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**CONSENT JUDGMENT- THE JURISDICTION FOR
SETTING SAME ASIDE**

**by
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INTRODUCTION

This write up seeks to discuss the concept of consent judgment, the legal basis as well as the jurisdiction for setting consent judgment aside.

It has also discussed the concept by a tinge of comparative practice in some other commonwealth jurisdiction particularly Nigeria.

It concludes with how the courts in Ghana have applied the concept in settlement of disputes.

MEANING

Black's law defines judgment at page 2463 to mean; "a courts final determination of the rights and obligations of the parties in a case" and further goes ahead to define "agreed judgment" as "a settlement that becomes a court judgment when the judge sanctions it"

In effect an "agreed judgment" otherwise a consent judgment, is merely a contract acknowledged in open court which binds the parties as fully as other judgments.

In the case of *Vulcan Gases Ltd. v. Okunlola* [1993] 2 NWLR p. 142 , the Court held that a consent judgment presupposes out of court settlement reached by the parties, and that the terms of the said settlement or agreement are furnished to the court and forms the basis of the court's judgment in the suit. Such judgment is intended to put an end to further litigation between parties just as much as if the judgment was the result of a decision of the court after the matter had been fought to the end.

The University of Pennsylvania Law Review, vol. 108 No. 2 , discussed consent judgment as follows, "where the parties settle dispute and a court enter a judgment upon the parties consent, that judgment is in many ways like Judgment entered after full contest upon a jury verdict or a Court's finding. It may be enforced in the same way as other judgments". This does not mean that Consent Judgments have the full attributes of Judgment obtained by full contested trial.

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¹ Black's Law Dictionary, 8th Edition, 2004

² *Vulcan Gases Ltd. v. Okunlola* [1993] 2 NWLR p. 142

CONSENT JUDGMENT AND ESTOPPEL

To what extent should a consent judgment entered by the court serve as a estoppel against the parties.

A court does not inquire into the merits or the equities of a case where it has entered consent judgment. Before a court enters consent judgment, the only questions to be determined by it are whether the parties are capable of binding themselves by consent, and whether they have actually done so.” The court may then be compelled to enter judgment upon the stipulation of the parties. The parties may not appeal from the judgment, “for the error in it, if there is any, its their own, and not the error of the court.”

In such a case it is clear that the requirements for collateral estoppel as stated in many cases and in the Restatement of Judgments are not met. The parties have not litigated the matters originally put in issue; they have only settled them. The court does not determine the matters originally put in issue; or if it assumes to do so, the determination is quite gratuitous and unnecessary.

Flowing from the above, it is not surprising then that a good many courts and commentators hold that the parties are not bound collaterally upon any of the facts originally at issue in the first action. Fleming James Jr. in his publication, “consent judgment as collateral estoppel” in the Univesity of Pennsylvania Law Review stated that the rules of res judicata and collateral estoppel do not require that a consent judgment bind the parties to facts which were originally in issue in the action that was settled.

Where collateral estoppel is involved the inquiry must always be as to the point or question actually litigated and determined in the original action only upon such matters is the judgment conclusive in another action.²

² 3 The University of Pennsylvania Law Review, vol. 108 No. 2

Consent judgment in the Ghanaian system of adjudication does not operate as Res judicata nor collateral estoppel since no judicial process had been taken to determine any issue of dispute between the parties and in my humble opinion that is the reason why the position of the law has been that, where a party intends to challenge a consent judgment, the procedure prescribed by law is to bring a fresh action which otherwise will not be allowed under Res judicata or collateral estoppel. These doctrines operate in instances where the issues, rights and liabilities have been fully determined by the courts. In the case of SIC Insurance Company Ltd v. Ivory Finance Co & ORS, Civil Appeal, J4/48/2017 , the Supreme Court had this to say,

“Ground one of the grounds of appeal raises the issues of the propriety of the manner in which the two lower courts formed the opinion that as a consent judgment has been given by the High Court, another High Court (a court of coordinate jurisdiction) was bereft of any jurisdiction to set it aside. We think that explains why the Court of Appeal in affirming the judgment of the trial High Court exhaustively dealt with estoppel per rem judicata”.

The Supreme Court held that despite the finality of the consent judgment, it did not operate in any form of estoppel whether Res judicata or collateral estoppel to estop a party from setting it aside.³

³ 4 SIC Insurance Company Ltd v. Ivory Finance Co & ORS, Civil Appeal, J4/48/2017

CRITIQUE OF CONSENT JUDGMENT

Some have held the view that no determination of issues are done in the case anytime the court pronounces consent Judgment.

