee had acted in reliance of the misrepresentation.

Whether there is a misrepresentation is a question of fact.

What was alleged in the writ as constituting a misrepresentation in this case was that: *"The Defendant falsely represented to Court and Counsel acting on behalf of the Plaintiff that a different land has been allocated to the Plaintiff."* In the statement of claim it was also stated under *"Particulars of Fraud"* that the misrepresentation was that Mr. Isilien, Deputy Chief Lands Office, representing the Defendants informed the Court that plot 263, Etete had been granted to the plaintiff in lieu of compensation and *"that by reason of the said representation, Mr. Oluyede not being aware of the true state of affairs signed the compromise arrangement which crystallised into the consent judgment"*.

In my opinion, the view held by the Chief Judge, confirmed by the unanimous view of the Court of Appeal, that fraudulent misrepresentation had not been proved cannot be faulted having regard to the evidence accepted by the learned Chief Judge. The parties agreed that land would be allocated to the appellant in lieu of compensation. Mr. Isilien and the appellant's solicitor agreed that plot 263 would be such land allocated. There was neither representation made to the appellant's agent nor falsity in any representation that plot 263 had been allocated in lieu of compensation. If there was any falsity, it was in the claim of the appellant that there were two parallel and unrelated transactions. His error was, apparently, that he did not realise that even if land was to be allocated to him in lieu of compensation, he still had to go through the

process of allocation and documentation. He admitted with candour that his applying for allocation of land was suggested and initiated by the respondent's witness as part of the negotiation to grant him land in lieu of the compensation for land which was compulsorily acquired, but he did not seem to have attached any consequence to that fact.

Even if a statement is true in the sense in which the representor meant it but is so obscure that the representee understands it in another sense, in which it is untrue, the representor is not liable if his interpretation is the correct one. (See *Mc Inerny v. Lloyds Bank Ltd* (1994) 1 Lloyd's Rep, 246, 254) It has further been held that the representor is not guilty of fraud, even if the court holds that the representee's interpretation was the correct one. (See *Akerhielm v. De Mare* (19 59) A C 789; *Gross v. Lewis Hillman Ltd.* (1970) Ch. 445.)

It is evident in this case that the interpretation given by the appellant to any statement by any agent of the respondents that the appellant has been given plot 263 in lieu of compensation as meaning 'another plot other than that allocated pursuant to his application' was sadly, of his own making, which, divorced from the antecedent negotiations and the surrounding circumstances, was erroneous. He appeared to have understood any such statement in a sense which was untrue. Rescission of a contract cannot be based on a misinterpretation of the representor's statement which on its true interpretation is not false.

It is obvious that counsel for the appellant found himself hard put to make any sensible case on this appeal when he argued that the representation was an alleged statement of Mr. Izilien (DW1) that "*the respondents were willing to settle the issue of compensation with the appellant by the provision of another alternative land*", without adverting to the fact that any such statement not being of an existing fact would not avail the appellant.

This appeal, evidently, could have been shortly dealt with on the well established principle that this court will not lightly in-

terfere with concurrent findings of fact made by the trial court and the Court of Appeal, unless such findings are perverse and utterly unreasonable. Such is not the case in this appeal. It is merely in deference to the fact that there was a split decision of the Court of Appeal that time has been taken to give a considered judgment. It is well to note that it being the unanimous finding of the Court below that there was no fraudulent misrepresentation, that should have been the end of the matter since that finding struck at the root of the action. The finding in the dissenting judgment that land claimed to be allocated in lieu of compensation was at the time of such allocation already the property of the appellant is, on the evidence, erroneous and was not the basis of the appellant's claim in the High Court.

Be that as it may, this appeal is utterly without substance. Accordingly, I dismiss it with ₦10,000 costs to the respondent.

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother E. O.Ayoola, JSC in this appeal. I agree entirely with his reasoning and conclusion dismissing the appeal. I wish however, to make some contribution of my own with regards to the two important and critical issues accentuated in the judgment. These are the bindingness of a consent judgment entered into by Counsel, on behalf of his client and the essential ingredient of misrepresentation which will vitiate a consent judgment.

The circumstances resulting in this litigation arose from a consent judgment entered on the authority of Counsel to the Plaintiffs with the Defendants in settlement of the suit brought by Plaintiff against the Defendants.

Brief summary of the facts as can be gathered from the pleadings are as follows –

Plaintiff/Appellant, who was a Deputy Commissioner of Police was the owner of a freehold land in Isiohor Village near Benin City. By the Bendel State Legal Notice No.174 of 28/4/77 published in Gazette No.24

vol.14 of 7/4/77, Plaintiffs afore-mentioned piece of land was acquired by the Bendel State Government. Plaintiff applied to the Defendants for compensation to be paid to him after he discovered that the rescission of the acquisition notice did not include his piece of land. When his effort to
 B obtain compensation was not producing favourable reactions from the Defendants, Plaintiff instituted suit No.B/49m/82 against the Defendants in the High Court, Benin City for the enforcement of his fundamental rights to payment of compensation for the piece or parcel of land acquired. Plaintiff instructed his Solicitor to petition the Military Governor of the
 C State for the matter to be settled amicably.

