IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

SUIT NO: FCT/HC/CV/498/2012

BETWEEN:

1. ANTHONY IKEMEFUNA)
2. MRS. ADEYINKA IKEMEFUNA)……PLAINTIFFS

AND

1. ZANKLI MEDICAL SERVICES LTD)
2. DR. OKECHUKWU O. KALU)……DEFENDANTS
3. THE CMD ZANKLI MEDICAL SERVICES LTD)

JUDGMENT

The claims of the Plaintiffs in this case are founded on allegation of medical negligence. The Plaintiffs are couple while the 1st Defendant who is the employer of the 2nd and 3rd Defendants is a medical services provider with office address at Plot 1021, B5, Shehu Yar'adua Way, Opposite Federal Ministry of Works, Utako District, Abuja.

The fact of the case is that sometime in June, 2012 the 2nd Plaintiff who was ostensibly pregnant and due for delivery was admitted into the 1st Defendant's medical facility and booked for Caesarian Section. The operation was carried out successfully and the 2nd

Plaintiff was discharged along with her baby from the 1st Defendant's facility four days after the surgery. The baby was brought back to the 1st Defendant's facility eight (8) days after delivery for circumcision which was also carried out. The 2nd Plaintiff has alleged that she subsequently discovered that she was not properly catered for by the Defendants while on admission and had indeed suffered "excruciating abdominal pains" after the surgery occasioned by the negligent conduct of the Defendants. The Plaintiffs then caused letters of complaint to be written to the 1st Defendant without any positive result. Consequently by an amended writ of summons filed on 4th November, 2014 the Plaintiffs claim against the Defendants jointly and severally as follows:

(a) A declaration that the action of the Defendants during the period of delivery of the 2nd Plaintiff between 12th and 16th June, 2012 amounts to negligence.

(b) An Order for payment of the sum of N25,000,000.00 (Twenty Five Million Naira) as compensation in favour of the Plaintiffs for the injury suffered as a result of the negligence acts.

(c) 10% interest on the Judgment sum from the date of Judgment until the entire sum is liquidated.

(d) Cost of this action in the sum of N500,000.00 (Five Hundred Thousand Naira).

The Defendants denied liability vide their 13-paragraphs joint further amended statement of defence filed on 4th February, 2015 which also incorporated a further amended counter claim. The gist of the counter-claim as set out at paragraph 36 of the Defendants' pleading is as follows:

(a) Damages against 1st Defendant for fraudulent misrepresentation in the sum of N25,000,000. (Twenty Five Million Naira) only.

(b) Legal costs of this defence and claim respectively in the sum of N5,000,000. (Five Million Naira) only against the Defendants.

Upon the receipt of the process of the Defendants the Plaintiffs on 19th June, 2015 filed a reply to statement of defence and defence to counter claim.

At plenary the 2nd Plaintiff personally testified as PW1. She also called one Tosin Osanyinbola who testified on her behalf as PW2. Both witnesses were duly cross-examined by the learned counsel to

the Defendants. At the close of the case for the Plaintiff the following documents were admitted in support of her case. These are:

1. Exhibit A.I.1 – Statement of medical services rendered by the 1st Defendant to the 2nd Plaintiff in the sum of N607,700.00 and dated 12/06/2012.
2. Exhibit A.I.2 – Payment receipt dated 13/06/2012 issued by the 1st Defendant in favour of the 2nd Plaintiff in the sum of N150,000.00.
3. Exhibit A.I.3 – Another receipt dated 15/06/2012 in the sum of N400,000.00 issued by the 1st Defendant in favour of the 2nd Plaintiff.
4. Exhibit A.I.4 – Statement of medical services rendered to the Plaintiff's baby in the sum of N54,300.00 and dated 16/06/12.
5. Exhibits A.I.5 – Payment receipt dated 16/06/2012 in respect of A.I.4.
6. Exhibit A.I.6 –Complaint letter dated 16th August, 2012 written by the 1st Plaintiff and addressed to the 3rd Defendant.
7. Exhibit A.I.7 – The 1st Defendant's reply to exhibit A.I.6 dated 27th August, 2012.
8. Exhibit A.I.8 – Plaintiffs' Solicitors' demand letter of 14th September, 2012.

