NCRM

CIV. APP. 2/2012.

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:

NESTOR CUMMINGS-JOHN -APPELLANT

AND

CONNETH CUMMINGS-JOHN -RESPONDENT

CORAM:
The Hon. Mr. Justice V. V. Thomas, JSC.- Presiding
The Hon. Mr. Justice N. C. Browne-Marke, JSC.
The Hon. Mrs. Justice P. O. Hamilton, JSC.
The Hon. Mrs. N. Matturi-Jones, JA.
The Hon. Mr. Justice A. H. Charm, JA.

COUNSEL:

Appellant in person.
E. E. C. Shears-Moses, Esq. for the Respondent

JUDGMENT DELIVERED ON THE 22nd DAY OF DECEMBER 2015

HONOURABLE MR. JUSTICE N.C. BROWNE-MARKE J.S.C

THE APPEAL

1. This is an appeal brought to this Court by the Appellant, by way of Notice of Appeal filed on 16th March,2012. It is an appeal against the Judgment of the Court of Appeal, dated 2nd February,2012. The appeal is against the whole Judgment of the Court below. The parts of the Judgment appealed against are to be found at pages 1 – 7 of the Record – (hereafter, references to page numbers, shall be references to the said Record). The grounds of appeal are to be found at pages 7 – 12. These grounds are as follows:

   A. The Court of Appeal misdirected itself in holding as follows:
   "It would have been tidier if the Appellant had brought a separate action for that purpose rather than it would to continue under the Misc

App FJ 2/04 which was instituted for the registration of a foreign judgment." It is also my view that it would have been better if separate proceedings were commenced rather than coming under the Miscellaneous Application which was for principally the registration and subsequently the setting aside of the registration of a foreign judgment", in that:

(A.1) Pursuant to the Foreign Judgment (Reciprocal Enforcement) Ordinance Cap 21 of the Laws of Sierra Leone Sections 5, 6 & 7 and in particular section 6(1)

"On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment –

(a) Shall be set aside if the registering court is satisfied –

(i) That the judgment is not a judgment to which this Part of the Ordinance applies or was registered in contravention of the foregoing provisions of this Ordinance.

And Section 5(1) provides:

"The power to make rules of court under section 24 of the Courts' Ordinance shall, subject to the provisions of this section, include the power to make rules for the following purposes – (f) for prescribing any matter which under this Part of this Ordinance is to be prescribed; and Order 29 Rule 13 (Now Order 45 Rule 11) provides as follows:

"The judgment debtor may, at any time within the time limited by the order giving leave to register after service on him of the notice of the registration of the judgment, apply by summons to a judge to set aside the registration or to suspend execution on the judgment, and if the judge on such application, if satisfied that the case comes within one of the cases in which under

section 4(1) of the Ordinance no judgment can be ordered to be registered or that it is not just or convenient that the judgment should be enforced in Sierra Leone or for other sufficient reason, may order that the registration be set aside (or execution on the judgment suspended) either unconditionally or on such terms as he thinks fit and either altogether or until such time as he shall direct:

Provided that the judge may allow the application to be made at any time after the expiration of the time herein mentioned."

The choice of the action or procedure and its powers is not a matter of procedure but a matter of legal (here statutory) provision.

B. The Court of Appeal misdirected itself in holding:

"It is my view that issue estoppel would not operate in the present circumstances of this case. The order of 2nd March, 2007 was irregular and void and the same ought not have been granted. With respect to counsel for the appellant the submission on issue estoppel could perhaps have been attractive or persuasive if the first order granted was valid."

I have read the case of HENDERSON v HENDERSON [1843] 3 HARE 100. I agree with the dictum of WIGRAM, V.C. in that case in which he stated:

"...Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which have been brought forward as part of the subject in contest but which was not.....only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was

actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable due diligence, might have brought forward at the time.":

In that

(B.1) After the judgment of the 2nd of March,2007, the Court was functus officio, it had exhausted its powers and come to the end of its remit – (see RE V G M Holdings [1941] 3 All ER 417) and had no jurisdiction to set the judgment aside as it purported to do by its ruling of the 16th May,2007. This is a fresh ground."

