



**Sarita t/a Myra IVF Clinic v CMM & 4 others (Constitutional Petition E556 of 2025)  
[2026] KEHC 2782 (KLR) (Constitutional and Human Rights) (4 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 2782 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E556 OF 2025**

**B MWAMUYE, J  
MARCH 4, 2026**

**BETWEEN**

**DR SUKHIJA SARITA T/A MYRA IVF CLINIC ..... PETITIONER**

**AND**

**MRS CMM ..... 1<sup>ST</sup> RESPONDENT**

**MR RM ..... 2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION . 3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition is brought by Dr. Sarita Sukhija, a duly licensed medical practitioner, gynecologist, and IVF specialist with over twenty-five years of professional experience, and the proprietor of Myra IVF and Medical Centre, a facility duly licensed by the Kenya Medical Practitioners and Dentists Council to provide assisted reproductive services in Nairobi.
2. The Petition, dated 27<sup>th</sup> August 2025, was accompanied by a Notice of Motion of even date, by which the Petitioner sought, inter alia, conservatory orders restraining the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents, jointly and severally, whether directly or through their agents, employees, or related entities, from summoning, arresting, detaining, charging, prosecuting, or causing the prosecution of the Petitioner or her employees in connection with any matter arising from complaints by the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents, or any matter forming the subject of the Petition. Further, the Petitioner sought orders



restraining the Respondents from requesting, demanding, accessing, or acting upon any medical, financial, or administrative records arising from any engagement between the Petitioner or her business and the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents, pending the determination of the Petition.

3. On 28<sup>th</sup> August 2025, upon preliminary consideration of the application, this Court issued conservatory orders granting the interim reliefs sought. The Court restrained the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents from taking any coercive action against the Petitioner or her employees in connection with the complaints by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, or any matter constituting the subject of the Petition. The Court further restrained the Respondents from demanding, accessing, or acting on any medical, financial, or administrative records relating to the Petitioner's professional practice in connection with the surrogacy arrangement. These interim orders were intended to preserve the status quo, protect the Petitioner's liberty, and safeguard sensitive medical, financial, and administrative information pending the substantive determination of the matter.

### **The Petitioner's Case**

4. The Petitioner asserts that in March 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents voluntarily approached her seeking assisted reproduction services by way of surrogacy. Following counselling and agreement on the process, a surrogate mother was identified and screened in accordance with professional standards, culminating in the execution of a surrogacy agreement on 4<sup>th</sup> November 2024 between the intended parents and the surrogate. The 2<sup>nd</sup> Respondent provided a sperm sample, an egg donor of Indian descent was selected, and the clinic's embryologist created an embryo which was transferred to the surrogate under accepted medical protocols.
5. The pregnancy was closely monitored and was complicated by circumvallate placenta. At thirty-three weeks' gestation, the surrogate experienced bleeding and was referred to Nairobi South Hospital, where an emergency caesarean section was performed, resulting in the live birth of a male child on 4<sup>th</sup> June 2025, albeit preterm. The surrogate consented to the registration of the birth in the names of the intended parents, and the child later received neonatal care at Gertrude's Children's Hospital before being discharged into the legal and actual custody of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
6. The Petitioner avers that, following delivery, the 1<sup>st</sup> Respondent expressed concerns regarding the child's complexion, asserting that it was darker than expected given the genetic father and the egg donor. The Petitioner advised that any conclusions would be premature given the preterm birth and prolonged neonatal care. Subsequently, by a demand letter dated 29<sup>th</sup> July 2025, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleged that an independently commissioned DNA test showed no genetic relationship between them and the child and demanded refunds and compensation. The Petitioner contends that the DNA test was conducted unilaterally, without her knowledge, participation, or oversight, and without any independent verification involving the clinic.
7. Following these events, the Petitioner was summoned by officers of the Directorate of Criminal Investigations (the 5<sup>th</sup> Respondent) to record a statement regarding the alleged offence of cheating contrary to section 315 of the Penal Code, which she duly complied with in the presence of her legal representatives.
8. Thereafter, the 4<sup>th</sup> and 5<sup>th</sup> Respondents issued further summonses to the Petitioner's staff, including personnel who did not participate in the surrogacy process, demanding extensive medical, embryology, financial, administrative, and other confidential records, including identifying data of the surrogate mother. The Petitioner contends that these actions violate her constitutional right to privacy, including doctor-patient confidentiality under Article 31 of *the Constitution*, and constitute harassment and abuse of the criminal justice process.



9. The Petitioner maintains that she acted at all material times within her professional mandate and in accordance with accepted medical standards. She asserts that any disputes arising from the surrogacy arrangement ought to be addressed through civil or professional regulatory mechanisms rather than criminal investigations. She denies any wrongdoing, including misrepresentation, child swapping, cheating, or trafficking, and contends that the criminal allegations are speculative, unfounded, and motivated primarily by dissatisfaction with the child's appearance rather than credible evidence of criminal conduct. She further avers that the intended parents were actively involved at all stages of the surrogacy process, including sperm and egg collection, fertilization, embryo creation, and implantation, with one embryo remaining at her clinic while another was successfully implanted into the surrogate mother.
10. The Petitioner submits that the multiplicity of proceedings instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, including complaints to investigative authorities and inquiries by the Kenya Medical Practitioners and Dentists Council, are calculated to harass her, disparage her professional reputation, and disrupt the operations of her clinic. She affirms her willingness to cooperate with legitimate professional inquiries but maintains that the criminal investigations and repeated demands for sensitive documentation are oppressive, unwarranted, and constitute an abuse of process.
11. Invoking the jurisdiction of this Court under Articles 22, 23, and 165(3) of *the Constitution*, the Petitioner seeks, the following reliefs:
  - a. That this Honourable Court be pleased to issue an order of prohibition, prohibiting the 4th and 5th Respondent from arresting, intimidating, detaining harassing, or otherwise interfering with the Petitioner's liberty.
  - b. That the Honourable Court be pleased to issue an order of prohibition prohibiting the 3rd and 4th Defendants from arresting, intimidating detaining harassing or otherwise interfering with the Petitioner's liberty.
  - c. That a declaration be issued that the acts of the 4th and 5th Respondents of investigating compelling and issuing summons for investigation and the request for patient confidential documents are contrary to Article 31, 47, 50, 238 of *the Constitution*
  - d. That an order of certiorari quashing investigations relating to surrogacy records, embryology records and medical records, documentation of embryology transfer to surrogate, correspondences, instructions and all administrative records and confidential patients records regarding surrogacy.
  - e. That a declaration that the Respondent's actions were an abuse of the criminal justice system and a violation of the Petitioner's rights under the Bill of Rights.
  - f. That a conservatory order maintaining the status quo that the 1<sup>st</sup> Respondent should refrain from further intimidating, arresting, harassing the Petitioner.
  - g. That Costs of the Petition
  - h. That Such other order as the court may deem just.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's case**

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that they acted in accordance with the advice of their legal counsel, which they regard as sound, and that it is both the constitutional and statutory mandate of the 4<sup>th</sup> and 5<sup>th</sup> Respondents to investigate their complaint. They aver that, in consultation with the 3<sup>rd</sup>