9. Exhibit A.I.9 – Defendants' Solicitors reply to exhibit A.I.8 and dated 26th September, 2012.

On the other hand, three witnesses testified for the defence. The DW1 is one Mr. Olu Bakare, the General Manager of the 1st Defendant while the DW2 is one Felicia, a Nursing Officer with the 1st Defendant. The DW3 is in fact the 2nd Defendant. All the witnesses for the defence were duly cross-examined on behalf of the Plaintiffs.

However, it is worthy of note that the Plaintiffs made a futile attempt to recall the DW1 and DW2 for further cross-examination. The application was refused in a well considered Ruling delivered on 19th September, 2018.

At the close of the Defendants' defence the following documents were tendered and received in evidence;

1. The 2nd Plaintiff's original outpatient medical case notes covering 14/06/2012 to 15/06/2012 is exhibit D1.
2. Schedule of the 1st Defendant's prices of room/wards, inclusive of breakfast is exhibit D2.
3. Schedule of professional fees for professional services issued by Lahai-Roi Chambers dated 22nd October, 2013 and addressed to the 1st Defendant is exhibit D3.

4. Exhibits D4, D5 and D6 are similar to exhibit D1 being long hand medical case notes of the 2nd Plaintiff.

At the close of the case, parties through their respective learned counsel filed and exchanged final written addresses which were adopted in the open court. Mr. Olakunle Yusuf Esq of counsel for the Defendants in his 31-pages address filed on 21st September, 2018 while adopting the deep issue format in the formulation of issues formulated one issue. It is couched thus:

> **"The position of the law is simply that actionable medical negligence shall relate to (i) a duty of care owed to the plaintiff by the defendant, (ii) a breach of that duty of care by the defendant, and (iii) damage(s) suffered by the plaintiff which must be causally connected to the defendant's breach of the duty of care. The 2nd Plaintiff underwent an emergency caesarian operation (due to foot prolapsed) which was successful with the safe delivery of her baby on 12/06/2012, as they received adequate treatment with all reasonable care and skills leading to their eventual discharge (on 16/06/2012) without any complaint and/or injury over the period of visit (between 12/06/2012 – 27/07/2012) to the 1st Defendant Hospital. Is the Plaintiffs' action as constituted sustainable in law?"**

On his part Mr. Samuel Ameh Esq for the Plaintiffs in his address dated 15/10/2018 adopted the issue put forward by the Defendants and went ahead to formulate one additional issue, to wit:

> **"Whether the case of the Plaintiffs is not deemed admitted"**

After a calm and dispassionate consideration of the state of pleadings and the evidence led in support I form the view that the critical issue for determination is as captured below:

1. **Whether the Plaintiffs have led evidence before the Court to support the allegation of medical negligence so as to entitle them to the reliefs sought.**
2. **Whether the Defendants have proved their counter claim against the Plaintiff.**

The learned counsel for the Defendant has attacked some of the processes filed by the Plaintiff in his written address. I shall deal with that issue as a preliminary point.

PRELIMINARY POINT

Whether the Plaintiffs' "Reply to Statement of Defence" and "Defence to Counter Claim" filed on 19th June, 2015 is valid taking into

account the further amended statement of defence filed by the Defendants pursuant to an Order of this Court made on 28/10/2014.

In arguing this point Mr. Yusuf of counsel for the Defendants submitted that in view of the Order for amendment made on 28/10/2014 the only valid process before the Court are as follows:

(1) Amended writ and statement of claim together with the PW1 and PW2 statement on Oath.

(2) Further amended statement of defence and counter claim together with DW1, DW2 and DW3 written statements on Oath which were all filed pursuant to the Order of the Court made on 28/10/2014.

Arising from the foregoing development it was the view of learned counsel that the "Reply to Statement of Defence" and "Defence to Counter Claim" filed by the Plaintiffs have become an invalid process for non-compliance with the Order of 28/10/2014. That the Plaintiffs cannot take benefit of these processes. That the grave consequence of this development is that the statement of defence and counter claim of the Defendants are left without any valid traverse by the Plaintiffs! Counsel further submitted that the statement on Oath of the PW1 tied to the purportedly defective pleading cannot stand. He referred the Court to the case of **OJUKWU**

VS YAR'ADUA (2009) 12 NWLR (PT. 1154) 50 to the effect that a party cannot lead evidence on facts not pleaded. In essence that the reply to statement of defence and defence to counter claim filed by the Plaintiffs are incompetent and as such cannot sustain the statement of Oath of the PW1.

