REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.443 OF 2014

BETWEEN

A.M.N. ……1ST PETITIONER

B.K.N. ……2ND PETITIONER

T.M.K. ……3RD PETITONER

AND

THE ATTORNEY GENERAL……..1ST RESPONDENT

THE DEPARTMENT OF NATIONAL REGISTRATION……..2ND RESPONDENT

THE KENYATTA NATIONAL HOSPITAL…….3RD RESPONDENT

THE NAIROBI IVF CENTER LIMITED…….4TH RESPONDENT

THE DEPARTMENT OF CHILDRENS SERVICES…….5TH RESPONDENT

THE IMMIGRATION SERVICES DEPARTMENT…….6TH RESPONDENT

JUDGMENT

Factual Background

1. This Petition raises the important issue as to how surrogacy agreements should be lawfully operationalized and related questions as to the registration of a child born out of a surrogacy arrangement.

2. For purposes of privacy of the Parties, the Petitioners shall be referred as X, Y and Z respectively, in all reproductions of this Judgment.

3. In the Petition dated 8th September 2014, the Petitioners aver that X was diagnosed with secondary infertility after losing one child at infancy and having had four miscarriages, each in the first trimester. She then sought advise on 13th July 2011 from the 4th Respondent and the

latter advised her to seek an egg donor IVF/ET as the most suitable fertility option and both X and her husband, Y, accepted the advise. The egg donor option was undertaken when an anonymous donor's eggs were identified but the procedure failed as X had no endocervical canal and so access to her cervix was impossible.

4. X and Y sought further advise from the 4th Respondent and it was agreed that a surrogate arrangement was the next best option and Z agreed to be the surrogate host. Her husband was also agreeable to the arrangement and a Surrogacy Agreement was subsequently signed on 6th June 2012. By that Agreement, Z *inter-alia* consented to have three embryos transferred to her and to hand over the born baby to the genetic parents. On 7th June 2012, Z underwent the embryo transfer at the 4th Respondent's facility and on 5th February 2013, she delivered twin babies of the female gender at the Kenyatta National Hospital, the 3rd Respondent.

5. Thereafter and after taking legal advise from the Attorney General, Kenyatta National Hospital issued a Birth Notification Certificate indicating that X and Y were the parents of the twins and the 2nd Respondent issued their birth certificates on 12th June 2013 with those particulars recorded. The twins also received Kenyan Passports on 19th June 2014.

6. What triggered the filing of the Petition was the fact that X and Y sometime after June 2014 applied for British Citizenship for the children and to enable them travel to the United Kingdom but the Application was unsuccessful and the response from the UK Passport Office dated 4th August 2014 was *inter-alia* as follows;

"In order to establish British citizenship for J and G there are two options available to you.

Adoption under Article 23 of the 1993 Hague Convention on the Protection of children and Co-operation in Respect of the Inter-Country Adoption – certificates issued under The Hague Convention Article 23 are acceptable for passport services.

Registration as a British citizen – it is open to you to contract the United Kingdom Visa & Immigration service (UKV&I) with a view to registering the children as British citizens. You should contact UKV&I) via the website www.gov.uk"

7. X and Y applied for a review of the said decision and in response, the UK Passport Office stated as follows, by letter dated 23rd August 2014;

"From the information we were given in the application, your daughters' claim would be based on the fact that they had a British parent named on their birth certificate. Information provided in support of your daughters claim have raised concerns that the details given on the birth certificate were found not to be true…"

8. Having sought legal advise on their predicament, the Petitioners thereafter came to this Court seeking relief on the following grounds;

(1) That currently there is no law in Kenya regulating surrogacy arrangements and it is because of lack of a legal regime that the Petitioners found themselves in this situation.

(2) That even where there is no legal regime the Constitution elaborates on the need to deal with the issue on the basis of the best interests of the child. Further, in the event of a dispute, the Children's Court or the High Court may be called upon to give the necessary direction by

applying the principles of the Constitution.

