

RWANDA / JUDGMENT

Re. N.A ET AL

RLR V.2 -2021

COURT

Intermediate Court

DECIDED

11 September 2020

CASE / FILE NUMBER

RCA 00161/2020/TGI/NYGE

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Text

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Re. N.A ET AL [Rwanda INTERMEDIATE COURT– RCA 00161/2020/TGI/NYGE (Udahemuka, P.J, Mukamana and Nshimiyimana, J.) 11 September 2020] Law governing persons and family – Procreation – Assisted Reproductive Technology – Assisted Reproductive Technology mentioned in article 254 of the Law N° 32/2016 of 28/08/2016 governing persons and family can be applied depending on the evolution of technology – Gestational surrogacy is one of the allowed forms of reproduction – Law N° 32/2016 of 28/08/2016 governing persons and family, article 254. Law governing persons and family – Child right – A child born through surrogacy has the rights to be registered in civil status registries as belonging to the couple which provided the embryo but has the right to be breastfed by the surrogate mother if possible – Law N° 32/2016 of 28/08/2016 governing persons and family article 254. Facts: This case began in Kicukiro Primary Court, whereby a husband and a wife (in this report the husband to be known as N.A and the wife as N.O) were requesting the Court to allow the another family (also in this report the husband to be known as K.F while the wife known as M.G) to bear a child for them through surrogacy. They filed this claim basing on the contract between both families whereby they agreed that the family of K.F and M.G will carry the pregnancy of the family of N.A and N.O through surrogacy because

since their marriage they failed to conceive and give birth, they took contract to the doctor who was going to perform the operation in the laboratory by artificial

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insemination and then insert the embryo in the surrogate mother's uterus but the doctor told them that he can't perform that operation because there is no regulation governing it and requested them to contact the competent authorities to give guidance, consequently N.A and N.O filed an application before the Court requesting that the doctor be compelled to proceed with the surrogacy operation. The Court found the application of N.A and M.O with no merit on the ground that the nature of the application is not provided by Rwandan Law and that reproduction is allowed between woman and man and not between two families. The applicant was not contended by that decision and appealed before Nyarugenge Intermediate Court indicating that the judge misinterpreted the provision of the Law because the court ruled that reproduction occurs between a woman and a man and not between two families, whereas they find that is not prohibited to be between families if they wish so. In this case Haguruka, University of Rwanda faculty of Law and HDI intervened as amicus curiae. To determine whether M.G the wife to K.F should be allowed to be allowed to carry the child of N.A and N.O, the applicants state that the Court should order the doctor to carry out the surrogacy operation as both families with, on the other side M.G and K.F also stated that they don't understand why the doctor refused to perform the operation since both families had consented. The counsel for the applicants argues that reproduction through surrogacy is new in Rwanda, before Rwandese who could not procreate naturally, they had to travel abroad to procreate through technology but since that technology is also in Rwanda, thus, her clients should utilise it, she states that it's all about gathering eggs from the mother, fertilize them with sperm from the father, and

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place the embryo into the uterus of a gestational surrogate who will carry the pregnancy and give birth on behalf of the couple which provided that embryo, she further argues that reproduction through technology is provided for under the Rwandan Law, though it's ambiguous. The faculty of Law/ University of Rwanda argues that the Rwandan laws accepts this form of reproduction which is through technology, thus it finds that in this case there are no legal challenges of determining whether this form of reproduction which is not nature is accepted under the Rwandan Law, thus the appellants should be granted their requests, however, the interests of the child should be taken into account mostly those regarding living with the surrogate mother at least for 6 months so that it can be breastfed. Haguruka Asbl, states that the applicant's request should be granted because are based on various laws, that the Constitution of the Republic of Rwanda provides that a person has the right to have a decent life, access to health care, and the right to have a family, the rights to have children is fundamental, it also argues that right of the child must be taken into consideration especially living with the surrogate mother for at least for 6 months because its antibodies are not yet developed. Health Development Initiative also, states that it concurs with others that the appeal has merit and that the rights of the children should

also be protected. Held: 1 The Gestational surrogacy is one of the permitted forms of reproduction, if it's agreed upon by the concerned parties because the law provides that reproduction occurs naturally between a man and a woman or it is medically assisted especially that the technology provided by the law is wide and can be

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applied depending on the evolution of the technology, thus, the contract between M.G the wife of K.F and N.A and M.O of Gestational surrogacy should be enforced.

