REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 2145 OF 2007

GRACE WAIRIMU KURARU……..…..1ST PLAINTIFF

JOHN MERERU SANAYET…….2ND PLAINTIFF

ELIJAH TANANGO SANAYET……..…….....3RD PLAINTIFF

SAKAIWA OLE KURARU…….....4TH PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF SISTERS

OF MERCY T/A THE MATTER HOSPITAL ……..……DEFENDANT

AND IN THE CROSS ACTION

THE REGISTERED TRUSTEES OF SISTERS

OF MERCY T/A THE MATTER HOSPITAL ……PLAINTIFF

VERSUS

GRACE WAIRIMU KURARU…….....1ST DEFENDANT

JOHN MERERU SANAYET…….…..…..…2ND DEFENDANT

ELIJAH TANANGO SANAYET……..…..…..3RD DEFENDANT

SAKAIWA OLE KURARU……..…..4TH DEFENDANT

CHRISTINE SANAYET……..5TH DEFENDANT

J U D G M E N T

The administrator of the estate of the late Gideon Sanayet Kurraru, by their plaint dated 21st September 2007 seek judgment against the Defendant for:

1. ***A declaration that the Defendant is not entitled to the benefits of Kshs.1,602,111.86 demanded***

as medical bills and to declare the said sum not payable.

2. ***A declaration that the agreement for sale of all that land known as LR Okajiado/Ntashata/996 ("the property) between the Plaintiff and the Defendant is null and void.***

3. ***Consequent upon granting of prayer (b) a mandatory injunction against the Defendant to deliver up title deed as LR okajiado /Ntashata/996 to the 4th Plaintiff.***

4. ***Damages and special damages as particularized herein together with interest thereon from the date of award thereof.***

5. ***A temporary injunction restraining the Defendant its servant, agents and or employees or otherwise howsoever from advertising, selling ,alienating by public auction or in any manner howsoever dealing with and/or interfering with the 4th Plaintiff's ownership, possession and enjoyment of LR.Kajiado/Ntashata/996 pending hearing and determination of this suit.***

6. ***Cost and incidental including costs of attendance of professional witnesses and interest thereon at court rates.***

According to the Plaintiffs the death of Gideon Sanayet Kuraru occurred due to the professional negligence of the Defendants. The particulars of negligence were particularized in the plaint.

The Defendant filed an amended statement of defence and counterclaim dated 7th November 2007 in which it denies all allegations in regard to the course of treatment and management of the deceased and the chronology of events set out in the plaint. The Defendant claims Ksh.1,602,111.86 being the outstanding debt for medical service rendered by the Defendant to the deceased from the Plaintiffs together with interest at 24% per annum.

In a rejoinder, the Plaintiffs denied all the allegations pleaded in the defence, and stated that the 5th Defendant, Christine Naisoi Sanayet did not enter into any agreement with the Defendant to sell the property as a way of settling the bill. The Plaintiffs argued that even if there was an agreement, the agreement only required the settlement of deposit of Ksh 15,000. They stated that they did not contemplate the escalation of the cost of treatment as a result of negligent treatment of the deceased by the Defendant who negligently mis-diagnosed and mismanaged of the deceased's initial complaints leading to the deceased lapsing into a coma on the second day of admission and eventual death after 32 days. The Plaintiffs contend that any amounts so incurred in relation to such treatment comprised in the medical bill were unnecessary and superfluous.

The 5th Defendant on her part denied the existence of any contract and stated that the alleged collateral agreement/purported agreement of sale or the purported assignment of rights over LR Okajiado /Ntashata/996 and the alleged personal guarantee with payments of interest provisions, were obtained by duress, undue influence and /or coercion as particularized in the plaint.

In evidence, 4th Plaintiff**, Sakaiwa ole Kuraru, PW1** stated that the deceased went to the Defendant to seek treatment. He told the court that he gave his land title as a security for the body of the deceased to be released. He testified that he appended his thumb print on documents whose content he did not know because he does not know how to read or write. In his understanding he did not sell the land to anyone.

In cross examination by Ms. Kiptoo for the Defendant, **PW1** reiterated that he gave his title as a security, and according to him the thumb print was to allow the title to be accepted as security for the deceased body to be released. He told the court that the family was unable to raise the money required to settle the hospital Bill. He stated that Paul Kuraro; Christine Kuraru and John Kuraru were present when he issued the title document.

The second witness for the Plaintiff was **Paul Memusi** who testified as **PW2,** he stated that the deceased complained of pain when he was at home and went to the Defendant where he was admitted. When he

visited the deceased the latter was in ICU unconscious. He returned again to the hospital to see him on Friday and there was no improvement. When he went to see him again on 27th October 2009 he found the deceased in the general ward still unconscious. He told the court that he inquired from the Defendant staff why the deceased was moved to the ward while he looked sick, and he was told that he had shown some improvement. In cross examination, he stated that the deceased was a wealthy man and most of his cattle's and goats died of diseases and drought when he died.

The third witness was the 5th Defendant in cross action, **Christine Naisoi Sanayet** who testified as **PW3.** From her evidence, she said she was the daughter of the deceased. That the deceased called her complaining that he was ill. He proposed to be taken to hospital the next day which was on Monday. She accompanied the deceased to hospital in his car. On arrival at hospital he was admitted with hypertension. The next day the deceased called to inform her that he reacted to a certain drug which was administered on him. She went to visit him and found that the deceased had a swelling on the neck, mouth and tongue. The nurse on duty told her that they were waiting for Dr. Ngugi who arrived at 9 am and prescribed medicine for him, assuring them that he will be fine. Dr. Ngugi told them that the deceased reacted to the drug he was given and he explained that the nurse who gave the injection did not manage it effectively since he could not get the deceased's vein. He stated that he was recalled and this time round he managed to inject the deceased properly. Dr. Ngugi told them that the swelling or reaction would go away after sometimes. Christine came back to the room where the deceased was at around 11 a.m. and she found that his tongue was still swollen and he could not talk.

He was taken to ICU and PW1 was allowed to see him at 2:30 p.m. when he found that the deceased could not breath properly. A doctor who came to see him asked PW1 to sign a consent form allowing the Dr to cut the diseased throat to fix a breather. She signed but a breather was placed through the mouth. He started breathing with easy although he was breathing through the nose and the Defendant explained that the bleeding was caused by the tubes.