(3) That the Petitioners' application for UK Passports was denied on grounds that surrogacy is not recognized in Kenya and as a result the documents supplied by the Petitioners for their children's application were not acceptable.

(4) That the only acceptable alternative by the UK passport office is an adoption order.

(5) That pursuant to the surrogacy arrangement the 1st and 2nd Petitioners can no longer satisfy the requirements for an adoption order as the children are actually their own.

(6) That in the face of this conflict of laws and from the unfolding immigration predicament, the Petitioners apprehend that the best interests of the children may not be achieved thus killing the dicta and spirit of the Constitution by discrimination arising from non-recognition of their registration of birth Certificates issued by the Department of National Registration and the birth notification issued by the Kenyatta National Hospital.

(7) That in the forgoing, the Petitioners have suffered loss and hardship from the inability to promptly acquire internationally recognized documents of identity for their children and it is only fair and just, that the Court grants the orders as prayed.

(8) That the honourable Court has jurisdiction to grant the orders sought.

9. The orders that they now seek for the above reasons are the following;

"(1) That this application be certified as urgent and service of the same be dispensed with in the first instance.

(2) That pending the hearing and final determination of this application this honourable Court be pleased to issue Orders to allow the Petitioner to amend the Birth Certificate and Kenyan passports of the Petitioners surrogate children to facilitate the adoption process.(sic)

(3) That pending the hearing and final determination of this application this honourable Court be pleased to offer guidance as to the parental status of Surrogate children in consideration of the conflict of laws between Kenya and the United Kingdom.(sic)

(4) That this honorable Court be pleased to issue a declaration order on the procedures to be used in the adoption of surrogate children with specific reference to harmonising United Kingdom rules.

(5) That the cost of this application be provided for."

10. It is obvious that because of inelegance in the drafting of the Petition, prayer (1) is misplaced while prayers (2) and (3) are improperly worded. I will however, in line with the provisions of **Article 159** of the **Constitution,** determine the twin issues based on their substance and not the inelegance of language and the words used.

Petitioners' Case

11. Mr. Mungola presented the Petitioners' case and relying on the Supporting Affidavit of X sworn

on 8th September 2014 together with its annextures as well as Submissions filed on 14th October 2014, he submitted firstly, that there is need to harmonise the legal position regarding surrogacy arrangements between Kenya and the United Kingdom because while the letter has an elaborate legal framework to govern surrogacy arrangements, Kenya has none. He made reference in that regard to the **UK's Surrogacy Arrangements Act, 1985** and the **Human Fertilisation** and **Embryology Act, 1990.**

12. Secondly, that in the present case, although the Attorney General advised X and Y on the procedure to follow in obtaining birth certificates for the surrogate twins, the said procedure has been found wanting in the United Kingdom leading to frustration by X to take the children to the United Kingdom as she had intended to. For avoidance of doubt, the Attorney General in his opinion dated 11th April 2013 addressed to the Chief Executive Officer of the Kenyatta National Hospital stated partly as follows;

"The current arrangement is not contentious since the surrogate host woman has raised no objection to the indication of the names of the surrogate genetic couple's names in the birth notifications of the twins born to the surrogate host woman. From the perspective of the Children's Act of 1991, the Registration of Persons Act, as well as the Citizenship and Immigration Act No.12 of 2011, it is notable that once the names of the surrogate genetic couple are entered in the birth notification of the children born out of this arrangement, legal parentage is conferred for all purposes under law, and would obviate the need for adoptive procedures subsequently. It is significant that the surrogacy agreement in the instant case documents that the surrogate host woman, on compassionate grounds, will not have any physical or legal custody or any parental duties with respect to the child born out of the arrangement."

13. Thirdly, that based on the provisions of **Articles 43** and **53** of the **Constitution, Section 11** of the **Children's Act, 2003**, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, children have the right to the highest attainable standards of health, certainty of parentage issuance of a birth certificate and the right not to suffer any form of discrimination. Further, that under **Article 45** of the **Constitution**, the family is the natural and fundamental unit of society and the necessary basis for social order and shall enjoy the recognition and protection of the State.

