IN THE SUPERIOR COURT OF JUDICATURE,
IN THE COURT OF APPEAL SITTING AT
ACCRA ON THE 23RD DAY OF JULY, 2004.

HI/111/2004.

CORAM - MRS. ADINYIRA, J.A. (PRESIDING)
AMONOO-MONNEY, J.A.
ANIM, J.A.

KWAKU TAMAKLOE	**]**	**…**	**PLT/APPELLANT**
VRS.			
1. THE REGISTERED TRUSTEES	**]**		
OF THE METHODIST CHURCH	**]**	**…**	**DEFTS/RESPTS.**
2. REV. DR. EMMANUEL K. MARFO	**]**		
3. REV. DR. SAMUEL ASANTE-ANTWI	**]**		

J U D G M E N T

ANIM, J.A. - This is an appeal from the ruling of the High Court, Accra, dated 19th March 2003, presided over by Her Lordship Justice Inkumsah-Abban.

The brief facts are that on 1st February 2002, the Plaintiff/Appellant (hereinafter referred to as "the Plaintiff") commenced action at the High Court, Accra, against the Defendants/Respondents (hereinafter referred to as "the Defendants). By his writ of summons the Plaintiff asked for:-

(a) Damages for unlawful ejectment.
(b) Damages for unlawful and wrongfully depriving Plaintiff of his goods, household furniture etc.
(c) Return of Plaintiff's goods, household furniture etc. and damages for detaining same.
(d) Injunction to restrain the Defendants from continuing to deprive Plaintiff of his belongings.

The Defendants, through their Solicitor, entered appearance on 21st February 2002. On 2nd May 2002, the Plaintiff filed a motion on Notice for Judgment in Default of Defence. The said motion was fixed for hearing on 20th May 2002. On this day the motion was not moved and the case was adjourned to 3-6-2002.

On this day the court sat. The following are the Court Notes for that day:

"Plaintiff present.

Defendant absent.

Yaw Semarco for the Plaintiff.

Kakra Essamuah for the Defendant.

Motion on Notice for judgment in default of Defence.

x x x

Defendants are submitting to judgment.

By Court - Judgment is entered against the Defendants by consent for reliefs 3 & 4.

3. Return of Plaintiff's goods, household furniture etc. and damages for detaining same.
4. Injunction to restrain the Defendants from continuing to deprive Plaintiff of his belonging."

The suit was then adjourned to 8-7-2002 for assessment of damages. The record indicated that on this day counsel for the Defendants sought the court's permission to put his house in order. The suit was adjourned at his instance.

Meanwhile on 5th November 2002, the Defendants, through a different Solicitor, filed a Motion on Notice for Stay of Execution and to set aside the judgment obtained in default of Defence and for leave to file Defence. This motion was fixed for hearing on Monday 11th November 2002. After the Plaintiff had filed an affidavit in opposition on 22nd November 2002, it was not until the 3rd of February2003 that the court sat again. And on this day it turned out that the Plaintiff's affidavit in opposition had not been served on the Defendants. The court therefore adjourned the suit to 26-2-2003 and ordered that the Defendants be served with the affidavit in opposition.

On 26th February 2003, Learned Counsel for the Plaintiff urged the court to dismiss the motion on grounds that the events of 3rd June 2002, being a consent judgment, it cannot be set aside.

Mr. Opoku Amponsah, Counsel for the Defendants on the other hand, submitted that their former Counsel , K. Essamuah, was not instructed to enter into a consent judgment. Counsel therefore asked for a short adjournment to amend his affidavit to

reflect the true state of affairs. The suit was adjourned to 19-3-2003 and costs of ¢600,000 was awarded in favour of the Plaintiffs.

On 19th March 2003, the motion was moved. The Learned Trial Judge, after hearing the submission of both Counsel, set aside the earlier order made on 3rd June 2002. The Defendants were ordered to file their defence within (10) ten days.

Aggrieved by and dissatisfied with this ruling the Plaintiff has appealed to this court. In the Notice of Appeal filed on 2nd April 2003, one main ground of appeal was formulated as follows:-

> "The Honourable Judge was wrong in setting aside without any basis a consent judgment duly and regularly entered against the Defendants/Respondents."

Then on 23rd January 2004, the Plaintiff filed an additional ground of Appeal thus:-

> "The Judge failed to assess the facts presented in the affidavit of Respondents to come to a just conclusion, namely, to dismiss the motion."

In arguing the main ground of appeal, Learned Counsel for the Plaintiff submitted that the Learned Trial Judge had admitted in her ruling that it was awkward for the Defendants/Respondents to deny that they gave instructions to their Counsel to take a consent judgment on their behalf. According to Counsel this implies, that she did not believe the Defendant's story that they did not give instructions to their Counsel to submit to judgment. Having found so, submits Counsel, the judge rather went on to say that if the Defendants feel strongly that they have a case it would be difficult to deny them the opportunity. Counsel submitted that it is not what a party feels that is important in a judgment or ruling of the court. That will be subjective. According to Counsel what is important in a judgment or ruling is the law applicable to the facts. Taking into consideration all the circumstances of the case, the Learned Trial Judge erred. Therefore the order made on 19th March 2003 ought to be set aside.

Learned Counsel for the Defendants fiercely resisted these submissions and countered that the order made on 19th March 2003 ought not to be set aside. Counsel

submitted that it is trite law that a consent judgment or order given in court by Counsel with authority and full knowledge of the facts to do so is binding on the clients. However, as an exception to this rule, such consent judgment or order can be set aside if it is ascertained that the consent was made contrary to the positive instructions of the client.

It seems to me that in considering this appeal the court should go back to the events of 3rd June 2002 where the court ruled that judgment had been entered against the Defendants by consent for reliefs 3 & 4.