One of the problems of consent judgment is the issue of precedents pointed out by Coleman, Silver, and Fiss. For them, resolving disputes is only one of the functions of the legal system, the other is shaping legal rules and principles for the future in the development of the legal system. They further argued that “The molding of the common law, the construction of statutes, and so on define “the law” with which people must comply. If every case were settled, there would be no ongoing process of elucidation”. When there are too few precedents, uncertainty will increase.

In the University of Chicago Law Review Forum , 1987, it is stated at page 20 at the last paragraph the following;

“Because voluntary compliance and contracts are thought desirable, it is surprising to hear voices opposing settlements and their embodiment in consent decrees. The opposing argument defines the outcome of contested litigation as the “just” result. Settlements do not mimic the outcome of any given trial; the parties compromise their differences; therefore, the settlements are not just, and decrees implementing settlements snarl the courts in administering the details of injustice. This is an unattractive view of settlements.

Frank H. Easterbrook, in his book, “Ways of Criticizing the Court”, 95 Harv. L. Rev. 802 (1982) , rather had a different opinion about precedents by stating that more precedents will increase rather than reduce the uncertainties in the law. For him, even if there were “too few precedents” this would not demonstrate that settlements are unjust.. Easterbrook’s concluding views on consent judgment is reflected in his following statement; ⁴

⁴ ⁵ Coleman, Silver and Fiss 8J. Legal Stud. 235, 235-40 (1979)

⁶ The University of Chicago Law Review Forum, 1987.

“The application of a novel rule to an existing dispute cannot confidently be described as “more just” than the settlement of that dispute under existing rules, and if the purpose of litigation is to clarify rather than change the rule, then litigation produces benefits for third parties at the expense of the litigants who must bear the costs of their own case”.⁵

Owen Fiss as quoted in the Yale Law Journal 93, at pages 1076-78, offers another reason for being wary of settlements. He characterizes this as “imbalance of power,” by which he meant that settlements reflect the parties’ wealth or some variable other than the anticipated outcome of trial.

Another argument is that, where there is a class action and the need for consent settlement arises, it affects the position or rights of those not represented in principle. For example, a union may settle a case on terms that affect people who are not yet employees or who are employees but not members of the union, not forgetting that fact that union leaders may have parochial interest of their own. If a class representative consents to a judgment or dismissal, that is not authoritative because the representative may not speak for the absent members.

The Supreme Court of Nigeria in the case of **Afegbai v. A.G., Edo [2001] 14, NWLR Pg. 425** however, held that where a person has given his Counsel a general authority without limitation to act on his behalf and to represent him in an action, the fact that the terms of agreement were negotiated and judgment entered by Counsel on behalf of such client and not by the client, will not affect the validity of the judgment.

⁷ Frank H. Easterbrook, in his book, “Ways of Criticizing the Court”, 95 Harv. L. Rev. 802 (1982).

⁸ The Yale Law Journal 93, Pages 1076-78.

⁹ Afegbai v. A.G., Edo [2001] 14, NWLR Pg. 425.

THE FOUNDATION AND SCOPE OF CONSENT JUDGMENT IN GHANAIAN ADJUDICATION PROCESS

Sections 63, 64, 81 and 82 of the Alternative Dispute Resolution Act, 2010, Act 798 provides some legal basis for engineering consent judgement on the basis of parties settlement agreement. The parties may resort to negotiations and mediation to arrive at consent.

Section 63(1) of Act 798 provides an instance where parties to an agreement or dispute may consent to mediation in resolving their dispute, despite the fact that subsection 7 does not compel a party to submit.

Section 64 of the Act, is rather the most interesting part of mediation option which the courts initiate and refer matters to mediation for resolution by consent agreement. The section states as follows;

S. 64(1)- where the court before which an action is pending may at any stage in the process, if it is of the view that mediation will facilitate the resolution of the matter or part of the matter in dispute, refer the matter or that part of the matter to mediation.

(5) where a reference leads to settlement of the dispute or part of the dispute the settlement shall be;⁶

- (a) drawn up and filed in the court
- (b) recorded by the court as a judgment of the court; and
- (c) enforced by the court as its judgment.

Section 81 of the Act also provides as follows;

(2) if the parties reach agreement or a settlement of the dispute, they may draw

up and sign a written settlement agreement and if requested by the parties, the mediator may draw up or assist the parties in drawing up, the settlement agreement.

Under section 64(5) of Act 798, the settlement reached under section 81 shall be adopted by the Court as the judgment of the court.

Similarly, the High Court Civil Procedure Rules CI 47 as amended in Orders 32 and 58 of CI 133 also provides settlement forum for parties who appear before the court to consent to settlement under rules 1D (a) & (b) and 8(1) (2) and (3) respectively.