14. In addition, that the best interest principle would necessitate that a child's social and emotional needs would need to be fully met at all times. In that regard, reliance was placed on the decisions in **A.O. vs S.A.J. & Anor (2011) eKLR, NHOS vs Little Angels Network (2014) eKLR,** and **THJ vs SMO (2014) eKLR,** Re A (a child).

15. In applying the best interests of the child principle, the Petitioners therefore submitted that in the unique circumstances of this case, the best interests of the twin children would be served if an adoption order was issued in favour of X and Y.

16. Fourthly, and in furtherance of the above submission, a distinction was made as between adoption orders and parental orders with the conclusion made that in the present case, an application in the UK for a parental order would not succeed because under **Section 54** of the **Human Fertilisation** and **Embryology Act, 2008** one of the conditions for grant of a parental order is that the application thereof must be made within six months of birth. That following the decision in **Re: L (a minor) [2010] EWHC 3146 (Fam),** the said time limit cannot be extended and so the Petitioners have been shut out of that process leaving an adoption order in Kenya as the only remedy available to them.

17. Lastly, that Courts should be flexible and liberal in applying the law to individual circumstances and not set *"the bar too high for parents whose only option is to have a child by way of surrogacy",* citing the South African case of the **High Court in North Gauteng (South Africa), Case No.29936/1, In the Ex-parte matter between WH & Others.**

18. For the above reasons, the Petitioners seek the orders elsewhere set out above.

1st , 2nd, 5th and 6th Respondents' Case

19. The above Respondents in response to the Petition filed a Replying Affidavit sworn on 24th October 2014 sworn by Ahmed Hussein, the Director of Children Services in the Ministry of Labour, Social Security and Services. Mr. Opondo, learned Litigation counsel also made oral submissions at the hearing of the Petition. Their case is straightforward; that since there is no law on surrogacy, the Court should decide the Petition on the basis of the best interest of the twin children. In addition, that since one of the Petitioners is actually a biological parent of the child, adoption cannot be best the relief to be granted because how can one adopt his own children" He offered no alternative relief and left the matter entirely to the Court.

4th Respondent's Case

20. The 4th Respondent, the Nairobi IVF Centre Ltd, filed a Replying Affidavit sworn on an unclear date by Dr. Noreh Joshua, an obstetrician gynaecologist and clinical embryologist. Mr. Okulo, learned Counsel also filed submissions on 27th October 2014. It supports the Petition and in Submissions added that this Court ought to find that looking at the legal definition of "mother", Z is the mother of the twin children while X is not.

21. That the said fact is borne out by the definition of "birth" in **Section 2** of the **Births and Deaths Registration Act, Cap.149 Laws of Kenya** and reliance was also placed on **Re G(children) [2006]UKHL 43** where Baroness Hale Richmond differentiated between genetic parenthood, gestational parenthood and psychological parenthood and that in the instant case, Z is the childrens' mother by fact of gestational parenthood. As a consequence, it was urged that it was an error to record X as the Children's mother while Z was the one who actually carried and conceived them.

22. It was the 4th Respondent's further submission therefore that the proper relief available to the Petitioners is a rectification of the childrens' birth certificates to indicate Z as the mother and thereafter X can properly adopt the children and thereby meet both the expectations of the law in Kenya and the UK.

Determination

23. Having reproduced the submissions by all parties to this Petition, it is obvious that the facts obtaining are wholly uncontested and the factual background above reflects the genesis of and the issues that triggered the Petition. It is also a point of agreement that had X and Y not applied for British Citizenship for the twin children and the same denied, this Petition would never have been filed.