2. A child born through gestational surrogacy has the rights to be registered as a child of the couples who provided the embryo but has also the right to be breastfed by the surrogate mother for a period of 6 months, thus the child must be registered on his/her parents namely N.A and M.O but have to first stay with M.G, the wife to K.F for a period of 6 months after his/her birth. Appeal has merit; The appealed judgment is reversed. Court fees cover expenses of this case. Statutes and Statutory instruments referred to: Constitution of the Republic of Rwanda of 2003, revised in 2015, articles 17 and 18 Law N° 32/2016 of 28/08/2016 governing persons and family, article 254 No cases referred to.

Judgment

I. BACK GROUND OF THE CASE

N.A and M.O were legally married on 22/12/2013, unfortunately they were unable to have a child, they consulted various doctors and they were told that M.O was not able to

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produce children this was according to the doctor's medical report dated 20/01/2020, therefore they decided to use surrogacy.

After reviewing various methods, N.A and M.O opted for gestational surrogacy and they wished the surrogate mother to be M.O's sister called M.G a wife to K.F, the latter were notified about it and they warmly welcomed it, subsequently made a written agreement whereby they agreed that the surrogate mother will give them the child after the birth and after signing the agreement they went to see Dr. Ngoga Eugene an expert in that field, who works from Kanombe Military Hospital, he made a report and informed them that he cannot perform the operation because there is no regulations governing it, he requested them to contact the competent authorities which will indicate how to proceed, N.A and M.O filed a claim to the Court requesting that the doctor be compelled to perform that operation.

After hearing the case, the Primary Court of Kicukiro found the claim of N.A and M.O with no merit on the ground that their request is not provided under the Rwandan laws, the applicants were not contended by that decision, thus appealed before Nyarugenge intermediate Court, their grounds of appeal being that the judge erred in law when he stated that the reproduction is naturally between a man and woman and not between two families, whereas the appellant find that is not prohibited between two families if they agree to do so.

Basing on the fact that this nature of the claim is new in courts, the Court requested those who wish to intervene as amicus curiae to apply, consequently the organisation called Haguruka, Faculty of Law / University of Rwanda and Health Development Initiative, applied and the Court after assessing their requests and their expertise they have on the subject matter,

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were all were granted to intervene as amicus curiae. After assessing the nature of the claim, the Court finds that, the following issues are to be examined. - Whether M.G a wife to K.F can be the surrogate mother of NA and MO's child - The challenges raised by Dr Ngoga and how it can be solved. II. ANALYSIS OF LEGAL ISSUES - Whether M.G a wife to K.F can be the surrogate mother of NA and MO's child

N.A and M.O state that they appealed before the Intermediate Court to reverse the decision taken by the Primary Court, thus, the Court should compel the doctor to execute the contract made before the notary between the two families, on the other side M.G and K.F who were also summoned, stated that they don't comprehend why the doctor denied to execute their contract whereas none of them had an objection; they further argue that both families agreed because M.O is a sister of M.G and that the latter felt the burden her sister carried for a long-time, to the extent that if it is possible to be a surrogate mother for her child , she is willingly to do so.

Counsel Kabasinga, assisting N.A and M.O further explains that reproductive technology is new in Rwanda, therefore, before there were couples who were not able to naturally bear children and had to travel abroad for medication, but that technology is now available in Rwanda, therefore, her clients want to utilise it also, she explained that Gestational surrogacy takes place when an embryo created by in vitro

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fertilization technology is implanted in a surrogate and give birth to a child who belongs to the family which donated the embryo, there are various persons who use this technique and there is no negative effects. She further stated that reproductive technology is provided by Rwandan law, but the law is silent on whether surrogacy is allowed, therefore deep analysis which was the Primary Court failed to carry should be done by the Intermediate Court, so that her client can get relief.

