

recognised that surrogacy was not regulated by any specific provisions in Kenyan law, and therefore surrogacy-related issues had to be decided on a case-by-case basis.

The South African case's views on the concept of the family is potentially notable for other jurisdictions. Genetic lineage is one of the important defining features of the family for many in Africa, and it is no wonder the SALC and the Parliamentary Committee that reviewed the law also considered it necessary to retain the genetic link. However, when the Court tested this requirement against constitutional rights, it found that this could not hold. Families should not be valued because of genetic links, though for some, it would be an important consideration. Rather, family should be based on intention of the parties and not physical attributes of the individuals as envisaged by the genetic link.

Despite most of Africa not having regulatory frameworks on surrogacy, the South African decision is still a beacon on how to think through issues of surrogacy in relation to human rights.

Ex Parte: MS and Others
[2014] ZAGPPHC 457
South Africa, High Court

COURT HOLDING

The Court could confirm a surrogacy agreement after the surrogate mother was already fertilised, because such an interpretation of the provisions of chapter 19 of the Children's Act, 38 of 2005 accorded with the Constitution of the Republic of South Africa, 1996, and promoted constitutional rights of the parties to the agreement.

Summary of Facts

The applicants were parties to a surrogacy agreement, namely the commissioning parents and the surrogate mother. They made the application to confirm a surrogacy agreement as required under Section 292 as read with Section 295 of the Children's Act, 38 of 2005 (the Act). According to Section 292, in order for a surrogacy agreement to be valid, it must be written and signed by all parties and confirmed by the High Court. The Act therefore envisages entering into a valid agreement before implementing its requirements. Section 296(1)(a) of the Act provides that no artificial insemination may take place before the surrogate agreement is confirmed by the Court. Section 303(1) renders it an offence to fertilise or assist in fertilising a woman before a surrogacy agreement is confirmed by the Court.

In this case, however, the parties entered into a verbal surrogacy agreement and proceeded to implement artificial fertilisation before the agreement was confirmed by the High Court. At the time of the application, the surrogate mother was 33 weeks into the pregnancy.

This case therefore raised a novel issue, as the Court had never addressed a situation where parties applied to confirm a surrogacy agreement when it had already been implemented.

Issues

The Court isolated two questions it would address:

1. Whether it is competent for a court to confirm a surrogacy agreement when artificial fertilisation of the surrogate mother has resulted in the conception of a child in the absence of a pre-existing valid surrogacy agreement; and
2. What approach a court should take to confirm a surrogacy agreement after conception.

Court's Analysis

The Court noted that the Act does not provide a clear direction on whether courts could confirm a surrogacy agreement after conception. While the Act envisaged confirmation of a surrogacy agreement before conception, it did not provide any guidance on the consequences of non-compliance for the validity of a written agreement subsequently entered into between the parties. It also was silent on whether courts could still validate such an agreement.

The Court reminded itself of the common law principle that an agreement to commit an unlawful act would not be enforceable. In this case, it was unlawful to fertilise the surrogate mother before validating the surrogacy agreement. The Court said that, normally, courts should not interpret a statute to condone unlawfulness.

The Court, however, was of the view that a surrogacy contract was a special kind of contract that should not be determined by common law principles, but rather the Court would be mindful of the human rights implication for the parties, and especially that it involved the rights of children who would be born out of the agreement. The Court observed that the surrogacy agreement aimed at advancing constitutional rights including the right to dignity, the right to make decisions concerning reproduction, and the surrogate mother's right to security in and control over her body.

The Court was cognisant of Section 39(2) of the Constitution, which mandated courts to interpret legislation in a manner that would promote the spirit, purport, and objects of the Bill of Rights. It said that courts would even interpret legislation to grant the court discretionary power where there was lack of express grant of such power if it was necessary to comply with Section 39(2) of the Constitution.

The Court examined the reason behind requiring confirmation of a surrogacy agreement and found that it was to protect the interests of the parties, including the child to be born. The Court therefore envisaged an interpretation of the provisions of the Act to include the discretion of the court to confirm a surrogacy agreement after the child has been conceived, if it was to promote the rights of the child.

The Court noted that there was an ambiguity with the provisions of the law, in that Section 295(b)(ii) referred to the interests of a child that is yet to be conceived, while Sections 295(d) and (e) referred to interests of a child that was to be born, which would include a child that had been conceived but was not yet born. The Court was of the opinion that Section 295 therefore covered both the situation where a child had not yet been conceived at the time that confirmation of a surrogacy agreement was sought, and the situation where a child had already been conceived, but was not yet born.

The Court further noted that neither Section 292 nor Section 295 required the court to be satisfied that the surrogate mother had not yet undergone the process of artificial fertilisation and that she was not already pregnant as a result. It therefore was of the opinion that the provisions conferring the power on a court to confirm a surrogacy agreement in and of themselves would not preclude the court from confirming such an agreement when the surrogate mother had already undergone fertilisation.

The Court then inquired whether it was the intention of the legislation to render post-fertilisation surrogacy agreements invalid and incapable of being validated. It observed that Section 296 made it unlawful to fertilise a surrogate mother before a valid surrogacy agreement, but nowhere did a provision expressly state that a court is precluded from confirming a post-fertilisation surrogacy agreement. The Court went on to say that a provision which would preclude a court's power to confirm a surrogacy agreement post-fertilisation might actually infringe on the constitutional rights of the parties. It would impact on parental rights, the right to exercise reproductive choice, and the right to dignity of the commissioning parents. It would impose parental rights on the surrogate mother, and would infringe the right to family or parental care of the child to be born. This would not be in the best interests of the child.

After considering all the facts of the case, the Court was of the opinion that it would be patently contrary to Section 28(2) of the Constitution to hold that a court had no discretion to confirm a surrogacy agreement in circumstances when confirmation is sought post-fertilisation. The Court therefore held that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement.

On how to approach post-fertilisation confirmations, the Court said that these applications must be considered within the framework of the Act, though each case would depend on facts peculiar to it. However, confirming a surrogacy agreement after fertilisation should be considered as an exception to the general rule. Therefore, parties should place sufficient facts before the court explaining why the application was made late. Further, the parties would also have to satisfy the court that the application was not aimed at, or would not have the effect of, permitting the parties to circumvent the objectives of the regulatory scheme. Parties would therefore have to, from the outset, satisfy the court that the arrangement between them fell within the permissible scope of a lawful surrogacy agreement.

The Court expressed the view that evidence of a pre-existing verbal or written agreement between the parties, which would have been a valid surrogacy agreement but for the absence of confirmation of the court, would be a good indicator that the parties are bona fide in their application.

The Court expressed the further view that an application for the validation of an agreement that is post-fertilisation should take place before the child is born. The provisions of the Act on surrogacy were aimed at a child that is not yet born, so that they would not apply where a child is already born.

The Court regarded the most important consideration in confirming surrogacy agreements post-fertilisation to be in the best interests of the child to be born. It noted that this requirement is stated in Section 295(e) of the Act.

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