IN THE HIGH COURT OF JUSTICE

OF EDO STATE OF NIGERIA

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A. AKHIHIERO

ON THURSDAY

THE 19TH DAY OF FEBRUARY, 2026.

BETWEEN: ***SUIT NO. B/762/2022***

1. MR COURAGE OSAYANDE
2. MRS. MERCY OSAYANDE ***----------CLAIMANTS***

AND

1.THE CHIEF MEDICAL DIRECTOR,
UNIVERSITY OF BENIN TEACHING HOSPITAL - ***DEFENDANTS***
2. DR. OSAGIE

JUDGMENT

The Claimants commenced this suit vide a Writ of Summons filed on the 27th of July, 2022, whereof the Claimants claimed against the Defendants jointly and severally as follows:

1. ***A Declaration that the acts of the Defendants' purported circumcision on the Claimants' child is abnormal;***
2. ***An Order of this Honorable Court directing the Defendants to pay the sum of N20,000,000.00 (Twenty Million Naira) only being damages to the Claimants; and***

3. ***An Order of this Honourable Court directing the Defendants to write an apology letter to the Claimants for the abnormal circumcision done to their child, baby Osayande Courage Osaosemwen.***

Upon being served with a copy of the Claimants' originating processes, the Defendants filed a Memorandum of Conditional Appearance and a Joint Statement of Defence, both dated and filed on 23rd September, 2022.

Subsequently, the Claimants filed a Reply and the 1st Claimant's additional Statement on Oath through a motion dated and filed on 15th February 2024.

In proof of their case, the Claimants testified for themselves, called one Dr. Ehi Eighemhenrio of Irrua Specialist Teaching Hospital as CW1 and tendered the following documents as exhibits:

i. Exhibit "A", A letter from G.A. Eghobamien & Co to the Chief Medical Director UBTH dated 18/06/2022;
ii. Exhibit "B" A reply letter from UBTH dated 5th July 2022;
iii. Exhibit "C", An enrolment of order in suit No.B/762/2022 dated 30th November 2023;
iv. Exhibit "D", Clearance form dated 16/1/2024;
v. Exhibit "E", Medical Report from Irrua Specialist Teaching Hospital;
vi. Exhibit "F", Boarding receipts;
vii. Exhibit "G1" Photographs;
viii. Exhibit "G2", Certificate of Compliance;
ix. Exhibits "H1" and "H2", Photographs; and
x. Exhibit "H3", Certificate of Compliance.

The Claimants' case as can be gleaned from the evidence which they adduced at the trial is that they are the parents of one Courage Osaosemwen Osayande who was born on the 10th day of December 2021, at the University of Benin Teaching Hospital (U.B.T.H.).

They alleged that three weeks after their son's birth, he was circumcised at the UBTH by some medical personnel under the supervision of Dr. Osagie, the 2nd Defendant.

According to them, sometime about the month of March, 2022, they observed the abnormal appearance of their son's penis, which was circumcised some few months back.

They alleged that by the month of May 2022, they took their son back to the U.B.T.H and met some Nurses in the Pediatrics Department/Ward who were very hostile to them and asserted that their child's penis was normal.

They said that they were not satisfied so they went to the Doctor, under whose care it was done, led by one Pediatric Consultant, Doctor Osagie, the 2nd Defendant in this suit.

They alleged that after the 2nd Defendant examined their son and gave them two options: (i) That their son will have to undergo what they called a **REDO** (that means to do the circumcision all over again); or (ii) That their son can wait for two to three years to allow the gland to grow out of the fore skin. They said that they chose the first option.

They said that they tried to interrogate the 2nd Defendant about what went wrong with the circumcision, but he was not forthcoming.

They said that they made several efforts to get the authorities of the UBTH to quickly schedule their son for the REDO but the hospital failed to give them an early date so they consulted a lawyer.

The Claimant alleged that their Lawyer requested for the Photographs of the child's penis, and the mother of the child decided to snap the child's penis with her Phone. At the hearing, they tendered two photographs of their baby's penis, one at erection, and the other at sleeping stage. They were admitted in evidence as Exhibits "H" and "H1".

The Claimants alleged that the authorities of the U.B.T.H in their letter dated the 10th of June 2022, maintained that there was no negligence in the circumcision and they tendered the letter as Exhibit "B".

They alleged that on the 30th of November 2023, upon application of their counsel, the Court granted an order for the REDO of their baby's circumcision at Irrua Specialist Teaching Hospital.

They said that on the 16th of January, 2024, the REDO operation was successfully performed at the Irrua Specialist Hospital and his penis is now looking normal. They took photographs of their baby and same were admitted as Exhibits “G1” and “G2”.

They alleged that the first circumcision performed at the UBTH was wrongly done and was incomplete hence the need for the second circumcision at the Irrua Specialist Hospital to correct the wrong circumcision at UBTH. They called a medical doctor from Irrua Specialist Hospital to lead medical evidence in this regard.

They maintain that the error by the UBTH staff was due to their negligence. Furthermore, when they approached the UBTH to perform the REDO they delayed in their response and insisted that they must make another payment for the REDO.

In defence of this suit, the Defendants called the 2nd Defendant Dr. Osasumwen Theophilus Osagie, who testified for the Defendants and closed their case.