And in that:

(B.2) Under Order 2 Rule 2 in the case of an irregularity and under its inherent jurisdiction in the case of a serious procedural irregularity, a procedural irregularity must be demonstrated rendering the judgment ineffective void, or a nullity. See CRAIG v KANSSSEN [1943] 1 K B 256; [1943] 1 All ER 108 (failure to serve process on defendant); see at pp 262, 113 respectively, per LORD GREENE, MR whose dictum was cited with approval in Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289 P.C.. See also Woolfenden v Woolfenden [1948] p 27; [1947] 2 All ER 653 (decree absolute obtained on application of a party against whom a decree nisi had been pronounced without notice of such application to the other party and in disregard of statutory provisions); Marsh v Marsh [1945] A C 271 P.C. at page 284, criticised by DENNING, L.J. in WISEMAN v WISEMAN [1953] P 79, C.A. at page 92; [1953] 1 All ER 601 at p. 607.

C. The Court of Appeal erred in Law in considering issue estoppel as follows: "*It is my view therefore that issue estoppel would not operate in the present circumstances of this case. The order of 2nd March, 2007 was irregular and*

void and the same ought not to have been granted. With respect to counsel for the Appellant the submission on issue estoppel could perhaps have been attractive or persuasive if the first order granted was valid" and paragraph 3.(b) –(h), in that:

(C.1) "Cause of action estoppel binds absolutely. There is no qualification, such as *'except in special circumstances'* Arnold and others v National Westminster Bank plc [1990] 1 All ER page 529.

2. The relief sought from this Court is that the Judgment of the High Court dated the 16th May, 2007 be set aside. I think it should actually read, 16 July, 2007 as there is no Order in the Record made on 16 May,2007.

3. The Appellant's statement of case filed on 13 July,2012 is at pages 1-11 of the Record. These pages are not the same as other pages also numbered 1 – 11 which contain the Notice of Appeal, a portion of which has been set out in paragraph 1, supra. The thrust of the Appellant's argument as could be gleaned from his statement of case, is that SHOWERS, J was wrong to have set aside her own Order made on 2 March,2007 as she had become functus officio immediately thereafter – the hearing leading to the Order made on 2 March,2007 had been inter partes; further, the Court of Appeal was wrong to have upheld her Ruling, and in holding that in certain circumstances, for instance, where the Order made by the Court below was clearly wrong, that that same Court could set aside an Order it made after an inter partes hearing.

BANKRUPTCY ORDER MADE BY UK COURT

4. The chronology of events has been set out by the Appellant at page 3 of his statement of case. I accept the correctness of the same, and shall be using it in this judgment. On 11th November, 1996, the United Kingdom

High Court of Justice in Bankruptcy made the following Order which is reproduced at page 127 of the Record:

"IN THE HIGH COURT OF JUSTICE
IN BANKRUPTCY
MR REGISTRAR PIMM IN CHAMBERS
RE: NESTOR CUMMINGS-JOHN
UPON THE PETITION OF BRADFORD & BINGLEY BUILDING SOCIETY P.O. BOX 88 CROSSFLATTS BINGLEY WEST YORKSHIRE BD 13 2UA a Creditor which was presented on the 6th day of September, 1996
AND UPON HEARING the Solicitor for the Petitioner and the Debtor in person
AND UPON HEARING THE EVIDENCE
IT IS ORDERED THAT NESTOR CUMMINGS-JOHN OF BROADWATER ROAD TOOTING LONDON SW17 0DT CURRENTLY A SOLICITOR be adjudged bankrupt.
DATED THIS 11TH November, 1996.
IMPORTANT NOTICE TO BANKRUPT
The/ One of the Official/ Receiver(s) attached to the Court is by virtue of this Order Receiver and Manager of the Bankrupt's estate. You are required to attend upon the Official Receiver of the Court at THE OFFICIAL RECEIVER, BLOOMSBURY STREET, LONDON, WC1B 3SS immediately after you receive this Order. The Official Receiver's offices are open Monday to Friday (except on holidays) from 10.00 to 16.00hours.