It would appear that the Plaintiffs did not join issue with the Defendants on this point. I have carefully perused the 18-pages final written address filed on behalf of the Plaintiffs and it is clear to me that the Plaintiffs did not join issue with the Defendants on this points.

Now the process in dispute was filed by the Plaintiffs on 19th June, 2015 in reaction to the Defendants' further amended statement of defence/counter claim dated 3rd February, 2015 and it is my view that the attack on the process by the Defendants is grossly misplaced. The record of the Court revealed that prior to the filing of the pleadings under attack the Plaintiffs had filed a similar one dated and filed on 11/02/2014. It was after the Defendants amended there processes that the Plaintiffs filed a Motion on Notice on 19th June, 2016 for leave to file reply and defence to counter claim and further witness statement on Oath and a deeming Order in view of the fact that those process were filed contemporaneously with the application for leave. If that be the case it cannot be right to

say that in view of the amendment of the Defendants' pleading sometime in 2014 the pleadings of the Plaintiffs filed in 2016 with leave of Court is not an answer to the pleadings of the Defendants.

For the purpose of argument I have observed that the disputed pleading was not christened as "amended" but it would amount to overstretching technicality to the point of absurdity if the processes were to be ignored. The Defendants were aware of this presumed irregularity yet the trial of this matter was conducted on the said processes without any objection by the Defendants. It is therefore in the interest of justice to affirm the validity of the Plaintiffs' reply, defence to counter claim and the further witness statement on Oath of the PW1. To hold otherwise would not augur well for the due administration of justice. Accordingly I overrule the objection and attack of the learned counsel to the Defendants on this point. In essence the disputed processes shall be effectively reckoned with in the determination of the dispute between parties in the overall interest of justice.

SUBSTANTIVE ISSUES

Whether the 1st Defendant was negligent in the management of the 2nd Plaintiff's medical circumstances so as to entitle the Plaintiffs to the reliefs sought in this case.

Before I delve into the submission of parties it's apposite at this point to state that it is now settled law that the Plaintiffs who are seeking declaratory relief must of necessity succeed on the strength of their case and not on the weakness of the defence.

The law is clear that the plaintiffs has the burden to lead credible evidence to determine their legal entitlement to the reliefs sought in this case especially as the first relief sought is declaratory in nature.

On this point of law see Section 131-133 of the Evidence Act, 2011 and the following cases:

1. **ELIAS V. DISU (1962) 1 SCNLR 361;**
2. **UNIVERSITY PRESS LTD V. I. K. MARTINS NIG. LTD (2004) 4 NWLR (PT.654) 584;and**
3. **DALHATU V. A-G, KATSINA STATE (2008) ALL FWLR (PT.405) 1651; and**
4. **ADDAH VS UBANDAWAKI (2015) 7 NWLR (PT. 1458) 325 AT 344** where it was held by the Supreme Court that:

> **"It should be stated clearly that the weakness of the defendant's case does not assist the plaintiff's case. He swims or sinks with his own case. See Animashaun vs Olojo 1991 10 SCNJ 143; Dantata vs Muhammed 2000 7 NWLR (PT. 664) 176; Ekundayo**

vs Baruwa 1995 2 NLR 211; Nwokidu vs Okanu 2010 3 NWLR (PT. 1181) 362 and Dumez Nig Ltd vs Nwakhoba 2008 18 NWLR (PT. 1119) 361 at 373-374 wherein it was graphically captured that the burden of proof on the plaintiff in establishing declaratory relief to the satisfaction of the Court is quite heavy in the sense that such declaratory reliefs are not granted even on the admission by the defendant where the plaintiff fails to establish his entitlement to the declaration by his own evidence."

It is now firmly established beyond every shadow of disputation that for the Plaintiff to succeed in an action for negligence, nay medical negligence it must be shown that the Defendants owe the Plaintiffs a duty of care. It is the breach of this duty occasioning damages to the Plaintiffs that will constitute the torts of negligence.