On 29th September 2004 PW3 visited the diseased and he was still in comma. She told the court that more tests were done and the hospital even called South Africa to inquire about the patient's reaction to the drug. She complained that they were denied access to the Plaintiff from the 5th day after admission. According to PW3 the hospital denied them access because of huge hospital bill; he testified that they demanded a deposit or they were told to take him to Kenyatta National Hospital.

On 27th October 2004 the deceased was moved to the general ward while still in a comma. She inquired from the sister in charge why he was moved to the general ward before improvement. She was told that he had improved. On 29th October 2004 the deceased passed on at about 11 am. According to PW3 the hospital did not properly attend to the deceased. She demanded for a postmortem which was conducted by Dr. Mutuma for the Defendant and Dr. Njue from Kenyatta Hospital for the family and Dr. Nkuraru was an observer/witness for the family.

The hospital demanded that the bill be cleared before the body was released. The Plaintiff did not pay because they did not believe the amount which the hospital claims was proper and due. PW1 agreed to be the guarantor and he issued a title deed as a security which was accepted by the hospital and the body was released for burial.

In cross examination by Ms Kiptoo, PW3 told the court that she signed a consent form to allow the doctors fix the breather tube. He testified that his father had not recovered enough to be moved from the ICU. She further stated that she visited the deceased every day at the general ward and there was no doctor or even nurse attending to him. She maintains that by the time the deceased was taken to the ward he was already cabbage and they were just telling them that he is fine.

The forth Plaintiff witness was **Grace Wairimu**, who testified as **PW4**. Her evidence was that she was the wife to the deceased. She told the court that the diseased was a veterinary officer and later retired to become a farmer who kept cows and goats and also did maize and wheat farming. She stated that the deceased supported his own family and also the extended family. She accompanied the disease to hospital

but left after he was admitted. He called her the following morning and told her to come very early in the morning failure to which she will find him dead. She arrived at 7 a.m. and found the diseased with a swollen head and he could not speak. He told her that it was an injection which made her swell. She testified that the family suffered after the deceased passed on .The members of the family started quarreling and one of her brother in-law took over the family. She further testified that she could not support the family because of her diabetic condition. In cross examination, she told the court that her children were jobless and relied on their father's support. She stated her late husband supported the family through farming.

Dr. Mose Njue testified as **PW5.** In his testimony he said that he works for the Government of Kenya as the head of Forensic and diagnostic services as well as the Chief Government Pathologist. He was in private practice as a consultant and a lecturer at the University. He stated that PW3 approached him to do an autopsy at the hospital. He said that the circumstance and cause of death were unclear and in his opinion it was unnatural death because the diseased died while undergoing treatment. He conducted the autopsy together with Dr Godfrey Mutuma and Dr. Kuraru as an observer for the family. The body was identified by PW3 and also present was Joseph and William. A police officer, John Maina was also present.

According to him, the autopsy was to determine four (4) things. One whether the deceased cause of death was the initial disease which was treated, Two whether there was omission or negligence by people who treated him, Three whether the medical team committed a misadventure and forth, whether there was failure of anesthetic medicine. He said that he relied on the relatives for the deceased history, the police and also the government pathologist. He testified that he perused the hospital file, clinical and managements notes.

He testified that he examined the body, and found that the deceased had gout, swellings on the hands, and the feet. There was evidence of medicine intervention as could be seen by punctures on skin. Internally, the lungs were heavy, one weighed 650gm (left) and 750 gm (right) while the normal size is 500gm. There was also evidence of respiratory distress syndrome caused by prolonged tutatron. In the kidneys there was evidence of inflammation and a collection of fats. In the heart one vessel showed contraction because of the fats but there was no evidence of cardiac malefunction. After the examination he formed an opinion that the cause of death was lack of oxygen to the brain caused by the swellings which were caused by the drug known as Tritace. He stated that Dr. Mutuma's finding were the same as his findings. He prepared a report which he submitted as **exhibit 2**. The police also filled a postmortem form which was also produced as **exhibit 3.**

In cross examination by Ms. Kiptoo, PW5 told the court that the family approached him 12 days after the death. He said that the body parts were still intact and well preserved. On the cause of death he stated that brain hypoxia is a reduction of oxygen in the brain which causes comma and convulsion. The brain swells and many functions of the brain are compromised. He confirmed that there was no blood clot in any part of the brain.

Moyez Bhanji, testified as **PW6**. He told the court that he was an actuary, an associate of the society of actuaries based in USA. He stated that his practices are in the area of life insurance, pension and investments and also risk management. He told the court that he was instructed by the family members to prepare an actuarial report on financial loss arising from early death of the deceased. He prepared a report which he produced in court as **exhibit 8**. In his report he made the following conclusions in regard to the deceased's wealth. He assessed the Deceased's wealth as follows: -

1. Livestock farming – Kshs.21,100,000/-
2. Wheat farming- Kshs. 3,300,000/-
3. Maize farming – Kshs. 1,900,000/-

Total - Kshs.26,272,250

He explained that the financial loss is arrived at by taking current net income, X annuity factors which

incorporate failure of life expectancy mortality and possible investment income. He stated that the Deceased was 65 years at his death, not very healthy and therefore his mortality was adjusted to 72 years due to his poor health. He found his annuity factors to be 4.834 which are multiplied by the estimated net income, to arrive at Kshs.127,000,000/-. He also stated that the deceased died on 29/10/2004 therefore considered the interest at 15% P.A his net income having been 350,000,000. In cross examination, he stated that the information used to prepare the report was given to him by an advocate. He did not visit the deceased farm to a certain the information given to him by the Plaintiffs advocate.

For the defence case, **Dr Paul Ngugi** testified as **DW1.** He told the court that he was a physician in internal medicine. He was in full time private practice after retiring from government. He testified that he was summoned by the casualty medical officer on 27th September 2004 informing him that they had admitted an elderly man who was complaining of chest tightness and had severe trophicious gout with an infected wound on the leg. The officer also informed him that the patient had hypertension and that he had extensive gout swelling on his body.