- Respondent, the 4<sup>th</sup> and 5<sup>th</sup> Respondents are empowered to determine whether to prefer charges against the Petitioner based on the outcome of the investigations. They assert that, should charges be preferred, the Petitioner's rights under Articles 49 and 50 of *the Constitution* of Kenya will fully apply, including the presumption of innocence until proven guilty by the 3<sup>rd</sup> Respondent, who bears the burden of proof beyond a reasonable doubt, and the Petitioner's right to adduce evidence in her defence during the course of investigations and any subsequent proceedings.
13. The Respondents contend that, in light of the chronology of events prompting their complaint, the investigations undertaken by the 4<sup>th</sup> and 5<sup>th</sup> Respondents are entirely justifiable to establish whether any criminal offence was committed by the Petitioner, her staff, Dr. Bashir, or the staff of Nairobi South Hospital. They further contend that the investigations are consistent with their constitutional rights to information and access to justice, noting that the 4<sup>th</sup> and 5<sup>th</sup> Respondents are independent government agencies with the requisite expertise and resources to determine the status of the embryos and/or the whereabouts of the child genetically related to the 2<sup>nd</sup> Respondent.
  14. The Respondents assert that the Petitioner has not demonstrated to the Court any violation or threatened infringement of her constitutionally guaranteed rights to lawful and fair process, nor any abuse of the criminal justice system, intimidation, or harassment by the 4<sup>th</sup> or 5<sup>th</sup> Respondents, who have not yet concluded their investigations or determined whether any criminal offence has occurred.
  15. They argue that the ex parte Conservatory Orders issued by this Court have curtailed the ability of the 4<sup>th</sup> and 5<sup>th</sup> Respondents to discharge their constitutional and statutory mandates, thereby impeding the investigation of potential criminal offences and the possible charging of any suspects.
  16. The Respondents further challenge the Petitioner's claim of a breach of her right to privacy, observing that she has disclosed sensitive personal information regarding the 2<sup>nd</sup> Respondent and the child in her pleadings, without specifying what information was wrongfully disclosed or how any such disclosure constituted a violation of her rights. They maintain that the sequence of events indicates the potential commission of criminal offences, which the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents are constitutionally and statutorily obliged to investigate.
  17. The Respondents assert that, under Kenyan law, including section 193A of the Criminal Procedure Code, civil and criminal proceedings arising from IVF and surrogacy arrangements may proceed concurrently, and the existence of civil proceedings does not bar the institution or continuation of criminal prosecution. They contend that the Petitioner's alleged conduct has deprived them of the right to create a family as contractually agreed and of access to truthful and credible information regarding the status of the embryos and the child genetically related to the 2<sup>nd</sup> Respondent, which they are entitled to obtain through both civil and criminal processes in a fair and transparent manner.
  18. The Respondents express concern that, with the Conservatory Orders in place, the Petitioner may leave the jurisdiction before her medical license expired on 31<sup>st</sup> December 2025, potentially frustrating the ability of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents to exercise their constitutional and statutory mandates, thereby denying them access to justice. They emphasize that they continue to provide care for the child, whose best interests remain paramount, pending further orders of the Court. The Respondents therefore pray that the Conservatory Orders issued on 28<sup>th</sup> August 2025 be set aside, that the Petition and related applications be dismissed in their entirety, and that they be permitted to cooperate fully with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents in the ongoing investigations.



### **3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's case**

19. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents, through their replying affidavit, aver that they are fully seized of the facts underlying the Petition and that the matter arises from a surrogacy arrangement facilitated by the Petitioner through her clinic. They state that the child in question was to be conceived using the 2<sup>nd</sup> Respondent's sperm and eggs from a designated donor. At approximately thirty-three weeks of gestation, the surrogate experienced complications necessitating a caesarean section, following which the child was placed under intensive care and subsequently transferred to Gertrude's Children's Hospital.
20. The Respondents assert that, following the birth, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents expressed doubts regarding the child's parentage, particularly noting the child's complexion, which appeared inconsistent with the reported genetic contributors. They further state that the intended parents commissioned DNA tests at accredited facilities, which indicated that the child was not genetically related to them. A subsequent DNA test was conducted involving the surrogate and the minor, with all identifiers redacted to protect privacy. In light of the contested DNA results, the matter was reported to the police, prompting investigations into potential child trafficking and to establish the child's legal identity.
21. In the course of investigations, the 5<sup>th</sup> Respondent has recorded statements from the complainants, the surrogate, the Petitioner, the embryologist involved in the embryo transfer, the clinic receptionist, and the pediatrician who attended to the child at birth. The 5<sup>th</sup> Respondent has also sought relevant records from the IVF clinic, the delivery hospital, and Gertrude's Children's Hospital to facilitate a comprehensive inquiry. The Respondents emphasize that the matter is not purely civil in nature, nor solely a matter for professional regulatory determination, but involves potential criminal conduct under the laws relating to child trafficking.
22. The Respondents submit that the child remains in the care of the intended parents, who are Canadian nationals, and that there exists a risk of the child being removed from the jurisdiction, which could frustrate the investigation. They contend that the Conservatory Orders granted on 28<sup>th</sup> August 2025 ought to be vacated to enable the 5<sup>th</sup> Respondent to complete investigations and forward the file to the 3<sup>rd</sup> Respondent for possible prosecution.
23. The Respondents assert that the Petitioner's claims of infringement of her fundamental rights are frivolous, constitute an abuse of the Court process, and are designed solely to delay and derail ongoing investigations. They therefore pray that the Petition be dismissed in its entirety.

### **The submissions**

#### **The Petitioner's submissions**

24. The Petitioner, through her written submissions dated 16<sup>th</sup> October 2025 and supplementary submissions of 30<sup>th</sup> October 2025, contends that disclosure of medical records to government agencies must be limited, necessary, and proportionate to a legitimate interest. She submits that the actions of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, predicated on allegations of cheating and child trafficking, were neither necessary nor proportional, particularly as they involved summoning the surrogate and a clinic receptionist who possessed no relevant knowledge, thereby infringing doctor-patient confidentiality and her professional duty to protect the privacy of clients, donors, and surrogates. She relies on Article 47 of *the Constitution*, asserting that the Respondents' conduct in summoning unrelated persons, demanding extensive confidential information, and camping at her clinic fell short of the standards



of fair, lawful, and reasonable administrative action, as set out in her affidavits of 27<sup>th</sup> August and 3<sup>rd</sup> October 2025.