The lecturers of Law sent by University of Rwanda as amicus curiae, namely Turatsinze Emmanuel, Uwineza Odette and Serugo Jean Babptiste stated that, the Court should settle the issue of whether reproductive technology is allowed in Rwanda. They explained that, it is important to distinguish between Medically Assisted Reproduction known as “MAR” and “Assisted Reproductive Technology” known as “ART”. Reference made to the explanations provided by World Health Organisation, they explained these two techniques whereby they explained that the “ART” technique is familiar in developed countries, even some countries enacted laws regulating it such as USA, others reject that technique due to “ethical reasons” like France, as it was ruled in the judgment of *Mennesson v. France* and the judgment of *Labassee v. France*. This explains why some French citizens who want to conceive through this means have to travel to USA, in conclusion, they state that the ART technique is incorporated in MAR technique.

Uwineza Odette also representing the University of Rwanda argues that the judge misinterpreted the law, because Rwandan laws clearly provides that reproductive technology is allowed; she further argues that the doctor did not refuse to perform the surrogacy process but he only wanted the regulations

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governing that process to be put in place, she finds that the Ministry of Health is the competent organ to enact those regulations, she concluded by stating that those regulations should be put in place by competent authorities, that the Court of law should be resorted to only if the doctor refuses to act accordingly to the provisions of the law, however as it is clear in this case, the doctor did not refuse.

They further explained that though surrogacy is permitted in some countries, there are issues associated with it like the one regarding the mother of the child, the amicus curiae explained that there are different views depending on the country, some countries like South Africa the mother of the child is the one who carried the pregnancy and gives birth whereas others argue that the egg donor is the mother of the child, she concluded by stating that whatever should be the decision of the Court, the interests of the child should be taken into consideration, mostly regarding the child living with the surrogate mother for at least 6 months in order to breastfeed.

Turatsinze Emmanuel reminded the Court to decide the case within the limits of the subject matter and not to decide in place of other institutions, he states that there are copies of judgments attached in the system, which concern civil status, child's rights, succession etc. those judgments are precedents, this Court could as well make a precedent in case someone had filed a claim regarding the contract they concluded, however, this is not the issue in the case at hand because there is no plaintiff, therefore, the Court should limit its analysis to determine whether gestational surrogacy between family is allowed or not, and desist from ruling on the issues which might happen in the future which are not yet raised. He concluded stating that, Rwanda allows

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reproductive technology as provided by paragraph two of article 254 of the Law governing family. Consequently, there is no doubt that the Rwandan law accepts reproductive technology such as gestational surrogacy, therefore the appellant should be granted their requests.

Counsel Garuka Chritian representing Health Development Initiative also stated that he concurs with the position of other parties whereby they find the application with merit and the surrogacy contract be implemented and the rights of the child to be born be ruled upon.

Counsel Mugemanyi Jean Nepomscene representing Haguruka Asbl finds that the application should be granted because its supported by various laws, such as article 17,18,21 of Constitution of the Republic of Rwanda of 2003 as revised to date, provides that a person has right to a family (wife, husband, children) the rights to have children is fundamental, he further states that there is a right to have a decent life, like a health care which is provided by article 25 of the Constitution, he also concurs with University of Rwanda, because paragraph 2 of article 254 on which they based to file the application provides that reproduction occurs naturally or it is medically assisted. He concluded that reproductive technology should not be provided to the spouses only but it should be extended to others depending on the development of technology and that the court should examine analysed how to register the child in civil status registry, he states that on that point the Court should rule on it and not wait for disputes to come up be raised regarding this specific issue and the surrogate mother stays with the child for a period of 6 months because his immunity has not yet grown, also this should be thought of before.

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The Court finds that, at first instance, the judge ruled the case as follows: The Court finds though the applicants exhibit a contract they made with the family which accepted to be a surrogate of which they base on their application to the Court , however it finds the provision of the law they are basing their application on has no link with their requests because that article provides for reproductive technology between a man and a woman whereas they are requesting to be done between two families, that is why, the Court finds their application without merit, this is the ruling appealed by the appellants stating that technology is vast, but the court only limited itself on just a single component; therefore the Court should rule that the previous court misinterpreted the law, and thus find their application with.

The Court finds that, for N.A and M.O could not produce normally was due to health complications as indicated by the medical report dated 20/01/2020 by Dr Eugene Ngoga, whereby he indicated that he followed up the health of M.O for 18 months and found that she can not get pregnant, health complications have always been in existence but scientists, lawyers and others, always look for solutions to various problems in our society, this was the birth of various technologies such as giving birth by caesarean, in these days, natural insemination complications are on the rise, to solve them, technology has shown that either a family (woman and man) or a woman can give birth whereas she did not get pregnant, known as surrogacy.¹

1 Surrogacy is an arrangement, often supported by a legal agreement, whereby a woman (the surrogate mother) agrees to bear a child for another person or persons, who will become the child's parent(s) after birth. ... Surrogacy is considered one of many assisted reproductive technologies. [<https://en.wikipedia.org/wiki/Surrogacy>] visited on 10/09/2020.