In their evidence, the Defendants stated that the circumcision done on the Claimants' son at the University of Benin Teaching Hospital by a Doctor under the Unit head of the 2nd Defendant was proper.

They stated that whatever was observed by the Claimants in respect to their child's penis was personal to their knowledge and that the Claimants' son's penis is normal.

They said that the 2nd Defendant did not lead the team that performed the circumcision on the Claimants' child. They maintained that the 2nd Defendant was not the one that examined the Claimant's child at the point that recommended a REDO or the option to wait for two to three years for the gland to outgrow the foreskin. They said that the overgrown skin on the baby's penis was not occasioned by the circumcision.

They asserted that the circumcision performed on the Claimants’ child followed the normal and usual procedure for the circumcision of male children and that no injury was done to the Claimants' child's penis during the circumcision.

They said that they were diligent in handling the observation raised about the outgrowing skin on the Claimants' child's penis.

Upon the conclusion of evidence in this suit, the learned counsel for both parties filed their written addresses which they adopted as their final arguments in support of their respective cases.

In his final written address, the learned counsel for the Defendants, ***Dr. S.O. Daudu*** formulated four issues for determination as follows:

1) ***Whether this Honourable Court can hear and determine the Claimants case based on an Undated and Unsigned Writ of Summons?***
2) ***Having regards to the facts and circumstances of this case, whether the parties herein are the proper parties to this case?***
3) ***Whether Exhibits "F, "G1, "G2, "H1, "H2, "H3 and the evidence led in support have any evidential value, the certificate of compliance with Section 84 of the Evidence Act, being undated? And***
4) ***Assuming but not conceding that the parties herein are proper parties to this case, whether the Claimants have established a case of medical negligence against the Defendants.***

ISSUE 1:

Whether this Honourable Court can hear and determine the Claimants Case based on an unsigned and undated Writ of Summons?

Arguing this first issue, learned counsel posited that a careful perusal of a certified true copy of the Claimants Writ of Summons reveals that it was undated and unsigned by the counsel who issued the Writ. He submitted that an unsigned and undated writ of summons is fundamentally flawed, defective and considered as a "worthless piece of paper" because it lacks the signature of the counsel that issued it, which is a mandatory requirement to activate the court's jurisdiction to entertain the Claimants' case.

He said that this defect is not a mere irregularity, but a fundamental jurisdictional issue that should warrant the case to be struck out or dismissed. He referred the Court to the following decisions on the point: ***Buhari v. Adebayo (2014) 10 NWLR at 560, Omega Bank Nig Plc v. OBC Ltd (2005) All FWLR (pt249) 1964***. In the case of ***Nweke v. Okafor (2007) 10 NWLR (PT 1045) 521*** and ***Braithwaite v. Skye Bank Plc (2013) 5 NWLR (pt1346) 1 at 15.***

He urged the Court to dismiss the suit with costs for being incompetent.

ISSUE 2:

Having regards to the facts and circumstances of this case, whether the parties herein are the proper parties to this suit?

Counsel submitted that given the facts and circumstances of this case, the parties before the Court are not the proper parties to this suit.

He said that the suit is a suit on behalf of a minor and the parents neither sued in a representative capacity nor joined the University of Benin Teaching Hospital as necessary parties.

He submitted that since the suit is at the instance of the Claimants' son, Baby Osayande, the Claimants ought to have instituted this action in a representative capacity and not in their personal capacities as the suit is presently constituted.

He maintained that since baby Osayande Courage is an infant who lacks the legal capacity to maintain an action in his name having not attained the age of majority, the Claimants should have filed the suit in a representative capacity.

He submitted that it is settled law is that to file an action on behalf of an infant in Nigeria, the parent or legal guardian must act as "Next of Friend" or Guardian ad litem. He said that if a parent, as it is in this case initiate a lawsuit for a minor in a non-representative capacity and this capacity is challenged and found to be improper, the lawsuit would be struck out for want of legal capacity.

He submitted that since this suit was not filed in a representative capacity, the entire action is invalid, and the suit should be dismissed.

Furthermore, learned counsel contended that the Defendants herein are not the proper parties to have been sued in this case. He said that the Defendants are agents of a disclosed principal, that is the University of Benin Teaching Hospital.

He said that the failure of the Claimants to join University of Benin Teaching Hospital is fatal to this case and he relied on the Case of ***U.O.O. Nigeria Plc v. Mr Maribe Okafor & 13 ors (2016) SC, 713*** where the Court held that the question of proper parties is an important issue which affects the Jurisdiction of the court since it goes to the foundation of the suit in limine.

He submitted that where the proper parties are not before the court, then the court lacks the jurisdiction to entertain the suit and he relied on the case of ***UTTH v. Onoyivwe (1991) 1 NWLR (pt166) SC.***

He referred to Paragraph 3 of the Claimants Statement of Claim where the Claimants averred that the 1st and 2nd Defendants are the Employees/ Agents of the University of Benin Teaching Hospital. He said that the Claimants, having disclosed that the 1st and 2nd Defendants are employees/agents of the University of Benin Teaching Hospital, they cannot successfully maintain this action against the Defendants without joining their principal (University of Benin Teaching Hospital).