I am happy that learned counsel in their respective final addresses is agreed on this principle of law. On this point the learned counsel to the Plaintiffs cited the locus classicus of **DONOGHUE Vs STEVENSON (1983) AC 592 and OJO VS GHARORO (2006) 10 NWLR (PT. 987) 173 at 234** paragraphs F to H.

See also the following cases cited by the learned counsel to the Defendants:

(1) A-G OYO STATE & ANOR VS FAIRLAKES HOTELS LTD & ANOR (NO. 2) (1989) 5 NWLR (PT. 121) 255;

(2) ORHUE VS NEPA (1998) 7 NWLR (PT. 557) 187; and

(3) UTB NIG. VS OZOMENA (2007) 3 NWLR (PT. 1022) 445.

To discharge this burden the Plaintiffs as stated earlier called two witnesses. The 2nd Plaintiff as PW1 testified that she was admitted into the 1st Defendant's facility for Caesarian Section on 12th June, 2012 and discharged four days after with her baby. She was not happy with the Defendants over the way and manner she was treated. Paragraphs 13 of the PW1's witness statement on Oath specifically captured the allegation of negligence against the Defendants, to wit:

13- That during the four day which I was on admission, I noticed and observed the following negligent acts:-

(a) Despite paying for the most expensive room the nurses insisted that a relation must stay with me each night because according to them, they are always stretched at night. I had to call my friend Tosin Osanyinbola who came to join me on the 13th of June, 2012.

(b) During the entire four days apart from the soap and tissue provided initially no other soap or tissue was supplied to me.

(c) Despite the inscription boldly written in the hospital that breakfast is included in the N18,000:00 per night, no breakfast was served on me during the entire four days despite repeated demands.

(d) On the day of delivery, my husband had to personally carry his baby in his hand for over 20 minutes while the nurse on duty called Chioma went looking for baby cot before they could find one.

(e) Treble menthol was recommended for me but I was not told.

(f) I had to literarily beg to have the room given me cleaned.

When cross-examined, the PW1 testified inter alia that:

> **"The Doctor told me that the baby was bridged. I cannot remember if the Hospital gave me a bill for my treatment on the day I came to them. However services were rendered to me before I made payment. It is true that I was in the Hospital for medical**

problem and treatment. During the second weeks I was experiencing pains I returned to Dr. Kalu to complain but I can't remember the date again. I came to the Hospital one week after delivery of the child for circumcision. The circumcision was successfully done. However I went to Dr. Kalu on the same day of circumcision to complain to him that I was having pains. Hormonal changes are not general with all pregnant women. After delivery the hormonal changes occur and a mother could begin to produce milk."

The PW2's evidence is essentially to corroborate the evidence of the PW1 that the Defendants left the 2nd Plaintiff while on admission with nobody to stay with her. That 2nd Plaintiff invited the PW2 over to the hospital to bridge the gap. PW2 also corroborated the PW1 on the non-delivery of basic supplies such as tissue papers and food. The totality of her evidence under cross-examination is not dissimilar to her evidence-in-chief.

The Defendants through the DW1 testified that while on admission the 2nd Plaintiff was adequately attended to and that problem erupted when she was handed down an extra bill with respect to medical services rendered to her baby. That at that point she

became angry to the point of threatening the peace of the Hospital. That the PW2 later left the Hospital in anger without settling her outstanding bills and at the same time ignored and failed to take delivery of her discharge drugs.

The DW1 also stated under cross-examination that:

> **"It is true that the 2nd Plaintiff was clinically discharged but not fully discharged."**

The DW3 (2nd Defendant) who carried out the surgery stated at paragraphs 3 to 7 of his witness statement on Oath as follows:

3. That the 2nd Plaintiff underwent an emergency caesarean section due to footing breach on 12/06/2012 which was successfully performed by a medical team led by my good self at the Defendant's hospital. Now shown to me and marked as Exhibit ZA5 is the 2nd Plaintiff's case note on even date.
4. That the 2nd Plaintiff and her baby while as patients on admission in the hospital received all necessary medical attention and medications and were treated with all reasonable skill and care.
5. Following the said operation, the 2nd Plaintiff who was clinically discharged from admission, returned to see me for post-partum clinic on 27/07/2012, with the baby. She did not

complain to me of any pain or other complications and was told her stitches will gradually clear-up over sometime; however, I counseled 2nd Plaintiff on contraception and requested her to be seen in one week for contraceptive application and hygiene. Attached herewith and marked as Exhibit ZA6 is the 2nd Plaintiff's case note on her medical examination dated 27/07/2012.