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Even the legislatures, made a progress and incorporated surrogacy in domestic laws, though some countries don't allow it. As far as Rwanda is concerned, the Constitution, articles 17 and 18, provides that the government has the obligation to protect the family, however none can protect the family when natural reproduction is not possible because if no measures taken the family may disappear, in that case, technology as a solution is necessary. Pursuant the provisions of 17 and 18, the Government of Rwanda enacted the Law N° 32/2016 of 28/08/2016 governing the persons and family, article 254 of that law provides that "Reproduction occurs naturally between a man and a woman or it is medically assisted. Medically assisted procreation must be by mutual consent of the concerned"²

The Court conclusively finds that reproductive technology is allowed in Rwanda and moreover technology is wide and keep on evolving, thus the technology in use today will not be the same in near future, in order to have consistent laws the legislature provided that: reproduction occurs naturally between a man and a woman or it is medically assisted. The Court finds that sentence complete and general, and provides a solution to the raised issue, otherwise if not so whenever a new technology comes up, the legislature will have to enact a new Law governing that new or trending technology, in reality that is the challenge the previous judge faced because he /she did not go further and understand that the concerned technology is wide.

2 Article 254 of the Law N° 32/2016 of 28/08/2016 governing the persons and family provides that "Reproduction occurs naturally between a man and a woman or it is medically assisted. Medically assisted procreation must be by mutual consent of the concerned.

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The Court finds also that, as explained by experts, surrogacy is made of two forms namely: traditional surrogacy whereby the surrogate's eggs are used, making her the biological mother of the child she carries, (biological)-Gestational surrogacy, the surrogate has no biological link to the baby.

As motivated in reproductive technology known as ART, what is known as gestational surrogacy is part of Assisted Reproductive Technology whereas the latter is also part of the technique known as Medically Assisted Reproduction (MAR). With regarding to the request of N.A and M.O to provide an egg to the family of K.F and M.G so that the latter can carry the pregnancy and bear a child for them, is scientifically known as "Gestational surrogacy". As they have chosen that technique, it means that M.G has no blood relation with the child she will give birth.

Pursuant to the motivations given above, the Intermediate Court of Nyarugenge finds that the agreement between the family of K.F and M.G and the family of N.A and M.O whereby the latter will be to be a gestational carrier, is in conformity with the Rwandan Law, thus it has to be executed in it's entirety. In addition to that, apart from this court ruling that the contract is legal, it's also important that the court address the issue raised by Dr. Eugene Ngoga. The challenges raised by Dr Ngoga and how it can be settled.

The Court finds that Dr Ngoga did not say that he is not able to perform the surrogacy operation, he clearly explained the

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issue he had before proceeding with the surrogacy operation³ after indicating that such operation have been performed all over the world for 30 years, and himself has an experience of 6 years, Dr Ngoga explained that the issue was only in the domestic laws, whereby the woman who carries the pregnancy and give birth to the baby becomes automatically the mother of the born child, therefore he was in need of another supporting document to register the child to it's real parents, who are the donors of the fertilised egg as also acknowledged by Dr Ngoga.

The Court finds a part from those issues raised by the physician, Counsel Ndayisenga Jean Claude though he was sent by Haguruka he made a statement different from his colleague

3 Dr Ngonga's letter responding to Florida Kabasinga Managing Partner Certia Law Chambers
Re: Your request concerning the case N0 RC 00161/2020/TGI/NYGE Dear Madam, I am a Chief Consultant Obstetrician Gynecologist working at Rwanda Military hospital. For the past 6 years I have been taking care of infertility couples including providing Assisted reproductive techniques. In the mentioned case, I advised the couple to seek the experts in law opinion as the only treatment which they could benefit from is surrogacy. This is part of assisted reproductive technic where the embryo from a couple (in this case husband and wife) is place in the uterus of another woman who will carry the pregnancy till term and deliver. Biologically speaking this child belongs to the couple which had their gametes fertilized. So, the child belongs to them and the surrogate mother is just a pregnancy carrier. This practice has been there for 3 decades. In Rwanda as the baby born is automatically related to person giving birth and written on her name, there is a need to have all important documents before the procedure to avoid any misunderstanding at the time of birth. Of course, the surrogate mother should be aware of what she is doing and a consent signed is required. The parents couple and the surrogate always get the explanations about the procedure and are counselled accordingly. I believe that when both sides are comfortable then we should support them so that they can fulfill their dream of being parents. Let me hope this has clarified the situation and I am available to clarify more even before the court of law."

