Conclusion

After finding that it can validate a surrogacy agreement post-fertilisation, and that the application satisfied the various elements set out by the Court, the Court granted the application and validated the verbal surrogacy agreement which the parties had entered prior to fertilisation.

Significance

This case provides guidance on interpreting legislation to promote constitutional rights and advance the best interests of a child where such legislation does not offer clear directions on how to address situations where parties fail to comply with the proper processes surrounding surrogacy. It took the Court some creativity to save the agreement from collapsing, and it had to reason around the common law principle that prohibits legislation to be interpreted in a manner that condones unlawfulness. It would be prudent for a legislature to address the gap that the case exposed to avoid leaving it to the courts to determine the issue of validating surrogacy agreements post-fertilisation on case-by-case basis.

J.L.N. & 2 Others v. Director of Children's Services & 4 Others
[2014] eKLR, Petition No. 78 of 2014
Kenya, High Court (Constitutional and Human Rights Division)

COURT HOLDING

The Hospital did not violate the petitioners' right to privacy when it divulged information about the surrogacy agreement while seeking the advice of the Director on what to do about the circumstances involving the petitioners and the Hospital.

The Director violated the rights and fundamental freedoms of the petitioners, including their right to dignity, when seizing the children and placing them in a children's home.

Summary of Facts

The 1st petitioner entered into a surrogacy agreement with the 2nd and 3rd petitioners, and gave birth to twins at MP Shah Hospital (the "Hospital"), the 3rd respondent. The 1st petitioner was the surrogate mother of the twins, while the 2nd and 3rd petitioners were the genetic parents. Following delivery, the question arose as to whose name, the surrogate's or the genetic mother's, should be entered in the Acknowledgement of Birth Notification (the "Notification"), as required under the Births and Deaths Registration Act, Cap 149 of the Laws of Kenya (BDRA). The Hospital sought the advice of the Director of Child Services (Director) who decided that the children were in need of care and protection. The children were therefore placed under the care of a children's home. The children were later released to the 1st petitioner, and the Hospital issued the Notification in her name.

The petitioners filed a suit against the Director and others in the Children's Court to prevent the children from being put up for adoption. Pending the hearing and determination of the main suit, the Children's Court ordered that the children be released into the custody of the genetic parents, and

that the surrogate mother be allowed unlimited access for purposes of breastfeeding the children. The Children's Court also ordered that the names of the genetic parents be entered into the birth notifications as well as the birth certificates.

The petitioners sought orders to compel the respondents to release the children into their custody and not interfere with the surrogacy agreement, and an order for damages. They also sought declarations that the Hospital's disclosure of the petitioners' medical information to the Director contravened the petitioners' constitutional rights to privacy, and that the Director's decision to seize the children from the surrogate mother contravened both her rights and the constitutional rights of the children.

Issues

The Court adjudicated on the following issues:

1. Whether the Hospital violated the petitioners' right of privacy under Article 31 of the Constitution; and

2. Whether the Director violated the petitioners' rights in taking away the children.

Court's Analysis

The Court affirmed that the BDRA requires that upon birth, a notification of birth be given. It also requires that the persons giving the notification give the particulars of the child including: 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 the person to whom the notification is issued.

On the issue of privacy, the Court examined Article 31 of the Constitution, and highlighted proviso (c) which protects the right to privacy of every person not to have information about their family or private affairs "unnecessarily required or revealed." The Court was persuaded by the petitioner's arguments that under certain conditions, the right to privacy may be limited, as was stated by Lord Justice Bingham in the English Court of Appeal decision of *W v. Edgell*. Indeed, it was the Hospital's argument that the disclosure was necessary under the circumstances.

The Court found that the Hospital had a statutory duty to record the details of the children in the Notification under Section 10 of the BDRA. However, the challenge was whose details should be included: the surrogate mother's or the genetic parents. The Court held that the mother referred to in the BDRA was the birth mother, and by virtue of Section 2 of the Children's Act, the surrogate mother had the immediate responsibility to maintain the children and was entitled to their custody. The Court therefore found that the Hospital had made the right decision to give the particulars of the mother. However, since there was no law on surrogacy, nothing prevented the Hospital from registering the names of the genetic parents in the notification.

In its final determination, the Court was ultimately persuaded by the Hospital, which argued that in the absence of a law on surrogacy, and in the face of uncertainty about what to do, it was justified in seeking the guidance of the Director. It said that this was a justifiable limitation on the right to privacy of the petitioners. Further, the Court cited Section 38(1) of the Children's Act which mandated the Director to safeguard the welfare of children.