24. What then are the issues arising for determination" In my view they are the following;

    i. Were the birth certificates issued to the twin children properly issued under the current legal

regime in Kenya" Was the information contained in them truthful and if not, what information should they lawfully contain"

ii. Who is the lawful mother of the twin children"

iii. In view of the position taken by the UK Passport Office as regards the entry into the UK by the twin children, what reliefs are available to the Petitioners"

Issuance of Birth Certificates

25. It is admitted that the twins were issued with birth certificates based on the advise given by the Attorney General vide his letter of 11th April 2013. In that letter the Attorney General made that advise on the basis of the consent between the Petitioners and to *"save all the parties concerned time and money that would otherwise need to be expended over an adoptive process under the Children's Act."*

26. The 4th Respondent has however faulted that short cut process arguing that the two birth certificates were falsified as X in law cannot be the mother of the children. That issue requires initial resolution, before I return to the issue of birth certificates.

Who is the mother of the surrogate children"

27. This issue has dogged other Courts in the past and the effect has been painful for affected Parties. In **R: X & Y (Foreign surrogacy) [2008] EWHC 3030 (Fam)** for example, reference was made to the diversity of approaches taken by different Countries and in that case, at one point during the proceedings, the effect of the conflict in the applicable UK and Ukrainian laws meant that *"…the children were marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home". (to the UK).*

28. This pain is what X has expressed in this case. She has raised the issue of the fact that as she pursued entry into the UK for the children while in Kenya, she lost her employment in the UK and has become almost destitute and yet the matter is far from resolved.

29. In any event, from what authorities I have come across, it would seem that a host woman is presumed in law to be the mother of a surrogate child until other legal processes are applied to transfer legal motherhood to the commissioning woman. I say so based on the following decisions;

i. Re X (A child) [2014] EWHC 3135 (Fam) where Mrs. Justice Fleanor King, DBE at paragraph 23 stated as follows;

"(a) The surrogate mother having carried a child following assisted reproduction 'and no other woman', is the child's legal mother-Section 33(1)HFEA 2008. This remains the case unless the child is subsequently adopted or parenthood transferred through a parental order. Absent adoption or a parental order, she has and she has and retains parental responsibility."

In addition, the learned Judge stated that;

b. *The father is the genetic and social father of CP.*

The surrogate mother was not married …Section 35 HFEA 2008 and was neither treated in a UK Licensed clinic, she was not in the category of relationship which would satisfy the so called 'Fathership' conditions' (Section 37 HFEA 2008) which relationships could otherwise have the effect of making the husband/partner of the surrogate mother the legal father in place of the genetic father.

c. ***The mother, absent legal intervention, has no status other than the emotional and social status of being CP's psychological mother. Crucially she does not have parental responsibility, she cannot therefore give consent to medical treatment, register CP for a school or take a myriad of decisions in relation to CP which parents routinely do without a thought as to whether or not they have the authority so to do."***

ii. In the **Ex-parte matter between WH & Others (supra)** at paragraph 52, the Court stated thus;

"In California, the position is that single men, single women, heterosexual couples and GLBT (gay, lesbian, bisexual and transexual) couples are able to successfully obtain parental rights. In order to list the intended parents on the birth certificate an order of the Superior Court is required wherein the surrogacy agreement is acknowledged and the position of the intended parents is confirmed. In Florida, the intended parents must petition the Court within three days of the child's birth for an expedited affirmation of parental status 'at which point the Court shall schedule a hearing of the matter.' If the Court is satisfied that the intended parents have entered a valid surrogacy contract and that at least one of them is the child's genetic parent, the court shall enter an order finding the intended parents to be the legal parent of the child."

30. I am also aware that in some jurisdictions such as France, Iceland and Italy, the surrogate mother *"has no parental rights over the child and the child born is legally the child of the prospective parents"* – See **In the ex-parte matter between WH & Others** at para.46. But having so said it would seem to me that absent a legislative framework in Keya, the position taken by the UK Courts and noting specifically the issues before me, ought to prevail here and so I will find that the surrogate mother is the mother of the twins until such a time as the necessary legal processes are undertaken or until this or any other Court has issued requisite orders in that regard. I will return to that subject later in the Judgment.