At about 3 or 4 pm he instructed the nurses on phone that they do an ECGI chest x-ray and laboratory tests. He visited the deceased at 7:10 pm. He conducted a review on the diseased and according to DW1 he did not reveal any other history of ailment other than gout.He said the deceased was overweight and obese with a deformed finger. He also had ulcers on the right ankle. His blood pressure was quite high i.e. 185/111. The chest examination showed an enlarged heart. Uric acid was high at 0.57 when the normal is at 0.45. creation level which test the kidneys functions showed a high at 252 when the normal should be 106. Sodium levels were low at 133. Blood urea Nitrogen was also high at 16.8 while normal should be 8. The calcium levels were also low at 1.83 when normal should be above 2. From the result he made a diagnosis of hypertensive heart disease due to severe hypertension. He also concluded that the chronic renal failure was due to high uric acid in the kidney which caused kidney failure that led to hypertension. He also concluded that the septic wound on the right ankle would have been caused by raptured gout tophi. He started the treatment based on the diagnosis.

He prescribed tritace 5mg which according to him is a good drug for heart deceased. He also gave Lasix for blood pressure and diuretic .He also prescribed clexane to prevent pulmonary blood clot and zinacef an antibiotic to treat the septic wound on his ankle and ordered oxygen therapy.

On the following day, the 28/9/2004 the diseased tongue was swollen, and a medical officer who attended to him made a diagnosis of angio-neurotic oedema which was a reaction of the tritace drug. The medical officer ordered that the diseased be given Hydrocortison 200mg and piriton for the allergic reaction. When Dr. Ngugi visited the deceased at about 8 am on the same day, and there was no much change, he stopped the use of tritace and prescribed a repeat of hydrocortisone. The diseased became breathless at around 11 am. The ICU doctors who reviewed him recommended that he be transferred to ICU. At the ICU, the doctors were unable to successfully intubate the diseased and they sought advice from ENT specialist Dr. Irungu Ndirangu and Dr. Adongo an Anaesthiologist. The process was finally successful although the deceased developed convulsions. It was not clear why the diseased suffered convulsions but relevant treatment was given by Dr James Joy, a neurologist.

From 28/9/2004 to 29/10/2004 the deceased was in ICU. There were minimal improvements and the Doctors considered removing the tube. He was then moved to the general ward. Dr. Ngugi testified that the deceased was awake but could not vocalize, but could try to open his eyes from time to time. His fever was high and according to Dr. Ngugi, there was not much improvement. On 28/10/2004 in the evening his condition changed. His blood pressure began to crush. An ICU doctor was called and tried to resuscitate him without any success. The deceased died at about 11.10 am. Dr. Ngugi testified further that the Defendant acted on the information given by the patient although the medical tests guided them as to what medication to give. His condition was properly attended to and what was humanly possible to do was done by the doctors to save his life.

In cross examination of Dr. Ngugi by Mr. Nyaribo, Dr. Ngugi told the court that he was a consultant at the Defendant hospital and was contacted when the deceased arrived at the hospital. Dr. Ngugi arrived at 7.10 pm and added triatace drug to lassics, clexane and zinassef. He said that he withdrew the triatace

after the diseased developed a swollen tongue and neck. He stated that the swollen tongue may or may not cause respiratory restriction. Intubation became necessary when the swelling because bigger and prevented breathing. He further testified that as on 6/10/2004 the doctors were aware that the deceased suffered brain damage but that the same was never communicated to the family. He further testified that the brain damage occurred within three to four hours of the patient's admission in ICU.

Mrs. Caroline Mwaura an advocate testified as **DW2,** her evidence is that she worked for the Defendant as a legal officer for 8 years. She told the court that her responsibilities in the Defendant among others, were to secure debts where a patient has been discharged with unpaid bill. She explained that her duty was to discuss with the family members on the options available for the payment of the bill. If the patient is unable to pay the bill then she would discuss with the family members other alternatives to secure the debt and one way is by giving a security such as a land title deed, log book or pay slip from an employed person.He testified that in this case the medical bill was Kshs.2,200,000/- at the time of discharge and the family was able to raise Ksh.615,000/- leaving a balance of Kshs.1,602,111.86. She had a meeting with four family members who offered a title deed as security for the debt. She told the court that she explained to members the consequences of securing a debt using a title, that is to charge the property as banks do and another option is conditional sale of the property. She stated that the family of the deceased opted for a conditional sale with prior knowledge of the family. She further explained to them that there was need of having at least two guarantors and one of them should have valid documents of title. She explained that the guarantors would be held liable in the event that the family is not able to raise money. In this case Christine Naisoi, PW3 signed the documents as the guarantor , and Saikaiwa Ole Kuraru, PW1 who issued his title deed and executed three documents. The third document was a sale agreement and she explained to him that the Agreement was drawn for the conditional of sale as agreed. The sale agreement was produced as **exhibit 6.**

She stated that the property was not disposed off and the Hospital claim still stands as long as the plaintiff continue failing to pay the amount due. She said she served a demand letter giving 14 days after which the Defendant Hospital would take legal proceedings. In cross examination from Mr. Nyaribo, the witness said the body would be kept by the Defendants until a payment in settlement or an agreement thereto were signed between the Hospital and the Deceased's family. She had suggested to the family to bring two guarantors together with an adequate title deed, which they did and the body was accordingly released.

I have carefully perused and considered the pleadings, the evidence and the written submissions filed by both sides. The Plaintiffs' first and foremost claim as against the Defendants is that the Deceased's death was a direct consequence of the Defendants' negligence. They claimed that the Defendant Hospital from the moment it admitted the Deceased, owed the Deceased a duty of care to handle him professionally throughout the deceased's stay in the hospital. This raised the following issues:-

i. Did the Defendants in the circumstances of this case owe the Deceased a duty of care and if so what was that duty.
ii. Was the said duty of care breached by the Defendant and if so how?
iii. Is the Defendant liable for compensation over the death of the deceased in general and/or special damages.
iv. If (iii) above is answered in the positive, then what is the quantum.
v. Was the title document offered as security for the Defendant's professional, medical drugs and other Hospital fees and costs, secured through duress, undue influence and/or coercion of the 4th Plaintiff by the Defendant.
vi. If the answer to (vi) above is negative, how should the document be applied by the Defendant?