The question is: What was the basis for arriving at the conclusion that the parties had entered into a consent judgment? In the attempt to find an answer to this problem I found solace in HALSBURYS LAWS OF ENGLAND, 4th Edition, paragraph 389 at page 281 where it is stated as follows:-

> "Where all the parties to a cause or matter in the Queen's Bench Division are agreed upon the terms in which a judgment should be given or an order should be made, a judgment or order in such terms, may be given as a judgment or order of the court without being given or made by any judicial officer, whether judge or referee or master. Before any such judgment is entered or order is sealed, it must be drawn up in the terms agreed and expressed as being "BY CONSENT' and it must be indorsed by Solicitors acting for each of the parties."

I ask myself the following pertinent questions:-

(a) Did the Court have before it on 3rd June 2002 any agreement upon the terms in which judgment should be given or an order should be made?

(b) Was any judgment drawn up in the terms agreed upon?

(c) Was such judgment expressed as being by consent?

(d) Were the terms as drawn up indorsed by Solicitors acting for each of the parties?

Since the answer to each of these questions is in a resounding No; how could there have been a consent judgment in the face of the record?

In the leading case of CHANDLESS – CHANDLESS VRS. NICHOLSON (1942) 2 All ER 315 where the Court of Appeal had to determine whether an order drawn up was a consent order or not this is what Lord Green M.R. had to say:-

> "Now the original which Master Bell himself made is not upon its face expressed to be a consent order at all, and, if it was a consent order, can only have been expressed in the order itself. Here again I would like to say quite distinctly that if an order is made by consent the practice should invariably be that it should, on the face of it, be expressed so to have been made. When the Court finds an order which is not expressed to be so made by consent, it certainly is not going to treat it as a consent order unless it is satisfied that it was a consent order. In the present case I am left in considerable doubt as to whether this order really was a consent order in the strict sense at all. There is a great deal of difference between a consent order in the Technical sense and an order which embodies provisions to which neither party objects. The mere fact that one party submits to an order does not make that order a consent order within the technical meaning of that expression, and I am not satisfied having regard to the somewhat conflicting statements which we have before us as to how this order came to be drawn up, that it was a consent order in the technical sense."

In the instant case, as of the 3rd of June 2002 no statement of Defence had been filed. And on that day, out of the blue, the Defendants' Solicitor voluntarily and unilaterally submitted to judgment. It is this action taken by the Defendants' Solicitor which the Learned Trial Judge described as a consent judgment.

In my considered opinion the view which the Learned Trial Judge took of the transaction of 3rd June 2002 was wrong for the circumstances did not meet the requirements of the law. The Learned Trial Judge misdirected herself in holding that a consent judgment had taken place. She seems to have fallen into this error because

she allowed her reasoning to be clouded by a wrong comparison between a consent judgment and a submission to judgment. The transaction that transpired on 3rd June 2002 was not a consent judgment since none of the questions posed above could be answered in the affirmative.

With the question as to consent judgment resolved, I now proceed to consider the vital point which emerges in the affidavit in opposition of the Defendants' affidavit ie that the former solicitor did not have any instructions whatsoever to submit to judgment for and on behalf of the Defendants. Clearly, this raises the question of the scope of the authority of Counsel retained in a case. A Counsel instructed to appear ought to have full control over the case and conduct it throughout to the best of his ability. Lord Esher, MR in MATTHEWS VRS. MUNSTER (1887)20 QBD 141 @ page 143 had this to say:-

> "The duty of Counsel is to advise his client 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."

Counsel does not need the consent of the client for a matter which ordinarily falls within the ambit of his authority, and if an admission is made by Counsel, or an action is settled in Court in the presence of the client his consent will be inferred and he will be precluded from saying that he did not understand the proceedings: See **CHAMBER VRS MASON (1858) 5 CB (NS) 59 141 ER 23.**

Further, in **STRAUSS VRS. FRANCIS (1866) L.R. 1 QB 379**, it was contended that Counsel had authority only to conduct a cause in the manner the client instructed him, and had no authority so to be able to bind the client by the withdrawal of a juror without his express consent. This contention was rejected by Blackburn J, with the following observation:-

> "Mr. Kenealy has ventured to suggest that the retainer of Counsel in a cause simply implies the exercise of his power

> of argument and eloquence. But Counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of Counsel by his reputation for honour, skill and discretion. Few Counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. 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 the apparent authority he enters into an agreement with the opposite Counsel as to the cause, on every principle this agreement should be held binding."

But in SWINFEN V. LORD CHELMSFORD (1860) 5 H & N @ 890; 157 ER 1436 at page 1449 however, Pollock. CB held the view that one of the limits of this general authority of Counsel is that he had no power to bind the client on matters collateral to the issues in the suit, unless the client expressly assents.

In the case before this Court, the issue of the Plaintiff's goods, household furniture and damages for detaining them was crucial and it cannot be doubted that the decision of Counsel for the Defendants concerning this matter fell within the scope of his general authority .

A fortiori, any admission made by Counsel in Court on 3rd June 2002 would be binding on the Defendants, and it makes no difference whether such an admission was made in the absence of the Defendants: See MATTHEWS V. MUNSTER supra. Therefore on 19th March 2003, the Learned Trial Judge erred in reversing the ruling made on 3rd June 2002.

It is for the reasons stated above that I uphold the appeal and set aside the ruling delivered on 19th March 2003.

S.Y. ANIM
JUSTICE OF APPEAL

I agree**.**

S.O. ADINYIRAH(MRS.)
JUSTICE OF APPEAL

I also agree.

J.C. AMONOO-MONNEY
JUSTICE OF APPEAL

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