6. That I know from many years of medical practice that patients who undergo major surgeries such as 2nd Plaintiff, are advised to avoid eating solid oral food for a variable period, therefore, the 2nd Plaintiff was advised accordingly and subsequently commenced oral sips and was then placed on semi-solid foods to enhance the healing process of her surgery.

7. That I equally assured 2nd Plaintiff that it was a normal consequence of her operation to feel pain, and as breast feeding mother to have occasional abdominal cramps, which in no distant time will soon clear up.

The DW 3 further testified under cross examination as follows:

"I am the Doctor who performed surgery on the 2nd Plaintiff. When the 2nd Plaintiff visited 6 weeks after discharged she did not present any complaint. I do not know how the 2nd Plaintiff was discharged from the

Hospital. Dr. Lawson was my employer at the 1st Defendant's Hospital. I am not aware when the 2nd Plaintiff brought her child to the 1st Defendant for circumcision. It is not true that the 2nd Plaintiff suffered severe pains as a result of the operation. I do not know why part of the medical bill was waived because it is an administrative action."

It is from the totality of the evidence led by the Plaintiffs that learned counsel urged upon the Court to hold that the claims of the Plaintiffs are established.

In a sharp reaction Mr. Yusuf of counsel for the Defendants urged the Court to hold that the case of the Plaintiffs is speculative and unsustainable. He submitted that the Plaintiffs have woefully failed in their pleadings to furnish the Court with particulars of negligence to enable the Defendants know why they were brought to Court. He referred the Court to the case of **IFEANYI VS SOLEH BORIEH (2000) 5 NWLR (PT. 656) 322 at 360** where Onu, JSC has this to say:

"It is trite law that allegation of precise breach of duty owed must be made in the pleadings, in other words, particulars must always be given in the pleadings

showing precisely in what respect the Defendant was negligent."

It was therefore the contention of Mr. Yusuf of counsel to the Defendants that the burden of proof under Section 131 (1) & (2) of the Evidence Act has not been discharged by the Plaintiff. That what the Plaintiffs lump together as the basis of their claim are unconnected with the tort of negligence. In other words, that the Plaintiffs' case is lacking or deficient in specificity thereby robbing them of any valid relief. On this point of law learned counsel called in the following cases:

1. **PLATEAU STATE VS AG FEDERATION (2006) 1 SC (PT. 1) 1;**
2. **OJO VS GHARORO (2006) 10 NWLR (PT. 987) 173;**
3. **U. T. B NIG LTD VS OZOMENA (SUPRA).**

I have carefully scrutinized the pleadings of the Plaintiffs and evidence led in support and it is clear to me that the foundation of the Plaintiffs' case is the surgical intervention performed on the 2nd Plaintiff on 12th June, 2012 by the 2nd Defendant. If that be the case the question to be asked and answered is whether the Plaintiffs have pleaded sufficient particulars with credible evidence in support to hold the Defendants liable in negligence with respect to the surgery (Caesarean Section) under reference.

Before I answer this question I find the case of **Ojo Vs Gharoro (Supra)** ably cited by the learned counsel to the Defendants as a useful guide in the determination of whether or not the Defendants are liable in medical negligence.

In that case Tobi, JSC (of blessed memory) pointedly held as follows:

> **"Let me end this Judgment with the words of that great Judge, Lord Denning, in his Sub-chapter titled Doctors at Law" in Part Six on Negligence in his book "The Discipline of Law", pages 237, 242 and 243.**
>
> > **"A medical man, for instance, should not be found guilty unless he has does something of which his colleagues would say: 'He really did make a mistake there. He ought not to have done it'... but in a hospital when a person who is ill goes in for a treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong, and indeed bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community, if it were so. It would mean a doctor examining a patient, or a**

surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger for an action in negligence... You must not therefore find him negligent simply because something happens to go wrong... You should only find him guilty of negligence when he falls short of standard of a reasonable skillful medical man, in short, when he is deserving of censure."