Further, the Courts Act, Act 459, 1993, provides under sections 72 and 73, platforms for amicable settlement of disputes in both civil and criminal cases under section 72 and 73 of the Courts Act respectively. The Act however, did not specifically provide for the adoption of that settlement as consent judgment unlike the Act 798 and the Civil Procedure Rules C.I. 47, 2004. Under the Courts Act, in a criminal case, where the courts grant the parties to settle the dispute, during the pendency of the negotiations for a settlement, the court may stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person.

JURISDICTION TO SET ASIDE CONSENT JUDGMENT- MODE OF SETTING ASIDE

Many Ghanaian cases have been resolved through consent judgment which have later resulted in disputes after the terms of settlement had been adopted by the court as its judgment. In some cases, parties have challenged such judgments as either being invalid or was fraudulently obtained.

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¹⁰ Alternative Dispute Resolution Act, 2010, Act 798.
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¹¹ Lamurde v. Adamawa State J. S. C. [1999] 12 NWLR @ 86

WHAT FACTORS VITIATE CONSENT JUDGMENT

In **Lamurde v. Adamawa State J. S. C. [1999] 12 NWLR @ 86** the Court stated the circumstances for setting aside a consent judgment as follows:

- a. Where the consent judgment was obtained by fraud,
- b. Where it was obtained by misrepresentation or non-disclosure of a material fact for which there was an obligation to disclose,⁸
- c. Where it was obtained under duress,
- d. Where it was concluded under a mutual mistake of fact,
- e. Where the consent judgment was obtained without proper authority.

It is stated in the case of **Samba Petroleum Co. Ltd. v. F.C.M.B.[2014] 3 NWLR @ 346** the Court held that by virtue of Section 241(2)(c) of the 1999 Constitution as amended, parties cannot appeal without leave of court from a decision of the High Court made with the consent of parties. A consent judgment has higher efficacy and binding effect than an ordinary judgment and is therefore more difficult to dislodge. The party seeking to rescind the terms mutually agreed upon has an arduous task and heavier duty to prove fraud and other vitiating elements.

The ways of challenging consent judgment was stated in the case of **Bessoy Ltd. v. Honey Legion Ltd. [2010] 4 NWLR .**, In that case, the court stated that, an aggrieved litigant has two major ways of challenging a consent judgment which he claims was obtained by fraud or mistakenly entered by the judge on the basis of fraudulent misrepresentation. The aggrieved litigant can either appeal against the judgment; or file a fresh action seeking an order of the court to vacate its judgment.

¹² **Bessoy Ltd. v. Honey Legion Ltd. [2010] 4 NWLR.**

¹³ **Guardian Assurance Company Ltd v. Bridi [1975] 2GLR 387-393.**

It appears from the **Bessoy and Samba** cases that in Nigeria, Appeal is permitted to set aside consent judgment. Challenging consent judgment in Ghanaian courts, however does not admit Appeals. Where it shares commonality with Nigeria is doing so by filing a fresh action seeking an order of the court to vacate its judgment.

The drill of what a party of a consent judgment could go through if he felt aggrieved occurred in the case of **Guardian Assurance Company Ltd v. Bridi [1975] 2GLR 387-393** . In that case, counsel for defendant raised the issue of a common mistake just when the judgment of the court was pronounced.

The mistake being that the agreement on which the parties settle temporary incapacity for the Plaintiff's injury was based on 52 weeks instead of 6 weeks. The Judge answered counsel that he had finished with his judgment (*functus officio*) and that counsel knows what to do if indeed there was a mistake as he claimed. Counsel for Plaintiff in that regard filed a motion for the court to review the offending portions of the judgment, this was dismissed by the court as incompetent. The motion having been dismissed, the Plaintiff/Applicant instituted an action for an Order to set aside the consent judgment and part of the issues for determination were as follows;

1. Whether or not this court is competent to adjudicate upon the issues joined between the parties⁹
2. Whether or not the Plaintiffs action was incompetent.

In dealing with the first issue, learned counsel for the defendant argued that the relief being sought by the Plaintiff does not call for the institution of a fresh action and that counsel is of the view that either counsel for the Plaintiff appeals against the decision or brings an application to set aside the judgment before the presiding Judge. In responding, the Judge referred to page 792 of **Halsbury's Laws of England (3rd Edition) vol. 22** where it is stated as follows;

¹⁴ **Halsbury's Laws of England (3rd Edition) vol. 22**

¹⁵ **EMERIS V WOODWARD [1889] 46 Ch D 185**

“ A judgment given or an Order made by consent may in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment.....