25. The Petitioner further submits that the multiplicity of proceedings initiated against her constitutes an abuse of the criminal justice system. She invokes *George Joshua Okungu & Another vs Chief Magistrate Court Anti-Corruption Nairobi & Another* (2014) KEHC 7181 and *Republic vs Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* (2002) 2 KLR 703, emphasizing that criminal proceedings cannot be employed to advance civil claims, coerce concessions, or oppress parties, and that the discretion to prosecute must be exercised solely in the public interest.
26. The Petitioner demonstrates that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents instituted multiple proceedings, including criminal complaints at the Directorate of Criminal Investigations alleging cheating under section 315 of the Penal Code and offences under the Counter Trafficking in Persons Act, civil proceedings in HCCC E223 of 2025 seeking specific performance and damages, complaints before the Kenya Medical Practitioners and Dentists Council, and proceedings in MCCRmisc E403 of 2025 to compel disclosure of confidential records. She submits that these actions are essentially civil in nature, the criminal allegations lack factual and legal basis, and the Respondents are misusing the criminal justice system to intimidate and harass her.
27. The Petitioner emphasizes that she has submitted to the jurisdiction of the Kenya Medical Practitioners and Dentists Council, which is competent to regulate professional conduct, inspect health institutions, and take disciplinary action. She asserts that the criminal investigations circumvent civil and professional remedies, violate her constitutional rights under Articles 31 and 47, and were conducted with the purpose of intimidation, including the summoning of unrelated persons, camping at her clinic, and instituting repeated proceedings.
28. The Petitioner invokes Article 23 of *the Constitution*, seeking prohibitory, declaratory, conservatory, and certiorari reliefs to safeguard her liberty and prevent further harassment. She submits that the actions of the Respondents, including the demand for confidential medical and embryology records, harassment of clinic staff, and instigation of multiple proceedings, constitute a violation of her rights and an improper use of the criminal justice system to resolve what is fundamentally a civil dispute. She reiterates that her Petition complies with the principles in *Anarita Karimi Njeru and the Mutunga Rules*, as well as the guidance in *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others* [2015] KECA 304 (KLR), requiring specification of the rights allegedly violated, the facts relied upon, and the reliefs sought, thereby enabling the Respondents to respond appropriately. She asserts that she has stated with reasonable precision the facts, the constitutional provisions allegedly violated, and the reliefs sought, including injuries suffered and likely to be suffered, arising from the Respondents' alleged abuse of the criminal justice system, harassment, and intimidation, particularly involving the police and regulatory officers at her clinic. The Petitioner highlights that complaints by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents regarding the child's complexion, without independent DNA verification involving her, have caused her to live in fear of arrest while performing her professional duties.
29. The Petitioner further submits that the actions of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents violated her rights under Articles 31 and 47 of *the Constitution*. She relies on *Republic v Chief Magistrate Court at Milimani & 3 Others; Kenya Hospital Association t/a The Nairobi Hospital (Ex Parte Applicant) Chief Executive Officer, Nairobi Hospital & 10 Others* (Judicial Review Application E073 of 2025; [2025] KEHC 11995 (KLR)) to demonstrate that doctor-patient confidentiality and the right to privacy are of high constitutional value and that limitations on such rights must be strictly necessary and proportionate. She submits that the 5<sup>th</sup> Respondent's request on 19<sup>th</sup> August 2025 for extensive confidential records, including surrogacy recruitment files, medical and embryology records, communications, administrative and financial records, and privileged legal correspondence, exceeded



what is necessary or proportionate. She notes that the Respondents summoned persons not involved in the surrogacy arrangement, including the carefully redacted surrogate mother and clinic staff with no relevant knowledge, thereby intensifying fear, harassment, and reputational harm, particularly given press attention.

30. The Petitioner contends that the Respondents' conduct in summoning unrelated persons, camping at her clinic, and demanding privileged and confidential records constitutes a breach of her constitutional rights, is procedurally unfair, and amounts to an abuse of the criminal justice system. Civil proceedings, including HCCC E223 of 2025 and complaints before the Kenya Medical Practitioners and Dentists Council, provide appropriate forums for any alleged negligence or professional misconduct, and the Respondents should be restrained from using criminal investigations to intimidate or coerce concessions in these civil or professional proceedings. She underscores that the Kenya Medical Practitioners and Dentists Council has statutory authority under the Kenya [Medical Practitioners and Dentists Act](#), CAP 253, to register and regulate medical practitioners and institutions, investigate professional misconduct, and take disciplinary action, rendering criminal interference unnecessary.
31. The Petitioner submits that the Respondents' conduct in demanding confidential medical and embryology records, harassing clinic staff, and instigating multiple simultaneous criminal and civil proceedings constitutes a profound violation of her rights under Articles 31 and 47, representing a clear abuse of the criminal justice system to resolve what is fundamentally a civil dispute. She urges the Court to grant the conservatory reliefs sought in the Petition dated 27<sup>th</sup> August 2025 to protect her rights, liberty, and professional confidentiality.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**

32. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the dispute before the Court emanates from a failed in vitro fertilisation (IVF) and surrogacy arrangement facilitated by the Petitioner's clinic, which culminated in the birth of Baby E, who, according to two independent DNA analyses conducted at accredited laboratories, is not genetically related to the 2<sup>nd</sup> Respondent—an outcome that constitutes a manifest departure from the parties' contractual arrangement. They submit that the Petition is predicated upon a mischaracterisation of both fact and law, as the impugned investigations are expressly directed at determining the true parentage of Baby E and, if applicable, the fate and whereabouts of the embryo and the child for whom the Respondents had contracted.
33. The Respondents emphasise that the apparent failure of the IVF and surrogacy process raises profound questions regarding embryo identification and handling, the circumstances of the pregnancy and birth, and the legal identity and parentage of the child, which cannot be resolved absent the completion of the ongoing investigations. They assert that these inquiries advance a compelling public interest and are necessary to vindicate the rights of the child, particularly under Article 7 of the United Nations Convention on the Rights of the Child and section 7 of the [Children Act](#), 2022, which impose upon the State a positive duty to ensure that every child is cared for and knows his or her parents. They further submit that Baby E, being of tender years and without confirmed parentage or nationality, is a vulnerable child whose constitutional and statutory rights cannot be subordinated to the Petitioner's asserted professional or personal interests.
34. Relying on the 1<sup>st</sup> Respondent's Replying Affidavit sworn on 19<sup>th</sup> September 2025, the Respondents recount that the Petitioner had undertaken to facilitate the birth of a child conceived using the 2<sup>nd</sup> Respondent's sperm and a donor egg, with the embryo implanted in a surrogate who delivered prematurely at approximately thirty-three weeks, necessitating neonatal care at Gertrude's Children's Hospital. They note that observable inconsistencies shortly after birth prompted DNA testing, the results of which conclusively established that Baby E is not genetically related to the 2<sup>nd</sup>