31. I see no reason to go and further and determine the issue of fatherhood because that matter was never contested before me and later, when determining the appropriate relief to the Petitioners that issue will resolve itself in the context of Kenyan law as opposed to the law in the UK.

32. Turning back to the issue of the birth certificates, once I have determined that the mother of the twins is the surrogate mother, it follows that the 4th Respondent's contention that the birth certificates were unlawfully issued contrary to **Section 22** of the **Births and Deaths Registration Act, Cap.149 is the correct legal position in Kenya.** In saying so, it is obvious that the Petitioners cannot be held to blame for their actions as both the 3rd Respondent and themselves acted on the advise of the Attorney General given in good faith in order to assist and alleviate a delicate and pressing situation. Having addressed the first two issues, the only other issue to determine is the appropriate reliefs to be granted in this case.

What reliefs are available to the Petitioner"

33. From what I have stated above, in **Re X(A child) (supra)**, Sir James Munby in answer to a question similar to the one I am addressing stated as follows;

"… What the commissioning parents want, and what on the face of it X's best interests plainly demand, is an order permanently extinguishing all the legal rights and responsibilities of the surrogate parents and permanently vesting all such rights and responsibilities in the commissioning parents. There are only two ways in which, in principle, such an outcome can be achieved; an adoption order made in accordance with Section 46 of the Adoption and Children Act 2002 or a parental order made in accordance with Section 54 of the 2008 Act. Adoption is not an attractive solution given the commissioning father's existing biological relationship with X. As X's guardian put it, a parental order presents the optimum legal and psychological solution for X and its preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity; the commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents…"

34. The challenges that the Court expressed above are the same challenges that this Court is now facing. Sadly, unlike the UK Courts, we do not have provision for parental orders and the only option that may be available is that of adoption. Whatever decision this Court makes in that regard must be guided by two main considerations;

    i. The need to ensure that the unit of the family as intended in the surrogacy agreement is not ruined by unnecessary detail and technicality.

    ii. That at all times the best interests of the surrogate children are paramount.

35. In addressing issue No.(i) in the context of a parental order, (and which principle is also applicable in the case of an adoption order), Sir Munby, in **Re X (A child)** stated thus;

"First, they draw on that part of the case-law which identifies the fundamental principles and policy underlying Section 54, directing my attention to three decisions of Theis J. The first is A v P (surrogacy): Parental Order: Death of Applicant) [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, paras 24-26:

The primary aim of Section 54 of the HFEA 2008 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The effect of the order is that the child is treated as though born to the applicants. It has clear implications as regards the right to respect for family life under Article 8 of the European Convention. Family life exists in this case as the child has lived with both Mr. and Mrs. A. The child is biologically related to Mr. A and perhaps Mrs. A. The effect of not making an order will be an interference with that family life in that the factual relationship will not be recognized by law. The Court's responsibility to 'guarantee not rights that are theoretical and illusory but rights that are practical and effective'* Marckx v Belgium (1979-) *2 EHRR 330, at para 31."

"A further relevant consideration is that family life is not only a matter of fact and degree but also the significance of legal relationships. In this case if an order is not made there is no legal connection between the child and his deceased biological father. Protection of the right to family life pre-supposes the factual existence of family life (Pini and Bertani; Manera and Atripalidi vs Romania (2005) 40 EHRR 13, [2005] 2 FLR 596, at para 143). Once that is established (and it is in this case) the state must facilitate and protect that right."