ENDORSEMENT ON ORDER

The Solicitor to the Petitioning Creditor is:
Name: HOWES PERCIVAL Address: OXFORD HOUSE CLIFTONVILLE NORTHAMPTON.

5. Prior to the passing into law of the Bankruptcy Act,2009, there was no local law relating to bankruptcy, but the English Court had declared the Appellant to be a bankrupt according to the Laws of England. Turning to the Concise Dictionary of Law, "bankruptcy" means as

follows: "*The state of a person who has been adjudged by a court to be insolvent. The court orders the compulsory administration of a bankrupt's affairs so that his assets can be fairly distributed among his creditors. To declare a debtor to be bankrupt a creditor or the bankrupt himself must make an application to the High Court or to a county court. If a creditor petitions, he must show that the debtor owes him at least 200 PSG.....*" A "*bankruptcy notice*" is described as: " *A document issued by a court, on a creditor's request, that requires a debtor to pay the debt due to the creditor. The debt must be one in respect of which a court judgment or order has been made against the debtor. If the debtor fails to comply with the notice he commits an act of bankruptcy and the creditor is entitled to petition for the debtor's bankruptcy.*" The relative positions of judgment creditor and judgment debtor will be discussed later, when dealing with the local statutory provision.

6. It seems to me therefore, that even though no specific amount of money is mentioned in the Order of Mr Registrar Pimm in the bankruptcy proceedings in the UK, it is acknowledged that the Appellant owed an unspecified amount of money to the Bradford and Bingley Building Society in the UK which he could not repay, and that he had no sufficient assets to enable him to do so. The Appellant has not denied that this was his situation as far back as 1996.

THE APPLICATION FOR REGISTRATION OF A FOREIGN JUDGMENT

7. By Notice of Motion dated 28th January,2004, - pages 122 -126, the Respondent applied by way of ex parte Originating Summons to the High Court for the following Order:

"*That leave of this Honourable Court be granted to the Applicant herein to Register in the High Court of Sierra Leone the Order of the High Court of Justice in Bankruptcy in the above-named delivered in chambers by the Registrar, Mr*

Pimm upon a Petition of Bradford and Bingley Building Society .....pursuant to Order XXIX ...of the High Court Rules.....and the Foreign Judgments (Reciprocal Enforcement) Ordinance....." The application was supported by the affidavit of the Respondent. It is at page 126, but the printing is quite faint. The purport of it is that he had arranged with the Trustee in bankruptcy appointed by the UK Court to pay off some of the debts due from the Appellant to the building society by selling some of the Respondent's assets in Sierra Leone, and remitting the proceeds obtained thereby, to the said Trustee in bankruptcy.

PROCEEDINGS BEFORE NYLANDER, J

8. The minutes of the proceedings before NYLANDER,J do not form part of the Record. But his drawn-up Order dated 5th February,2004 is at page 136.

It reads:

"*UPON READING the ex parte originating summons dated the 28th day of January,2004, the supporting affidavit of Coneth Cummings-John sworn to on the 28th January,2004 and filed herein with the exhibit attached thereto; UPON HEARING B C J THOMPSON Esq., of Counsel for the Applicant herein and what was canvassed by him; IT IS THIS DAY ORDERED that the Application be granted as prayed, to wit: That Leave of this Honourable Court be granted to the Applicant herein to Register in the High Court of Sierra Leone THE ORDER OF THE HIGH COURT of Justice in Bankruptcy in the above matter delivered in chambers by the Registrar Mr PIMM UPON a petition of Bradford and Bingley Building Society.....pursuant to Order XXIX of the High Court Rules of Sierra Leone and the Foreign Judgment (Reciprocal Enforcement) Ordinance Chapter 21 of the Laws of Sierra Leone. The costs of this Application shall be Costs in the Cause.*"

In order to find out whether NYLANDER, J was right to have made this Order, we must examine the statutory provision and the rules he referred to.

FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, CHAPTER 21 OF THE LAWS OF SIERRA LEONE, 1960.

9. The Foreign Judgments (Reciprocal Enforcement) Act, Chapter 21 of the Laws of Sierra Leone, 1960 was enacted in June,1935 when Sierra Leone was still a British Colony and Protectorate. Section 2 is the definition section and provides that:

"judgment" means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party....."