He submitted that once the principal's identity is revealed, they become the proper party to be sued and he relied on the English case of ***Gadd v. Houghton (1876)1 EXD, 357.***

He urged the Court to hold that neither the Claimants nor the Defendants are proper parties to this suit and therefore liable to be dismissed in its entirety.

ISSUE 3:

Whether Exhibit "F, "G1, "G2, "H1, "H2, "H3 and the evidence led in support have any evidential value, the certificates of compliance with Section 84 of the Evidence Act being undated?

Counsel submitted that Exhibit "F" tendered as a boarding receipt is irrelevant to the Claimants suit and as such should be disregarded as lacking any evidential value. He said that Exhibit "F" is not prima facie evidence of a trip in connection with the subject matter before this Honourable court and has no connection or bearing with the case before this Honourable Court. He urged the Court to disregard it as lacking evidential value.

Furthermore, he submitted that Exhibits G1, G2, H1, H2, H3 and the evidence led in support are without any evidential value and as such, they should not be relied upon by this Honourable Court. He said that it is trite law that an undated document is a worthless piece of paper with no evidential value and he relied on the following decisions: ***Garuba v. Kwara Investment Co. Ltd & 2 ors (2005) 5 NWLR (Pt. 917)160, Gbadamosi & Anor v. Biala &ors (2014) LPELP 24389 (CA) and Brewtech Nigeria Ltd v. Akinnawo &Anor (2016) LPELR (CA).***

He urged the Court to expunge all the aforesaid exhibits from this proceedings for being irrelevant and undated.

ISSUE 4:

Assuming but not conceding that the parties herein are the proper parties to this suit, whether the Claimants have established a case of medical negligence against the Defendants?

Arguing this issue, learned counsel submitted that the Claimants have not established any case of medical negligence against the Defendants to be entitled to the beliefs sought in Paragraph 39 (a), (b) and (c) of their Statement of Claim.

He said that the Claimant's case is hinged on post-circumcision observation and not on medical negligence. He said that post-circumcision observation is not a known ground for medical negligence. He said that the post-circumcision observation after five months, has no nexus with the procedure adopted during the circumcision of Baby Courage Osaosemwen Osayande.

He posited that the Claimants did not plead any form of medical negligence against the Defendants. He referred to paragraphs 1 - 39 of the Claimants Statement of Claim and maintained that they did not plead medical negligence against the Defendants and as such this Honourable Court cannot determine the Claimants' reliefs premised on an alleged abnormal circumcision.

He said that the Court cannot speculate about abnormal circumcision because there was no physical comparison undertaken by the Court between Master Courage Osaosemwen Osayande and any other male child of his age and size to determine which circumcision is normal or abnormal. He said that the pictorial evidence which

did not satisfy the requirements of the law cannot also be relied upon by the court to conclude that the circumcision was indeed abnormal.

Counsel said that the fact that a REDO was carried out by Irrua Specialist Teaching Hospital is not a conclusive proof of medical negligence. He maintained that it is a post circumcision observation and not a case of medical negligence.

He said that to prove that the circumcision carried out by the University of Benin Teaching Hospital amounts to medical negligent, the Claimants must establish that injuries were inflicted on Master Courage Osaosemwen Osayande from which damages could flow from. He said that the Claimants must also prove the particulars of the abnormalities complained of. He said that none of this was pleaded nor established at the hearing of this suit.

He said that evidence was led to show that there was nothing medically wrong with Master Courage Osaosemwen Osayande at the time of his medical examination at Irrua Specialist Teaching Hospital. That, what was observed was a minimal redundant prepuce that has no negative effect on him. He said that there was no allegation of difficulty in urinating, or pains caused by the circumcision.

Furthermore, he submitted that the Claimants did not establish that the therapeutic procedure adopted by the Defendants Hospital is not the usual and standard procedure or practice during circumcision.

Counsel posited that all the medical opinions sought by the Claimants were at consensus that the circumcision complained of was normal in most chubby children, such as the Claimants' son.

On what must be proved to establish negligence against a medical practitioner, learned counsel referred to the decisions in the cases of ***Alex Otti v Excel-c Medical Centre Limited &Dr. Ejike Oeji (2019) 16 NWLR, 274 at 281*** and ***Ojo v Gharoro (2006) 10 NWLR (pt987) 173.***

He relied on the English cases of ***Donoghue v Stevenson (1932) AC 562; Roe v. Ministry of Health, (1984), QB at 56*** and ***White House v. Jordan, (1981), All E.R 650.*** He also relied on the Nigerian case of ***Plateau State Health Services Management Board & anor v Inspector Philip Fitoka Goshwe (2012) LLJR SC.***

On the whole, he urged the Court to dismiss the Claimants case in its entirety and hold that the Defendants are not liable for medical negligence.

In his final written address, the learned counsel for the Claimant, ***E.E. Ativie Esq.*** formulated three issues for determination as follows:

1) ***Whether this Honourable Court can hear and determine the Claimants' case based on an undated and unsigned Writ of Summons?***
2) ***Whether the parties herein are the proper parties to this case? And***
3) ***Whether the Claimants have established a case of Medical Negligence against the Defendants on the balance of probabilities.***

Thereafter, the learned counsel argued the three issues seriatim.