On the 30th Oct., 1984 Plaintiff applied for a piece of land in the Government lay out at Etete, Benin City. The Military Governor in a letter dated 7/1/85 approved of the application and the allocation of plot 263 Etete
 D Lay-Out to Plaintiff. By a letter dated 24/1/85 Plaintiff requested to pay the necessary fees, which he did. Plaintiff spoke to Mr. Izilien, the Deputy Chief Lands Officer the DW1 at the trial, who promised to assist in facilitating issuance of the certificate of occupancy.

Plaintiff said that subsequently, his counsel, Mr. R. A. Oluyede informed him that Defendants were interested in settling the matter out of court by allocating another piece of land to the Plaintiff in lieu of monetary compensation. Plaintiff accepted the arrangement and instructed his
 E Counsel to negotiate terms of settlement. The terms of settlement was
 F negotiated and was signed on 16/5/85, and the consent judgment incorporating the terms of settlement was entered on 20/5/85.

When Plaintiff was informed by his counsel that Plot 263 Etete Lay-Out, Benin City was the subject matter of the Consent judgment, he
 G objected to the arrangement and instructed counsel to write to object to the arrangement. Plaintiff admitted that he at no time informed his Counsel about the earlier allocation to him of Plot 263 of the Etete Lay Out; and that Counsel was not aware of that arrangement.

H Plaintiff's application to the Court to set aside the consent judgment was refused.

Plaintiff's contention is that Defendants have failed, refused or neglected to pay compensation or allocate a suitable alternative land in lieu

of compensation. He contended that Plot 263 Etete Lay-Out was independently and legitimately acquired, and was not a suitable alternative land within the arrangement of the parties.

Plaintiff says that he did not at any time consent to Plot 263 Etete Lay-Out being used as the subject matter of the arrangement for compromise which was entered as the consent judgment. He contends that the consent judgment was obtained by reason of the fraudulent misrepresentation of the Defendants.

The Defendants deny any fraudulent misrepresentation on their part and aver that Plot 263 Etete Lay-Out was allocated as compensation for Plaintiff's land compulsorily acquired. The issue of settlement out of court arose after suit No.B/49M/82 had been instituted. Plot 263 Etete Lay-Out Benin City was allocated to Plaintiff, and the certificate of occupancy thereof prepared ready for his collection pursuant to settlement. Plaintiff's counsel was at all times throughout the negotiation for settlement out of court aware that Plot 263 Etete Lay-Out Benin City was allocated to Plaintiff as compensation for his acquired land at Isiohor Village.

ACTION IN THE TRIAL COURT.

Plaintiff has brought this action by writ of summons claiming for a declaration that the consent judgment made and given by the High Court on the 20th day of May, 1985 in Suit No.B/49M/82 between Plaintiff and the Attorney-General, Bendel State, and the Commissioner for Lands and Survey, Bendel State is null and void on grounds of fraudulent misrepresentation. Plaintiff also claimed for an order setting aside the said consent judgment and relisting the Suit No.B/49M/82 for hearing and determination on the issue of compensation.

After trial on the pleadings and of hearing the witnesses of the parties, Akpovi, C.J. found that Plaintiff failed to establish either of the claims, and dismissed the case accordingly. The learned Chief Judge held that the consent judgment signed and enrolled was binding on the parties, and that the consent of the solicitor was the consent of his client, the Plaintiff. He held that on the facts before him the Defendant could not be said to be fraudulent or be held guilty of misrepresentation.

APPEAL TO THE COURT OF APPEAL

Plaintiff appealed to the Court below, at the Benin City Division of the Court of Appeal on the 29th April, 1991. Appellant filed eight grounds of appeal. After hearing, the Court by a majority dismissed the appeal. Appellant has further appealed to this Court. This is the appeal now before us.

IN THIS COURT

Appellant has filed four grounds of appeal which without their particulars are as follows –

“GROUND 1

The Learned Justice of the Court of Appeal erred in law when they held “But has the appellant proved the falsity of the representation? Has the appellant proved that his point has been altered as a result of the alleged fraudulent misrepresentation? These questions have remained unanswered the plaintiff/appellant.

GROUND 2

The Learned Justice of the Court of Appeal misdirected themselves on the facts when they held that the plaintiff/appellant’s Solicitor, p.w.1, can give a valid consent to the terms of settlement as no fraudulent misrepresentation was practised on him.

GROUND 3

The Learned Justices of the Court of Appeal erred in law when they held that the parties to the consent judgment i.e. Exhibit A, were ad idem on the point that Plot 263 Etete Lay-Out Benin City, was to be given to the plaintiff/appellant in lieu of compensation for his land that was acquired and went further to conclude “The fact that Plot 263 Etete Layout had been granted to the plaintiff in 1985...was never disclosed to P.W.1 his Solicitor ...Plaintiff’s non-disclosure of the fact is an embarrassment to p.w.1, his Solicitor.”

GROUND 4

The Judgment of the Learned Justices of the Court of Appeal is against the evidence contained in the printed records before it.”

ISSUE FOR DETERMINATION

Only one issue for determination was formulated by Learned Counsel for the Appellant from these grounds of Appeal. The issue for-

ulated runs thus

“Did the Appellant fail to prove the essential ingredients of fraudulent misrepresentation against the Respondent.?”

Learned Counsel for the Respondents adopted this formulation of the issue by learned Counsel for the Appellant.