It would be seen immediately, that because of the use of the disjunctive "*or*" after civil proceedings, the requirement that the Order made by the Court should relate to the payment of a sum of money, applies only to criminal proceedings, and not to civil proceedings. However, Section 3(2)(b) thereof, seems to suggest that the judgment or order must be one for the payment of money. It reads:

"Any judgment of a superior court of a foreign country to which this Part of this Act extends, other than a judgment of such court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if – (a).....(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and...."

10. But the next Section throws into doubt whether the Learned Judge was indeed right to have made the Order. Section 4(1) states:

"A person, being a judgment creditor under a judgment to which this Part of this Act applies, may apply to the High Court at any time within six years after the date of the Judgment....to have the judgment registered in the High Court....."

Clearly, the Order made by Mr Pimm was made more than 6 years prior (1996 – 2004) to the date of application for it to be registered – 8 years in all. Further, the Judgment which led to the making of the Bankruptcy Order was not itself exhibited before the Learned Judge.

10. "*judgment creditor*" is defined as:

"*the person in whose favour the judgment was given and includes any person in whom the rights under the judgment have become vested by succession or assignment or otherwise*".

The categories of "*judgment creditors*" are not therefore closed. But the Respondent did not state clearly under whose authority he was acting in initiating the registration proceedings as he had not been party to the English proceedings which resulted in the Bankruptcy Order being made. On the other hand, "*Judgment debtor*" is defined as:

"*the person against whom the judgment was given and includes any person against whom the judgment is enforceable under the law of the original court.*"

This definition may therefore cover the Appellant, as he has not himself in any of the proceedings denied that judgment was obtained against him in the English Court by the Bradford and Bingley Building Society, and that he was subsequently declared a bankrupt. But it follows also, that the Respondent may not necessarily fall within the category of a "*judgment creditor*". Be that as it may, NYLANDER, J was satisfied when the ex parte Application was made before him that the Respondent was entitled to have the Order made by the Court in England, registered here in Sierra Leone.

APPLICATION TO SET ASIDE ORDER FOR REGISTRATION

11. By Judge's Summons dated 2 June, 2004, the Appellant applied to the High Court for the registration Order made by NYLANDER, J to be set aside. The grounds for making the application were essentially, that the High Court lacked jurisdiction to make the same; and that the Respondent had not made full and proper disclosure of all the facts in his ex parte application. In his affidavit in support of that application,

the Appellant deposed, inter alia, that the Respondent was not a party to the Bankruptcy proceedings in the English Court; nor, was he a beneficiary of the Order made by that Court. It was also contended by the Appellant that the Order or judgment which was registered by the Respondent, was more than 6 years old at the time application was made for its registration, as it had been made in 1996. This was unarguable.

ORDER OF NYLANDER, J MADE ON 3 OCTOBER, 2005

12. On 3 October, 2005, NYLANDER, J gave his ruling on this Application, as appears at pages 39 – 43 of the Record. The Learned Judge set aside the Order for registration he had made on 5 February,2004, and also made certain consequential Orders which, in my view, have given rise to the plethora of proceedings which have followed it. His consequential Orders appear at page 43 of the Record:

"Thus, it is this day Ordered that the Order dated 5/2/04 be set aside with the following effect:

i. The 3 conveyances exhibited which resulted in the transfer of properties from Applicant to Respondent as a result of the Court Order dated 5/2/04 are cancelled and shall be expunged from the book of conveyances by the Administrator and Registrar-General.

ii. All other properties transferred by virtue of the Order dated 5/2/04 are hereby cancelled and shall be expunged as in 1 above.

iii. All properties in the pipeline for transfer by virtue of my Order dated 5/2/04 are declared void.

iv. The Judge's Summons dated 2/6/04 is granted as prayed.

v. The Respondent shall pay the costs of this application.

Liberty to apply."

13. Section 6 of Cap 21 sets out in extenso, the reasons which will persuade the Court which granted the order for registration, to set the same aside. Paragraph (a) of subsection 6(1), sets out the circumstances in which the Court shall set aside the registration of the judgment. Paragraph (b) sets out the circumstances in which it may set aside the same. NYLANDER, J in his ruling of 3 October,2005 clearly applied the provisions set out in paragraph (b).