ISSUE 1:

Whether this Honourable Court can hear and determine the Claimants' case based on an undated and unsigned Writ of Summons?

Arguing this first issue, the learned counsel posited that the Claimants' counsel signed the Court's copy of the Writ of Summons.

However, he submitted that assuming but without conceding that the Writ of Summons was not signed by the issuing counsel, that it is a mere technical objection aimed at derailing the course of justice. He submitted that justice is rooted in substance, not in technicalities, and that once a party has taken steps in the proceedings, filed a Defence, cross-examined witnesses, and submitted a Final Address, any alleged irregularity in the originating process becomes a mere irregularity curable by participation. He relied on the cases of ***A.G. of Anambra State (1991)6 NWLR (Pt. 200)659*** and ***Amaechi v. INEC (2008)5 NWLR (Pt. 1080)227.***

He said that the Defendants have actively participated in every stage of the proceedings, and having joined issues, cross-examined witnesses and filed their own address, the Defendants cannot approbate and reprobate by seeking to nullify the same process they participated in. He submitted that participation in the suit has already cured any alleged irregularity.

He emphasized that it is trite law that not every defect in form goes to the root of an action. He maintained that failure to sign or date a Writ, if any, is a mere irregularity, which does not vitiate the proceedings where no miscarriage of justice has been occasioned and he relied on the cases of: ***Dike v. Okorie (1990)4 NWLR (Pt. 161) 418; Adeniji v. Onagoruwa (1992)2 NWLR (Pt. 223)350*** and ***Bello v. INEC (2010)8 NWLR (Pt. 1196)342.***

He also relied on the provisions of ***Order 5, Rules 1 & 2 of the Edo State High Court (Civil Procedure) Rules, 2018*** on waiver for non-compliance.

ISSUE 2:

Whether the parties herein are the proper parties to this case?

He submitted that as guardians to the injured minor, the Claimants possess the requites *locus standi* to sue on behalf of their child, he said that they also suffered financial and emotional harm. He cited the case of ***Ojo v. Gharoro (2006)10 NWLR (Pt. 987)173 (SC)*** where the Supreme Court held that substance must prevail over technicalities. He also cited the case of ***Amadi v. NNPC (2000)10 NWLR (Pt. 674)76 (SC)*** to show that a person with sufficient interest is a proper part to sue. He maintained that the Claimants are proper and necessary parties in this suit.

Responding to the submission that the Claimants did not sue in a representative capacity, counsel submitted the omission to expressly describe them as "next friends" is at worst a curable irregularity which does not go to the root of the case to render the proceedings incompetent. He maintained that substance must prevail over form and he relied on the cases of ***Okechkwu v. Etukokwu (1998)8 NWLR (Pt. 563)618*** and ***Okwueze v. Ejiofor (2009)15 NWLR (Pt. 1164)277.*** He also relied on the provisions of ***Order 5, Rule 1and 2 of the Edo State High Court (Civil Procedure) Rules, 2018,*** and submitted that the Court has the power to amend any misdescription or irregularity in the title of the proceedings to bring it in conformity with justice.

ISSUE 3:

He submitted that the Claimants have discharged the burden placed upon them by ***Sections 131-134 of the Evidence Act 2011***, through oral evidence, documentary exhibits, and expert testimony.

He said that the elements of duty of care, breach, and medical negligence have been clearly established and that once these are proved, the burden shifts to the Defendants to rebut the presumption of negligence, which he claimed the Defendants have failed to do. See ***Okafor v. Agho (1991)3 NWLR (Pt. 593)35*** and ***Nigerian Army v. Yakubu (2013) LPELR-20088 (CA).***

Counsel contended that the circumcision in question was performed within UBTH premises, under its authority, and in the presence of its Medical Personnel. He said that the identity of the individual who performed the procedure has been deliberately concealed by UBTH. He said that the principle of respondent superior and vicarious liability makes the hospital liable for all acts of its staff or agents, whether named or unnamed, provided such acts occurred in the course of their official duties. He relied on the case of ***Ifeanyichukwu (Osondu) Co. Ltd v. Soleh Boneh (Nig.) Ltd (2000)5 NWLR (Pt. 656) 322.***

He said that it is unsettling that the person identified as the **Surgeon Dr. Osagie,** denied performing the procedure, yet came to testify as a witness for the Defendants.

He said that this contradiction casts serious doubt on the credibility of the Defendants' case. Furthermore, he said that the hospital's refusal or failure to produce the actual surgeon constitutes suppression of vital evidence, which the law frowns upon and he cited the case of ***A.G. Federation v. Abubaka (2007)10 NWLR (Pt. 1041)1*** and ***Section 167 (d) Evidence Act, 2011).***

He pointed out that the testimony of Dr. Osagie, the 2nd Defendant therefore, amounts to hearsay and conjecture.

He said on their part, the Claimants led consistent, truthful testimonies and supported it with Medical Report and photographic evidence. He said that the evidence of their expert witness from Irrua Specialist Teaching Hospital, who examined and corrected the defect, stands unchallenged.

He pointed out that despite the Defendants' heavy reliance on the term "Therapeutic Process" yet in this case, the identity of the doctor who carried out the circumcision remains unknown.