- Respondent. These findings, which remain uncontroverted by the Petitioner, underscore the necessity of investigations into a possible embryo mix-up or child trafficking and the urgent need to establish the child's true parentage. In their submission, the Petition cannot lawfully be employed to shield such matters from scrutiny or impede investigations undertaken in accordance with domestic law and Kenya's international obligations on child protection.
35. The Respondents further submit that the Petition does not meet the constitutional threshold of precision, as articulated in *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154, *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR, and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR). They argue that the Petitioner has failed to plead, with reasonable particularity, the nature of the alleged violations or the specific injury suffered. Reliance on Articles 31 and 50 of *the Constitution* is, in their submission, misplaced, given that the Petitioner has neither been arrested nor charged, rendering any apprehension of a breach of fair trial rights speculative and premature. In support, they invoke *Republic v Directorate of Criminal Investigations & another; Omumani (Ex parte Applicant)* [2025] KEHC 4307 (KLR), wherein it was affirmed that the protections conferred by Article 50 crystallise only upon arrest or charge.
  36. On the procedural dimension, the Respondents submit that the Petitioner was afforded due process throughout the investigative process, having been duly served with summonses and requests for documents that outlined the scope and nature of the investigations, and having provided a statement pursuant to section 4(3)(b) of the *Fair Administrative Action Act*. They argue that the mere issuance of summonses and the taking of statements does not, without more, constitute a violation of Article 47 of *the Constitution*, and that the Petitioner has failed to demonstrate illegality, procedural impropriety, malice, or bad faith on the part of the investigating authorities. They further note that Article 47 was not pleaded in the Petition and was raised only at the stage of submissions, contrary to the settled principle that parties are bound by their pleadings.
  37. Regarding the alleged infringement of the right to privacy, the Respondents assert that the documents sought are directly relevant and necessary to establish the truth concerning a potential DNA mismatch or child swap. While acknowledging the importance of confidentiality, they maintain that it cannot operate as an absolute bar to lawful criminal investigations conducted pursuant to valid court orders. They rely on *Republic v Chief Magistrate Court at Milimani & 3 others*, *Kenya Hospital Association t/a The Nairobi Hospital*, and *Mwangi v Director of Criminal Investigations* to underscore that sensitive medical data may be accessed for investigative purposes where necessity and proportionality are demonstrated and safeguards, including compliance with the Data Protection Act, are observed.
  38. The Respondents categorically reject the assertion that the criminal justice process has been abused, emphasising that the complaint arose not from subjective perceptions but from objective DNA evidence demonstrating the absence of a biological relationship between Baby E and the 2nd Respondent. They submit that the existence of parallel civil proceedings and disciplinary inquiries before the Kenya Medical Practitioners and Dentists Council does not preclude criminal investigations, pursuant to section 193A of the Criminal Procedure Code, and that regulatory bodies lack jurisdiction to determine criminal culpability or impose penal sanctions. They further highlight that the 4<sup>th</sup> and 5<sup>th</sup> Respondents are constitutionally and statutorily mandated to investigate criminal complaints, and that judicial intervention at the investigative stage is unwarranted absent clear proof of abuse of power or violation of constitutional rights.
  39. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents assert that the complaint precipitating the investigations is genuine, that no violation or threatened violation of the Petitioner's rights under Articles 31, 47, or 50 of *the Constitution* has been demonstrated, and that the interests of justice particularly the rights of the child



and the intended parents to ascertain the truth regarding parentage and the fate of the embryo require that the investigations proceed to their proper conclusion. They accordingly urge the Court to dismiss the Petition in its entirety.

### **The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' submissions**

40. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents submit that the Petition is premature, misconceived, and wholly devoid of both factual and legal foundation, and ought to be dismissed for seeking to improperly restrain lawful criminal investigations. They state that the Petition arises from a complaint lodged on 24<sup>th</sup> July 2025 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, alleging that, contrary to the agreed IVF and surrogacy process, a child was born who bore no genetic relationship to the intended parents. Upon receipt of this complaint, the 3<sup>rd</sup> Respondent instituted investigations to ascertain whether offences of deception, forgery, substitution of gametes, or child trafficking under the [Counter-Trafficking in Persons Act](#), 2010, may have occurred. These inquiries were supported by a DNA report confirming a genetic mismatch. The Respondents contend that, rather than cooperate with these lawful investigations, the Petitioner filed the present Petition in an attempt to shield herself from scrutiny under the guise of constitutional protection.
41. The Respondents submit that the Court ought not to intervene in ongoing investigations, invoking the doctrine of ripeness and the well-established principle that constitutional courts should refrain from adjudicating hypothetical or prospective disputes. They rely on *Legal Aid South Africa v Mzoxolo Magidiwana and the President of the Supreme Court of Kenya and another* (2016), *Esther Wambui Muitiria & others v DPP & 2 Others* (2015) eKLR, and *Lameck Okeyo & Another v IG & 2 Others* (2016) to underscore that courts should not usurp the constitutional and statutory mandate of investigative agencies except in exceptional circumstances. They submit that investigations are inherently exploratory, requiring consideration of both incriminating and exculpatory material, and that the mere possibility that allegations may ultimately prove unfounded cannot justify halting bona fide inquiries.
42. It is further contended that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents acted strictly within their constitutional and statutory mandate. They rely on Article 157 of [the Constitution](#) and section 5 of the [Office of the Director of Public Prosecutions Act](#) to assert the independence of the prosecutorial function, highlighting that neither consent nor direction from any authority, including the Court, is required for investigations or prosecutions. Placing reliance on *Hon. James Ondicho Gesami v Attorney General & Others*, *Mohamed Ali Swaleh v Director of Public Prosecutions & Another*, and *Republic v Commissioner of Police & Another* (2012) eKLR, they submit that once reasonable suspicion is established, investigative and prosecutorial authorities are duty-bound to act, and that requiring a person to submit to investigation does not, of itself, constitute a violation of constitutional rights. They caution that judicial interference at this stage would undermine the doctrine of separation of powers and risk emasculating independent constitutional offices.
43. On the alleged infringement of constitutional rights under Articles 31, 47, and 50, the Respondents submit that no violation has been demonstrated. They argue that the right to privacy under Article 31 is not absolute and may lawfully be limited under Article 24 in the interests of justice, public safety, and the protection of vulnerable persons, particularly children. They rely on *Muchiri v Eldoret Hospital Limited* (Constitutional Petition 024 of 2021) [2022] KEHC 13365 (KLR) to establish that access to information, including medical records, may be compelled where necessary for the exercise or protection of rights. They further invoke section 51(2) of the Data Protection Act, submitting that the requests for records were made pursuant to lawful processes, were proportionate, and served the legitimate public purpose of investigating possible child trafficking and related offences. In addition,



reliance is placed on Article 53(2) of *the Constitution*, emphasising that the best interests of the child are of paramount importance and justify the limited intrusion alleged by the Petitioner.

44. The Respondents further submit that the Petitioner has failed to plead or prove any constitutional violation with the precision required by *Anarita Karimi Njeru v Republic (1976–1980) KLR 1272*. They contend that the Petition is founded on broad assertions unsupported by evidence, contrary to the principle articulated in *Leonard Otieno v Airtel Kenya Limited [2018] eKLR*, that constitutional claims must be grounded on a clear evidentiary foundation. They maintain that Article 50 is inapplicable, as no charges have been preferred, and that the Petitioner will, in any event, enjoy all due process guarantees should the matter proceed to trial.
45. The Respondents contend that halting investigations at this stage would gravely undermine the rule of law and public interest, particularly given the seriousness of allegations involving possible child trafficking. They rely on *Trusted Society of Human Rights Alliance v Attorney General [2012] eKLR* and *Meixner & Another v Attorney General [2005] 2 KLR 189* to submit that courts should not shield suspects from lawful investigative processes under the pretext of constitutional protection. They further argue that the existence of disciplinary proceedings before the Kenya Medical Practitioners and Dentists Council does not bar criminal investigations or prosecutions, invoking Article 157 of *the Constitution* and section 193A of the Criminal Procedure Code, which expressly permit parallel civil, disciplinary, and criminal processes arising from the same facts.
46. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents submit that the investigations complained of are lawful, proportionate, and conducted in strict compliance with *the Constitution* and statute. They contend that the Petition constitutes an impermissible attempt to fetter the discharge of constitutional duties by investigative and prosecutorial authorities, and that granting the orders sought would undermine public confidence in the criminal justice system and the protection of children. They accordingly urge the Court to dismiss the Petition with costs.