Before I examine the facts of this case in particular, I will first examine the law on negligence on the medical field:-

`The duty of care in the practice of medicine owed by a medical practitioner to a patient is explained in the **Halsbury's Laws of England, Vol. 26 at page 17** as follows:-

"…. a person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted, owes him certain duties, namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, and duty of care in his administration of that treatment."

Speaking generally of men and women who use special skill or competence Lord Mc Nair stated thus in the case of **Bolam vs Friern Hospital Management Committee [1957]2 ALL ER 118**:- at page 121 –

"Where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art..."

The **Halsbury's Laws of England** herein above cited clearly state that a Practitioner must bring to his/her task a reasonable degree of skill and knowledge, and must exercises a reasonable degree of care – which is neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case. That a person is not liable in negligence because somebody else of greater skill and knowledge would have prescribed a different way. Finally, that a person is not guilty of negligence if he acted in accordance with a practice accepted as proper by a reputable body of medical men skilled in that particular art, although a body of adverse opinion existed among medical men.

How then do the plaintiffs' allegations against the above legal background apply?

There is no dispute on most of the facts in this case. The Deceased was admitted in the late afternoon of 27th September, 2004. He complained of chest tightness, chest pain and headache. He was in the company of wife (PW 4) and his daughter (PW3). The fact that he drove himself to the hospital in these matters is neither here nor there. The fact that is important is that he went to that hospital because he was feeling unwell and wanted a doctor to examine him and medically treat him upon finding need or reason to do so.

The Deceased from the clinical records was examined by a Casualty Medical Officer and Nurses at about 4 pm. They informed Dr. Ngugi, the Consultant physician of the Defendant hospital on cardiac related matters of the case and received his instructions on phone. Dr. Ngugi ordered for an electro cardiograph (ECG), chest x-ray procedures and laboratory tests to be done immediately. The tests revealed that the Deceased had enlarged heart with an irregular beat, very high blood pressure and severe gout trophicous. He also had an open infected wound on the right leg. Dr. Ngugi ordered that he be given oxygen supply, drugs called Adalat for severe hypertension, zinacef, an antibiotic, aspirin to thin blood and panadol to reduce pain in the joints.

Dr. Ngugi arrived about three (3) hours later at 7.10 p.m. and personally examined the deceased. He himself diagnosed a hypertensive heart disease, a kidney disease (nephrolithiasis), chronic renal failure and severe gout. The doctor on medicine earlier prescribed, added three drugs – tritace to alleviate high blood pressure and reduce renal condition, and lassix to eliminate fluid in the heart and remove uric acid crystals from the kidneys and clexane to reduce and/or prevent pulmonary blood clots. The doctor left the patient to rest under the close supervision and observance of the Casualty Medical Officer and Nurses.

Upto that point, it is clear that the Deceased was a very sick person at the time of his admission although relatives who took him there deny the fact. The Plaintiffs' argument that he was that well when he was admitted to the Defendant's hospital would therefore not hold water. What will determine issues accordingly is how the patient was handled or treated after he came into the Defendant's hands as such patient.

I have carefully perused the evidence from the doctors. I have also examined the treatment record of the

deceased. There are no record minutes overnight until 6.20 a.m. the next morning on 28.9.2004 when the record shows that the Doctor and Nurses discovered that the patient's tongue and the lips and the surrounding parts, were swollen.

The first sad observation I must make is that the original time record for the minute that follows appears altered. The quoted time thereafter, is done by thicker ink and added figures to the original single "hour" figures first recorded. What to me appears to have been first recorded is "-- am" before "am" was supraimposed with 6.20 to look "6 a.m". I cannot at this stage say what the recorder intended to hide or portray. That particular alteration, if any, however, was not an issue.

What is only important and should be noted at this juncture, however, is the fact that there is no recording of when the swelling of the tongue started during the night until its discovery at 6.20 am. Dr. Ngugi who came later at 8 a.m., diagonised a condition called angioneurotic Oedema, generally understood as a known allergic reaction to the drug tritace, two hours or more, before he saw it. He ordered and administered intravenously a drug hydrocortisone and piriton six-hourly to reverse the swollen tongue and mouth. He ordered the immediate stop of tritace which he believed had been used only once the evening before. The Doctor instructed on record that if the patients breathing became more belaboured, he should be notified to review the situation. This clearly arose from the fact that the swelling of the tongue appeared to be growing.

The record further shows that at about 11.00 a.m. the tongue had further swollen and Doctor Ngugi who was contacted who instructed a transfer of the patient to High Dependency Unit apart from administration of hydrocortisone and piriton in continuation of the effort to reduce the swelling. He also ordered suctioning of liquid from the mouth as clearly the same could not be possibly swallowed due to the increased swelling. It is not clear if admission of patient to High Dependency Unit was really carried out. This is because from the clinical notes at 11.35 a.m. (although it was clearly cancelled from 12.35 p.m.) an ICU Doctor is the one who appears to have ordered for an HDU bed which he only booked for at 11.45 a.m. (or was it 12.45 p.m.). The record reads however, that the patient was transferred to ICU at 12.11 p.m. (or 12.20 p.m.).

On admission to ICU, the patient is shown to have been in a sick looking poor condition; was on oxygen through a face mask, and was dysponoepic. The notes show that intubation had been attempted many times by out-patient doctors and nurses without success. Several necessary drugs to help the patient are shown as given and several relevant procedures are shown as carried out.

The Doctor's review shows that the whole of the afternoon from 1 p.m. to about 4 p.m., the patient was under heavy observation from several Doctors including Dr. Irungu, Ngugi, Nguchu, Adongo, Nyakundi, Hellen, Joy and Rerean – all specialists in different areas of medicine.

Two facts, however, stand out of others. The first one is that although the patient clearly developed difficulty in breathing and swallowing liquids from as early as 6.20 a.m. in the morning of the second day of admission being the 28th September, 2004, and continued growing worse for lack of intubation which became immediately necessary, intubation was never fixed until after 4 p.m. of the day. There is clear evidence that the procedure was left to the Causality Medical Officers and Nurses who not being expert thereof, never ceased trying, but reported failure constantly. Surprisingly, even the Arterial Line always required in such difficult and critical cases for the transmission of drugs into the failing body system of a patient like the deceased, was not fixed for more than three hours from the time it was ordered by the Doctors to be in place. That comes out clearly from the clinical notes.