On the assertion that the child's condition was a post-circumcision occurrence in "chubby children", counsel submitted that this argument is both medically baseless and factually deceptive. He said that the REDO surgeon's expert testimony, which stands unchallenged, conclusive established that what was done at UBTH was an incomplete circumcision, not a normal post-circumcision occurrence.

He submitted that the Defendants owed a clear duty of care, and the expert evidence of the **REDO** surgeon confirmed that the initial circumcision was incomplete. He maintained that the Defendants' offer of a "**REDO"** procedure after Sixty-Seven Days constitutes an admission of fault. He said that the same operation at Irrua Specialist Teaching Hospital was completed within three days. He said that such delay falls short of professional diligence expected of a teaching hospital.

Finally, he urged the Court to grant all the reliefs sought, in the interest of Justice and the protection of the child's dignity.

Upon a careful review of the evidence adduced, I am of the view that the two Issues for Determination in this suit are as follows:

1) ***Whether this suit is competent; and***
2) ***Whether the Claimants are entitled to the reliefs claimed in this suit.***

I will proceed to resolve the two issues seriatim.

ISSUE 1:

Whether this suit is competent?

It is settled law that the issue of competence of an action and jurisdiction of the Court to entertain the same are threshold in nature and once an issue of jurisdiction is raised it has to be resolved first before anything else. See ***A-G RIVERS vs. A-G AKWA IBOM (2011) LPELR (633) 1 at 123, OKWUOSA vs. GOMWALK (2017) LPELR***

(41736) 1 at 9 and OKOYE vs. NIGERIA CONSTRUCTION AND FURNITURE CO. (1991) 7 SCNJ (PT 2) 365 at 388.

It is only upon the resolution of the question of jurisdictional competence that the Court can proceed, where it holds that it has jurisdiction, to exercise the jurisdiction to hear the matter. The Court can only make orders where the suit is competent. See the following cases: ***APP vs. OBASEKI (2021) LPELR (58374) 1 at 37, ELUGBE vs. OMOKHAFE (2004) 18 NWLR (PT 905) 319 and ADEKOYE vs. NIGERIAN SECURITY PRINTING AND MINTING CO LTD (2009) LPELR (106) 1 at 10.***

In this suit the Defendants are challenging the competence of the suit on three main grounds:

I. ***On the ground that the Writ of Summons is undated and not signed by the learned counsel for the Claimants;***
II. ***On the ground that the proper parties are not before the Court;***
III. ***On the ground that the suit ought to have been instituted by the Claimants' son suing through the Claimants as Next Friend or Guardian ad litem.***

I will address these heads of objection seriatim.

On the objection that the Writ of Summons is undated and not signed by the learned counsel for the Claimants, upon a careful examination of the Writ of Summons in the Court's file, I observed that same was dated 2nd of August, 2022 and signed by the Registrar and E.E. Ativie Esq. who is the learned counsel for the Claimants. By the provisions of ***Section 122(1) & (2) (m) of the Evidence Act, 2011***, every Court is empowered to take judicial notice of the processes before it or the course of its proceedings. Thus, a court can look at the processes in its file. See the cases of ***Agbareh V Mimra (2008) 2 NWLR (Pt.1071) 378; Nwora V Nwabueze (2011) 17 NWLR (Pt.1277) 699*** and ***UDE V. OTTIH (2017) LPELR-44615(CA) (PP. 25-29 PARAS. A).***

From the fore going the objection on the non-signing of the Writ of Summons is overruled.

Next is on the issue of proper parties not being before the Court. In his address, the learned counsel for the Defendants seriously contended that the University of Benin Teaching Hospital (UBTH) is a necessary party to this suit and failure to join them

renders the suit incompetent. He posited that the two named Defendants in this suit are agents of the UBTH which is their disclosed principal. He submitted that the agent of a disclosed principal cannot be sued without the disclosed principal.

It is not in doubt that the two Defendants are the agents of the UBTH which is their disclosed principal. Generally, an agent acting on behalf of a known and disclosed principal incurs no liability. This is because the act of the agent is the act of the principal. The common law rule is expressed in the Latin maxim thus: ***"Qui facit per alium facit per se"*** which means: "he who acts through another is deemed to act himself." See the case of ***Essang v, Aureol Plastic Ltd (2002) 17 NWLR (Pt. 795) P. 155 @ 181***; ***Progress Ltd v. NEL Corporation (1989) 3 NWLR (Pt. 107) p. 58 and Leventis Tech. Ltd v. Petrojesicca Ent. Ltd (1992) 2 NWLR (Pt. 234) P. 459.***

However, there are exceptions to the general rule of law enunciated above. For instance, in the case of ***FBN Plc v. Excel Plastic Industry Ltd (2003) 13 NWLR at 837, P. 412 @ 459,*** the Court of Appeal, enunciated that the principle that an agent of a disclosed principal is not liable is not inflexible. There is no agency in the case of a wrongdoer. The relationship of agent and principal has no application in the case of a wrong doer. Thus, where an agent on a frolic of his own does an act not authorized by his principal, he would be personally liable. See ***Rickett v. B.W.A Ltd (1960) SCNLR 227; West African shipping Agency (Nig) Ltd. V. Kalla (1978) 3 SC 21.***

The fact that a person is an agent and is known to be so does not of itself necessarily prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. It is not the law that if a principal is liable, his agent cannot be. The true principle of the law is that a person is liable for his engagement (as per his torts) even though he is acting for another unless he can show that by the law of agency he is to be held to have expressly or impliedly excluded his personal liability.