### **The Interrogatories;**

47. It is on record that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a series of interrogatories directed to the Petitioner, seeking detailed elucidation of matters pertinent to the dispute. In response, the Petitioner was duly placed on the witness stand and examined viva voce, in accordance with the principles of procedural fairness, thereby affording both the Court and the Respondents the opportunity to test the veracity, clarity, and sufficiency of her answers under oath. The process was conducted in a manner consistent with established judicial practice, ensuring that the Petitioner's responses were elicited in open court and could be weighed as evidence in the determination of the issues before the Court. The said interrogatories, together with the Petitioner's respective responses thereto, are set out herein below for the Court's consideration:

#### **A. Sperm Sample Collection**

1. How exactly was the 2<sup>nd</sup> Respondent's sperm sample labelled in terms of date of receipt, name and unique patient code and under what temperature and security conditions was it stored?

Answer: There is a specific lab person who labels the jar which is given for the sample collection witnessed by the senior embryologist. Every patient is given a unique code, you proceed to semen collection room and return with a sample. We store the vials in liquid nitrogen. Once they go into liquid nitrogen tanks we then name, code, date and the tank number and how many vials, recorded manually and also on the computer. The temperature is -19.6 Centigrade.<sup>nd</sup> Respondent the name and unique patient code Rene Mathews, 1938 (ID code) 12:35pm time of collection; 3<sup>rd</sup> July 2024; sample



in cannister No. 4; 3 vials. Tank was A01 (canister No. 4). One vial was used on 24<sup>th</sup> July 2024 and two vials are still with us.

For the 2

2. Who was personally responsible for collecting, labelling and storing this sperm sample?

Answer: The person who was responsible was the lab technician & embryologist who is then witnessed by senior embryologist.

He no longer works with us but Leonida still does, both were employees.

Dr. Satyawun was the senior embryologist.

Leonida Akika, was the technician.

B. Egg Donor and Egg Retrieval

3. Does the Clinic have an affiliate medical facility in India or elsewhere involved in sourcing egg donors?

Answer: Carla the 1<sup>st</sup> Respondent wanted an Indian donor, we don't have an affiliate medical facility in India. We use egg donor agencies, they give us a list of donors & donor profiles with physical & social characteristics and the client chooses. We then inform the egg donor agency and receive...

4. Were the egg donors on the list you provided to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents affiliated with that facility?

Answer: No, we don't provide a list.

5. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents meet or communicate with the selected egg donor at any stage?

Answer: They don't meet. It is anonymous and we don't allow them to meet to avoid legal complications in future, claims may be by the biological mother; we keep it anonymous.

6. Who paid for and organized the egg donor's travel to Kenya, if she indeed travelled, for egg retrieval?

Answer: The person who wants the egg pays all expenses, they pay through us. The 1<sup>st</sup> & 2<sup>nd</sup> respondents were the ones who paid.

7. How exactly were the retrieved eggs labelled in terms of date of retrieval, name and unique patient code and under what temperature and security conditions were they stored?

Answer: Date of retrieval 24/07/2024; the senior embryologist labels all the petri dishes. The temperature in this room is 37° C which is body temperature, he looks for the eggs & it is a manual process all over the world. Retrieval is a small surgery to extract the eggs from the donor. The donor travels and we perform a minor surgery to extract. We don't store the eggs, we have the name therein of the donor, they go straight into the incubator & we immediately fertilize. We retrieve and take the egg into a dish, the dish is labelled by the name of the patient and for whom it is taken. Within 2 hours it is used, the name of the egg donor & the patient for whom it is being used.

8. Who was personally responsible for collecting, labelling and storing the retrieved eggs and on what date?

Answer: The senior IVF doctor, me, I am the only person who collects the sample by undertaking the surgery. The senior embryologist then labelled & placed into the incubator. Dr. Satyawun did it.

C. Embryo Identification and Handling

9. On what date was fertilization conducted?



Answer: 24/07/2024 is the date fertilization was done.

10. How many embryos resulted from this fertilization procedure after preimplantation genetic testing?

Answer: There were six day five embryos, on day one we check until day five. Some die before day 5. We had six (6) day five embryos which then have preimplantation genetic testing.

11. How exactly were these embryos individually labelled in terms of date of fertilization, name, unique patient code and under what temperature and security conditions were they stored prior to the transfer to the surrogate?

Answer: All that is done by the senior embryologist all in separate tubes, the embryos are kept in -196°C in separate tubes labelled in the same way and manner as the sperm samples. Tank A02 canister 6, Id 1938 -six straws in that canister 6 which is secure, stored until used.

12. Who was personally responsible for fertilization, labelling and storage of these embryos?

Answer: Labelling is by permanent marker, nobody used barcoding. We have just started this December using barcoding but of the other 10 centers in Kenya use barcodes. It costs USD 25,000. We implemented it to ensure world class standards but not all of us or European use barcodes. We have implemented this to completely eliminate a possibility of mix ups.

The dis is labelled before the incubators where the embryos will grow.

This is all the senior embryologist Dr. Satyawan; he has a Masters Degree in Embryology he is from India; we didn't have any in Kenya.

13. Who performed the embryo transfer to the surrogate and what verification and control procedures were in place to ensure that the correct embryo was transferred to the surrogate?

Answer: I performed the embryo transfer together with Dr. Satyawan but the actual bringing of the embryos is by Dr. Satyawan. The surrogate is on the table. The embryo transfer was done by me; I inserted the catheter into the cervix and the embryos are taken out by the embryologist to them in the incubator for at least two hours, then I put a second catheter after confirming the surrogate name.

The senior embryologist then takes the embryo loads into the catheter. The nurse verifies and matches as the senior embryologist did this. Nurse Kaweru witnessed & ensured the catheter is correctly loaded with the correct embryos.

The catheter is not labelled; it is just a tool for delivery. Only the dish is labelled. I confirm the name by asking the surrogate her name, then I check also with the material being brought in.

I didn't confirm the surrogate by ID; this is done before she gets to the table by the nurses. And I confirm by name.

14. How exactly is the remaining embryo labelled in terms of date of fertilization, name and unique patient code and under what temperature and security conditions is it stored at the Clinic?

Answer: We implanted 1, we still have 5 left.

No. 4, was normal as a boy, another was a girl. That is why we used No. 4, a normal a boy, that is the one we implanted.

The patient is the client & we also put the husband, so the couple is there.

We refill the liquid nitrogen after 2 weeks. The report by the lab was sent to the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

There is no genetic testing lab in Kenya, we send biopsy to Egypt, we now do England.



#### D. Surrogacy Agreement and Process

15. Under the agreement, who was responsible for selecting the surrogate?

Answer:<sup>st</sup> & 2<sup>nd</sup> Respondents but we don't give the clients a choice.

The clinic selects the surrogate, we select the surrogate. I've told the 1

16. Did the 1st and 2nd Respondents ever meet or communicate with the surrogate before or after signing the agreement?

Answer:

They never met nor communicated. Anonymous. If you allow them to meeting, issues or blackmail arise. I practiced in India for 20 years, it used to happen.

17. Please confirm that the surrogate was a stand-alone party to this agreement?

Answer:

Yes, a stand-alone party, the surrogate is a stand-alone party.

18. Did the surrogate have independent legal counsel?

Answer:

The surrogate didn't have any independent legal counsel. The clinic had a lawyer in Surrogacy Agreement "DSS2" to the supporting affidavit. She is explained the Agreement by our lawyer.