With the benefit of the above judicial authority I now return to the question of whether the Defendants were liable in negligent in this case. To answer this question I must state without any iota of equivocation that I agree with the learned counsel to the Defendants that the burden is on the Plaintiffs to furnish the Court with sufficient particulars of the alleged negligence complained of. To discharge this burden the Plaintiffs at paragraph 13 of their statement of claim itemized what they termed as "negligent act." I shall reproduce same, albeit at the risk of repetition to facilitate ease of understanding, to wit:

> 13- That during the four day which I was on admission, I noticed and observed the following negligent acts:-

(a) Despite paying for the most expensive room the nurses insisted that a relation must stay with me each night because according to them, they are always starched at night. I had to call my friend Tosin Osanyinbola who came to join me on the 13th of June, 2012.

(b) During the entire four days apart from the soap and tissue provided initially no other soap or tissue was supplied to me.

(c) Despite the inscription boldly written in the hospital that breakfast is included in the N18,000:00 per night, no breakfast was served on me during the entire four days despite repeated demands.

(d) On the day of delivery, my husband had to personally carry his baby in his hand for over 2 minutes while the nurse on duty called Chioma went looking for baby cot before they could find one.

(e) Treble menthol was recommended for me but I was not told.

(f) I had to literarily beg to have the room given me cleaned.

Looking at the particulars of "negligent acts" captured above it is my view that there is nothing to suggest that the surgery carried out on the 2nd Plaintiff was done in violation of any established medical standard or regulation. As a matter of fact there is nothing whatsoever in the Plaintiffs' pleading to suggest that the surgery was performed in an unprofessional manner. On the contrary the PW1 (2nd Plaintiff) corroborated the testimony of the surgeon (DW3) that it was a successful exercise. If that be the case it would appear to me that this case was contrived in gross misapprehension of the law. For the avoidance of doubt what the Plaintiffs itemized as "negligent acts" to support their case founded on medical negligence may be summed up as follows:

(a) Failure of the 1st Defendant to attach any of its personnel to stay with the 2nd Plaintiff after the surgery carried out on her.

(b) Failure to supply additional soap and tissue papers after the initial supply.

(c) Failure to deliver breakfast to the 2nd Plaintiff as part of the fringe benefits of the N18,000 room per night she occupied.

(d) 20 minutes delay in making baby cot available after the 2nd Plaintiff was successfully delivered of her baby.

(e) Failure to notify the 2nd Plaintiff that treble menthol was recommended for her.

(f) Failure to clean the 2nd Plaintiff's room until she literarily begged for the cleaning to be done.

Parties have joined issues on the above allegations but I do not see the need to delve into the merit of those allegations. The reason is simple. Even if the above allegations are proved it cannot ground liability in medical negligence. For an act to qualify as medical negligence it must have a touch of violation of some professional Rules or established medical ethics. The Plaintiffs in such circumstance must show what the Defendants did what ought not to have been done or that which ought to be done was left undone thereby rendering the conduct of the Defendant unprofessional.

The learned counsel to the Plaintiffs at pages 3 to 4 of his address referred to Rule 29. 4 of the Code of Medical Ethics in Nigeria 2008 and itemized types of acts or omission that would amount to medical negligence. They are:

1. Failure to attend promptly to a patient requiring urgent attention when the practitioner was in a position to do so;

2. Manifest incompetence in the assessment of patient.

3. Making an incorrect diagnosis particularly when the clinical features were so glaring that no reasonable skillful practitioner could have failed to notice them;
4. Failure to advise, or proffering wrong advice to a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result in serious side effects like deformity or loss of organ, or function;
5. Failure to obtain the informed consent of the patient before proceeding on any surgical procedure or course of treatment when such consent was necessary;
6. Making a mistake in treatment e.g. amputation of the wrong limb, carelessness that results in the termination of pregnancy, prescribing the wrong drug, or dosage in error for a correctly diagnosed ailment, etc;
7. Failure to refer, or transfer a patient in good time, when such a referral or transfer was necessary;
8. Failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient;
9. Failure to see a patient as often as his medical condition warrants or to make appropriate comments in the case notes

of the practitioner's observations and prescribed treatment during such visit. It also includes failure to communicate with the patient or with his relatives as may be necessary with regards to any developments, progress or prognosis in the patient's condition."