As to the effect of not making any appropriate order, he stated thus;

"The consequences of not making an order in this case are as follows;

i. ***There is no legal relationship between the child and his biological father who is also the commissioning father;***

(ii) The child is denied the social and emotional benefits of recognition of that relationship;

iii. ***The child may be financially disadvantaged if he is not recognized legally as the child of his father (in terms of inheritance);***

iv. ***The child does not have a legal reality which matches the day-to-day reality;***

v. ***The child is further disadvantaged by the death of the biological father."***

36. In applying the above holding to this case, this Court in granting relief must take into account the fact that since 2012, X and Y have struggled to attain the family they intended to have and three years down the line, to attain the family they intended with the twin children to have and three years down the line, with an obvious huge amount of money, other resources and time spent, they have hit legal walls, one after another. I need not repeat the obvious physical and psychological pain that they are undergoing while practically raising the twin children as their own (as they are). Whatever orders are to be made therefore must be both within the law and also realistic and practical. In the words of the Court in **Marckx vs Belgium (supra),** they must also be effective.

37. On issue No. (ii), the principle that the best interests of the child, in any case involving a child, must be paramount, has been universally accepted. Our **Constitution** in **Article 53(2)** provides as follows;

"(1) …

(2) A child's best interests are of paramount importance in every matter concerning the child."

38. I have in addition to the above, having been pointed out to the decision in **A.O.G & S.A.J. (supra)** by the Court of Appeal (O'kubasu, Waki and Aganyanya, JJ), **NHOS vs Little Angels Network (Odero, J) THJ vs SMO [2014} eKLR** where the said principle was firmly applied.

39. In invoking the said principle, Moylan J. **In the matter of Re: D (A child) EWHCC 2121 (Fam)** addressed also the issue of fatherhood which was peripherally raised in the present case. Although Z is married, her husband only featured in the signing of the Surrogacy Agreement and it is obvious that neither he nor Z have any intention of claiming the twin children in the future and therefore to all practical intents and purposes, X and Y are the ones raising the children as parents (though their legal parenthood is still to be secured). Moylan J. in that regard stated thus;

"The issue I have to decide in this judgment is whether the surrogate mother was married at the relevant time. This is necessary for the purposes of deciding whether, as a matter of English law, the father is the child's legal father. As Baroness Hale said in Re G (children) [2006] 2 FLR 629, parenthood can be defined in a number of different ways: genetic parenthood, gestational parenthood and social and psychological parenthood. There is, of course, in addition, legal parenthood.

There can be no doubt that both the Applicant and the 1st Respondent are the social and

psychological parents of the child, which is why in the rest of this judgment I will refer to them as the mother and the father. However, this does not make them at law the parents of the child. The father is also a genetic parent but that too, in the circumstances of this case, does not necessarily make him at law a parent or the father of the child. The mother is not the legal parent of the child.

The legal parental status of the mother and the father is not affected by the fact that both of them are registered as the child's parents on the birth certificate provided by the State of Georgia."

He went on to state that;

"The relevant statutory provisions are contained in part 2 of the Human Fertilisation and Embryology Act 2008 ('the HFEA 2008'). Pursuant to Section 33, D's legal mother is the surrogate mother. This Section provides that the woman who is carrying or has carried a child through surrogacy is to be treated as the mother of the child. This applies whether the woman was in the United Kingdom or elsewhere at the time the surrogacy was effected."

Further, that;

"By virtue of Section 35 of the HFEA 2008 the answer to the question, 'Who is the legal father"', depends on whether the surrogate mother was married at the relevant time. Section 35(1) provides;

'If – (a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage, and;

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, and;

Then, subject to Section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

Section 35(2) provides;

'This Section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).'

Section 48 of the HFEA 2008 provides that where, by virtue of the Act, a person is to be treated as the mother, father or parent of a child, 'that person is to be treated in law as the mother, father or parent (as the case may be) of the child for all purposes.'

Section 48(2) provides the converse, namely that where, by virtue of the HFEA 2008, a person is not to be treated as a parent of the child, 'that person is to treated in law as not being a parent of the child for any purpose'."

