**The Right to Dignity in Upholding Surrogacy Arrangements**

**Petitioners: JLN, WKN and CWW**

**Respondent: Director of Children’s Services & 4 others**

**High Court of Kenya in Nairobi**

Case no. 78 of 2014

Judgment delivered by Justice David S. Majanja on 30 June, 2014

The Kenyan Constitution (2010) is the starting point for the creation, promotion and protection of fundamental freedoms of the citizens. We discuss the development of the right to dignity through case law in the case of JLN v Director of Children’s Services. This summary provides activists and civil society members with a practical understanding of the case law.

The facts of the case are that the first petitioner, JLN, entered into a surrogacy agreement with the second and third petitioners, WKN and CWW, respectively. In vitro fertilization was used to implant an embryo from WKN and CWW into JLN, who agreed to carry the child to term and then hand the child over to its genetic parents. On 25 January, 2014 JLN prematurely gave birth to twins at M.P. Shah Hospital in Nairobi.

After the twins were born, an issue arose over who should be listed as the birth mother on the children’s notification documents. Registration of the children is required under the Births and Deaths Registration Act (Chapter 149 of the Laws of Kenya). Section 10 requires that the particulars of a child are recorded after his or her birth, including his or her name, weight and parentage. The Hospital, unsure of whose name to put on the documents, contacted the Director of Children’s Services. The Hospital informed the Director of the surrogacy agreement, and the Director, believing that the children were in need of care and protection, ordered they be sent to a Children’s Home.

At this point, petitioners filed suit in the Children’s Court on 11 March, 2014. Petitioners filed suit to prevent their children from being put up for adoption by the Children’s Home. After listening to the parties, the Court ordered that the children be released to the first and second applicants (WKN and CWW, the genetic parents), that JLN have unlimited access to the children and that WKN and CWW’s names be entered on the notification documents and birth certificates.

Following the Children’s Court’s decision, parties filed the present suit in the High Court at Nairobi. Petitioners argued that the suit was bared by *res judicata*. Justice David S. Majanja, upon hearing the case, ruled that *res judicata* did not apply, because the Children’s Court had not been competent to hear the case due to the constitutional issues present. Further, he stated that an affidavit was issued following the judgment that withdrew the matter, and a consent order was signed on 21st February, in which the parties agreed the children would be released to JLN.

Justice Majanja proceeded with the case and issued a judgment on 30 June, 2014. The judgment represents a significant achievement in terms of recognizing the Constitution’s guarantee of the right to dignity under Article 28. In addition, the judgment is an important step forward in the field of sexual and reproductive health rights, solidifying individuals’ right to autonomously and privately determine how, when and under what conditions to reproduce and start a family. The judgment also calls for the development of a legal framework on surrogacy in Kenya.

The issues for determination in the matter can be summarized as follows:

1. Whether the Hospital violated the petitioners’ right to privacy under Article 31 of the Constitution in revealing the details of their surrogacy arrangement to the Director of Children’s Services.
2. Whether the Director of Children’s Services violated the petitioners’ rights in sending their children to a Children’s Home.

The Court in coming up with its judgment considered the following:

1. [The Constitution of Kenya (2010)](http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010)

Article 28 of the Constitution provides that all people have the right to dignity and to have that dignity respected. Article 31(c) provides that every person has the right to privacy, and specifically the right to not have information relating to his or her family and affairs unnecessarily revealed. Article 43(1) (a) provides that every person has the right to the highest attainable standard of health. Article 45(1) states that the family is entitled to the state’s protection, as the “natural and fundamental unit of society.” Article 53(1) provides that all children have the right to a name, parental care and protection, basic health care and to not be neglected or abused. Article 53(2) provides that the best interests of the child must be the primary motivation behind any decision made regarding the child.

1. [The Children Act, Chapter 141 (2010)](http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20141)

Section 4(2) of the Children Act provides that in all situations involving children, the child’s best interest must be of primary importance when making any decisions. Section 11 provides that every child has the right to a name and nationality. Section 28(1) states that the Director of Children’s Services is responsible for ensuring the welfare of children and is responsible for assisting in *“*the establishment, promotion, co-ordination and supervision” of all childcare services and facilities. Section 119 lists nineteen instances in which a child is deemed to be in need of care and protection. These include if the child has been abandoned, if the child is found begging and if the child’s parents are incapable of caring for him or her.