The law is trite that an agent of a disclosed principal may also be liable just as the principal, having due regard to the facts of the case, the circumstances of the event leading to the cause of action, and most importantly, the nature of the acts done by the agent; this proposition of the principles of law has been espoused in the case of ***Asafa Foods Factory v. Alraine (Nig) Ltd (2002) 12 NWLR (Pt. 781) P. 353 @ 773***

where the Court held that the fact that a person is an agent and is known to be so does not therefore of itself necessarily prevent his incurring personal liability.

From the foregoing, I hold that the failure to join the UBTH as a co-defendant in this suit is not fatal to the suit.

Next is on the objection that this suit ought to have been instituted by the Claimants' son suing through the Claimants as Next Friend or Guardian ad litem.

From the pleadings of the parties in this suit, together with the evidence adduced at the trial, it is evident that the Claimants instituted this suit to seek redress against the Defendants for their alleged negligence in the circumcision of their son. It is an indisputable fact that their son is an infant who lacks the capacity to sue by himself.

The provision of ***Order 13 Rule 11 of the Edo State High Court (Civil Procedure) Rules 2018*** provides: - ***"Persons under legal disability may sue by their guardians or defend by guardians appointed for that purpose."***

The Claimants' son admittedly an infant and therefore non sui juris, this suit ought to have been instituted by him suing through his parents (the Claimants) as his guardians.

In this suit, the Claimants instituted the suit without reflecting the fact that they were suing on behalf of their son as his guardians. They did not title the suit as that of the infant but rather made it appear as if they are the actual Claimants seeking redress against the Defendants. In the case of ***Sofolahan & Anor. v. Fowler (2002) 14 NWLR (PT 788) 644*** the Claimants titled the suit as: ***'Dr. O.O. Sofolahan (Suing as a parent and the next friend Olabosipo Sofolahan) and Mr. Seyi Sule (Suing as a parent and the next friend of Tunde Sule, Tife Sule and Toyosi Sule).'*** There, the apex Court held that the way the suit was titled was not just a mere irregularity but a fundamental defect; that in such an action the infants are the real plaintiffs, and their names ought to be at the forefront and not the other way round. In the said suit, ***His Lordship Katsina-Alu, J.S.C, at p. 684 – 689*** exposited thus:

"Finally, as to the title of this action supposedly brought on behalf of the infants, I have no doubt that it was wrong the way it plaintiff/appellants here were stated in the writ of summons and other processes. The names of each of the two parents were stated and were indicated as 'Suing as a parent and the next friend of ...' This

is against the procedure. It also shows that each of those parents was at the same time pursuing his or her cause since they claim to sue also as parents. The right procedure is that the name of the infant should take the forefront while that of his next friend should follow, labeling each correctly as infant and next friend respectively. The proper form is as per Form 2 in Atkins Court Forms. 2nd edition, Vol. 21(3), 1997 issue, page 402. The law is clear that the next friend in a suit is an officer of the Court appointed and allowed to pursue the interests of the minor he represents; he is not regarded as a party to the proceedings: see..... He is not to appear in the proceedings in a way as pursuing his own cause: see ..... All these authorities were considered by the Court below. The default committed in the title of the suit is no technicality. It is fundamental."

In this present suit the situation is even worse than that of ***Sofolahan & Anor. v. Fowler (2002) supra.*** Here, the Claimants brazenly presented themselves as the victims of the alleged negligence. The name of their son who is the true victim does not appear at all as a Claimant. The Claimants did not state that they are suing on his behalf. A careful examination of the reliefs show that the Claimants are seeking the reliefs for themselves and not for their infant son. For example, in reliefs (2) and (3), they are seeking the following reliefs:

"2. An Order of this Honorable Court directing the Defendants to pay the sum of N20,000,000.00 (Twenty Million Naira) only being damages to the Claimants; and

3. An Order of this Honourable Court directing the Defendants to write an apology letter to the Claimants for the abnormal circumcision done to their child, baby Osayande Courage Osaosemwen."

Clearly, the Claimants were under a misconception that the suit was at their instance, the name of their son is conspicuously absent as a party in this suit. In ***Sofolahan's case*** it was adjudged that the defect in describing the parties was a fundamental defect which rendered the suit incompetent and it was struck out by the Apex Court on this ground. That is also the fate of this case. A fundamental defect cannot be waived: See the case of ***Administrator/Executors of the Estate of General Sani Abacha (deceased) v. Eke-Spiff (2009) 7 NWLR (PT 1139) 97 @ 138 A-B (S.C.).*** In the event this suit is incompetent and ought to be struck out. Issue 1 is therefore resolved in favour of the Defendants.

However, to be on the safe side, I will consider the merits of the suit and resolve Issue 2.

ISSUE 2:

Whether the Claimants are entitled to the reliefs claimed in this suit.