It is curious to observe this as the only issue which Counsel has considered could be formulated from the four grounds of appeal filed. The issue formulated relates to grounds 1 and 2 which alleged error in law in the court below failing to find was fraudulent misrepresentation on the part of the Defendants. The issue would seem to me not to cover the error alleged in ground 3 that the court held that the parties to the consent judgment were *ad idem* on the subject matter of the consent. This is because the ground does not allege fraud in the obtaining of consent, and even the particulars which allege that the court should have imputed knowledge through DW1 to the Defendants that Plot 263 was already allocated to Appellant in a separate and independent transaction admitted that Appellant never disclosed to his Counsel negotiating on his behalf that he applied for and was granted such land. Even a benevolent construction of the issue as formulated cannot include ground 3 which is a specific allegation touching on the scope of the duty of counsel to his counsel properly instructed. It would appear that despite the exclusion of the ground of appeal, the formulation of the single issue which has not considered the ground is an abandonment of the ground and would not come within the issues for determination before us.

It is obvious from the position adopted in the brief of argument filed by learned counsel to the Appellant which did not consider the scope of the duty of counsel to the Appellant, that he actually intended to and actually abandoned the ground of appeal in the presentation of his argument.

However, the issue cannot on the admitted facts, be ignored in any discussion concerning the entering of the consent judgment in this case. Accordingly I shall consider the issue as it affects the consent judgment which is the subject matter of this action.

APPELLANT COUNSEL’S SUBMISSION

In his submission on the only issue for determination, learned Appellant’s Counsel, Mr. Ovrawah, referred to paragraphs 8, 10, 11, 20 of Plaintiff’s statement of claim, where the relevant discussions about the Defendants’ compulsory acquisition of his land, and the intention to allocate another in lieu of monetary compensation were pleaded. At para.20 of the Statement of Claim the particulars of the fraud alleged were pleaded. Counsel also referred to the evidence of PW1, his solicitor, as to the instruction of the Plaintiff to his solicitor to settle the matter out of court.

Learned Counsel referred to the evidence of PW1 who stated that he did not have the opportunity to consult with Plaintiff before he accepted Plot 263, Etete Lay-Out Benin City, and when eventually Plaintiff became aware on reading a copy of the consent judgment, he told PW1 he was already allocated the Plot 263 Etete Lay-Out and that he had a certificate of occupancy issued to him in that behalf. Counsel also referred to the evidence of D.W.1, the Deputy Chief Lands Officer who negotiated the settlement out of court on the side of the Government of Bendel State. Reference was made to the finding of the learned Chief Judge who rejected the allegation of fraudulent misrepresentation and found that on the facts before the Court, Plaintiff failed to prove fraud on the part of Defendants.

Learned Counsel also referred to the judgment of the Court of Appeal, where the findings of the learned trial Judge were affirmed.

Learned Counsel to the Appellants submitted after defining “fraud” to mean something dishonest and morally wrong – See *Olufunmise v. Falana* (1981) (1990) 3 NWLR. 1361. *Talabi v. Adeseye* (1972) 490 that the conduct of the Defendants was knowingly fraudulent. He referred to the case of Derry v. Peek (1889) 14 App. Cas.337, 490-491. Relying on Derry v. Peek (1889) 14 App. Cases 374, it was submitted that fraud has been proved.

It was submitted that the representation of the D.W.1 on behalf of the Respondents was fundamental to the whole transaction. This is because of his statement to the effect that they were willing to settle the question of compensation with the Plaintiff by the provision of another alternative land.

Learned Counsel argued that the representation made to Plaintiff's Counsel in relation to the consent judgment did not bind the Plaintiff.

It was argued that since there is the evidence of DW1 that he knew that Appellant had applied for government land, and also that none of the documentary exhibits tendered contained any mention that Appellant had applied for land in compensation for his land compulsorily acquired; Plaintiff had succeeded in proving that the representation was false. Derry v. Peek (1889) 14 App. Cas. 337 was relied upon for this submission. This was claimed to have satisfied the requirement of absence of honest belief in DW1, and is in accordance with Plaintiff's pleading in para.20(e) of the statement of claim. Learned Counsel for the Appellant submitted that the denial of the Defendants of para. 20(e) of the statement of claim in paragraph 8 of the statement of defence is an insufficient denial which by implication is an admission. The case of Lewis & Peat (NRI) v. Akhimien (1978) 7 SC.159; Adeleke v. Aserifa (1990) 3 NWLR (pt. 136) 941 were cited and relied upon for this submission.

SUBMISSION OF LEARNED COUNSEL FOR THE RESPONDENTS

Learned Counsel for the Respondents, Mrs. B. O. Kalu, adopted Respondents' brief of argument and relied on it in argument before us. Mrs. Kalu adopted and referred to the only issue for determination and submitted that the allegations of fraud made in paras.8-19 of Plaintiff's statement of claim were criminal in nature and the onus of proof on the Plaintiff required is proof beyond reasonable doubt. Accordingly, Plaintiff must prove the falsity of the alleged representation made to him by DW1 beyond reasonable doubt. Plaintiff has failed to lead evidence of the allegation for fraudulent misrepresentation and accordingly not discharged the burden of proof on him. The case of Olufunmise v. Falana (1990) 3 NWLR (pt.136) 3 was cited and relied upon.