14. Section 7 of the Act sets out the powers of the Court in setting aside registration of a foreign judgement. None of the 3 subsections provide for the making of any consequential Orders. And this is where, in my view, NYLANDER, J went wrong. The 3 consequential Orders he made set out in paragraph 12 supra, were clearly not authorised by statute. His duty was merely to set aside registration. If acts or things had been done, consequent upon the order granting registration, it was for the party against whom the order for registration had been granted, to apply to the Court in separate proceedings, for those acts or things done, to be set aside.

15. The Appellant has relied on the Rules in Order XXX of the then High Court Rules,1960. That which deals with the Court's powers when it comes to the setting aside of an order for registration, is Rule 13, which states:

"The judgment debtor may, at any time within the time limited by the order granting leave to register after service on him of the registration of the judgment, apply by summons to a judge to set aside the registration or to suspend execution on the judgment, and the judge on such application, if satisfied that the case comes within one of the cases in which under section 4(1) of the Act no judgment can be ordered to be registered or that it is not just or convenient that the judgment should be enforced in Sierra Leone or for other

sufficient reason, may order that the registration be set aside or execution on the judgment be suspended either unconditionally or on such terms as he thinks fit and either altogether or until such time as he shall direct: Provided that the judge may allow the application to be made at any time after the expiration of the time herein mentioned."

16. This rule, like all such rules, is made pursuant to statutory power conferred in that behalf. It cannot go beyond what the statute provides for. The use of the expression "*just or convenient*" in that rule does not authorise a Court to make an Order not authorised by the parent statute. It is not true therefore, as contended by the Appellant in this appeal, that this Rule empowers the "*...Court to deal comprehensively with any situation....*" Nor is it true, as he also contends that" "*It would be untidy if arising out of a situation where something had gone wrong under Order 45 Rule 11 it would be necessary to institute a new ~~a new~~ and separate action.....This would not be necessary as the Court can make all the above Orders under its discretion made available by Order 45 Rule 11 (here referring to the new Order 45 Rule 11 in the High Court Rules, 2007).*

APPELLANT'S MOTION DATED 7 DECEMBER, 2005

17. Instead of instituting originating process to recover properties which, he the Appellant claimed had been forcibly or irregularly taken over by the Respondent, he applied to the High Court by way of Notice of Motion dated 7 December,2005 for the Respondent to hand over properties listed in paragraph 1 of the motion paper. That is the Application which came up for hearing before SHOWERS, J. on 16 January, 2007. On 2 March,2007, SHOWERS,J ordered Respondent to hand over the properties listed in paragraph 1 of her Order to the Appellant, and that the Respondent do render an account to the Appellant, of such monies he had received in respect of the said properties in the six year period immediately preceding the date of that Order.

RESPONDENT'S MOTION DATED 7 MAY, 2007

18. By Notice of Motion dated 7 May, 2007, the Respondent applied to the High Court for the Order made by SHOWERS, J on 2 March, 2007 to be set aside. The application was opposed by the ~~Respondent~~ Appellant. On 16 July, 2007, SHOWERS, J set aside the inter partes Order she had made on 2 March, 2007 on the ground that it had been irregularly obtained. Her Ruling is at pages 113 to 116 of the Record. Underlying her Ruling is the acceptance that in setting the order for registration, NYLANDER, J may have been right in making a consequential order relating to 3 of the properties in dispute. This is why the Learned Judge went on to make Orders relating to certain properties claimed by the Appellant. As we have stated above, the relevant statutory provision did not empower the Court to make the particular order made by NYLANDER, J. His duty was simply to set aside registration if he was of the view that the circumstances of the case warranted that course of action. SHOWERS,J was therefore wrong to have made Orders relating to the properties claimed by the Appellant in both Orders dated 2 March, and 16 July, 2007 respectively. Further, the hearing into the Application dated 7 December,2005 was inter partes. Full argument was heard from both sides by SHOWERS, J before she gave her judgment on 2 March,2007. She became funtus officio thereafter.