On the second issue, the Court considered whether the Director had acted in the best interests of the children. The Court found that the children were not in need of care and protection. The Court pointed out that the Director was called upon to guide the Hospital on what to do about the registration and to decide on to whom the children would be released. The Court noted that there was no issue about the mother rejecting them, nor was there any dispute between the surrogate mother and the genetic parents. The Court therefore found that the decision of the Director to seize the children and place them in a children's home was not in the best interests of the children in respect of Article 53(2) of the Constitution and Section 4(2) of the Children's Act. It held that the actions of the Director to seize the children contravened the right to dignity of the petitioners, and caused them embarrassment and distress.

The Court observed that the issues it was asked to adjudicate arose because there was no legislative regime on surrogacy in Kenya. The Court was of the opinion that it was the duty of the state to enact legislation to regulate surrogacy. This duty stemmed from the right to health and health care services, including reproductive health guaranteed under Article 43(1)(a) of the Constitution, but also the right to recognition and protection of the family under Article 45(1). It followed the decision of the High Court of Kenya in *Organisation for National Empowerment v. Principal Registrar of Persons and Other* (Petition No. 289 of 2012 [2013] eKLR), and decided that the details of the genetic parents be registered rather than those of the surrogate mother because the child is entitled to the identity of its genetic parents.

Conclusion

The Court awarded damages to the petitioners as compensation for violation of their right to dignity.

Significance

The head note of an article by Aamera Jiwaji says: "In the absence of clear regulation, the practice of surrogacy in Kenya is growing as an unsupervised industry with no law to fall back on if anything goes wrong during the treatment."[69] A cursory review of countries that have some legislation on surrogacy on the African continent only brings up South Africa as having a law on surrogacy. Umeora *et al.,* writing about the practice of surrogacy in Nigeria could only speculate that surrogacy probably takes place in Nigeria. Surrogacy is not very visible on the African continent,[70] but some may be happening clandestinely.

Surrogacy raises complex ethical, moral, and legal questions. There are a number of interrelated perspectives from which to discuss surrogacy. There is the reproductive rights perspective involving the parties in the surrogacy arrangement. There is the children's rights perspective, which concerns a child or children born out of a surrogacy arrangement. Parental rights are another perspective. Finally, the rights of women, as the ones who must carry the pregnancy and who often predominately shoulder responsibility for childrearing, constitute a fourth perspective of note.

The Court primarily focused on the issue of parental rights and the rights of the child. The Court reasoned that parental rights be accorded to the genetic parents. It held that taking away the child from the surrogate and genetic parents was an infringement of their rights as parents. Of course, the issue would be more complex in a case where there is no genetic link between the commissioning parents and the child.

With regard to the rights of the child, the Court emphasised that the rights of a child born out of a surrogacy arrangement were no different from the rights of any child recognised under national and international law. Other scenarios could be imagined that could complicate the case; for instance, in the case of Baby Gammy, an Australian couple had twins out of a surrogacy arrangement with a woman in Thailand, but decided to leave behind one of the twins because he had Down's Syndrome.[71] This case sparked debate but also revealed that failure to regulate surrogacy may allow loopholes and expose children to human rights violations.

From a reproductive rights point of view, the starting point could be the concept of the right to sexual and reproductive health, and reproductive rights as articulated at the 1994 International Conference on Population and Development (ICPD) that took place in Cairo. Reproductive rights were defined in the Program of Action (PoA) as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[72]

However, surrogacy was not on the agenda at the ICPD. Barbara Stark argues that to the extent that surrogacy enables persons to exercise their reproductive goals and to have children, the ICPD PoA supports surrogacy, or in the least would weigh against an outright ban of the practice.[73] Stark's view can be buttressed by the argument that surrogacy arrangements are a realisation of the right to enjoy the benefits of scientific progress[74] for persons who would otherwise not have had the chance to reproduce, and in some instances, have progeny that share their genetic identity.

Commercialisation of surrogacy is an important challenge because of the risk of coercion or undue influence on the surrogate. Global or transnational surrogacy agreements have therefore been criticised because they have usually involved rich prospective parents and poor potential surrogates. Vida Panitch is one thinker who believes that such transnational commercial surrogacy agreements should be criminalised as they involve exploitation of women by violating their reproductive rights to be free from violence and coercion.[75] She emphasises that the exercise of the right to reproductive choice (by the prospective parent or parents) should not result in the infringement of another person's reproductive right to be free from coercion (the surrogate). Yet, this approach could also be critiqued as assuming that individuals who are poor or otherwise marginalised are in all instances unable to exercise agency in deciding whether to become surrogates.

MIA v. State Information Technology Agency (Pty) Ltd.
[2015] ZALCD 20
South Africa, Durban Labour Court

COURT HOLDING

In applying maternity leave policy, an employer must recognise the status of parties to a civil union and recognise the rights of commissioning parents in a surrogacy agreement, including male parents in same-sex unions. The respondent's refusal to grant the Applicant paid maternity leave on the grounds that he was not the biological mother of his child therefore constituted unfair discrimination.