However, the pleadings filed on behalf of the Plaintiffs had not shown that the case of the Plaintiffs can be positioned within the context of any of the itemized Rules set out above. Ironically the learned counsel to the Plaintiffs who devoted about 8 of his 18-page final address to reproduce an article on medical negligence did not state anywhere in the said address that the Defendants were in violation of any of the acts or omission he so copiously spelt out in his address as constituting professional negligence.

Flowing from the foregoing, I must agree as I should with the learned counsel to the Defendants that the case of the Plaintiffs is conclusively speculative and bereft of any merit. The declaration sought by the Plaintiffs to the effect that Defendants are liable in negligence cannot be granted. It is trite law as set out elsewhere above that declaratory relief may only be granted on cogent evidence. I have no such evidence before me. The relief is therefore refused and dismissed.

The claim for damages, cost of action and interest element tied to the principal claim must of necessity crumble as they are incidental in nature. They are therefore refused and dismissed as incidental claims do not have a life of their own.

COUNTER CLAIM

Whether the counter claim of the defendants is proved to warrant the grant of the reliefs sought by the counter claimants.

By paragraph 36 of the further amended statement of defence the Defendants submitted a further amended counter claim as set down below:

(a) Damages against 1st Defendant for fraudulent misrepresentation in the sum of N25,000,000. (Twenty Five Million Naira) only.

(b) Legal costs of this defence and claim respectively in the sum of N5,000,000. (Five Million Naira) only against the Defendants.

Parties both in their pleadings and evidence led in support have joined issues on the above claims. The counter claimants being the

plaintiffs in respect of their counter claim must lead credible evidence to support their claim.

In **JERIC (NIG) LTD V. UBN PLC (2000) 15 NWLR (PT.691) 447**, Kalgo, JSC stated the law thus:

> **"It is trite law, that for all intents and purposes, a counter-claim is a separate, independent and distinct action and the counter-claimant, like all other plaintiffs in an action, must prove his claim against the person counter-claimed against before obtaining judgment on the counter-claim."**

See also:

1. **OGBONNA V. A.-G., IMO STATE (1992) 1 NWLR (PT.220) 647; AND**
2. **DABUP V. KOLA (1993) 9 NWLR (PT.317) 254.**

On the first head of claim for damages of N25,000,000.00 (Twenty Five Million Naira) for fraudulent misrepresentation, it is clear that the claim is based on exhibit A.I.6. See paragraph 32 of the pleadings in support of the counter claim. The exhibit titled "Complaint about poor services rendered" itemized the particulars of negligence set out in the Plaintiff's pleadings which I have summed up elsewhere above as follows:

(a) Failure of the 1st Defendant to attach any of its personnel to stay with the 2nd Plaintiff after the surgery carried out on her.

(b) Failure to supply additional soap and tissue papers after the initial supply.

(c) Failure to deliver breakfast to the 2nd Plaintiff as part of the fringe benefits of the N18,000 room per night she occupied.

(d) 20 minutes delay in making baby cot available after the 2nd Plaintiff was successfully delivered of her baby.

(e) Failure to notify the 2nd Plaintiff that treble menthol was recommended for her.

(f) Failure to clean the 2nd Plaintiff's room until she literarily begged for the cleaning to be done.

Looking at the above complaints of the Plaintiff against the Defendants the question that must be asked and answered is whether the complaints are fraudulent in nature.

To start with I need to say in line with the decision of the apex Court in **AFEGBAI V. ATTORNEY-GENERAL, EDO STATE (2001) 7 SC (PT. 11) 1** per Iguh, JSC that:

> **"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. "**

I have considered the allegation of fraudulent misrepresentation as the basis of the damages sought in this counter claim and I form the view that the claim is misconceived as it is conclusively off target.