19. Were the Clinic's advocates involved in facilitating the drafting and execution of the agreement?

Answer:

It is our lawyer who drafted and the execution is done by the parties, the authentication was by our lawyers & witnessed all signatures. Charles Gomba Advocate.

20. Did you allow or encourage the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as the intended parents to meet or communicate with the surrogate during the pregnancy?

Answer:

We monitor the pregnancy and update them, they don't need direct contact. My secretary does this.

Answered earlier please. No.

We don't allow or encourage direct communication, but if they meet or communicate it is outside my knowledge.

21. To whom were all payments made, including those for the surrogate's fees?

Answer:

All payments are paid to us, including surrogate fees.

#### E. Pregnancy Monitoring and Delivery

22. Are you aware of an anatomy scan performed at Jalaram Medical Services around 7<sup>th</sup> February 2025?

Answer:

Yes an anatomy scan was performed at Jularam medical services on 07/02/2025.

23. Did this particular anatomy scan reveal a circumvallate placenta?

Answer:



A circumvallate placenta is an abnormality where the placenta folds up, it is 2% of cases and no treatment. You just take more care as it can cause bleeding and pre-term labour or neo-natal death since the placenta is touching the fetal side membranes. It can result in need for emergency CS.

24. Did the second or subsequent ultrasound scan(s) conducted by the Clinic on the surrogate confirm the circumvallate placenta?

Answer:

The second test discharged; the clinic and I saw that it was not circumvallate placenta. We have a sonographer & I confirmed it; we both agreed.

25. Would a circumvallate placenta result or likely result in higher risks for pregnancy complications like early vaginal bleeding or pre-term delivery?

Answer:

I answered at Q23, she started slight bleeding but we don't believe that at 33 weeks it was due to circumvallate placenta.

26. What complications, if any, occurred during the pregnancy?

Answer:

No complications prior to week 33; she reported some bleeding & minor contraction. The nurse at our clinic relayed this information to me. I then directed that the surrogate be taken to the clinic immediately. We took her to Nairobi South Hospital, by expressway. It is in south C, I am attached to Nairobi South Hospital and I have visiting and operating rights. I deliver at Nairobi South

27. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, as the intended parents, express a wish for the surrogate to deliver at a specialized medical facility, such as the Aga Khan University Hospital?

Answer:<sup>st</sup> & 2<sup>nd</sup> Respondents that if they wanted another hospital they would have to get another person to deliver but they said Nairobi South Hospital was fine since that is they wanted me to deliver. They were given the option and had the right to choose under the Agreement.

They discussed with me, but I said Nairobi South Hospital. I deliver all of my surrogates, and I informed the 1

I have no rights at Aga Khan Hospital, I only have MP Shah and Nairobi South Hospital rights.

They asked me and I said Aga Khan is fine but not then with obstetrician being me. I prefer Nairobi South because it gives better and faster services for less price. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents were and did pay Nairobi South Hospital.

28. Who had the final authority to select the delivery hospital under the surrogacy agreement?

Answer:<sup>st</sup> & 2<sup>nd</sup> Respondents had the final authority to select the Hospital.

The 1

29. Who decided that the surrogate would deliver at Nairobi South Hospital?

Answer:

We discussed and then they chose Nairobi South Hospital. We selected this they did, well in advance; within 1 hour they had conducted an emergency delivery. Nairobi South Hospital is excellent, this was pre-term; you must put these measures in place well in advance.



30. What area or locality of Nairobi was the surrogate living in right before she was taken to Nairobi South Hospital?

Answer:

On Wayaiki way.

31. Does the Clinic have any formal arrangement with Nairobi South Hospital with respect to delivery by surrogates?

Answer:

No we don't have any formal arrangement other than visiting rights agreement. Nairobi South Hospital is better, MP Shah takes 4 hours here just to...

32. What necessitated the emergency caesarean section on 4th June 2025?

Answer:

Pre-term bleeding.

33. Who was the attending obstetrician or surgeon who delivered the baby?

Answer:

I was the attending obstetrician who delivered.

34. Was Dr. Bashir the pediatrician present during the delivery?

Answer:

Dr. Bashir is the senior most neonatologist at Nairobi South Hospital who has good knowledge that surrogates need general care and concern.

35. What was the appearance and condition of the baby immediately after delivery in terms of the sex, complexion, weight and Apgar score?

Answer:

A boy, who looked fair in complexion, the facial identity I was not concerned with, I didn't really concern myself; you have a bleeding uterus and other issues, provided that the baby cries, you hand over to the pediatrician immediately. Taken immediately to neonatal ICU. Apgar score is the breathing and color of the skin, basically a checklist.

36. Are you aware whether this was the same baby that was transferred to

Gertrude's Children's Hospital the following day 5 June 2025?

Answer:

Baby delivered on 04/06/2025; I don't know if the same baby was taken to Gertrude's Children Hospital on 05/06/2025. I immediately handed over during the surgery. The tagging on the ankle is done in the operating room by the nurse in the presence of the pediatrician.

I went to glance at the baby after. They told me the baby had difficulty in breathing and eating, the Nairobi South Hospital Pediatrician told me.

You can't tell the race of a new born baby even premature. Light here is not complexion, it has no bearing on pre-term. On day one I went to NICU and I can't remember the color. The baby was in a cot. I went right up to the cot. The baby was very small. I was not concerned with skin color. I was more concerned with oxygen deficiency and other issues.



I went to the NICU before I left.

The surrogate was in hospital 8:30am, by 9:30am we had delivered. Carla was informed even before we got to the hospital.

I have seen the annexure, 09:31 hours paragraph 26 of the 1<sup>st</sup> Respondent's replying affidavit, I cannot recall all the accuracies of the time all I can say is about an hour from arrival of deliver.

37. Can you confirm that the baby whose details are before the Court is the same baby that was delivered by the surrogate and handed over to the intended parents on 5 June 2025?

Answer:

I cannot confirm the baby details and I cannot confirm that the baby I delivered is the same one handed over to the intended parents on 05/06/2025.

### **Analysis and Determination**

48. The Court has carefully considered the Petition, the affidavits on record, the rival written submissions, and the authorities cited by the parties. The core issue is whether this Court should intervene to restrain ongoing criminal investigations arising from a surrogacy arrangement, on the basis of alleged violations of the Petitioner's constitutional rights under Articles 31, 47, and 50 of *the Constitution*.
49. The Petition raises the question whether the conduct of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents in pursuing criminal investigations, summoning the Petitioner and her staff, and demanding extensive confidential medical, embryological, financial, and administrative records in respect of an assisted reproductive and surrogacy arrangement, trespassed the Petitioner's constitutional rights and amounted to an abuse of the criminal justice process warranting judicial intervention.
50. The Respondents contend that the Court should not interfere with ongoing investigations, invoking the doctrines of non-interference and ripeness. These doctrines, however, are subject to the settled principle that the High Court may intervene where fundamental rights are demonstrably violated, ultra vires conduct is established, or the constitutional threshold for justiciability is met.
51. As articulated in *Anarita Karimi Njeru v Republic* (1979) KLR 1272 and reaffirmed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, a petitioner must plead with reasonable precision the rights said to be infringed and the manner of their infringement. The Court of Appeal has emphasized that such precision is substantive rather than formalistic and must ensure that the issues in controversy are clearly identifiable.
52. Exceptions to strict non-interference arise where investigative conduct is arbitrary, lacks factual basis, or threatens erosion of constitutional guarantees. In *Maina & 4 others v Director of Public Prosecutions & 4 others* [2022] KEHC 15 (KLR), the High Court exercised supervisory jurisdiction to delineate circumstances in which parallel civil and criminal proceedings may proceed, cautioning against initiating criminal processes disproportionate to the alleged conduct.
53. In this matter, the interrogatories filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents demonstrate the purpose of such instruments, to elicit information relevant to the investigation. However, a careful review of these interrogatories reveals that the inquiries largely concern procedural conduct, record-keeping, administrative processes, and professional oversight within the clinic. The nature of the questions, and the persons targeted, point more toward alleged negligence or incompetence in the handling of the surrogacy arrangement rather than establishing a prima facie case of a serious criminal offence such as child trafficking. While the latter is undeniably a grave offence, the Court is not satisfied, on the