40. I have quoted Moylan J. to reiterate the matters I raised elsewhere above and to note that the learned Judge was addressing the case before him in the context of the HFEA 2008 which is not applicable to the case before me but which I only cite as persuasive to my mind. Even then, the

principle of law raised in it is that in crafting an appropriate relief, there is need to confer upon X and Y legal parenthood by the most expeditious and inexpensive lawful process. Elsewhere above, while all the Petitioners and the 4th Respondent have agreed that an adoption order is the only appropriate relief, the 1st, 2nd 5th and 6th have raised doubts about the efficacy of such an order because Y is actually genetically the father of the twins and so how can he adopt his own child" To my mind, that issue is not important because what matters as stated by Mrs. Justice Eleanor King in **JP & Anor vs SP & CP [2014] EWHC 595 (Fam)** at paragraphs 24 – 43 is how to confer *"parental status/parental responsibility upon the mother."* In that case, she toyed with a number of lawful options including;

i. A Parental order
ii. Adoption
iii. Special guardianship order
iv. Residence order

In making her decision she was guided by the following considerations;

a. The need to provide the mother with security and recognition of her status,

b. The need to regulate the use the surrogate mother may choose to put of her parental responsibility in circumstances where, whilst there is no immediate reason to believe she would act inappropriately, she is a close personal friend of the mother and continues to see the child.

c. To achieve (i) and (ii) without jeopardising the father's role as legal father with parental responsibility.

41. The above considerations also apply to the case before me and I note that in his letter of 11th April 2013, the Attorney General stated as follows;

"Legal parentage is a matter of law, and in questions of surrogacy, Kenyan law is silent. Consequently, this is an area for future development of public policy and law. In foreign jurisdictions where law recognizes surrogacy arrangements – and we reviewed the United Kingdom, Australia and the United States – the surrogate mother/host woman and her husband (where applicable) are considered the legal parents of any infants born to a surrogacy arrangement, until they transfer their legal rights to the intended parents/surrogate genetic couple. In those foreign jurisdictions, two main legal instruments are employed in the transfer of legal parentage: (i) parental orders or (ii) and adoption order. We note that the Kenyan legal system does not recognize the instrumentality of parental orders that would have been the tool most proximate in reflecting the reality in this case. In the event of a tussle, there is no specific direction for the present case under existing law.

Noting the absence of contention in this case, therefore, Kenyatta National Hospital may consider the surrogacy agreement, together with the surrogate host woman's no objection, as consent to enter the names of the intended genetic couple in the birth notification of twins born out of this arrangement, and subsequently in the birth certificate of the said twins. This would save all parties concerned time and money that would otherwise need to be expended over an adoptive process under the Children's Act."

42. In his opinion therefore and contrary to submissions made before me, the Attorney General did not rule out adoption as an option open to the commissioning parents i.e. X and Y. Similarly, in

the letter dated 4th August 2014, the UK Passport Office stated that the options available to X and Y are;

"Adoption under Article 23 of the 1993 Hague Convention on the Protection of children and Co-operation in Respect of the Inter-Country Adoption – certificates issued under The Hague Convention Article 23 are acceptable for passport services.

Registration as a British citizen – it is open to you to contract the United Kingdom Visa & Immigration service (UKV&I) with a view to registering the children as British citizens. You should contact UKV&I) via the website www.gov.uk"

43. It would seem from the above therefore that the common option that seems agreeable to all parties and is actually the only one that I can see is available within out Legal regime, is adoption by X since Y is already a parent in fact and in law. I say so also in view of what Munby J. stated in **Re X (A child)** elsewhere above.

44. Since adoption is therefore the only relief that meets both the expectations of the law in Kenya and the UK, I should now return to the prayers in the Petition before I dispose of the matter.

Whether the Petitioners should be allowed to amend the Birth Certificates and Kenyan Passports of the Surrogate Children

45. I have held that the birth certificates and the Kenyan Passports were issued in error and in contravention of the law *(albeit in good faith)* and both therefore ought to be amended to reflect the fact that while Y remains the biological father, Z should be recorded as the biological mother pending the finalization of the adoption process.

What guidance should the Court offer as to the parental status of surrogate children in consideration of the laws between Kenya and the United Kingdom"

46. I have held that the surrogate mother is the legal mother and the genetic father is the legal father until a legal process is invoked to transfer legal parenthood to the mother. This position will remain until a statutory framework is created perhaps along the lines of the law in the U.K. because of our historical ties including in our laws.