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who states that parental love in case of gestational surrogacy has to be taken into account, he stated that the expert Prof Dr. Gakwavu argues that in case of giving birth through this technology, though the born child's DNA is different from that of the surrogate mother, thus the latter stays longer with the baby to breastfeed him (purposely to provide him with antibodies) this may become a real love between the baby and the person who breastfed and may cause some difficulties for the surrogate mother to give the child to the real parents even at time of separation the baby may be traumatised because of the bond between them, thus to solve that issue, the child must be handled to the real parents at birth to avoid increasing the bond between the surrogate mother and the baby, which may have negative impacts on the child. Therefore, though Haguruka asbl agrees that breastfeeding the baby is essential but that issue should also be taken into account.

The Court concurs that the issues raised by Dr. Ngoga are founded because as indicated by the amicus curiae, after the delivery, the surrogate mother may get fond of the baby especially when she recalls the difficulties she accounted during pregnancy and refuse to give the baby to the real parents, lawsuits will raise especially that under the Rwandan law the mother of the child is the one who gave a birth, therefore, this issue if is not resolved in beginning, may be the source of disputes which the physician raised, mostly that the technology in Rwanda has significantly advanced, to the extent that a child is registered in civil status registry at birth while he/she still in maternity, therefore, the Court based on the contract available in the case file and the statements of both families before the Court, it decides that the child will be registered as M.O and N A's child. Therefore, the issue raised by Dr Ngoga is settled.

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The Court finds also that, the child's rights have to be protected and are not limited only to being registered in registry of civil status, because the child to be born must have a decent life including being breastfeeding at least for six months by the surrogate mother, during that time he must be only fed on breastmilk, as recommended by World Health Organization (WTO) and UNICEF⁴, concerning regarding the issue that the surrogate mother may get fond with the baby if she stays longer with her as put by Counsel Ndayisenga Jean Claude, those feelings of the surrogacy mother who breastfed him and also the obligations contained in contract they concluded with the other family which carried the pregnancy. Therefore, within those six months the child will live with the surrogate mother, who is M.G however the baby's real parent can visit them whenever they wish but without prejudicing the peace of M.G and K.F family, the reason for staying with the surrogate mother for 6 months is for the breastfeeding the baby, implying that in case the surrogate mother fail to breastfeed him, then there will be no reason of

4 In Infant and Young Child Feeding, lesson 1, it is stated as follow “Adequate nutrition during infancy and early childhood is essential to ensure the growth, health, and development of children to their full potential. Poor nutrition increases the risk of illness Recommended Infant and Young Child Feeding

Practices: WHO and UNICEF’s global recommendations for optimal infant feeding as set out in the Global Strategy are: exclusive breastfeeding for 6 months (180 days) (11); Exclusive breastfeeding means that an infant receives only breast milk from his or her mother or a wet nurse, or expressed breast milk, and no other liquids or solids, not even water, with the exception of oral rehydration solution, drops or syrups consisting of vitamins, minerals supplements or medicines (12).” WHO. Infant and young child feeding: model chapter for textbooks for medical students and allied health professionals. Geneva, World Health Organization, 2009, [https://www.who.int/nutrition/publications/infantfeeding/9789241597494.pdf] accessed on 10/08/2020.

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living with her, instead the child will be given to the real parents who are N.A and M.O. III.
DECISION OF THE COURT

Decides that the appealed judgment RC 00168/2020/TB/ KICKI is reversed in it’s entirety.

Orders the execution of the surrogacy contract between M.G and K.F and N.A and M.O.

Orders that the born child should be immediately registered by N.A and M.O in the civil registrar.

Holds that the child to be born will live with M.G the wife to K.F for a period of 6 months.

Holds that the court fees cover the expenses of this case.

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