evidence before it at this stage, that the Petitioner's conduct amounts to criminal culpability of that magnitude.

54. Courts have long recognised that multiplicity of proceedings particularly where a person faces numerous overlapping civil, regulatory, and criminal actions arising from the same facts can amount to an abuse of process and may prejudice the litigant's right to fair and orderly adjudication. While Section 193A of the Criminal Procedure Code permits civil and criminal proceedings to run concurrently, this statutory regime is not a free-for-all, the inherent jurisdiction of superior courts may properly be invoked to stay, quash, or prohibit proceedings where concurrent litigation risks prejudicial outcomes or where the criminal process is deployed to circumvent other dispute resolution forums. This principle accords with the doctrine against multiplicity of suits, which seeks to avoid parallel actions capable of producing inconsistent determinations or unfairly burdening a party with duplicative litigation.
55. In Civil Appeal No. 83 of 2017 *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 Others*, the Court of Appeal emphasised that the law disfavors parallel proceedings between the same parties on the same cause of action in order to prevent abuse of court process and to conserve judicial resources.
56. Similarly, the sub judice rule articulated in *Republic v Paul Kihara Kariuki; Ex parte Law Society of Kenya* [2020] eKLR underscores the salutary objective of avoiding multiple suits over the same subject matter where the determination of one would render the other *res judicata*, thereby protecting parties from needless, vexatious, or oppressive litigation.
57. Where an individual is subjected to a cascade of suits: civil, disciplinary, and criminal arising from the same factual matrix, superior courts may, in appropriate circumstances, exercise their supervisory and inherent jurisdiction to curtail, stay, or synchronise such proceedings. The purpose of such intervention is not to shield a party from lawful accountability, but to ensure that the administration of justice does not itself become oppressive, prejudicial, or violative of the constitutional guarantees of fair hearing and equality before the law.
58. In the present matter, the Petitioner is facing proceedings before the Kenya Medical Practitioners and Dentists Council (KMPDC) as well as criminal investigations arising from the same surrogacy arrangement. The civil and disciplinary processes remain pending, and their findings are capable of informing the appropriate course of action, if any, including whether the facts disclose professional negligence, incompetence, or a more serious infraction.
59. To permit criminal proceedings to advance in the absence of a clear evidentiary foundation, and before the specialised regulatory body has rendered its determination, risks prejudging matters properly within that forum and exposing the Petitioner to undue prejudice.
60. The Petitioner has demonstrated that her constitutional rights to fair administrative action, dignity, and fair hearing have been infringed. The initiation and continuation of criminal investigations without a demonstrable evidentiary substratum, coupled with broad and intrusive demands for confidential medical and administrative records, carries a real risk of stigma, reputational harm, and irreparable prejudice. Judicial intervention is warranted where investigative action is disproportionate, arbitrary, or likely to infringe fundamental rights, consistent with the principle *ubi jus ibi remedium*.
61. It is common ground that the Petitioner, a medical practitioner and proprietor of a licensed IVF clinic, facilitated an assisted reproductive and surrogacy arrangement resulting in the birth of a child in June 2025. Subsequent disputes concerning genetic parentage led to criminal complaints and extensive investigative measures, including summonses to personnel not directly involved in the process. These measures, the Petitioner avers, were oppressive, disproportionate, and violative of Articles 31, 47, and 50.



62. Article 31 guarantees the right to privacy, encompassing doctor-patient confidentiality and the protection of sensitive medical information.
63. Article 47 requires administrative action to be lawful, reasonable, and procedurally fair, while Article 50 guarantees fair hearing and protection against arbitrary deprivation of liberty.
64. In *Law Society of Kenya & another v Director of Criminal Investigations & 4 others; Wamunoro Investments Limited & 5 others* (Petition E212 of 2023) [2026] KEHC 1002 (KLR), this Court held that prosecutorial action which imperilled fair trial rights, interfered with professional duties, and lacked nexus to clear evidence of criminal conduct violated Articles 47 and 50 and constituted an abuse of process.
65. The Respondents are correct that investigative agencies have constitutional and statutory mandates to investigate crime. However, such functions must be exercised within constitutional guardrails. The State cannot weaponize prosecutorial discretion to intimidate, coerce, or demand sensitive data absent clear justification. Investigatory zeal must be balanced with proportionality; excessive or unfocused intrusion into professional practice violates the Bill of Rights.
66. Evidence establishes that the Petitioner cooperated with legitimate inquiries, but many summonses and document demands extended beyond any identifiable offence, targeting personnel with no involvement in the surrogacy. Such broad, unspecific demands demonstrate lack of proportionality and disregard for privacy. *Salus populi suprema lex* does not permit the State to subordinate individual rights to unchecked investigative processes.
67. Administrative action in the present context, including vague and overbroad summonses without adequate reasoning, contravenes Article 47. Criminal investigatory measures, though unaccompanied by formal charges, risk prejudgment, stigma, and interference with professional freedom, engaging Article 50 protections.
68. The Court acknowledges the Respondents' claim that the Petitioner's conduct amounts to a usurpation of their constitutional mandate to investigate crime. However, constitutional mandates are not absolute, they operate within the constraints of the rule of law and fundamental rights. Courts may intervene in criminal investigations to prevent abuse of process, protect rights, or where evidence is insufficient to justify coercive measures.
69. Kenyan jurisprudence, including *Mwangi v Director of Criminal Investigations & another* [2025] KEHC 9583 (KLR) and *Legal Aid South Africa v Mzoxolo Magidiwana & another* (2016), supports such intervention where investigations threaten constitutional rights, are baseless, or risk irreparable prejudice. *The Constitution* envisions exceptions to rigid procedural precision, recognizing that investigatory or prosecutorial action may be curtailed when disproportionate, arbitrary, or infringing on fundamental rights.
70. On the facts, interrogatories filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents point to professional negligence rather than criminality. Civil suits and disciplinary proceedings remain pending, highlighting those criminal investigations should not preempt or prejudge matters properly within another forum. The principle *concurrentibus actibus non est turpitudinis* permits civil, regulatory, and criminal processes to proceed concurrently but requires that no party's constitutional rights be compromised.
71. The Court further notes that the Conservatory Orders issued on 28/06/2025 and the orders dated 09/02/2026 including summonses to CPL Emmaculate Naipamei and the Head of the Anti-Human Trafficking and Child Protection Unit were aimed at preserving the status quo and protecting



constitutional rights pending this determination. These orders are hereby extinguished upon delivery of this judgment.