It was finally submitted that there are concurrent findings of the two courts below on the issue of absence of fraudulent misrepresentation by the Defendant. Plaintiff has not given reasons why these findings should be disturbed. This Court is urged to uphold these findings – Adeleke v. Aserifa (1990) 3 NWLR (pt.136) 94.

DISCUSSION OF COUNSELS' SUBMISSION AND CONSIDERATION

OF THE APPEAL.

I have stated the submissions of the parties in this appeal concisely. The only issue for determination is whether the learned trial Judge was right in holding that Plaintiff did not prove the allegation of fraudulent misrepresentation made against the Defendants and therefore did not succeed in setting aside the consent judgment entered into between Plaintiff and Defendants.

I have set out the facts of this case earlier in this judgment. Plaintiff has admitted that the misrepresentation which he alleges to be fraudulent was based on negotiations made between the DW1 on behalf of the Defendants and PW1, who was Counsel representing the Plaintiff. It is the outcome of this negotiation which resulted in the consent judgment entered for the parties and which Plaintiff has rejected, and is the subject matter of the action resulting in this appeal.

The only issue for determination in this appeal, is identical with the first of the four issues formulated in the court below. It seems to me necessary for a proper determination of this issue to examine the subject matter of this case, which is the consent judgment.

CONSENT JUDGMENT

There is a consent judgment where parties to an action in court have fashioned out an agreement as to how to settle their dispute out of court and apply to the court to give judgment on the terms they have agreed upon. Such judgment when given is called a judgment by consent and serves as a final determination of the dispute between the parties – See *N.W.R.D. v. Jaiyesimi* (1963) 1 All NLR.215 – See also *Woluchem v. Wokoma* (1974) 1 All NLR. 605 at p.617.

A consent judgment is a final decision, since it finally determines the issues and dispute between the parties – See *N.W.R.D. v. Jaiyesimi* (1963) 1 All NLR.215. It is a final decision within S.241(1)(a) of the Constitution 1999. However, leave of the High Court or of the Court of Appeal is required for the exercise of a right of appeal. – See S.241(2)(c) of the Constitution 1999. A judgment of Court which finally settles the rights of the parties in the subject matter of the claim in the sense that it was not given in default of a statement of defence is a final judgment –

See Babajide v. Aisa (1966) All NLR.254.

It is well settled law that to have a valid consent judgment the parties must be *ad idem* as to the agreement, and the terms of settlement must be filed in Court. It is the order of court based upon the terms of settlement that is the consent judgment – See Woluchem v. Wokoma B (1974) 3 SC.153. An aggrieved party can appeal against the order of consent judgment with leave of the court – See S.241(2)(c) Constitution 1999. A consent judgment will not be set aside on grounds of unilateral mistake, unless the mistake was induced by fraud or misrepresentation. C – See Akinwunmi v. Idewu (1969) 1 All NLR. 319.

It is clear from the facts of the appeal before us that the consent judgment entered into by the parties is binding on the parties – See Alomasojo v. Ibru (1973) 4 SC.13. The parties in this case on the evidence before the court have requested the making of the order. – See D Thanni v. Adeboyega (1971) 1 NMLR.369. When a consent judgment has been obtained, it remains binding on the parties until set aside by a fresh action, if it can be established to have been obtained by fraud – See Talabi v. Adeseye (1972) 8-9 SC.20, Akanbi v. Durosaro (1998) 12 E NWLR.284 Enigbokan v. Baruwa (1998) 8 NWLR.96.

The grounds on which the consent judgment is sought to be set aside in the instant case is that the misrepresentation was made to learned Counsel to the Plaintiff, and not to the Plaintiff himself, and that misrepresentation by the Defendant which induced the agreement for the making of the order of consent judgment was fraudulent. F

It is important to consider the objection in para.19 of his statement of claim that Plaintiff did not at any time consent to Plot 263 Etete Lay-Out Benin City, being used as the subject matter of the compromise arrangement. It is for this reason it was pleaded “there is no consensus ad idem as to the subject matter.” It is also relevant to refer to the averment in paragraphs 11, 12, 13 and 14 of the statement of claim where it was averred as follows – G H

11. *Plaintiff avers that R.A. Oluyede Esquire of Counsel, who represented the Plaintiff in the said suit, later informed Plaintiff in the said suit, later informed Plaintiff of intention of the Defendants to settle*

the matter out of court by allocating another piece of land to the Plaintiff in lieu of land to the Plaintiff in lieu of monetary compensation.

12. *Plaintiff avers that this arrangement was acceptable to him.*

13. *Plaintiff states that because of the nature of Plaintiff's duties as a Police Officer, he was not always available at the trial but was always represented by R.a. Oluyede Esquire of Consel."*

14. *Plaintiff was away to Kano on Special Duties and was not Present when the terms of settlement was signed on 16/5/85 and was not also present when consent judgment was entered on 20/5/85."*

It is obvious and not disputed that Plaintiff was aware of the arrangement to settle out of court, the action instituted by him against the Defendants. He was also aware that the arrangement was to allocate another piece of land to him in lieu of monetary compensation for his piece of land compulsorily acquired. This arrangement was acceptable to him and he instructed Mr. R. A. Oluyede to represent him in the negotiation. Mr. Oluyede entered into the negotiation, representing the Plaintiff, signed the terms of agreement with the Defendants in which Plot 263 Etete Lay-Out was allocated to Plaintiff and as Counsel this agreement was entered as the Judgment of the Court in the suit. The judgment so entered by Consent of the parties is valid and enforceable. The fact that the terms of agreement was negotiated and the judgment entered by Counsel on behalf of Plaintiff and not by the Plaintiff himself with the Defendants did not affect its validity by an iota. This is because Plaintiff has given to his Counsel a general authority without limitation to act on his behalf and to represent him in the action. – See *Adewunmi v. Plastex Ltd.* (1986) 3 NWLR (pt.32) 767.