19. We agree with the Court of Appeal, that in certain circumstances, a Court of first instance may, if the Order made after an inter partes hearing turns out to be void or irregular for one reason or the other, set the same aside. The cases cited by Counsel at the hearing before that Court, and also those relied on by that Court, constitute sufficient authority that this could be done in certain circumstances. But we think the better course is for the losing side to appeal after a full inter partes hearing. By delving into the issues of which properties were

covered by the first or second Order made by NYLANDER, J, and to whom such properties lawfully belonged, and whether such properties had legitimately changed hands, SHOWERS, J had herself impliedly agreed that in an application for setting aside registration of a foreign judgment, consequential orders, such as those made by NYLANDER, J could be made. That was clearly an error in Law. The Court of Appeal was heading in the right direction when it held at pages 226- 227 that: "*.... It would have been tidier if the Appellant had brought a separate action for that purpose rather than it would to continue under the Misc App FJ 2/04 which was instituted for the registration of a foreign judgment. It is also my view that it would have been better if separate proceedings were commenced rather than coming under the Miscellaneous Application which was for principally the registration and subsequently the setting aside of the registration of a foreign judgment.*" Having come to this conclusion, it is our view that it should have gone on to hold that the consequential Orders made by NYANDER, J on 7 October,2005 were insupportable in view of the express provisions in Cap. 21. There was therefore no need to go into the issue of which properties were covered by the several Orders made by the High Court, or which of the two parties was entitled to possession of certain properties, consequent upon the second Order made by NYLANDER, J as the Court of Appeal did at pages 225 – 229 of the Record. It should have accepted that SHOWERS, J had become functus officio as of 2 March,2007 and should have dismissed the Appellant's appeal to that Court simply on the ground that it could not enforce the erroneous consequential Orders made by NYLANDER,J. We however agree that that Court was right, in the result, to have dismissed the Appellant's appeal.

HONOURABLE MR. JUSTICE V.V. THOMAS – ACTING CHIEF JUSTICE

This is a civil appeal from the judgment of the Court of Appeal filed by the Appellant by Notice of Appeal dated 16th March2012 against the said judgment delivered on the 2nd February 2012. When this matter first came up for hearing on the 10th October 2013, the Honourable Mr. Justice P. O. Hamilton was the presiding Justice and the Honourable Mrs. Justice V. A. Wright was a member of the panel. The composition of the panel was overtaken by events and had to be reconstituted as shown above. The Notice of Appeal states that the Appellant is dissatisfied with the said judgment of the Court of Appeal and appeals to this Court upon grounds of Appeal enumerated on pages 7 to 12 of the Records. According to the said Notice of Appeal, the relief sought from this Court is that "the judgement of the High Court dated the 16thMay 2007 be set aside". Two corrections to be made in the formulation of the relief sought are that there was no judgment of the High Court dated 16th May 2007 but a ruling of the Court dated 16th July 2007. The Notice of Appeal to the Court of Appeal is found on pages 118 to 121 of the Records and the judgment of the Court is found on pages 218 to 230 of the Records. The Certificate of the Orders made are to be found on page 231of the Records and states that:-

1. The Appeal as contained in the Notice of Appeal intituled (intitled) Civ. App.33/2007 dated 9thAugust is hereby dismissed.

2. The several reliefs prayed for in said Notice of appeal are refused.

3. The Respondent shall have the cost of this appeal such costs to be taxed.

The Notice of Motion which gave rise to the Ruling of the High Court dated 16th July 2007 of Showers J (as she then was) is dated 7th May 2007. The application of the Respondent herein in that Notice of Motion is found on pages 1 and 2 of the Records and the ruling thereon is found on pages 113 to

117 of the Records. The Appellant opposed the said application. Essentially the Applicant sought an order of the Court to set aside its own order dated 2nd March 2007 as stated in the Judge's ruling on the ground of irregularity for the following reasons:

> *"a).The order granted possession of properties which were never in dispute before this court."*
> *b). The order was at variance with the order dated 25th October 2004 directed at three properties stated therein.*
> *Further the applicant seeks the said order to be set aside on the grounds that it was irregularly obtained for reasons that the order was obtained for possession of certain properties without any claim or evidence before the court that the applicant therein was entitled to them."*

In the Ruling of the Court, the learned judge ruled that the Respondent (Appellant) had not shown satisfactory evidence that he is entitled to recover possession of all the properties listed in the said order of 2nd March 2007 and therefore upheld counsel for the Applicant's (Respondent herein) submissions that the order of the 2nd March 2007 was irregularly obtained and consequently set aside her own earlier order.