Unless all the parties agree, a consent order when entered can only be set aside by a fresh action and an application can not be made to the court of first instance in the original action to set aside the judgment or Order except apparently in the case of an interlocutory Order nor can it be done by way of appeal”.

In the case of **EMERIS V WOODWARD [1889] 46 Ch D 185** , it was held in holding 1 thus:

“Notwithstanding that a consent judgment had been given and completed, a trial High Court had ample jurisdiction to set it aside upon any grounds which would entitle it to set aside an agreement entered between the parties on the grounds of mistake.... And given that an appeal would not ordinarily lie against a consent judgment, bringing a fresh action to challenge the validity of a consent judgment was a standard and accepted procedure. Thus a fresh action to establish fraud, mistake, or other vitiating factor seemed a reasonable procedure for achieving justice in the circumstances.”

Per the decision in **Tuakwa v Bosom [2001-2002] SCGLR 61** , an appeal is a matter for rehearing by the Appellate court and since a consent judgment was not arrived at by hearing the issues by a trial court, there is certainly no basis to come by appeal which is in a form of rehearing than to come by a fresh action.

Similarly, in the case of the **Republic v High Court, Exparte The Trust Bank Ltd. [2009] SCGLR** , a dispute arose as to the rate of interest on a loan facility after the court had adopted the terms of settlement of the parties as the consent judgment. The interested party, one Ampomah Photo Lab brought a motion before the trial Judge to set aside the consent judgment on account of the dispute as to the applicable interest rate. The trial Judge on the authority of Guardian Assurance

Co. Ltd. v. Bridi [1975], refused to set aside the consent judgment. The interested party taking a cue from Sakordie- Addo J in that case brought a fresh action as the proper procedure required.

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Therefore, it is not the position of the law in Ghana or England that a consent judgment may be set aside by Appeal as stated in the case of **Bessoy Ltd. v. Honey Legion Ltd. [2010] 4 NWLR,**

SHOULD THE TRIAL COURT ASSUME JURISDICTION IN SETTING ASIDE CONSENT JUDGMENT?

Authorities on whether a consent judgment can be entertained by the trial court in setting same aside are in harmony, a lawyer can find it unsettling. In the Exparte Trust Bank case, the applicant’s argument was that a High Court cannot exercise jurisdiction over another High Court to set aside a consent judgment.

In the Bridi case, Counsel for the defendant argued that a court of coordinate jurisdiction had no power to set aside the judgment of another High Court. Owusu-Addo J held that:

“I am fully satisfied that the clear result of the authorities and the law is such that notwithstanding the consent judgment having been given and completed, this court has ample jurisdiction to set it aside upon any ground which would entitle it to set aside an agreement entered into between the parties on the ground of mistake

Vaughan William J, expressed similar position in Huddersfield Banking Company Ltd. v Henry Lister & Sons Ltd. ([1895] 2 Ch. 273 at p. 275) as follows;

“... it seems to me that the law would be in a very lamentable condition if an order and arrangement based upon such a mistake could not be put right by the Court,...”

¹⁶ Tuakwa v Bosom [2001-2002] SCGLR 61

¹⁷ Republic v High Court, Exparte The Trust Bank Ltd. [2009] SCGLR

In *Wilding v. Sanderson* [1897] 2 Ch. 534, C.A , it was decided that the trial court had ample jurisdiction to set aside a consent order on the same grounds as it would have power to set aside an agreement concluded by the parties.

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In the *Exparte Trust Bank* case (supra), the Supreme Court of Ghana, speaking through *Date-Bah JSC* held that, this Court is, of course, not bound to follow the decision in the *Bridi* case, nor of the two English cases above cited by the English Courts, and that where there is any ground to set aside a consent judgment, that is an issue that a co-ordinate High Court will have to determine.

CONCLUSION

In brief conclusion, consent judgment under our jurisprudence is sanctioned under the Courts Act, Alternative Dispute Resolution Act and the Civil procedure Rules. The adoption of a consent agreement of the parties by the court becomes the court's final judgment and can be executed just like any other judgment of a court.

Where dispute arises in respect of the consent judgment and that dispute is in the nature of any factor that vitiates a contract, that consent judgment can be set aside in a fresh action before a court of coordinate jurisdiction.

The Nigerian approach of using an Appeal to do so is not acceptable in Ghana.

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(PUPIL)

¹⁸ *Huddersfield Banking Company Ltd. v Henry Lister & Sons Ltd.* ([1895] 2 Ch. 273 at p. 275)

¹⁹ *Wilding v. Sanderson* [1897] 2 Ch. 534, C.A