THE SCOPE AND AMPLITUDE OF AUTHORITY OF COUNSEL

The scope and the amplitude of the authority of Counsel acting on behalf of his client is stated in paragraph 1181 Halsbury's Laws of England 4th Edition to include –

"...the action and all matter incidental to it and to the conduct of the trial such as withdrawing the record, challenging the juror, calling or not calling witnesses, cross-examining or not cross-examining witnesses consenting to a reference to arbitration, a compromise or a verdict, un-

dertaking to appear, or on the hearing of a motion for a new trial, consenting to a reduction of damages. The Client's consent is not needed for a matter which is within the ordinary authority of Counsel, thus if in court, in the absence of the client, a compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound." B

There is no averment in the statement of claim wherein the Plaintiff has placed any limitation in the scope of the exercise of authority of counsel whilst representing the Plaintiff either in the negotiation of the arrangement for allocation of another piece of land in lieu of monetary compensation for the piece of land compulsorily acquired or in the conduct of the trial in the suit. Counsel is therefore expected to use his discretion in the exercise of his professional skill to conduct the case of his client in the manner he thinks to be in the best interest of and beneficial to the client. D

In Swinfen v. Swinfen 26 L.J. Co.P.97, Blackburn J stated the position as follows –

"Counsel therefore being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which in the exercise of his discretion, he may think best for the interest of his client in the conduct of the cause; and if within the limits of this apparent authority he enters into agreement with the opposite counsel as to the cause, on every principle this agreement should be binding." F

The nature of the legal relationship between Counsel and his client, which exists in this case between Plaintiff and PW1, his counsel, is one of an Independent Contractor and not one of Principal and Agent – See *Performing Right Society Ltd. v. Mitchell & Booker Palais de Danse Ltd.* (1924) 1 KB.702 at p.365 per Mc Cardie J. It is not that of Master and Servant. Counsel is clearly not a servant of his client. It is accepted that where a client gives specific instruction to counsel, such instruction must be adhered to. Where the nature of the specific instruction is in conflict with the manner of discharging his professional skills and interferes with his control of how to conduct the case of his client, Counsel is entitled to G H

return the brief to his client. Counsel who is in law, the *dominis litis* is not bound to obey any such instructions. It is in the exercise of his apparent general authority in the discharge of his professional duties to his client, to have complete control how such instructions are to be carried out, and over the conduct of the case.

Where there is the exercise of the apparent, authority and Counsel acts within the scope of his actual authority without any express or implied limitation, the client is bound by the exercise of such authority. In *Matthews v. Munster* (1887) 20 Q.B.D.141, where Counsel in the absence of express authority assented to a verdict for the Plaintiff for L350 with costs on the understanding that all imputations against the Plaintiff were withdrawn, the objection of the Plaintiff against such arrangement in an application to the court to set aside the verdict on the ground that he gave no authority to consent to the terms of settlement was rejected. The Court of Appeal in England held that Counsel had apparent general authority to consent to the terms of settlement which were accordingly binding. In this case Lord Esher, after stating the scope of the authority of Counsel concluded at p.143 that,

"The duty of a counsel is to advise his Counsel out of Court and to act for him in Court, and until his authority is withdrawn, he has with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client."

In the instant case there is no averment that the authority of Plaintiff's counsel to conduct the case on his behalf was withdrawn at any stage or limited by any general or specific instruction. Counsel to Plaintiff therefore had throughout the conduct of the case general and apparent authority to conduct the case of the Plaintiff in his discretion within his professional skill and in the best interest of the Plaintiff. The consent of Counsel in the negotiation for settlement of the dispute out of court was with the consent of Plaintiff. There was no averment that counsel and the Defendants were not *ad idem*, both in the terms of agreement to settle out of court and in entering the consent judgment in court. Plaintiff was therefore bound by whatever results from such negotiations – See Adewunmi v. Plastex Ltd. (1986) 3 NWLR (pt.32) 767, Strauss

v. Francis (1866) 1 L.R.Q.B. 379 at p.381. See also Ngwu v. Onuigbo (1999) 13 NWLR.512 SC.

The consent judgment was entered by Counsel in exercise of the specific authority of the Plaintiff to enter into negotiation with the Defendants for an arrangement to settle the litigation pending between the parties out of Court. The subject matter of the negotiation was the allocation of another piece of land in lieu of the piece of land compulsorily acquired from the Plaintiff. The consent judgment was with respect to the grant of Plot 263 Etete Lay-Out Benin City in satisfaction of the claim in the suit before the court. There is no doubt that Counsel was acting within the scope of his general and apparent authority in all of these transactions.