The Appellant filed his Statement of Case dated 13th July 2012 and the Respondent filed the Statement of his Case dated 28th March 2013. The grounds of appeal filed by the Appellant in support of the relief he has prayed for essentially concern various alleged misdirections and error in law in considering issue estoppel.

Having perused the Statements of Case filed by the parties and listened to the oral arguments of the Appellant and Counsel for the Respondent in the light of the relief prayed for in this Court, the central question for determination is whether Showers J. (as she then was) was right in setting aside her own Order dated 2nd March 2007 in her ruling dated 16th July

2013. The Appellant contends that she was wrong while the Respondent's Counsel has argued that she was right and that the judgment of the Court of Appeal was "impeccable" in affirming the decision of Showers J. (as she then was).The parties cited various authorities in support of the positions they have taken in the appeal. The Court of Appeal in its judgment recognized that the general rule is that no court or judge has power to review, alter or vary its own judgment or order after it has been drawn up and entered and that the object of the rule is to bring litigation to an end at its various stages. The exceptions to this general rule as stated in Halsbury's Laws of England 3rd Edition were noted but the Court went on to say *"It may perhaps be safe to say therefore that the categories or instances that would constitute an exception to the general rule are not closed."*

The history of the case (which has been catalogued in detail in the separate opinion of my brother, Honourable Mr Justice N. C. Browne-Marke) was that Nylender J. (deceased) on an application to register a foreign judgment had made orders dealing with properties in Sierra Leone which were in excess of the application that was before him. That error was compounded in the order of Showers J. (as she then was) dated 2nd March 2007 (found in pages 182 to 184 of the Records) in that she also dealt with properties that were not the subject of the application that was before her.The Learned Judge in her Ruling of the 2nd March 2007 simply concluded and ordered that the orders prayed for are granted.

The Learned Judge in her Ruling summarized the reason for setting aside her previous order as follows:

> *"Counsel for the applicant has submitted that the order of 2nd March is irregular for reason that the order was obtained for possession of certain properties without any claim or evidence before the court that the applicant was entitled to them. It is my view that the respondent has not shown satisfactory evidence that he is entitled to recover possession of all properties listed in the said order. In an application of this nature there must be certainty as to the properties for which the orders for possession*

sought appertains. It would be disastrous to the occupants of the properties if an order is made for them to be evicted on an order irregularly obtained, and if it turns out the respondent is not entitled to recover possession of them.

I therefore uphold counsel for the applicants submission that the order was irregularly obtained as there was not sufficient evidence before the court that the respondent is entitled to possession of all the properties listed in the said order."

In support of the contention that the learned judge had no jurisdiction to set aside her judgment, the Appellant has relied on a number of authorities including the case of **Re V. G. M. Holdings, Ltd**. [1941]3 All.E.R.417 where it was held that where a judge had made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal. Counsel for the Respondent on the other hand, has relied on other authorities including the case of **Muir v. Jenks** [1913] 2K.B. 412 which is a case which came on appeal in the English Court of Appeal. It was held in the latter case that where a plaintiff signs judgment in default of appearance for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduced. Delay on the part of the debtor will not necessarily deprive him of his right to have the judgment set aside.