72. The Court finds that the continuation of criminal investigations in their current form constitutes a violation of Articles 31, 47, and 50, amounts to abuse of the criminal justice process, and undermines the rule of law. Civil and professional disciplinary proceedings are the appropriate venues to address alleged professional negligence.

## Conclusion

73. Having given all due consideration to the Petition, the affidavits on record, the rival submissions of learned counsel, and the applicable constitutional and statutory framework, this Court is satisfied that the Petitioner has surmounted the requisite constitutional threshold so as to justify the exercise of this Court's supervisory jurisdiction.
74. The doctrines of non-interference and ripeness, though foundational to the orderly administration of criminal justice, are not impregnable shields against constitutional scrutiny. Where investigatory action demonstrably infringes fundamental rights, lacks proportionality, or is bereft of a discernible evidentiary substratum, this Court is duty-bound to intervene in vindication of *the Constitution*.
75. Upon a careful appraisal of the material placed before it, the Court is not persuaded that the impugned investigations disclose a prima facie factual substratum commensurate with the gravity and opprobrium of the criminal offences alleged. The tenor and scope of the interrogatories and summonses issued are more consonant with inquiries into possible professional negligence or administrative impropriety than with conduct amounting to criminal culpability of the magnitude insinuated. In those circumstances, the invocation of the coercive apparatus of the criminal law is manifestly disproportionate, premature, and constitutionally untenable.
76. The Petitioner has demonstrated, to the requisite standard, infringement of her rights under Articles 31, 47, and 50 of *the Constitution*. The sweeping and intrusive demands for confidential medical and administrative records offend the right to privacy; the vague and overbroad summonses contravene the dictates of lawful, reasonable, and procedurally fair administrative action; and the spectre of unmoored criminal process imperils the guarantees of fair hearing and protection against arbitrary prejudice.
77. While Section 193A of the Criminal Procedure Code contemplates the concurrent institution of civil and criminal proceedings, such concurrency is neither absolute nor unqualified. It must not be deployed as an instrument of oppression so as to subject a litigant to a multiplicity of proceedings arising from the same factual matrix, nor to sidestep or pre-empt the jurisdiction of specialized statutory or regulatory fora.
78. In the present case, the pending proceedings before the Kenya Medical Practitioners and Dentists Council constitute the proper and primary forum for the determination of issues relating to professional competence, negligence, or ethical propriety arising from the impugned surrogacy arrangement. To allow the criminal process to advance in its current posture would occasion a real risk of prejudgment, foster duplicative and potentially inconsistent determinations, and expose the Petitioner to unwarranted and irreparable reputational injury which would be difficult or impossible to repair in the event that she was cleared at either the investigatory or judicial phase.
79. This Court reiterates, for the avoidance of doubt, that its intervention is not intended to insulate any person from lawful accountability. Should credible, cogent, and particularized evidence of criminal conduct subsequently emerge from the outcome of the Kenya Medical Practitioners and



- Dentists Council inquiry into the complaint, the Respondents shall remain at liberty to exercise their constitutional and statutory mandates, but strictly within the confines of the law.
80. What *the Constitution* proscribes is not the legitimate investigation of crime, but the disproportionate, arbitrary, or oppressive deployment of investigative power untethered to a demonstrable factual foundation and inconsistent with the guarantees of the Bill of Rights.
  81. *The Constitution*, as the supreme law of the land, constitutes the ultimate bulwark against the excesses of state power. In the faithful discharge of its mandate under Articles 23 and 165, this Court affirms that investigatory zeal, however well-intentioned, must invariably yield to the imperatives of constitutional fidelity, ensuring that the exercise of state authority remains circumscribed by the rights, freedoms, and procedural safeguards enshrined in *the Constitution*.
  82. In the present case, this Court is satisfied that the Petitioner's constitutional rights would be threatened and or/infringed by the criminal proceedings being instituted against her concurrently with regulatory and potentially High Court civil proceedings touching on the same subject matter.
  83. This Court is further satisfied that given the nature of the grievances raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, investigations and proceedings of a criminal nature would either be enriched or the need for the same eliminated based on the findings and outcome of the regulatory proceedings pending against the Petitioner before the Kenya Medical Practitioners and Dentists Council at the very least, and possibly the findings and outcome of any civil suit brought by the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents as against the Petitioner.
  84. As capable and effective as the Directorate of Criminal Investigations is, the expertise and peer-knowledge reposed in the Kenya Medical Practitioners and Dentists Council in circumstances such as the present ones are broader and more specialized, and any prudent investigator and thereafter any prudent prosecutor should wish to have the benefit of that expert and peer-led investigation and fact-finding before deciding how to proceed. In matters requiring technical knowledge, expert acumen, and considerations of professional standards and practices, deferring for a short period of time to the specialized body within a particular sector is a reasonable action that law enforcement and the prosecution should take.
  85. As I conclude, this Court underscores that it is this Court's expectation that the Kenya Medical Practitioners and Dentists Council will conduct the pending regulatory proceedings against the Petitioner based on the complaint by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in an expeditious manner that is cognizant that law enforcement and prosecutorial actions were stopped on account of the same. That being said, those proceedings should not, in pursuit of expeditious determination, be rushed or in any way compromise on reaching a high-quality finding in a manner that fully secures the Petitioner's various rights.
  86. In the premises, the Court makes the following final declarations and orders:
    - a. A declaration be and is hereby issued that the continuation of the impugned criminal investigations, in their present form and on the material presently disclosed, violates the Petitioner's rights under Articles 31, 47, and 50 of *the Constitution*.
    - b. An order of prohibition be and is hereby issued restraining the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents, whether by themselves, their officers, agents, or servants, from continuing or pursuing criminal investigations or charges against the Petitioner arising from the impugned surrogacy arrangement relating to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, pending the determination of the



complaint lodged on the same subject matter before and by the Kenya Medical Practitioners and Dentists Council.

- c. An order of prohibition be and is hereby issued restraining the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from issuing or enforcing any order of summonses, directives, or demands for production of confidential medical, embryological, financial, or administrative records pending the determination of the complaint lodged on the same subject matter before and by the Kenya Medical Practitioners and Dentists Council; and any such material or evidence previously collected and the underlying investigations are hereby quashed for having been collected and undertaken in violation of the Petitioner's rights under Articles 31, 47, and 50 of *the Constitution*.
- d. The conservatory orders dated and issued on 9<sup>th</sup> February 2026 are hereby discharged and extinguished upon delivery of this Judgment.
- e. Each party shall bear its own costs.

Bottom of Form

87. Orders accordingly. File closed accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF MARCH 2026.**

**BAHATI MWAMUYE MBS**

**JUDGE**

In the presence of: -

Counsel for the Petitioner – Mr. Kelvin Mogeni and Ms. Purity Makori

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent – Mr. Wachira and Ms. Mupa Mbedza

Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent – Ms. Kihara and Mr. Mwandawiro

Court Assistant - Ms. Lwambia

HCCHRPET. NO. E556 OF 2025 JDT Page 16 | 16