A claim founded on fraudulent misrepresentation presupposes that there was a transaction between parties and the Plaintiff (Counter

Claimants in this case) acted or altered their position based on a representation made by the Defendant which turned out to be fraudulent. I have no evidence before me to suggest that there was any transaction between parties wherein the Defendants to the counter claim made any representation that turned out to be fraudulent or that as a result of such misrepresentation altered their position to their disadvatange. The only transaction between parties was that of medical services and at no point was it shown that the Defendants to counter claim made any representation to the counter claimants. If the letter of complainant (exhibit A.I.6) is what the counter claimant termed as a representation, then they missed the gist of the legal effect of the exhibit.

A complaint by a dissatisfied patient such as the one before the Court cannot by any stretch of imagination be styled as a fraudulent misrepresentation. Let me also add with considerable haste that may the day never come when a dissatisfied patient would be sore afraid to complain to the very hospital where he was admitted for medical attention for fear of being slammed with an action for fraudulent misrepresentation. That would not augur well for the society.

In this case the 1st Plaintiff on the face of exhibit A.I.6 after itemizing what he believed to constitute acts of negligence against the Defendants concluded as follows:

> **"My wife went through unnecessary and unimaginable pains, all because of the negligence or deliberate act of Zankli Hospital. I feel defrauded for paying for a service and not getting the required service. The health and wellbeing of my wife was unnecessarily compromised.**
> **Please let me hear your response on this matter before the end of August, 2012."**

Although I have held that the allegation of professional negligence was not proved but that cannot form the basis of an action for fraudulent misrepresentation against the defendants to counter claim. As a matter of fact there was no representation in the first place let alone a fraudulent misrepresentation. An aggrieved patient who honestly lodged a direct complaint to the hospital where he felt he was not properly attended to cannot be held liable for fraudulent misrepresentation. The nature of fraudulent misrepresentation and the legal effect was well stated in **AFEGBAI V. ATTORNEY-GENERAL, EDO STATE (supra)** where His Lordship Iguh, JSC further held as follows:

> **"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 recission 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."**

I cannot fathom how the counter claimants may successfully prosecute a case of fraudulent misrepresentation taken into account the peculiar facts and circumstances of this case where there was no representation on the part of the defendants to counter claim let alone a fraudulent one!

Let me also add for the records that the 1st counter claimant undeniably recognized the right of the defendants to counter claim to lodge complaints where dissatisfied with its services. This position is well fortified by the response of the 1st counter claimant to the letter of complaints (exhibit A.I.6) which formed the basis of

this claim. The said reply is exhibit A.I. 7. The last two paragraph of the exhibit A.I.7 read as follows:

> **"We appreciate all the points raised in your letter and we will address them accordingly. We are determined to give the best to our patients and in this regards, we believe that a patient is always right. We want to plead with you that, next time, you please call the attention of the Matron or the undersigned to any complaint for immediate attention to get the problem solved to your satisfaction.**
>
> **<u>Thank you very much for making your grievances known to us as our esteemed customer.</u> We assured you of best services." (Underlining supplied for emphasis)**

From the foregoing it is clear that upon the receipt of the letter of complaint (exhibit A.I.6) the counter claimants warmly and gratefully responded to it. It is therefore unacceptable for them to now turn around and ascribe fraudulent character to the same letter. No Court or Tribunal will entertain such flimsy and misleading attitude on the part of any service provider.

If the counter claimants are of the view that the letter of complaint (exhibit A.I.6) is defamatory in nature this is not the proper

approach in ventilating such perceived grievances. In essence the claim for damages is not proved.

It also goes without saying that the claim for solicitor's fees which is incidental to the principal claim cannot be sustained having failed in the principal claim for damages. It is trite law that cost is consequential and having failed to establish any wrong doing against the Plaintiff, the claim for cost is also refused and dismissed for want of merit.

In all the case of the plaintiffs is not proved. Ditto for that of the counter claimants! The main claim and the counter claim are accordingly refused and dismissed for want of merit.

SIGNED
HON.JUSTICE H. B. YUSUF
(PRESIDING JUDGE)
26/06/2019

Appearance

Sam Ameh Esq……... For the Plaintiff

Olakunle Yusuff Esq…… For the Defendants/Counter Claimants

SIGNED
HON.JUSTICE H. B. YUSUF
(PRESIDING JUDGE)
26/06/2019