As things stood, Dr. Adongo anaethetician fixed the intubation tube only at 4.5 p.m. while Arterial line was fixed at 5.15 p.m. It is noted that although the intibutation had finally succeeded, the tube had been fixed so deep that it caused injury to the throat flesh and caused continuous bleeding which demanded continuous suctioning which as well, complicated the breathing process of the patient.

Be that what it may, the conclusion this court reaches from these facts on record is that what led the patient's condition to deteriorate was the lack of oxygen into the patient's body caused by the constantly

growing swelling tongue and mouth. Alleviation of the lack of oxygen could have been achieved by intubation which was ordered in place early in the morning of 28th September, 2004, by Dr. Ngugi but which was not achieved until a period of over ten hours (6.20 a.m. – 10.15 p.m.) Medical evidence on record supports the view that brain damage which occurred in this case, barely requires five (5) minutes to take place.

The question that arises in this case is whether the Defendant's Doctors and Nurses, if they applied reasonable care, could have avoided this patient lacking oxygen as he did. The Defendant's submitted that they did all a reasonable person, professing the medical skill they practice, could have done. The Plaintiff's averred that the Defendant's Doctors and nurses could have prevented the situation by putting intubation in place the moment they saw the deceased's breathing was becoming soon after 6.20 a.m. when they noticed the mouth and tongue swelling, or soon after the breathing became difficult after 11 a.m. same morning. I however, carefully have examined the situation. I come to conclusion that the Defendant indeed did not pay much attention to the issue in the real and proper sense. The fact that the Casualty Doctors and Nurses constantly tried but failed to successfully intubate the patient, called for a deliberate decision to call an expert like Dr. Adongo to do it, noting as medical professional men and women that the life of the Deceased who had been placed in their hands as experts depended on it. It is not denied by the Defendant that by or during the time the patient was taken to High Dependency Unit and later the ICU, the lack of entry of oxygen into the patient's body through his mouth and/or nose, also had led to failure of oxygen reaching the brain and had causing the brain cells to die. It is not also denied and the facts on record support it (see Doctor's clinical notes on 165 – Exhibit. 6) that much of the effort by Defendant through several and various doctors with different skills, came in the afternoon when the damage had already occurred. It is not clear to the court whether such a situation is reversible, for which reason the gathering of the various doctors to try and reverse the situation would make greater sense. However, in this case they did not succeed since they came a little too late when the patient's brain cell had died.

Going back to the issues raised, the court answers them as follows: -

The Defendant had and owed a duty of care to the deceased to give him the best medical treatment that it could offer after the patient was placed within its control taking into account the circumstances that prevailed in respect of the case.

The second issue is also answered in the affirmative; that is to say that the defendant breached his duty of care to the deceased when it failed to intubate the patient within time to avoid insufficiency of oxygen to the brain and that way avoid death of the brain cells. The delay to intubate in this case lasted about (11) eleven hours. The only explanation given by the Defendant is that the Casualty Doctors and nurses were repeatedly trying to accomplish the intubation. There is no reasonable explanation as to why an expert was not acquired to do it at the earliest possible time to enable the deceased to continue receiving adequate oxygen into his brain. In **Wishaminya Vs Kenyatta National Hospital Board [2004] 2 EA** a delay to treat a patient for ten (10) hours was held 100% negligent. In this case further Dr. Ngugi confirmed that the casualty Doctors and Nurses were not qualified to intubate and that a specialist on call or form outside should have been called at the earliest to do it. The Defendant's casualty Doctor or Mr. Ngugi who was in charge of the patient, clearly failed to summon a specialty doctor to carry out the necessary intubation until too late.

Another issue which arose, is the that the medical history of the Deceased was taken by a Casualty Doctor who clearly did little, as the clinical notes show, to establish the patient's allergies. Even Dr. Ngugi who prescribed the drug **"tritace"** appears not to have instructed the casualty Doctor to establish the patient's allergies. Nor did he himself do so, reading either the clinical notes availed in evidence or in his testimony in court. Notwithstanding his good efforts to controvert the effects that the drug caused, it nevertheless remains clear that his failure to fully dig out was a major contribution in the negligence that finally led to the cases of the Deceased's death.

The final comment on this issue of negligence comes from the Post Mortem Report. The Death Certificate of the Deceased indicated that the cause of death was brain hypoxia due to angioneurotic Oedema caused

by an administration of tritace. In a layman's language, the deceased died because of lack of oxygen to the brain caused by a swelling of the mouth/tongue which had in turn been caused by the administration of the drug tritace. I do not hear the Defendant denying these facts that led to the death of the Deceased. Looking at the flipside of these facts, the situation would appear to have been this – that had the Defendants doctors established a case allergic to tritace from the beginning by digging the deceased's history or having failed that, had they intubated the patient immediately they notice the mouth and tongue swelling and thus enabled him to continue having adequate air to brain, the death by of oxygen could have been prevented.

The conclusion the court reaches therefore, is that the defendant, by being negligent in the performance of giving medical service to the Deceased, breached its duty of care and hereby declared liable the extent of 100%.

On this issue of "**cause of death**" of the Defendant heavily relied on the Death Certificate which shows the cause as **"brain hypoxia due to angioneurotic oedema due to hypertensive disease**." The court finds this explanation as a little misleading. This is so because angioneurotic Oedema was not caused by the hypertension but by the injection and presence of the drug tritace in the body of the deceased, which in turn caused the swelling of the mouth and tongue and prevented breathing in of oxygen.

The Chief Government Pathologist gave evidence in this case. He stated that the Defendant's Doctors, Medical treatment of the Deceased fell far below the expected professional standard in the following manner: -

i. That there was failure by the Defendant's doctors to act in good time to attend the deceased once he was diagnosed with the angioneurotic oedema.
ii. That there was failure on Defendant's part to have qualified staff present to conduct an intubation or in the alternative, a tracheostomy.
iii. That the defendant kept the deceased in ICU for long full knowing that he was brain-dead without probable chances of recovery.

In the view of this court, the observations above are true and correct in view of the facts and evidence analysed hereinabove. The first two go to strengthen the conclusions of this court on the negligence of the Defendant. The second observation will be relevant when I consider the issue of professional fez and drug costs expended on the Deceased during the period when he was kept in the ICU probably without good cause.

