



9 July 2014

## **Kenya: Judge Makes Groundbreaking Ruling On Surrogacy**

*By John Chigiti*

Who is your mother? Is she the woman who gave birth to you -- the woman who is genetically related to you -- or the woman who intends for you to be born and plans to take up parental responsibility as outlined in the Children's Act?

Under section 23, parental responsibility means all the duties, rights, powers, responsibilities and authority which by law a parent has in relation to the child. This includes the duty to maintain the child and to provide him with an adequate diet, shelter, clothing, medical care, education and guidance and protect the child from neglect, discrimination and abuse.

Hospitals have to indicate the mother's particulars and name on the notification of birth slip and the registrar of births and deaths has to issue a birth certificate when a child is born. However, there is a dilemma when it comes to registering surrogate children and the recognition of surrogacy agreements.

Whereas the status of motherhood used to be "self-evident" by the pregnancy and birth of a child, new reproductive techniques (discussed in last week's article) have evolved in recent years ahead of jurisprudence, thereby complicating and overwhelming the issue of maternal and reproductive health rights. This means that there is a gap in the Kenyan laws since the laws do not directly address these emerging forms of parenthood.

In surrogacy arrangements, there are potentially three different players with different maternal rights: the donor who supplied the ovum, the woman who gestated and gave birth to the child, and the woman for whom the child was intended. The genetic rule is based on the view that a woman's genetic contribution to a child is the most determinative factor while the gestational maternity rule is primarily based on the emotional and physical connection developed during pregnancy. The intent based maternity rule is based on the fact that at the beginning of every surrogacy arrangement, the commissioning mother has the preconception intent to raise the child and the surrogate mother has the intent to surrender the child. We must not lose sight of the fact that under the constitution at Article 26, life begins at inception.

On June 30, a monumental judgment was delivered by Justice Majanja setting the precedent on how surrogacy arrangements and the conception of motherhood will be adjudicated in Kenya given that Parliament has yet to legislate or develop policy on this matter.

In this case, the petitioners WKN and CWW, the genetic parents entered into a surrogacy agreement with JLN who consented to be a surrogate mother by undergoing IVF. Following the delivery of the twins in MP Shah Hospital, a dispute arose as to whether the birth mother or the genetic mother should be registered in the Notification of Birth issued by the hospital because the law under the Births and Deaths Registration Act defines birth as "the issuing

forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead". This implies that the birth mother has the immediate responsibility of custody and maintenance of the children. Given the complex situation, the hospital in need of guidance informed the director of Children Services of the circumstances surrounding the birth of the twins. The Director took the view that the children were in need of care and protection and as a result took them and placed them under the care of a children's home.

Distraught, the parents rushed to the Children's Court in order to prevent the children from being put up for adoption. Similarly, a suit was instituted in the Human Rights Court against the hospital for breaching the petitioners' right to privacy based on the doctor/patient confidentiality and against the Director of Children Services for illegally taking away the children. The director in his defence stated that they were acting in the children's best interest given that surrogacy agreements being unregulated by law in Kenya may expose children to harm. Hence the only option for the genetic parents was to apply for adoption after they were six months. (Children Act section 156).

In its decision, the court held that the hospital was not at fault and it was entitled to seek guidance from the director. The director, however, violated the fundamental rights of the petitioners, caused the distress and embarrassment by taking away the children. As there was no dispute between the surrogate mother and the genetic mother he ought to have retained the children in hospital or given immediate custody to the birth mother pending court orders.

The honourable judge stated that a child born out of a surrogacy agreement is no different from any other child. They have a right to certainty of their parentage under the best interest of the child principle. The child is therefore entitled to the identity of their genetic parents and in principle, the registration of the genetic parents as opposed to the surrogate mother as a parent must be permitted.

In retrospect, the precedent set is that under the Births and Deaths Act, the birth/surrogate mother has custody of the child. However, registration of the genetic parents is permitted and the surrogacy agreement is effected through court orders where there is no dispute between the parties. In the event of a dispute, the Children's Court or the High Court may be called upon to give the necessary direction as who is to be registered as the parent by applying the principles of the best interests of the child in the absence of a legislative framework.

The Coalition on violence against Women appeared in this matter as an interested party while the Kenya National Commission on Human Rights appeared as a friend of the court.