It is settled law that in civil cases, the burden of proof is on the party who asserts a fact to prove the fact. The burden of proof of negligence is upon the Claimant who alleged negligence. This is because negligence is a question of fact, not law, and it is the duty of the party who asserts it to prove same. By virtue of ***Section 135(1) of the Evidence Act, 2011*** whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See: ***NB PLC V. AUDU (2009) LPELR-8863(CA) (PP. 27 PARAS. C); ABUBAKAR & ANOR V. JOSEPH & ANOR (2008) LPELR-48(SC) (PP. 31-32 PARAS. F).***

From the totality of the evidence adduced at this trial, the substratum of this suit is on the tort of medical negligence.

In the case of ***OKWEJIMINOR V GBAKEJI & ANOR (2008) LPELR-2537(SC),*** the apex Court while expositing on negligence referred to the old English case of ***Blyth v. Birmingham Waterworks Co. (1856) 11 EXCH. 781 at 784***, where the English Court defined negligence as: ***"… the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

Again, in the old English case of ***Lochgelly Iron and Coal Co. v. M'mullan (1934) A.C. 1 at P. 25***, Lord Wright exposited as follows: ***"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed."*** This latter definition spells out for us the three basic components of the tort of negligence, to wit: ***[a] duty of care [b] breach of the duty of care; and [c] damage caused by the breach.***

In every case of negligence, the burden is on the Claimant to plead and lead evidence to prove these three basic components of the tort of negligence.

Once a Claimant fails to establish by credible evidence all or any of these three key ingredients of the tort of negligence, such a claim must fail. See ***B. J. Ngilari V. Mothercat Ltd (1999) 13 NWLR (Pt. 636) 626. See also Oyidiobu V. Okechukwu (1972) 5 SC 191; Orhue V. NEPA (1998) 7 NWLR (Pt. 557) 187***.

In the instant case it is expedient to examine the evidence adduced by the Claimants to determine whether they established these three salient ingredients.

First on the issue of duty of care. The apex Court has given a guide on how to determine the duty of care in the case of ***I.M.N.L. v. NWACHUKWU (2004) LPELR-15269(SC)*** thus: ***"The recent decision of the House of Lords has summed up the law admirably in Ann v. Merton London Borough Council (1978) AC 728 where Lord Wilberforce stated as follows:- "Through the trilogy in this house; Donoghue v. Stevenson (1932) AC 562, Hedley Byrne & Co. Ltd. v. Heller Partners Ltd. (1964) AC 465 and Dorset Yacht Co. Ltd. v. Home Office (1970) AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. First one has to ask as between the alleged wrong doer and the person who has suffered damage if there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises ..." Per MUSDAPHER, J.S.C See also AGBONMAGBE V CFAO (1996) 1 ALL NLR 140 at 145; MAKWE V NWUKOR (2001) 7 NSCQR 435 and FIRST BANK OF NIGERIA PLC V ASSOCIATED MOTORS CO. LTD (1998) 10 NWLR (Pt.750) 441 at 464.***

Going by the proximity test as suggested by the apex Court, I must determine whether the relationship between the parties herein is such that the Defendants could reasonably have contemplated that any act of carelessness on their part may likely cause damage to the Claimants' son.

The generally accepted principle of negligence is that a person owes a duty of care to his "neighbour" who would be directly affected by his act or omission. The word "care" means serious attention or heed. Under the law of negligence or of obligation, it means the conduct demanded of a person in a given situation. Typically, this

involves a person, giving attention both to possible dangers, mistakes and pitfalls and ways of minimizing those risks. See: ***Nigerian Ports Plc Vs Beecham Pharmaceutical PTE Ltd (2013) 3 NWLR (Pt 1333) 454, Kabo Air Ltd Vs Mohammed (2015) 5 NWLR (Pt 1451) 38.***

There is a legal duty owed to take reasonable care to avoid acts or omissions which can be reasonably foreseen as likely to injure a neighbour. Who then in law can be described as the neighbour of a Claimant in a claim for negligence? In the Holy Bible, the parable of the Good Samaritan aptly demonstrates who is a neighbour! However, in legal parlance, as far back as 1932, in England, ***Lord Atkin*** had provided an answer as to who in law can be described as a neighbour to a Claimant in a claim for negligence. In the classical case of ***Donoghue V. Stevenson (1932) AC @ P. 580*** he stated thus: ***"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*** See also the English case of ***Anns V. Merton London Borough Council (1977) 2 All ER 492 @ 498;*** and the Nigerian case of ***Abusomwan V. Mercantile Bank of Nig Ltd (1987) 3 NWLR (Pt. 60) 180 @ 198***, where the court held that the doctrine of proximity is the foundation of duty of care in the tort of negligence.

The question to ask on the "neighbour" and "duty of care" principle is whether between the Defendants and the Claimants' son, there is sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may likely cause damage to the latter? See the cases of ***Abusomwan Vs Mercantile Bank of Nigeria (supra) and Anya Vs Imo Concorde Hotels Ltd (2002) 18 NWLR (Pt 799) 377.***

In this suit, I have already held that the Defendants are the agents of the UBTH although the 2nd Defendant tried to extricate himself from the circumcision procedure, I am satisfied from the totality of the evidence that he was the leader of the team that performed the circumcision at the UBTH.

Upon the above authorities, I hold that the Defendants owed the Claimants' son a duty of care under the particular circumstances of this case.