In conclusion the court finds the Defendant fully negligent of the death of the deceased Gideon Sanayet Kurraru and declares the said Defendant fully liable. The Defendant did not in its pleadings and evidence seek a sharing of liability and evidence does not support any such distribution.

I will now turn to damages, starting with special damages. The Plaintiff's sought Special Damages in paragraph 23(d): -

Medical Expenses

The Plaintiff claim of Ksh.618,649/- under the above paragraph. Little or no evidence was adduced to explain the figure or prove it. Special damages must be specifically proved by evidence. Even in the Plaintiff's submissions little or nothing was said. The court accordingly, is at sea as to what medical expenses are referred to in paragraph 23(d). It hereby dismiss the sub-heading.

Post-Mortem & Pathology and Funeral/Burial Expenses

This refers to the postmortem of the deceased which was met by the estate of the deceased. The receipts of the same are in the bundle of exhibit (1) of Plaintiff's bundle. Similarly are the funeral expenses inclusive of car hire and fuel related to the transporting of the body to and form funeral home and

eventually to the decease's home. I allow the expenses as reasonable. They Total ksh.198,683/- + 35,000/- + 262,810 = Ksh.297,810/-.

Probate and Letters of Administration

These receipts appear as court and legal fees. They amount to ksh.250,000/- and are granted.

As special damages accordingly the court hereby grants ksh.496,693/- only.

The claim for (2) two air tickets was not supported by any evidence. It is not granted.

Damages under the Law Reform Act and Fatal Accidents Act

The Plaintiff seeks Ksh.250,000/- under the heading Expectation of Life. The Deceased is said to have been at age 65 years as shown in his death certificate. He however, had given his age at 67 years when he was admitted in the Defendant's Hospital and the same was recorded in his admission form. The court accepts his age as 67 years since he had no reason to lie when he was being admitted. In the circumstances, his relatives gave him about 10 years to live.

I have considered the Deceased health life at the time of his admission. It is not disputed that he suffered from a hypertensive heart disease characterized by an enlarged heart with an irregular heartbeat, chronic hypertension, nephrolithiasis (Kidney stones), chronic renal failure and severe gout trophicus that had been mismanaged. He also had a wound on his right ankle and was later found to be anaemic. In short, he was a very sick man and even had his condition been properly attended and relieved at the time, he would unlikely have lived for ten more (10) years. Doing the best I can, I would give him (6) six more years to live. I would accordingly give Ksh.80,000/- as life expectation for him.

Lost Years

The Plaintiffs claimed that the Deceased was a farmer owning and selling livestock, maize and wheat. He definitely had two large pieces of land but it is alleged that he every year hired land in Narok Area where he grew large scale maize and wheat which he sold for gain. The Plaintiffs even called one Moyez Bhanji who produced an actuarial Report dated 14th February, 2012. Bhanji, however, on cross-examination, admitted he never visited the decease's home nor the shambas said to have been hired for farming. Bhanji admitted that all the figures he used were given to him by the Plaintiff's advocates to prepare the Report for this case. In short, Bhanji himself agreed that the figures, unless supported by people who originally got them, were unreliable and pure hearsay. The mentioned advocates did not testify as witnesses. The children of the deceased did not specifically support or justify the figures.

I have examined the evidence of Mr. Bhanji and the Actuarial Report and find it of little use or support to the Plaintiffs' claim. Its contents only amount to hearsay and I reject the same as evidence.

Furthermore, the evidence by the Plaintiffs claiming that the Deceased was a farmer-businessman, yearly hiring farms in Narok and growing maize and wheat, was not supported by evidence. No documents or receipts or papers showing that he sold maize and wheat in large scale as portrayed in the actuarial Report was tendered in evidence. Even as an uneducated person, he would have kept some documents. For example when delivering maize for sale in Cereals Depots he would get delivery documents and later get payment cheques and slips and acknowledgment documents. Not a single document was produced in evidence.

In this matter, the Plaintiffs were urging the court to award more than Ksh.87,000,000/- on the basis that the deceased was a businessman-farmer who made about Ksh.26,000,000/- income per year. He was further said to have been a fairly wealthy man with a large family and supported his many children, grand-children, great-grand children, relatives and the surrounding community. It was testified that he did not only have large tracts of land in Masaai land and other parts of Kenya but yearly hired big farms in the Narok Area of Masaai land and carried out large scale farming before he sold his grains to relevant

institutions.

It would not therefore, be improper or undesirable to think that such a farmer- businessman would be receiving and keeping documents of such trade which would include receipts, delivery notes, delivery invoices, cheques, banking slips, purchase of farming insecticides and fertilizer receipts and many related documents. Plaintiffs, who claimed such big amounts as mentioned above, would not in the court's view spare any effort to prove their claim by availing to court such evidence.

The Plaintiffs, however, claimed that such documents were not available because the decease did not keep them because he was uneducated. The court does not believe or accept such an assertion. Supposing, however, the allegation is true, then for the purpose of proof of their case, the Plaintiff would be expected to have sought other alternative evidence to support their case. They would call persons who worked in farms as labourers, or lorry owners and/or drivers who delivered grains to Cereals Depots; or bank clerks who did his banking and others who took part in his business to come and testify. This, the Plaintiffs failed to do and since their claim was controverted, this court holds that the Plaintiffs claim over the wealth of the deceased is not supported by evidence. It is accordingly rejected.

In the absence of any proof of the deceased's income prior to his death and doing the best I can, I will adopt a monthly figure of Ksh.20,000/- as the net sum which the deceased could reasonably have been making in his farming business or any other economic activity in which he must have been engaged in. He was 67 years old. Giving him up to 75 years which is the age the court presumed he would live to in an active life, a multiplier of 6 years would be reasonable. This is after taking into account vicissitudes of life. The conventional figure of 2/3 is adopted by court as the ratio of the decease's income that he was using towards maintenance of his families and off springs. The computation of the lost years will accordingly be as under: -

Kshs.20,000/- x 12 x 6 x 2/3 = Ksh.920,000/-.