I now turn to the basis of the Plaintiff's case which is the allegation of the fraudulent misrepresentation on the part of the Defendants in the Plaintiff in the allocation of Plot 263 Etete Lay-Out Benin City to the Plaintiff. Learned Counsel to the Plaintiff/Appellant has submitted on the authority of Eholor v. Osayande (1992) 2 NWLR (pt.249) 524 that notwithstanding the concurrent findings of facts in the two courts below, we can re-evaluate the evidence of the Appellant.

It is well settled that a consent judgment can only be set aside if the application to do so can establish that there was a unilateral mistake induced by fraud or misrepresentation – See Akinwunmi v. Idewu (1969) 1 All NLR.319. It seems to me clear from the averments in para.16 of the statement of claim that “*he (Plaintiff) did not inform R. A. Oluyede Esquire that he had been granted Statutory right of occupancy in respect of Plot 263 Etete Lay-Out and the said R. A. Oluyede Esquire was not aware that Plaintiff had legitimately and distinctly acquired Plot 263 Etete Lay-Out in accordance with law.*”

The obvious implication of this averment in the light of evidence before the Court is that R. A. Oluyede Esquire of Counsel who conducted the transaction was unaware of the full facts that Plot 263 Etete Lay-Out had already been allocated to Plaintiff and was therefore under a unilateral mistake in accepting the same Plot 263 Etete Lay-Out in lieu of monetary Compensation in place of the Plaintiffs's land compulsorily acquired. Learned Counsel for the Appellant has not shown why the concurrent

findings in the two courts below against the fraudulent misrepresentation alleged against the Defendants should be set aside.

The basis of the allegation of fraudulent misrepresentation against the Defendants is on the averment in paragraph 20 of the statement of claim
B that

“B. The Defendant knew that Plaintiff applied for and paid for Plot 263 Etete Lay-Out in accordance with law...

C C. That notwithstanding this fact Mr. Izilien, Deputy Chief Lands Officer representing the Defendants informed the Court that Plot 263 Etete Lay-Out had been granted to the Plaintiff in lieu of compensation.

D D. That by reason of the said representation, Mr. Oluyede not being aware of the true state of affairs signed the compromise which crystallised into the consent judgment.

D The court below accepted the finding of the learned trial Judge rejecting the allegation of fraud against the defendants in the negotiations crystallising in the consent judgment. The learned trial Judge had found as follows as at p.38 lines 19 –

E “The big question is can this judgment be set aside as null and void for fraud.? In other words, can it be said from the facts before the court that the defendant or were guilty of misrepresentation? I must say that from the facts before me fraud or the part of the defendants has not
F been proved. I accept the evidence of the defence witness Mr. Izilien that the defendants issued a certificate of occupancy in respect of the land at Etete Lay-Out and did so within two months of the application by the Plaintiff in order to meet the terms of settlement in Court.”

The court below accepted this finding. On their part the court below
G considered the contention to set aside the consent judgment on the allegation of fraudulent misrepresentation on the part of the Defendants. The court referred to the averment that Defendants knew Plaintiff had applied for and was granted a Plot of land at Etete Lay-Out by the Gov-
H ernment. This was known to DW1 who represented the Government and went further to inform the Court that the plot had been allocated to Plaintiff in lieu of compensation. These are the representations alleged by the Plaintiff to be fraudulently made by the Defendants.

In answering the question whether Plaintiff proved the allegations, the court below referred to the essential ingredients of fraudulent misrepresentation and answered in the negative. The Court held that Appellant through his Solicitor was represented, whilst the Defendants were represented through DW1. The alleged representations were contained in the terms of settlement incorporated in the consent judgment. Appellant has not proved the falsity of the representations. He has also not proved that his position has been altered as a result of the alleged fraudulent misrepresentation. The Court below stated that mere allegation of what a person ought to have known is no proof that the Plaintiff's position has been by the fraudulent misrepresentation. The learned Justice of the Court of Appeal finally held as follows at p.118 lines 28-34,

"I have examined the evidence of the Appellant and his witness in the Court below there is no shred of evidence proving false representation or fraud against the Defendants/Respondents, hence I cannot disturb the finding of the learned trial Judge on this issue. The learned trial Judge was right when he held that the Plaintiff had failed to prove fraudulent misrepresentation in this case."

I agree entirely with this finding and conclusion. I am to add however, that as a matter of general principle, fraud if established vitiates consent, however apparently well given. In the Earl of Aylesford v. Morris (1873) 8 Ch.484 at p.490-491 Lord Selbourne L. C. has said,

"Fraud does not here mean deceit or circumvention; it means an unconscientious use of power arising out of these circumstances and conditions; and when the relative positions of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to rebel the presumption by contrary evidence, proving it to have been in point of fact, fair, just and reasonable."

The Courts below having rejected the allegations of fraudulent misrepresentation raised the presumption that the transaction was fair, just and reasonable.

Again, there has been the suggestion that the conduct of Defendants alleged was made, knowingly and/or without belief in its truth, or

recklessly careless whether it be true or false in accordance with the principles laid down in Derry v. Peek (1889) 14 App. Cas. 337 at 374. There has been no finding in either of the courts below in support of the submission. I find nothing even inferentially to support such a finding
B from the evidence before the Court.

It is clear from the evidence before the trial Judge that the parties were *ad idem* in the negotiations which crystallised in the consent judgment. The Court having rejected the allegation of the Plaintiff, and
C Plaintiff having conducted the negotiation through his counsel was bound by the terms of settlement and subsequent Consent Judgment resulting therefrom.