Having determined the existence of duty of care between the Defendants and the Claimants son, the next relevant consideration is whether there was a breach of the duty of care. Although negligence is a question of fact, each case must be decided in the light of its own facts and circumstances; the established principle of law is that the degree of care which the duty involves must be proportional to the degree of risk involved if the duty of care should not be fulfilled. See the cases of ***North Western Utilities Ltd V. London Guarantee & Accident Co. Ltd (1936) AC 108;*** and ***U.T.B (Nig.) V. Ozoemena (2007) 3 NWLR (Pt. 1022) 488.*** The test is that of a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs.

The established legal position is that the onus of proving negligence is on the Claimant who alleges same; but where the Claimant has adduced evidence of how the alleged incident occurred, the onus shifts to the Defendant to show that he is not at fault. See the cases of ***IFEANYI IBEKENDO VS. IKE (1993) 4 SCNJ 50;*** and ***UBA PLC VS. ACHORU (1990) 9 - 10 SC 115.***

In law, negligence is not established by mere proof of damages, without proof of a duty of care and a breach of that duty of care. There must be evidence of the act or omission of the Defendant that caused the damages complained of by the Claimant, failing which a claim in damages for negligence is not made out and ought to fail and be dismissed. The tort of negligence is not even all about duty of care and damages.

To succeed therefore, the critical element of breach of duty of care must be proved. See the case of ***MTN V. MUNDRA VENTURES (NIG) LTD (2016) LPELR-40343(CA) (PP. 58 PARAS. A).***

Furthermore, to succeed in an action for negligence, the law is settled as to the standard of pleading and proof required. As a matter of law, therefore, a Claimant in a suit for negligence must plead the particulars of negligence alleged and give cogent and credible evidence at the trial in line with the detailed pleadings. It is not sufficient pleading for a Claimant to make a blanket allegation of negligence against the Defendant without giving detailed particulars of the items of negligence relied

on as well as the duty of care the Defendant owes him. See: ***DIAMOND BANK LTD. V. PARTNERSHIP INVESTMENT CO. LTD. & ANOR (2009) 18 NWLR (PT. 1172) 67; UNIVERSAL TRUST BANK OF NIGERIA V. FIDELIA OZOEMENA (2007) 3 NWLR (PT. 1022) 448; 1-2 SC (PT. 11) 211 KOYA V. UNITED BANK FOR AFRICA LTD (1997) LPELR 1711; (1997) 1 NWLR (PT. 481) 251; MTN NIGERIA COMMUNICATIONS LTD V. MR. GANIYU SADIKU (2013) LPELR 27705 CA.***

In the instant case, upon a careful examination of the Claimants' pleadings together with the evidence adduced at the trial, I observed that the Claimants did not give sufficient particulars of the alleged acts of negligence on the part of the Defendants. The fact that the circumcision was incomplete or that they had to complete the exercise at Irrua Specialist Hospital is not proof of medical negligence. It is common practice for a sick patient to receive treatment from more than one hospital before he is completely healed. The mere fact that the first treatment did not cure him is not proof that the medical personnel there were negligent. There is a medical aphorism that ***doctors treat, but God heals***!

Furthermore, on the issue of medical negligence, it is rudimentary law that in order to find a medical professional guilty of negligence, the situation has to be such that what he did is what professional colleagues would say that he really made a mistake and that he ought not to have made it. Put differently, the action would be such that falls short of the standard of a reasonably skilful medical professional: See the case of ***OTTI V. EXCEL-C MEDICAL CENTRE LTD & ANOR (2019) LPELR-47699(CA) (PP. 52-53 PARAS. F).***

In his Book: ***"The Discipline of Law", in the sub-chapter titled "Doctors of Law in Part six on Negligence in pages 237, 242 and 243: Lord Denning Master of the Rolls of blessed memory*** exposited thus:

"A medical man, for instance, should not be found guilty of negligence unless he has done 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 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 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 that a doctor examining a patient, or a surgeon's operation 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 for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body. 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 the standard of a reasonably skillful medical man, in short, when he is deserving of censure."

Incidentally, in the instant case under cross-examination, the Claimants' expert witness, a medical doctor who testified as CW 1 stated thus:

"I observed that there was a complication arising from the earlier circumcision performed at the UBTH. The complication was a complication following the circumcision; it is the commonest complication following circumcision. The complication is that part of the foreskin was left after the circumcision. It can be seen even by the best surgeons; I have had several. It was not an emergency situation. When a case of a patient is not that of an emergency the booking for any therapeutic procedure or treatment is guided by their working diaries based on schedules.

The situation was not an emergency because some people live without being circumcised."

In view of the above evidence from the Claimants' expert witness, I hold that there was no breach of any duty of care by the Defendants.

In view of the failure to prove the second salient requirement of breach of duty of care, there will be no need to consider the third requirement of whether there were any damages or injury arising from the breach of the duty of care.

In the event, I hold that since the Claimants have failed to prove negligence, they are not entitled to the reliefs which they seek. Issue two is therefore resolved in favour of the Defendants.

Having resolved the two issues in favour of the Defendants, the Claimants suit is dismissed with N100,000,00 (One Hundred Thousand Naira) costs in favour of the Defendants.

P.A. AKHIHIERO
JUDGE
19/02/26

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