Pain and Suffering

The Plaintiff claimed that the deceased underwent much pain from the moment he was admitted until he died. The Defendants denied that claim. The evidence on record however, shows that the deceased entered the hospital while in some pain from his several ailments already enumerated hereinabove. There is no doubt in my mind, however, that his pain was greatly heightened when his tongue and mouth swelled and he could not easily or at all breathe in and out. This will have started in the night before the angioenurotic a condition was discovered in next early morning. It became worse at 11 a.m. when the swelling had increased and continued as he awaited admission in the Intensive Care Unit. The court will never be sure when the pain and the suffering stopped but can safely accept that it must have continued for as long as he remained conscious until the swelling subsided. The pain must have increased when the intubation was put in place since there was evidence of bleeding from mouth and nostrils owing to the overreaching of the tube into the oesophagus.

I have carefully considered the issue and the kind of pain and suffering that a person who was prevented to breathe could have undergone for such a long period. **In Chudasama Vs Social Service League & another [2004] 2 EA 36**, Kshs.3 Million was awarded for pain and suffering. Doing the best I can I award ksh.2,000,000/- under this heading.

Exemplary Damages

To establish a case for awarding damages under this heading, the Plaintiff must satisfy the court that the Defendant's conduct was exceptionally or particularly offensive and/or was accompanied by male violence or spite and secondly, that the injury caused was to personality interest, like in defamation cases. The Plaintiffs or claimants' proper feeling of pride and/or dignity which gave rise to humiliation, insult or other distress must have been demonstrated against the claimant who in this particular heading is the estate of the deceased under the Law Reform Act. No evidence of this nature stated above was tendered by the Estate. I accordingly find that the claim for aggravated or exemplary damages has not been proven

and I award damage.

Witness expenses

Witness expenses would if already arisen at the time of filing the suit be properly pleaded and proven as so by tendering receipts and other related documentation. Otherwise, they should be included in the Bill of Costs and so proved. I find no evidence to support his heading and I reject the claim.

The summary of the awards to the Plaintiffs is as follow: -

1. **Special Damages**

a. Post mortem & Pathology - Kshs. 35,000/-
b. Funeral & Burial Expenses Ksh.461,593/-
c. Probate & Administration Fees Ksh.250,000/-

Total Special Damages Ksh.736,593/-

2. Pain and suffering Ksh.2,000,000/-
3. Lost years Ksh. 920,000/-
4. Loss of Expectation of Life Ksh. 80,000/-

TOTAL AWARD **Ksh.3,746,593/-**

I now revert to the Counterclaim against the Plaintiffs and the 5th Defendant's cross-action. The Defendant sought judgment of Ksh.1,602,111.86 plus interest thereon at 2% per month from 12th November, 2004.

Liability to the 1-3 Plaintiffs arose when they became the Administrators of the Estate of the Deceased who had generated a medical treatment bill at the defendant Hospital of Ksh.2,200,000/- before Kshs. 615,000/-was paid by the deceased's family to remain the balance of Kshs.1,602,111.86 now claimed. The 1st – 3rd Plaintiffs deny liability on two main grounds: -

1. That there was no agreement to pay by and the deceased did not sign the admission forms.
2. That the interest of 2% claimed is not due or claimable against the deceased's estate and is unjust enrichment.
3. That although signed by the 4th Plaintiff Christine Sanayet the contract to pay such expenses was not signed by 1-3rd Plaintiffs
4. That the major fees and expenses arose due to the negligence of the Defendant who should not be allowed to benefit from its wrongful conduct.
5. That the contract signed by the 5th Plaintiff was invalid for not being witnessed by an independent witness.

I have carefully considered grounds upon which the Plaintiffs deny liability. I find the contract signed at the time of admission of the deceased by the 5th Plaintiff who is a daughter of the deceased, to be valid against herself as a guarantor and against the Estate as the medical treatment then sought, was for the benefit of the deceased. The contract did not require an independent witness as the 5th Plaintiff who was an adult was qualified to sign it. Also the contract was signed in the presence of one or more of the 1st – 3rd Plaintiff although they did not themselves sign. I have not heard them deny the execution of the contract by the 5th Plaintiff who in any case signed it for and on behalf of her father who was too ill at the time. Furthermore the contract was partly honoured when a sum of Ksh.615,000/- was paid to remain the balance of Ksh.1,595,411.86 rounded up to Ksh.1,607,111.86 /-. The conclusion I come to is that the contract to pay for the medication of the deceased as signed by Christine Sanayet is lawful and valid and should bind her and/or the Administrators of the Estate of the late Gideon Sanayet Kurraru subject to

what the court will find on the issue that the Estate should not be liable to the extent in which the Defendant wrongfully caused the expenses to unnecessarily increase.

It was the Plaintiff defence to the counter-claim that the Defendant by its negligent or unprofessional conduct, kept the deceased in the ICU and continued to run many medical tests on the deceased while fully aware that such tests were, would not improve the medical condition of the deceased who was to their full and adequate knowledge and information, irreversibly brain-dead, even before his admission in ICU.

On the above issue the Chief government Pathologist who is himself a Senior Doctor and who testified was categorical that the Defendant's Doctors treatment of the Deceased fell far below the expected professional standards. He asserted that they failed to act in good time to properly attend to the deceased once they diagnosed him with angioneurotic Oedema. He said that the Defendant should have availed qualified staff to conduct intubation or tracheostomy which was critically necessary at that moment. He also expressed a strong view against keeping the deceased in ICU knowing full well that he was brain-dead and that the condition was irreversible or irrecoverable.

Surprisingly, the witness did not meet much challenge over the above views from the Defendant who only appeared to challenge that opinion only in their written submissions. In my view, this is a difficult matter to easily conclude on by laymen like me. However, relying on the position taken by the Government Pathologist and using simple logic on the issue, I entirely agree with that position. The Defendant's doctors from the evidence on record, appreciated that intubation was necessary right from the moment in the morning they noticed the swelling of the mouth and tongue. They ordered the Casualty Medical Officer and Nurses to carry out the intubation. The latter reported failure to intubate, not once, not twice, but many times as recorded. That continued even when the swelling became marked and glaringly interfered with the deceased breathing. The Defendant did not seek an expert doctor to intubate, even when Dr. Ngugi who was closely in charge of the patient knew well (and he so testified) that those causality doctors and nurses were not qualified to intubate the patient and that a specialist was required.

I have earlier condemned the Defendant's conduct in the above respect as negligent. I do so again in respect of the issue in hand. The Defendant argued that the Doctors attending to the deceased from 8 a.m. to 4.15 p.m. when intubation was finally done by Dr. Adongo, did not know or were not sure whether or not the patient was brain-dead. In the court's view, however, from the evidence, if they were not sure at the moment they took him to ICU, which this court seriously doubts, they must have become sure soon after the ICU admission when the patient's mouth swelling declined and breathing eased up. The evidence on the clinical notes shows that the patient did not have upheavals or strong twitches after intubation. I am aware that the family members argued that the deceased should not have been removed from ICU until death. But I go with the proper and professional view that he was brain-dead, an irreversible condition, and that longer stay there was unnecessary and more costly and without any eventual beficial goal to be achieved.

The question to resolve is whether it was necessary to keep the deceased in ICU under the condition or situation above. I hold that it was not reasonable for the doctors of the Defendant to keep or continue keeping the deceased in ICU the moment or soon after, when they realized he was brain-dead, an irreversible condition. I place that time to be immediately after intubation when free breathing would make a difference to the patient, but failed to do so. I would for that purpose allow two or three more days for doctors observation of the patient to make a fair conclusion.

To the above end I hold that the medical and related expenses chargeable upon the deceased would be the average expenses charged fees and expenses which the Plaintiffs were charged during the last two days before his death in the ordinary ward. Such average expenses, as stated above will be assessed by a committee of two doctors, selected by each party herein, each to be paid by the party that appointed him/her but such fee to become costs in the suit. The effect of the above finding is that the admission and stay of the deceased in the Defendant's Hospital is found to have been necessary. It will, therefore, be ordinarily chargeable against the Plaintiffs for all the days the patient was admitted except for the three (3) days in which the deceased is declared as rightly staying in ICU. The ICU admission and stay shall be

chargeable on a higher ICU rate which is already recorded and whose figures are available to both sides.

I now turn to examine the contract signed between the Defendant and the 4th Plaintiff, Sakaiwa Ole Kurraru, as personal guarantor of the total medical charges due from the Estate of the deceased. The Plaintiffs' position is that the contract and personal guarantee were secured by the Defendant under duress, coercion, undue influence and probably ignorance of the correct facts. They asserted that the Defendant refused to release the body of the deceased for burial unless the medical charges due, were cleared or unless members of the family gave adequate security for repayment and settlement of the bill after the burial. That the 4th Defendant did not properly understand fully what the agreement entailed, otherwise he would not have signed or offered his land title. Furthermore, that he did not understand the implication of 2% interest per month – 24% per year, because he is an uneducated person and the Agreement and printed forms were not interpreted to him before he signed them. That there was, therefore, no consensus ad idem.

I have carefully perused the documents and examined the evidence over these documents. It appears that when the Defendant demanded for the settlement of the bill which was Ksh.1,602,111.86 from the 5th Plaintiff who originally had guaranteed payment, the latter was unable to do so. The 5th Plaintiff was apparently in company of other members of the family including her sisters and brothers, uncles and relatives. That the Defendant's explained to them that in case they could not immediately raise the funds, any or several of them could deposit a title deed or deeds and sign or execute a Conditional Sale Agreement over such title to secure the sum due and executing a Payment Guarantee Form to bind him to settle the amount with interest at 2% per month or any such interest as the Defendant would impose. It is in evidence that the Plaintiffs' family members consulted and allowed the 4th Plaintiff to offer his title L.R. Kajiado/Ntashat/996 as security. Several of them are educated persons and knew what it meant to allow him to offer the land and sign the Payment Guarantee Forms. To argue that the 4th Plaintiff did not understand the purpose of releasing his title documents to the Defendant, is not genuine or credible. Indeed, it appears that their attempt to disown the contract came after the family had collected the body of the deceased and the date of payment which by agreement had been fixed on 10th December, 2004, had passed.

I observe too that the Defendant institution established the "**guarantee procedure**" to assist the families who cannot raise funds to settle the medical bill of the person who became subject of medical treatment. I cannot fail to appreciate the fact that the procedure secures and preserves the integrity and reputation of the family of the patient who receives treatment and avoids embarrassment. In my view, the procedure should not be used wrongly or unfairly by either party. The Hospital should be slow to dispose the property that is given as security and should not impose unreasonable terms including interest. The patient or his family should similarly be willing to honour their obligations under such Agreements which keep the family integrity intact.

In this case, I hold that the contract between the 4th Plaintiff and the Defendant was genuine and voluntarily and knowingly entered. Apart from the interest of 24% that appears to be on the higher side and should need to be reduced to be equal with court interest, the contract should be enforceable as against both the Estate of the Deceased and the 4th and 5th Plaintiffs', jointly and/or severally. To that end, I also find no fault with the contract signed by the 5th Defendant for and on behalf of the deceased.

The summary findings of the court therefore, are as follows in form of orders: -

ORDERS

1. **Special Damages against the Defendants in**

   favour of the Plaintiffs **Kshs. 746,593.00**

2. **General Damages in favour of the Plaintiffs**

a. **Pain and suffering** **Kshs.2,000,000.00**
b. **Lost years** **Kshs. 920,000.00**
c. **Loss of Expectation of Life** **Kshs. 100,000.00**

TOTAL **Kshs.3,746,593.00**

3 a) Special Damages in favour of the

Defendant against the 5 Plaintiffs jointly Severally subject to (b) below Kshs.1,602,111.85

b) The special damages in (a) above will first be reduced by the daily average total medical charges difference between ICU ward and ORDINARY ward in respect of the 29 days out of the 32 days during which the deceased lay in ICU ward unnecessarily.

c) The assessment and/or computation in (b) above shall be carried out by two doctors one of whom is selected by each party herein but who is not presently practicing in any manner with the Defendant, within 14 days.

4. All the declarations sought by the Plaintiffs against the Defendant are hereby denied but there shall be a stay of execution against either side for a period of 90 days to enable parties to settle their obligations to others as found in this judgment..

5. (i) Special damages to the Plaintiffs shall carry court interest from the date of filing the suit and the General Damages shall carry interest from the date of judgment.

(ii) The Defendants judgment sum when adjusted by the Committee of two doctors shall carry interest at 14% per annum from the date of agreement i.e. 11th December, 2004.

5. **Each party shall bear the costs of the other party.**

Dated and delivered at Nairobi this 12th day of March, 2015.

…….

D A ONYANCHA

JUDGE