There is therefore no doubt in my mind and for the reasons in this judgment that Appellant has failed to prove the essential ingredients of
D fraudulent misrepresentation against the Respondents. I therefore hereby dismiss the appeal. The appeal of Appellant against the judgment of the Court of Appeal dated 26th May, 1995 is accordingly hereby dismissed. Appellant shall pay N10,000 as costs to the Respondents.

E _____

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment just
F delivered by my learned brother, Ayoola, J.S.C. I agree entirely with all the opinions expressed in the judgment and for those reasons, I too would dismiss the appeal. I also adopt the facts of the case as stated in the said judgment.

The sole issue for determination in this appeal as identified in the
G plaintiff/appellant's brief is whether the plaintiff did not prove fraudulent misrepresentation in the High Court. The learned trial judge, Akpovi, C.J. held that the plaintiff did not prove fraud on the part of the defendants/respondents herein and accepted the evidence of the defendants
H that the latter issued a certificate of occupancy in respect of plot 263 at Etete Layout in the New GRA, Benin City with two months of his application to meet the terms of settlement in court.

The court below (Ige and Ubaezonu, JJ.C.A) affirmed this finding

and dismissed the plaintiff's appeal. Akpabio J.C.A. dissented though agreeing with the majority view that the plaintiff failed to prove fraudulent misrepresentation. In effect, the court below unanimously found that there was no proof of fraudulent misrepresentation on the part of the defendants. The only point of difference in the judgment of the Court B below is that Akpabio, J.C.A. found that the defendants offered plot 263, Etete Layout to the plaintiff as compensation when he already owned that plot by virtue of Certificate of Occupancy No. BDSR 5199. There was no basis for this conclusion having regard to the evidence led particularly the evidence of the plaintiff's solicitor, Mr. Oluyede and that of C Mr. Izilein, the Deputy Chief Land Officer who represented the defendants. The evidence of the plaintiff was clearly unreliable.

In an action alleging fraudulent misrepresentation, the plaintiff must prove that the defendant made the false statement knowing it to be D false, or reckless, neither knowing nor caring whether it was false or true. A close study of the evidence has brought me to the conclusion that the courts below were right in their finding that the plaintiff failed to prove fraud. E

The plaintiff was under the illusion that plot 263, Etete Layout was allocated to him as of right and unconnected with compensation for his land acquired by the Government. Akpabio, JCA was under the same misapprehension when he held as follows: F

"Since by the time the consent judgment was entered on 20th May, 1985, giving plot No. 263 to the Appellant by virtue of Certificate of Occupancy dated 11th April, 1985, it means that the Respondent really had nothing to allocate to the Appellant as at 20th May, 1985. The G purported allocation or exchange was therefore a nullity, and should be set aside."

On that reasoning he granted the relief sought by the plaintiff and set aside the consent judgment.

The courts below (Ige and Ubaezonu, JJ.C.A) had no difficulty H in coming to the conclusion that there was only one transaction and not two. I think the evidence of the plaintiff is completely untrustworthy. It is only in exceptional circumstances that justices who have not seen a

witness in the box ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness. The appeal is also against concurrent finding of two lower courts which is not lightly disturbed.

B The appeal has no merit and I also dismiss it with N10,000.00 (ten thousand naira) costs to the defendants.

IGUH JSC

C I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, J.S.C. and I agree that this appeal is without substance and should be dismissed.

D The main claim before the court is for a declaration that the consent judgment entered on the 20th day of May, 1985 in suit No. B/49M/82 between the parties by the then Bendel State High Court, holden at Benin City is null and void and of no effect on the ground of fraudulent misrepresentation on the part of the defendants/respondents. The plain-
E tiff also claimed an order setting aside the said consent judgment and relisting the suit for hearing and determination on its merit.

The fraudulent misrepresentation alleged by the plaintiff is that the defendants falsely represented to both the trial court and to counsel
F acting on behalf of the plaintiff in the suit that a different piece or parcel of land, to wit, Plot 263 Etete Layout, Benin City had been allocated by the defendants to the plaintiff in settlement of the plaintiff's claims against the defendants in that suit. The plaintiff claimed that it was as a result of
G this false representation that the consent judgment in the suit was accordingly entered. The contention of the plaintiff is that the grant of Plot No. 263 Etete Layout, Benin City to him had nothing to do with his claim for compensation against the defendants in suit No. B/49M/82. He stressed that he would not have agreed to the consent judgment being entered if
H he knew that the defendants' allocation to him was to offset the compensation he was claiming in respect of his land acquired compulsorily by the defendants.

For the defendants, it was contended that plot No. 263 at Etete

Layout in the new G.R.A., Benin City, was allocated to the plaintiff to the knowledge of all concerned to satisfy the settlement of the claim in court for compensation in respect of the plaintiff's acquired land at Ugbowo.

There can be no doubt that the gist of the plaintiff's action against the defendants revolves almost entirely on fraudulent misrepresentation. A representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. However, in determining whether or not there has been a misrepresentation at all, the knowledge, belief or state of mind of the representor is immaterial, save in cases where the representation relates to the representor's state of mind; but his state of mind is clearly relevant for the purpose of considering whether the misrepresentation was fraudulent or otherwise. The burden of alleging and proving that degree of falsity which is required for the representation to be a misrepresentation rests in every case on the party who sets it up. See Goldstein v. Salvation Army Assurance Society (1917) 2 K.B. 291 at 294.