1. International and Regional Conventions

Article 2(6) of the Constitution of Kenya provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya.

The Court took into account the [United Nation’s Convention on Rights of the Child](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx) and the [African Charter on the Rights and Welfare of the Child](http://www.ohchr.org/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf). Article 7 of the Convention on the Rights of the Child provides that every child shall be registered upon birth and shall have the right to a name, nationality and if possible, the right to know and be cared for by his or her parents. Article 9(2) of the African Charter on the Rights and Welfare of the Child provides that parents have a duty to guide and direct their children in the exercising of their rights.

1. Case law

The Court mentioned several cases in reaching its decision. These cases include:

1. Karia and Another v Attorney General and Others **[2005] 1 EA 83,** and ***Omondi v National Bank of Kenya Ltd and Others* [2001] EA 177. In both cases the court held that *res judicata* was inapplicable. For *res judicata* to apply, the issue in the present suit must have been previously decided by a competent court of law, the issue must be substantially similar to that previously litigated and the parties in the two suits must be the same.**
2. W v Edgell **[1990] 1 ALL ER 835, which set out three conditions that must be present to justify a doctor revealing confidential information about one of his patients. The conditions are: there must be a real and serious risk of danger to the public if the information is not revealed, disclosure must be to a person with a legitimate interest in the information and only the information strictly necessary must be revealed.**
3. [Organisation for National Empowerment v Principal Registrar of Persons and Other Nairobi Petition No. 289 of 2012 [2013]eKLR](http://kenyalaw.org/caselaw/cases/view/87516/)**, in which the court held that adopted children have a right to birth certificates, rather than adoption certificates.**
4. [C.O.M v Standard Group Limited & Another Nairobi Petition No. 192 of 2011 [2013] eKLR](http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBsQFjAA&url=http%3A%2F%2Fwww.kenyalaw.org%2FDownloads_FreeCases%2F92994.pdf&ei=rSTjU764IYag0QWMq4DQBA&usg=AFQjCNEgQgcc83Ngg6MbA4crrhetnTySpQ&bvm=bv.72676100,d.d2k)**. This case involved a violation of the petitioner’s right to privacy when his HIV status was revealed through publication without his consent. Petitioner was awarded Kshs.** 1,500,000.

Finally, the Court made a determination as follows:

1. The Hospital did not breach the petitioners’ right to privacy in revealing the existence of the surrogacy arrangement to the Director of Children’s Services. The Judge held that due to the lack of a legal framework on surrogacy in Kenya, the Hospital was justified in involving the Director to seek guidance on how to handle the situation. The Judge noted that because there was no guiding legal framework, the Hospital could have chosen to register the children in the birth mother’s name or in the names of WKN and CWW. Despite testimony by JLN to the contrary, the Judge found that there was no evidence that the Hospital was made aware of the surrogacy arrangement in advance. Therefore, the Judge ruled the Hospital was entitled to call upon the Director for guidance under Section 38(1) of the Children Act.
2. The children were not in need of care and protection under Section 119 of the Children Act. None of the circumstances listed in Section 119 were present, and therefore the Court found that the Director should have acted in the children’s best interest in accordance with Article 53(2) of the Constitution and Section 4(2) of the Children Act. The Judge determined that because the children were born premature, it was in their best interest to remain in the hospital, until their biological parents could take them home.
3. The Director violated the petitioners’ right to dignity under Article 28 of the Constitution, when he ordered their children be taken to a Children’s Home. The Judge stated that the Director’s actions caused the petitioners embarrassment and undue hardship. There was no dispute among the petitioners over whose names should appear on the notification documents, and therefore no reason for the Director to have found that the children were in need of care and to have sent them to a Children’s Home.
4. In reaching his decision, the Judge stated that children born via surrogacy are no different than children born through ordinary pregnancy. These children are entitled to the same rights and protections under the law as all children. The Judge called for the creation of a legal framework on surrogacy, which would avoid conflicts such as this one in the future, and ensure that the rights of children born through surrogacy arrangements are protected and respected. Until such a framework exists, the Judge advised that the best interest principle should be used to determine issues relating to surrogacy agreements.

*The petitioners were awarded Kshs. 500,000 each as against the Director*, approximately 5,700 USD.

To read the full judgment follow this link http://kenyalaw.org/caselaw/cases/view/99217/