47. In that regard, I note that the Attorney General recognized this lacunae in his letter of 11th April 2013 wherein he stated thus;

"***Noting advances in medical health, and the likelihood that surrogacy arrangements are likely to be witnessed on a more frequent basis in the years to some, there is merit in government initiating a deliberate process of public policy formulation on the question of surrogacy. It is therefore strongly recommended that a formal inter-agency and multi-stakeholder process be initiated by the Ministry of Health to consider the need for a formal policy, and possibly law, on surrogacy in Kenya. The stakeholders may need to consider the following key issues among others during that process;***

a. ***The need for a policy or legislation on surrogacy in Kenya;***
b. ***The advisability of the tool of parental orders in the transfer of legal parentage under surrogacy arrangements;***
c. ***Definition of key terminology in surrogacy transactions;***

d. ***Implications of a legal recognition of surrogacy in Kenya on all related laws and regulations;***
e. ***Constitutional implications arising from recognition of surrogacy, particularly in the case of same-sex couples in Kenya.***
f. ***Issues of advertising for surrogacy arrangements and involvement of third parties;***
g. ***The question of commercial versus altruistic surrogacy; and***
h. ***Implications of surrogacy on medical ethics."***

48. I note the above initiative and would only add that the matter requires urgent attention to save prospective parents the agony that X and Y have undergone.

49. The above finding would also address prayer 4 in the Petition. I say so because the only available procedure in Kenya today is adoption under the **Children's Act.** Such a procedure would also meet the expectations of the law in the UK and I have shown why.

Conclusion

50. In **Du Toit & Anor vs Minister of Welfare and Population Development & Others 2003(2) SA 198 (CC),** Skweyiya J. stated as follows;

"The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and means and that legal conceptions of what constitutes family life should change as social practices and traditions change."

51. Further, in the ex-parte matter between **WH & Others (Supra)**, Tomlay and Kollapen JJ had this to say;

"While there appears to be a growing international trend to provide an adequate legislative basis to deal with surrogacy, informal surrogacy has been in existence for a long time. Practiced as far back as the biblical era it is invariable shaped by the cultural, traditional and social norms of a given society. Family members of friends motivated by altruism would become surrogate mothers without any formalities being entered into and this practice probably continues without the oversight or the intervention of the State.

However there is also growing recognition that private and familiar relationships may not always provide the answer to parents who seek to have a child of their own resulting in both the recognition in some jurisdictions of formal surrogacy and the need to regulate it."

52. I adopt all the above findings and would add that in Kenya, there is now no doubt that we require a law to regulate surrogate arrangements in order to protect all involved and affected parties including and most importantly, the children – See also **JLN & 2 Others vs Director of children [2014] eKLR** per Majanja, J.

53. The matter is at an end and the final orders to be made are that;

i. ***The Petition dated is allowed in the following terms;***

a. ***An order is hereby issued that pending a fast-tracked adoption process for the surrogate twins herein, their birth certificates and Kenyan passports shall be amended and/or altered to indicate that Z and not X is their biological mother.***

b. ***The adoption proceedings contemplated in (a) above shall be fast-tracked and an order is hereby issued directing the Deputy Registrar of the Family Division to so fast-track the adoption proceedings in the interests of justice.***

c. ***It is hereby determined that in cases of surrogacy, the surrogate mother shall be registered as the mother of a born child pending legal proceedings to transfer legal parenthood to the commissioning parents.***

d. ***The Attorney General is directed to fast-track the enactment of legislation to cater for surrogacy arrangements in Kenya.***

e. ***Each party to shall bear its own costs.***

54. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Mugola for Petitioner

Mr. Okulo for 4th Respondent

Mr. Mohamed holding brief for Mr. Kamunyu for 1st Respondent

Mr. Muli holding brief for Mr. Tolo for 3rd Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE