



JLN & 2 others v Director of Children Services & 2 others; Kenya National Human Rights Commission & another (Interested Parties) (Petition 78 of 2014) [2014] KEHC 7491 (KLR) (Constitutional and Human Rights) (30 June 2014) (Judgment)

JLN & 2 others v Director of Children Services & 4 others [2014] eKLR

Neutral citation: [2014] KEHC 7491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 78 OF 2014

I LENAOLA, J

JUNE 30, 2014

BETWEEN

**JLN 1ST PETITIONER
WKN 2ND PETITIONER
CWW 3RD PETITIONER**

AND

**THE DIRECTOR OF CHILDREN SERVICES 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
MP SHAH HOSPITAL 3RD RESPONDENT**

AND

**THE KENYA NATIONAL HUMAN RIGHTS COMMISSION INTERESTED PARTY
CENTRE FOR VIOLENCE AGAINST WOMEN INTERESTED PARTY**

Recognition of a woman in a surrogacy agreement as a birth mother and a parent under the law

The matter revolved around whether persons who had entered into a surrogacy agreement to be surrogate parents could be registered as parents in the birth certificate of a child. The court held that the Births and Deaths Registration Act imposed the duty on the Hospital to give particulars of the child under section 10 by reference to the act of giving birth after a period of pregnancy. The court thus held that that implied that the mother referred to in the Act was the birth mother.

Reported by Kakai Toili



Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to privacy - disclosure of confidential medical information to a third party - whether disclosure of information touching on a surrogacy agreement was a violation of the right to privacy - what were the principles under which a doctor could disclose the information held in confidence from a patient - Constitution of Kenya 2010, article 31.

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to human dignity - whether the withdrawal of children from their parent's custody would be a violation of the right to dignity - Constitution of Kenya 2010, article 28.

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - children's right - children in need of care and protection - circumstances in which a child would be deemed to be in need of care and protection - whether children born through a surrogacy agreement would automatically be deemed to be children in need of care and protection - Children Act, Cap 141, section 119.

Family Law - definition of a parent - whether a woman who gave birth under a surrogacy agreement would be recognized as a birth mother and a parent under the law - Births and Deaths Registration Act (Cap 149), section 10; Children Act (Cap 141), section 2.

Civil Practice and Procedure - doctrine of *res judicata* - factors to consider in determining *res judicata* - what were the requirements to be met in determining whether a matter was *res judicata*.

Brief facts

The 2nd and 3rd petitioners entered into a surrogacy agreement with the 1st petitioner who agreed to be a surrogate mother by undergoing *in-vitro* fertilization. Following the delivery of the children, the issue arose as to whether the 3rd petitioner should be registered as the mother of the children in the Acknowledgement of Birth Notification, as required under the Births and Deaths Registration Act (Cap 149) rather than the 1st petitioner, the birth mother.

The Hospital (the 3rd respondent) informed the 1st respondent, the Director of Children Services of the circumstances concerning the birth of the twins. The Director took the view that the children were in need of care and protection and as a result, his officers took them and placed them under the care of a children's home.

Issues

- i. Whether a woman who gave birth under a surrogacy agreement would be recognized as a birth mother and a parent under the law.
- ii. Whether children born through a surrogacy agreement were children in need of care and protection.
- iii. Whether disclosure of information touching on a surrogacy agreement was a violation of the right to privacy.
- iv. What were the principles under which a doctor could disclose the information held in confidence from a patient?
- v. Whether withdrawal of children from persons claiming to be their parents would, in certain circumstances, be a violation of the right to human dignity.
- vi. What were the requirements to be met in determining whether a matter was *res judicata*?

Held

1. For the doctrine of *res judicata* to apply, the issue in the instant suit must have been decided by a competent court in the former suit. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine was pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.
2. The issue of *res judicata* did not arise as the issues pending determination in the petition concerned the enforcement of the petitioners' fundamental rights and freedoms under the Constitution which were beyond the jurisdiction of the Children's Court. Furthermore, according to the supplementary



- affidavit of Stephen Gitonga Mureithi sworn on 16th April 2014, the matter was subsequently withdrawn. The court noted that the parties further recorded a consent order on February 21, 2014 where they agreed that the children be released from the children's home to the care, custody and control of the 1st petitioner.
3. Although Order No 3 issued by the Children's Court was issued as part of an interim measure, it was couched in final and mandatory terms. Following the decision in the Children's Court Case No. 206 of 2014, it was no longer necessary to determine whether or not the names of the 2nd and 3rd petitioners should be entered in the birth certificates as the order dealt with the issue.
 4. Section 14 of the Children Act provided that where the birth of any child had been registered before it had received a name, or where the name by which it was registered was altered, the parent or guardian of such child could within two years of the registration, on payment of the prescribed fee, and on providing such evidence as the registrar could think necessary, register the name that had been given to the child. Therefore it was not necessary to give the child a name immediately after birth.
 5. The right to privacy was not absolute. Implicit in the protection accorded, under the right to privacy, was the requirement that information relating to family and private matters was not to be unnecessarily revealed. However, there would be instances where the right to privacy in respect of the patient/client relationship could be abridged.
 6. The principles under which a doctor could disclose the information held in confidence were as follows;
 - a. a real and serious risk of danger to the public had to be shown for the exception to apply.
 - b. Disclosure had to be to a person who had legitimate interest to receive the information.
 - c. Disclosure had to be confined to that which was strictly necessary (not necessarily all the details).
 7. The Hospital had a statutory duty to record to the best of its knowledge the particulars of the children in the notification under section 10 of the Birth and Deaths Registration Act. The 1st petitioner confirmed that it was the petitioners' intention to have the notification in the names of the 2nd and 3rd petitioners, while the Hospital was keen on following the law and recording the 1st petitioner as the mother who delivered the child.
 8. By defining birth as issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead, the Births and Deaths Registration Act imposed the duty on the Hospital to give particulars of the child under section 10 of the Act by reference to the act of giving birth after a period of pregnancy. That implied that the mother referred to in the Act was the birth mother.
 9. Section 2 of the Children Act defined a parent as the mother or father of a child and included any person who was liable by law to maintain a child or was entitled to his custody. As the birth mother, the 1st petitioner had the immediate responsibility of maintaining the children and entitled to their custody. The Hospital was therefore within the law to insist that the 1st petitioner had to be registered as the parent of the children.
 10. In the absence of a law on surrogacy, the Hospital was entitled to seek guidance on the issue from the Director. Section 38(1) of the Children Act provided that the Director would safeguard the welfare of children and would in particular assist in the establishment, promotion, co-ordination and supervision of services and facilities designated to advance the well being of children and their families. In the alternative, the Hospital was entitled to seek guidance from the Principal Registrar of Births and Deaths. Therefore the Hospital did not violate the right of privacy of the petitioner when it informed the Director of the arrangements between the petitioners.
 11. The Director did not act in the best interest of the children as there was no dispute even between the surrogate mother and the genetic mother. The best solution was to have the children retained in the hospital pending the determination of the parental issue in court or by giving appropriate directions. In that way, the children would continue getting medical attention which they needed most given that



- they were pre-term. The law provided that at birth, the mother was the person entitled to immediate custody of the children in case there was no issue of the birth mother rejecting the children.
12. The Director violated the rights and fundamental freedoms of the petitioners. The Director violated the dignity of the petitioners, caused them distress and embarrassment by taking away the children. In short their dignity under article 28 of the Constitution was violated. There was no law in Kenya regulating surrogacy arrangements. It was because of lack of a legal regime that the parties found themselves in such a situation. But even where there was no legal regime, the court or any persons dealing with the issues had to in accordance with article 57 of the Constitution; decide the issue on the basis of the best interests of the child.
 13. A child born out of a surrogacy arrangement was no different from any other child. Under article 53 of the Constitution and section 11 of the Children Act every child had the right to certainty of their parentage, a right to family, a right to a name acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their surrogate birth. Those rights were buttressed by international instruments like the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child under articles 7 and 9 respectively.
 14. Surrogacy was not a hypothetical issue any more. It was real and many Kenyans were turning to surrogacy as an alternative to being parents especially those who could not for medical reasons have their own children. In such circumstances, it was the duty of the State to protect the children born out of such arrangements by providing a legal framework to govern such arrangements.
 15. The Director violated the rights of the children and the petitioners by taking away the children in a manner that could not be justified under the Children Act.

Petition partly allowed.

Orders

- i. *The case against the 3rd respondent was dismissed with no order as to costs.*
- ii. *The 1st respondent shall pay each of the petitioners the sum of Kshs 500,000.00 which shall accrue interest at the court rates from the date of this judgment.*
- iii. *The 1st respondent shall pay the costs of the petition.*

Citations

East Africa

1. *Karia and another v Attorney General and others [2005] 1 EA 83 - (Mentioned)*
2. *Omondi & another v National Bank of Kenya Ltd and 2 others [2001] KLR 579; [2001] 1 EA 177 - (Mentioned)*

United Kingdom

1. *W v Edgell [1990] 1 All ER 835; [1990] 2 WLR 471 - (Explained)*

Statutes

East Africa

1. Births and Deaths Registration Act (cap 149) sections 10, 14 - (Interpreted)
2. Constitution of Kenya, 2010 article 31- (Interpreted)

JUDGMENT

1. The 1st petitioner is the surrogate mother of twin children born at the Shah Hospital (“the Hospital”) in Nairobi. The 2nd and 3rd petitioners are the genetic parents of the children. In the amended petition dated April 7, 2014, the petitioners seek the following orders from this court;



1. “ An order compelling the respondents to release the minor children to the petitioners and not interfere with any surrogacy agreement/legal process entered into by the petitioners.
2. A declaration that the respondents’ actions contravened the rights of the petitioners and the children and are void.
3. A declaration that the 3rd respondent’s actions to disclose the petitioners’ medical information contravened their constitutional rights to privacy and their consumer rights as provided for in the *Constitution*.
4. An order that the petitioners are entitled to damages against the respondents jointly and severally and the court to quantify such damages as appropriate and just.
5. Writs of prohibition stopping the respondents from interfering with the petitioners’ rights of having custody of the children A & B and naming them as they will elect.
6. Writs of mandamus compelling the Registrar of Births and Deaths to register the children A & B in such manner as will be proposed by the petitioners and specifically directing the 3rd respondent to issue the Notifications of Birth with the 2nd and 3rd petitioners as father and mother respectively.
7. A declaration that the Director of Children’s services has no powers to seize children borne out of surrogacy agreements.
8. A declaration that the seizing of children from the 1st petitioner contravenes the 1st petitioner’s and the children constitutional rights and is therefore void and of no legal effect.
9. Any other, further orders, directions, declarations and remedies as the honourable court may deem fit and just to grant in the circumstances.

Background

2. The facts of the case can be gathered from various depositions of the parties. WKN and CWW entered into a surrogacy agreement with JLN who consented to be a surrogate mother by undergoing in vitro fertilization. Following the delivery of the children, the issue arose as to whether CWW should be registered as the mother of the children in the Acknowledgement of Birth Notification (“the Notification”) required under the *Births and Deaths Registration Act* (chapter 149 of the Laws of Kenya) rather than JLN, the birth mother. The Notification is the preliminary document confirming the birth of a child and is necessary for the issuance of a birth certificate.
3. The Hospital informed the 1st respondent, the Director of Children Services (“the Director”) of the circumstances concerning the birth of the twins. The Director took the view that the children were in need of care and protection and as a result, his officers took them and placed them under the care of a Children’s Home. The children were later released to JLN and the Hospital issued the Notifications in the name of JLN.
4. The petitioners filed Nairobi Children’s Case No 205 of 2014, *WKN, CWW & JLN v National Council for Children Services, Director of Children Services and another* after the children were taken to the Children’s Home by the Director in order to prevent them from being put up for adoption. On March 11, 2014, the Children’s Court made the following order;
Pending the hearing and determination of the main suit;



1. That the unnamed twins born on January 25, 2014, at MP Shah Hospital and delivered to the 3rd respondent by officers from the 2nd respondent's office be released into the custody of the 1st and 2nd applicants.
 2. That the 3rd applicant be allowed to have unlimited and unrestricted access to the unnamed twins born on January 25, 2014 at MP Shah Hospital and delivered to the 3rd Respondent by officers from the 2nd respondent's office so that they can be breastfed regularly as required.
 3. That the names of the 1st and 2nd applicants be entered into the birth notification as well as the certificates of the unnamed twins born at MP Shah Hospital on January 25, 2014.
 4. That there be liberty to apply.
 5. That costs in the cause.
5. The 1st and 2nd respondents submit that as a result of the orders made in the case filed in the Children's Court, this matter is *res judicata*. For the doctrine of *res judicata* to apply, the issue in the present suit must have been decided by a competent court in the former suit. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see *Karia and another v Attorney General and others* [2005] 1 EA 83, *Omondi v National Bank of Kenya Ltd and others* [2001] EA 177).
6. In my view, the issue of *res judicata* does not arise as the issues pending determination in the petition concern the enforcement of the petitioners' fundamental rights and freedoms under the *Constitution* which are beyond the jurisdiction of the Children's Court. Furthermore, according to the supplementary affidavit of Stephen Gitonga Mureithi sworn on April 16, 2014, the matter was subsequently withdrawn. I also note that the parties recorded a consent order in this court on February 21, 2014 where they agreed that the children be released from the Children's Home to the care, custody and control of JLN.
7. Although Order No 3 issued by the Children's Court was issued as part of an interim measure, it was couched in final and mandatory terms. Following the decision in the Children's Court Case No 206 of 2014, it is no longer necessary to determine whether or not the names of WKN and CWW should be entered in the birth certificates as the order deals with issue. The State, through the 1st and 2nd respondents, does not contest the decision of the Children's Court and has in fact argued that the matter is indeed settled. I will however address the issue in my determination of the other issues if only to clarify the legal position later in the judgment.

Registration of Births

8. Before I consider the issues for determination, I note that it is common ground that this dispute revolved around which party should be registered as a parent in the Notification issued under the *Births and Deaths Registration Act*.
9. Under the *Births and Deaths Registration Act*, birth has been defined as "issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead". Upon birth a notification of birth is given. Section 10 of the *Births and Deaths Registration Act* provides that every person who gives notification of a birth shall 'to the best of his knowledge and ability give the prescribed particulars of the child'. The content of the particulars include the following; name of the child, date of birth, sex, type of birth (single or twins), nature of birth (alive or dead), place of birth,



name of father, name of mother and lastly to whom the notification is issued. After the notification of birth, a birth certificate is issued by the Registrar of Births and Deaths. In the Schedule to the Registration of Births and Deaths Certificates a sample of the register of birth and a certificate of birth are given. The contents of both relate to the particulars of a birth and they include;

- (a) full name of the child,
- (b) Date of birth,
- (c) full name of father,
- (d) full name of mother and
- (e) exact place of birth.

10. As regards the name of the child, it is not necessary to give the child a name immediately after birth as section 14 of the Act provides,

“Where the birth of any child has been registered before it has received a name, or where the name by which it was registered is altered, the parent or guardian of such child may within two years of the registration, on payment of the prescribed fee, and on providing such evidence as the registrar may think necessary, register the name that has been given to the child.”

11. The issue in this matter was who should be registered as the mother of the children in the Notification and whether it was necessary to involve the Director in such a determination. In light of the foregoing, there two issues for determination are as follows;
- a. Whether the Hospital violated the petitioners’ right of privacy under article 31 of the Constitution.
 - b. Whether the Director violated the petitioners’ rights in taking away the children.

Right to Privacy

12. The petitioners’ case against the Hospital is that it violated their right privacy by unnecessarily and without just cause disclosing confidential medical information to a third party in violation of their right to privacy protected under article 31 of the Constitution. Their case is anchored by the fact that the Hospital breached the doctor/patient confidentiality principle in disclosing the details of the surrogacy arrangement.

13. The petitioners’ case is supported by the supporting and supplementary affidavits of JLN both sworn on April 7, 2014. The averments of JLN are confirmed by the depositions of WKN and CWW sworn on April 7, 2014. The petitioners’ also filed written submissions. JLN in her supporting affidavit states as follows;

[10] That after a successful pregnancy, I was admitted to MP Shah Hospital on January 24, 2014 and delivered twins on January 25, 2014.

[11] That thereafter, the hospital without cause refused to release the minors to either myself or the 2nd and 3rd petitioners.

[12] That we sought clarification/information on why they were refusing to release the children and there was no explanation from the hospital.



- (13) That the petitioners had disclosed the medical circumstances informing the childbirth and the hospital in breach of confidentiality shared this information with third parties. There was no legal basis for this as the minor children were not in any danger and the petitioners had not broken any law.
14. Mr Mureithi, counsel for the petitioners, submitted that the Hospital had no factual or legal justification to disclose the petitioners' medical information regarding the manner in which the children were conceived and in doing so it violated the petitioners' right to privacy under article 31 of the *Constitution*.
15. The petitioners augmented their claim by relying on the Hippocratic Oath and the doctor/patient confidentiality principle which imposes on medical practitioners a duty not to disclose information reposed in them by their patients. Counsel further submitted that there are exemptions to patients' rights to privacy and non-disclosure of medical information. He referred to Faculty of Occupational Medicine (FOM) Guidance on Ethics for Occupational Physicians (Faculty of Occupational Medicine 1999) which identifies seven situations where confidential information may be disclosed as follows; with consent of the client, if disclosure is clearly in the patient's interests but it is not possible or is undesirable to seek consent, if it is required by law, if it is unequivocally in the public interest, if it is necessary to safeguard national security or to prevent a serious crime, if it will prevent a serious risk to public health and in certain circumstances for the purposes of medical research. The petitioners submitted that the circumstances of this case do not fit into any of these exceptions.
16. The petitioners argued that in the circumstances, there was no obligation on the Hospital to inform the Director of the surrogacy arrangement as it could readily issue the Notification in the manner it deemed appropriate as it later did.
17. The Hospital denied that it breached the petitioners' right to privacy. It contends that the disclosure of that information was justifiable as the situation was complicated and that it had to seek the guidance of the Director. It opposes the petition through the replying affidavit sworn on March 11, 2014 by Lilian Mulinge, its Manager in charge of the maternity division. She explained that in December 2013, CWW visited the Hospital to inquire about a maternity package for her friend who was the surrogate mother. She was requested to bring the necessary documentation. She did not come back and only returned to the Hospital with JLN when she gave birth prematurely. Lilian Mulinge stated as follows;
- (8) That on admission the 3rd petitioner came without any documents and when asked she kept saying she will bring them. On Monday January 27, 2014 she was asked for any documents she said she would bring them.
- (9) That on Tuesday 28th I informed the 3rd petitioner that we needed to do birth registration and that in the absence of any documentation to the contrary the Hospital would use the birth mothers details for registration as required by law.
- [10] That the 3rd petitioner said we should not register the babies in the 1st petitioner's name because they were her babies.
- (11) That I personally had a lengthy conversation with both the 1st and 3rd petitioners and I explained the procedure of registering births in the country which provides that we recognize the mother who delivered the babies.
- (14) The 1st petitioner was not ready to have her names written on the birth notification and on the 29th January 2014, the 1st petitioner was discharged, having not agreed to have her names



on the birth notification. The children continued to receive care at the hospital as they were still not medically fit to be discharged.

- (16) That I explained to the 3rd petitioner that we would have to register the babies in preparation for discharge, she kept saying she can't stand seeing her babies being given to someone else and asked if she could come with the 1st petitioner on the February 4, 2014 with her personal ID for us to register the babies.
- (17) That I informed the hospital administration who in turn consulted the Department of Children Services because the case was becoming complicated and a decision had to be made on where to discharge the babies as we could not discharge them to the 2nd and 3rd [petitioners] and the 1st [petitioner] did not want to take the babies with her.
18. The Hospital contended that JLN wanted the names of the 2nd and 3rd petitioners written on the Notification. JLN was discharged having failed to have her name written on the Notification and the children continued to receive care at the hospital as they were still not medically fit to be discharged. The hospital then decided to involve the Director because the case had become complicated and a decision had to be made as to whom to discharge the new born babies to as they could not be discharged to WKN and CWW. The children were discharged to a children home awaiting verification of the mother and a resolution of the case.
19. Ms Ogutu, counsel for the hospital, claimed that the JLN had never been treated at the hospital before and that it was not made aware of any surrogacy arrangement prior to the birth of the children. She submitted that the hospital had an obligation to provide accurate information regarding the birth of the children. In her view, the issue was not that of naming the children but stating who the parents were. Counsel submitted that the hospital acted reasonably when it sought the guidance of the Director in the best interests of the children and as such the hospital should not be held liable for any violation of the petitioners' fundamental rights and freedoms.
20. The petitioners denied that the Hospital did not know of the surrogacy arrangements between the petitioners. JLN deponed that the hospital knew this way back in September 2013 when she attended a pre-natal visit where she was referred for an ultrasound examination. She denied that at no point did she refuse to take the children with her and that she pleaded with the Hospital to release the children if there were outstanding issues. In paragraph 14 of the supplementary affidavit she states, in part, that, "[I]t is not true that I contested registration of the children in the names of the 2nd and 3rd petitioners as the parents. This was the intention all along and I am appalled at the insistence that there was a dispute where there was none."
21. Right to privacy is provided for under article 31 of the Constitution as follows;
- Every person has the right to privacy which includes the right not to have-
- (a) their person, home or property searched;
 - (b) their possessions seized;
 - (c) information relating to their family or private affairs unnecessarily required or revealed; or
 - (d) the privacy of their communications infringed. [Emphasis mine]
22. The right to privacy is not absolute. Implicit in the protection accorded is that information relating to family and private matters must not be "unnecessarily revealed." Indeed, counsel for the petitioner submitted that there are instances where the right to privacy in respect of the patient/client relationship may be abridged. He cited the case of W v Edgell [1990] 1 All ER 835 where Lord Bingham set out



the principles under which a doctor may disclose the information held in confidence. The principles were as follows;

- i. A real and serious risk of danger to the public must be shown for the exception to apply.
 - ii. disclosure must be to a person who has legitimate interest to receive the information.
 - iii. disclosure must be confined to that which is strictly necessary (not necessarily all the details).
23. In light of these principles was the disclosure of the petitioners’ surrogacy arrangements necessary” The hospital had a statutory duty to record to the best of its knowledge the particulars of the children in the Notification under the section 10 of the [Births and Deaths Registration Act](#). JLN confirms that it was the petitioners’ intention to have the Notification in the names of WKN and CWW while the hospital was keen on following the law and recording JLN as the mother who delivered the child. How was this issue to be resolved”
24. By defining birth as “issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead,” the [Births and Deaths Registration Act](#) imposes the duty on the Hospital to give particulars of the child under section 10 of the Act by reference to the act of giving birth after a period of pregnancy. This implies that the mother referred to in the Act is the birth mother. Section 2 of the [Children Act](#) defines a parent as “the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody.’ As the birth mother, JLN had the immediate responsibility of maintaining the children and entitled to their custody. The hospital was therefore within the law to insist that JLN had to be registered as the parent of the children. It is admitted that Kenya does not have a law that governs surrogacy and related issues and it was also open for the hospital to record the genetic parents in the Notification.
25. The petitioners argue that the Hospital knew of the surrogacy arrangement way back in September 2013. The evidence for this is that JLN went for ultrasound scans. There is no evidence that the ultrasound examination was anything other than that. Moreover, the evidence of Lilian Munge is not controverted by CWW who is the person who was supposed to have made arrangements for JLN admission to the hospital.
26. In these circumstances, I am persuaded to hold that in the absence of a law on surrogacy, the hospital was entitled to seek guidance on the issue from the Director. Under section 38(1) of the [Children Act](#) provides,
- “The Director shall safeguard the welfare of children and shall in particular assist in the establishment, promotion, co-ordination and supervision of services and facilities designated to advance the well being of children and their families.”
- In the alternative, the Hospital was entitled to seek guidance from the Principal Registrar of Births and Deaths.
27. I therefore find and hold that the hospital did not violate the right of privacy of the petitioner when it informed the Director of the arrangements between the petitioners.

Whether the Director violated the petitioner’s rights

28. The second issue for determination arises from the action of the Dir upon receipt of the information from the hospital. The petitioners as that the Director did not have any basis in law to take away the children and that his actions were *ultra vires*, illegal and unconstitutional. They contend that the Director has not laid any basis to show that he took the children away because they were in need of



care and protection. The petitioners aver that the only request made was for the names of the genetic parents to appear in the Notification as there was a surrogacy agreement in place.

29. The petitioners submitted that fertility treatment and in vitro fertilization is not illegal and is an increasingly acceptable medical procedure that is making it possible for parents who could not have had children because of medical problems to become parents. They therefore urged the court to find that the 2nd and 3rd petitioners had legitimate expectation that their names would be endorsed on the Notification and consequently on the birth certificate of the children as the parents of the children. The petitioners submitted the children were not in need of care and protection and that the circumstances surrounding a surrogacy arrangement cannot qualify as a situation giving rise to children in need of care and protection.
30. The Director of Children Services and the Attorney General in reply to the petition filed a replying affidavit sworn on February 20, 2014 by Maurice Mumbetsa Tsuma, the County Director of Children Services. They also filed written submissions dated February 24, 2014.
31. Mr Awino, counsel for the respondent, submitted that the surrogacy arrangement entered into by the petitioners is not recognized under Kenyan law and that the court should consider the issue of the biological mother and the implication that the Notification has on the registration of persons. He contended that the surrogacy agreement, being unregulated, by any law may expose the children to harm and that therefore the only option for the 2nd and 3rd petitioners was to apply for the adoption of the children after they were six months as required under section 156(1) of the [Children Act](#). In taking away the children, the Director stated that he acted within the provisions of the [Children Act](#) and the [Constitution](#) by seeking to uphold the best interest of the children.
32. The Director contends that the Hospital reported the situation as it could not determine the person or persons to whom to release the new born children and therefore the children were placed in the custody of Children's Home until the matter was resolved. The Director states that in the circumstances and given that there was no legal or regulatory framework on surrogacy it was in the best interests of the children that they be placed in custody pending the determination of this suit. The Director states that he applied section 120 of the [Children Act](#) as the children were in need of care and protection at that point.
33. Whether the actions of the Director were lawful must be judged on the basis of the principle of the best interests of the child which is articulated in article 53(2) of the [Constitution](#). It provides as follows, "A child's best interests are of paramount importance in every matter concerning the child." This is reinforced in section 4(2) of the [Children Act](#) which states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".
34. The Director's case is that he acted in accordance with the provisions of section 119 of the [Children Act](#). Under this provision, a child is deemed to be in need of care and protection in the following circumstances;

119(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or



- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the third schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for Health.

35. Were the children, born of a mother, under a surrogacy agreement, children in need of care and protection” Could be said that the children had no parents or guardians or had been abandoned by the parents or guardians or were destitute” A cursory look at the provisions of section 119 of the *Children Act* confirms that the children were not in need of care and protection and if indeed they were there was no reason to take them to the Children’s Home. At the time the Director took his action, the 1st petitioner had been discharged from the Hospital and left the new born children still receiving care at the Hospital as they had been born prematurely. The children had not been abandoned, they were not destitute thus in need of care and protection. The only issue that the Director was called upon to decide was to register the children and release them since the law did not provide for surrogacy agreements.



36. In the circumstances of this case, I do not think that the Director acted in the best interest of the children as there was no dispute even between the surrogate mother and the genetic mother. The best solution was to have the children retained in the hospital pending the determination of the parental issue in court or by giving appropriate directions. In that way, the children would continue getting medical attention which they needed most given that they were pre-term. As I stated earlier the law provides that at the birth mother is the person entitled to immediate custody of the children and in this case there was no issue of the birth mother rejecting the children.

37. I therefore find and hold that the Director violated the rights and fundamental freedoms of the petitioners. The Director violated the dignity of the petitioners, caused them distress and embarrassment by taking away the children. In short their dignity under article 28 of the Constitution was violated.

Issue birth certificates in the names of 2nd and 3rd petitioners.

38. Surrogacy arrangement is one in which one woman (the surrogate mother) agrees to bear a child for another woman or a couple (the intended parents) and surrenders the child at birth. In full surrogacy, the surrogacy mother has no genetic link with the child. The surrogate mother only gestates the embryo, which is usually created from the eggs and sperm of the intended parents (see “*Towards a legal framework on Assisted Human Reproduction in Kenya; Some thoughts on the law, technology and social change*” Muthomi Thiankolu, (2007) Nairobi Kenya).

39. Currently there is no law in Kenya regulating surrogacy arrangements. It is because of lack of a legal regime that the parties found themselves in such a situation. But even where there is no legal regime, the court or any persons dealing with the issues must, in accordance with article 57 of the Constitution, decide the issue on the basis of the best interests of the child. I agree with the submissions of Mr Chigiti, counsel for the 2nd interested party, that a child born out of a surrogacy arrangement is no different from any other child. Under article 53 of the Constitution and section 11 of the Children Act every child has the right to certainty of their parentage, a right to family, a right to a name acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their surrogate birth. These rights are buttressed by international instruments like the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child under articles 7 and 9 respectively.

40. Surrogacy is not a hypothetical issue any more. It is real and many Kenyans are resulting to surrogacy as an alternative to being parents especially those who cannot for medical reasons have their own children. In such circumstances, it is the duty of the State to protect the children born out of such arrangements by providing a legal framework to govern such arrangements.

41. Other fundamental rights that buttress the State obligation to provide a legal framework for surrogacy arrangement include article 43(1)(a) of the Constitution which provides that, “Every person has the right — to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.” Article 45(1) of the Constitution provides, “The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”

42. In Organisation for National Empowerment v Principal Registrar of Persons and other Nairobi Petition No 289 of 2012 [2013] eKLR the court held that adopted children were entitled to a birth certificate as opposed to an adoption certificate. Likewise, the child is entitled to the identity of his or her genetic parent and in principle, the registration of the genetic parents as opposed to the surrogate mother as a parent must be permitted. In this case the Children’s Court directed the surrogate parents be registered



as the parents of the children. It gave effect to the surrogacy agreement as there was no dispute between the parties. In the event of a dispute the Children's Court or the High Court may be called upon to give the necessary direction as to who is to be registered as the parent by applying the principles of the best interests of the child in the absence of a legislative framework.

Relief

43. I have found the Director violated the rights of the children and the petitioners by taking away the children in a manner that could not be justified under the *Children Act*. The petitioner claim Kshs 1,500,000.00 per petitioner for the violation of their right to privacy. They cite the case of *COM v Standard Group Limited & another* Nairobi Petition No192 of 2011; [2013] eKLR. They also claimed Ksh 2,000,000 from the Director for the loss of companionship occasioned by the unjustified limitation of their fundamental rights and that of the children.
44. The above cited case involved the violation of the right to privacy by way of publication which resulted in disclosure of the petitioner's HIV status. Damages in the circumstances are an appropriate remedy. I award each petitioner the sum of Kshs 500,000 each as against the Director.

Conclusion and Disposition

45. In summary, I have found that the Hospital is not liable for the breach of the petitioners' privacy rights. However, the Director violated the children's rights by removing them from the custody of JLN.
46. I therefore make the following orders;
- a. The case against the 3rd respondent be and is hereby dismissed with no order as to costs.
 - b. The 1st respondent shall pay each of the petitioners the sum of Kshs 500,000.00 which shall accrue interest at the court rates from the date of this judgment.
 - c. The 1st respondent shall pay the costs of the petition.

SIGNED BY

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 30TH JUNE 2014.

I.LENAOLA

JUDGE

Mr Mureithi instructed by Gitonga, Mureithi and Company Advocates for the petitioners.

Mr Awino, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd respondents.

Ms Ogutu, instructed by S. Musalia Mwenesi Advocats for 3rd respondent.

Mr Chigiti, instructed by Chigiti and Chigiti Advocates for the 2nd interested party.