Turning now to the meaning of "*fraud*" in connection with representations, it is firmly settled that whenever a man makes a false statement which he does not actually and honestly believe to be true, that statement is, for purposes of civil liability, as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false. So, in Derry v. Peek (1889) 14 A.C. 337 H.L. at 374, Lord Herschell in the judgment of the House of Lords succinctly stated that fraud is proved when it is shown that a false representation has been made by the representor (1) knowing, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false; the third case being but an instance of the second.

A fraudulent misrepresentation, whereby the representor has induced the representee to alter his position by entering into a contract or transaction with the representor confers the right to the representee to either maintain an action for damages, or repudiate the contract or transaction. In such a case, the representee may institute proceedings for the rescission of the contract or transaction. He may also set up the fraudulent misrepresentation as a defence to any action instituted for the direct or

indirect enforcement of the contract or transaction. It can therefore be said that the plaintiff in the present case, if he established fraudulent misrepresentation against the defendants as a result of which his counsel, acting on his behalf, was induced to alter the position of the said plaintiff by entering into a transaction with the defendants, the representors, consequent on which the High Court of the former Bendel State, holden at Benin City entered the said consent judgment in suit No. B/49M/82 between the parties, is entitled to institute the present proceeding for the repudiation and nullification of the said consent judgment on ground of the said fraudulent misrepresentation. The crucial question now is whether the plaintiff was able to establish a case of fraudulent misrepresentation against the defendants as he claimed.

In this regard, the learned trial Judge after a careful review of the evidence posed the question thus:-

"The problem that has arisen is that the plaintiff is contending that the Grant of the plot to him has nothing to do with the demand of compensation for his land for which he sued the defendants, saying that if he knew that fact before the enrolment of the consent judgment, he would not have agreed to it. It is clear from the circumstances in which the consent judgment was delivered that the consent of the solicitor (P.W.1) was the consent of his client, the plaintiff. In other words, the consent judgment of the court was proper judgment of the court. The big question is, can this judgment be set aside as null and void for fraud? In other words, can it be said from the facts before the court that the defendants were fraudulent or were guilty of misrepresentation?"

He proceeded to proffer the answer as follows:-

"I must say that from the facts before me, fraud on the part of the defendants has not been proved. I accept the evidence of the defence witness Mr. Izilein that the defendants issued a certificate of occupancy in respect of the land at Etete Layout and did so within two months of the application by the plaintiff in order to meet the terms of settlement in court. There is no doubt that the plaintiff as a Nigerian is ordinarily entitled to a Grant of land from Government. Such application for a Grant may be refused. It is not everybody in the society who owns Gov-

ernment land, and when Government gives land to a citizen such Grant is not a sale. The applicant does not pay the value of the land. The fact that the plaintiff in this case paid the processing fees of the application for a Grant of land does not mean that he has paid to Government the value of the land. In such circumstance, Government is entitled to make a Grant of their land to an individual in lieu of compensation to him in respect of acquired land elsewhere. I therefore come to the inescapable finding that the plaintiff has failed to establish fraud and hold the view that government land at Etete G.R.A. has value which it has exchanged for compensation that was due and payable to the plaintiff. This case is accordingly dismissed."

The above view of the learned trial Judge was affirmed on appeal by the Court of Appeal per the leading judgment of Ige, J.C.A., with which Ubaezonu, J.C.A. agreed, when she held as follows:-

"Applying the above outlined principles of Law to the case in hand, has the Appellant proved the essential ingredients of a fraudulent misrepresentation? I have examined carefully the evidence of the Appellant and his witness in the Court below. There is no shred to evidence proving false representation or fraud against the Defendants/ Respondents, hence I cannot disturb the finding of the learned trial Judge on this Issue. The learned trial Judge was right when he held that the Plaintiff had failed to prove fraudulent misrepresentation in this case."

I have myself given close consideration to these findings of both courts below and find myself in complete agreement with them. Besides, the law is that where there are concurrent findings of fact, then unless those findings are found to be perverse; or are not supported by the evidence; or are reached as a result of a wrong approach to the evidence; or as a result of a wrong application of any principle of substantive law or procedure, this court, even if disposed to come to a different conclusion upon the printed evidence cannot do so. See Enang v. Ada (1981) 11 - 12 S.C 25 at 42, Nwadike v. Ibekwe (1987) 4 N.W.L.R. H (Part 67) 718, Igwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) 561 at 576 etc.

In my view, both courts below were right in holding that the

plaintiff/appellant was unable to establish any case of fraudulent misrepresentation against the defendants/respondents as claimed or at all and the appellant's claim was rightly dismissed.

It is for the above and the more detailed reasons contained in the B judgment of my learned brother, Ayoola, J.S.C. that I, too, dismiss this appeal as lacking in substance. I abide by the Order as to costs contained in the leading judgment.

C

KATSINA-ALU JSC

I have had the privilege of reading in advance the judgment of my learned brother AYOOOLA, JSC in this appeal. I entirely agree with it. For the reasons which he has given, I also would dismiss the appeal with D N=10,000.00 costs to the respondent.

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