What was the application before the Court which gave rise to the order of the Court made on the 2nd March 2007? That application is dated 7th December 2005 and is to be found on pages 45 and 46 of the Records and it was, *inter alia*for the Respondent to hand over 11 properties to the Applicant and to give an account of Respondent's management of those properties. In her Ruling of 2nd March 2007, the Learned Judge said that "the orders sought

are in essence to effect compliance by the Respondent of various orders made in an order dated 3rd November (October) 2005 by Mr. Justice L.B.O. Nylender." In my view the order of the 2nd March 2007 was wrong and ought to be corrected but the method by which the Learned Judge attempted to put it right by setting aside her own order was also incorrect. The error in the order of the 2ndMarch 2007 ought to have been corrected by way of appeal unless the Court did not have jurisdiction to make the order of the 2nd March 2007 in the first place. I hold that the Court had jurisdiction to make the order of the 2nd March 2007 and it was not a nullity, although it was wrong as it inadvertently granted orders which went beyond what had been ordered and were the subject-matter of Nylender J's orders. In her 2ndruling she herself stated that the "respondent has not shown satisfactory evidence that he is entitled to recover possession of all properties listed in the said order". That does not give her power to set aside her own earlier order but will entitle the applicant to appeal the said orders before a higher tribunal, that is to say, the Court of Appeal. Such an appeal had been filed but had been dismissed with the effect that there was no longer a stay of execution of "the order of the 20th January 2006". It was in those circumstances that the learned Judge concluded her Ruling of the 2nd March 2007 by stating that "the orders prayed for are hereby granted." See pages 182 to 184 of the Records for the said Ruling.

The Court of Appeal in its judgment pointed out a number of irregularities in the order of the 2nd March 2007 and concluded that it was "irregular and void" and thus the Learned Judge was right in setting it aside. The Court adjudged that the instant case presented a special circumstance and that issue estoppel does not apply to bar the judge from setting aside her own order. The Court further relied on rules 31 and 32 of the Court of Appeal Rules 1985 which grant powers to that Court to review decisions of the High Court as if the Court of Appeal were a court of first instance. The Court then concluded that in the exercise of its powers of review under the Rules of the Court of Appeal, it has concluded that "the order of the 2nd March was

irregular and ought not to have been granted and further that the order of the 16th July 2007 was regular valid and appropriate". In those circumstances the Court saw "no need, necessity or justification to set aside the order of the 16th July 2007."

The conclusion I have come to on a review of all the documents filed (including Statements of the Parties' Cases) and the arguments and submissions made in this appeal is that the order of the 2nd March 2007 of Showers J (as she then was) was irregular and wrong in law in that she inadvertently granted possession of properties which were not before the Court, to the Appellant who had adduced no evidence that he was so entitled. That decision of the 2nd March 2007 ought to have been reversed on appeal to the Court of Appeal and not by way of an application to the same judge sitting in the High Court, to set it aside. However, the Court of Appeal exercising its powers of review under the Rules of the Court of Appeal, 1985 was right in setting aside the said order of the 2nd March 2007 in so far as it virtually granted possession of properties to the Appellant without the evidence necessary to justify such an order.

In the circumstances the Appellant's appeal to this Court is dismissed for the following reasons:

(1) The Consequential Orders made by the Honourable Mr. Justice Nylander on 3 October, 2005 were insupportable in view of the express provisions of Section 7 of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 21 of the Laws of Sierra Leone, 1960 and were therefore erroneous in Law. It was incumbent on the Appellant to have instituted originating process or processes to recover properties claimed by him, consequent on the setting aside of the Order for registration of the foreign judgment.

(2) For the same reason, the Orders made by the Honourable Mrs. Justice Showers on 2 March, 2007 were erroneous in Law. She became functus officio thereafter.

(3) The Orders made by the Honourable Mrs. Justice Showers on 16 July, 2007 were wrong in Law as she had become functus officio as of 2 March, 2007.

(4) The relief sought in this appeal is refused because the Court of Appeal in the exercise of its powers of review under the Rules of the Court of Appeal, 1985 was right in setting aside the Order of the 2nd March 2007.

(5) The parties are to bear their respective costs in this appeal.

HON MR. JUSTICE V. V. THOMAS,
ACTING CHIEF JUSTICE

I agree

HON MR. JUSTICE BROWNE-MARKE, JSC.

I agree

HON MR.JUSTICE P.O. HAMILTON, JSC.

I agree

HON. MRS. JUSTICE MATTURI-JONES, JA

I agree

HON. MR JUSTICE A. H. CHARM, JA