REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.266 OF 2013

BETWEEN

BABY 'A' (Suing through her mother, E.A)…….1ST PETITIONER

THE CRADLE-THE CHILDREN FOUNDATION…….2ND PETITIONER

AND

ATTORNEY GENERAL…….1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL……..2ND RESPONDENT

THE REGISTRAR OF BIRTHS AND DEATHS……..3RD RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS…..1ST INTERESTED PARTY

NATIONAL GENDER AND EQUALITY COMMISSION……..2ND INTERESTED PARTY

KENYA CHRISTIAN PROFESSIONALS FORUM LTD…..…...3RD INTERESTED PARTY

AND

KENYA HUMAN RIGHTS COMMISSION……..……....*AMICUS CURIAE*

JUDGMENT

Introduction

1. On or about 3rd May 2009, one E.A. who is the mother of the 1st Petitioner, gave birth to a baby who was born with both male and female genitalia. On 10th May 2009, the 2nd Respondent, Kenyatta National Hospital, issued E.A with various documents used in the process of carrying out genitogram tests, x-rays and scans on that baby who was named Baby A for purposes of these proceedings and a question mark '(?)' was inserted for the column indicating the child's sex. To-date, the child has never been issued with a birth certificate and in the Petition dated 24th May 2013, the Petitioners' claim that the entry of a question mark on the child's medical and treatment notes offends the child's rights to legal recognition, erodes its dignity and violates the right of the child not to be subjected to inhuman and degrading treatment as guaranteed under **Section 4** of the **Children Act** as well as **Articles 27, 28** and **29** of the **Constitution.** The Petitioners have thus sought the following orders;

> ***"(a) Legal recognition and protection of intersexual children.***
>
> ***(b) A declaration that intersexual children are entitled to and or guaranteed to the rights under Articles 2,(1), (4)& (5), 10, (1), (2a&b), 19(1), (2) & (3), 22(1) & (2), 23 (1) &(3), 27(1), (2), (4), (5), (6) & (7), 28, 29(a,c,d&f), 31(c) 43(a), 52(1), 53(a,c,d&e), (2), 65(3), 258 and 260 of the Constitution, part II of the Children Act and in all the international instruments s pleaded herein above.***
>
> ***(c) A declaration that all surgery on intersex infants that is not therapeutic be approved by a Court by way of a judicial review order under Article 23 of the Constitution and under the principles of parens partriae and the best interest of the intersexual child.***
>
> ***(d) Directions in relation to guidelines, rules and regulation in line with paragraph 28 of the Petition.***
>
> ***(e) An order directing the 1st Respondent to investigate, monitor, collate data and or statistics on all intersexual children in Kenya.***
>
> ***(f) Any other orders or directions that this Court may deem fit to grant.***

The Petitioners Case

2. The Petitioners' case was presented by Mr. Chigiti who submitted that under **Article 5** of the **Universal Declaration on Human Rights**, everyone has the right to recognition everywhere as a person before the law, including Baby A. That in Kenya, legal recognition is

achieved through the issuance of statutory documents known as an acknowledgement of birth slip and a birth certificate which is issued by the 3rd Respondent, the Registrar of Births and Deaths, under **Section 7** of the **Registration of Births and Deaths Act (Cap 149 Laws of Kenya).** That under **Section 2(a)** of that **Act**, the sex of a child is one of the prescribed particulars to be disclosed in Forms No. 1 and 7 used for registration of any birth. He thus claimed that it has become problematic for intersex children to be registered because the form only provides for male and female sex markers and therefore there is no mark for intersex children. He thus submitted that the said provision denies an intersex child such as Baby A, the right to legal recognition and violates **Article 7** of the **Convention on the Rights of the Child** which provides that the child has a right to be registered immediately after birth and have the right to a name. It was also Mr. Chigiti's submission that the Respondents have failed to discharge their positive obligation and duty owed to Baby A under **Article 20** of the **Constitution** which provides inter alia that the Bill of Rights shall be enjoyed by every person to the greatest extent consistent with the nature of the right or fundamental freedom.

3. In addition, Mr. Chigiti submitted that a birth certificate is of great importance in all spheres of life and development of a child because it is the ticket to admission in school, issuance of a passport, a national identity card, employment, etc and without that document and or legal recognition, a child cannot realize or enjoy the rights, protection and guarantees made under **part II** of the **Childrens Act, the Bill of Rights** and **Article 7** of the **Convention** on the **Rights of the Child**. In making that submission, he relied on the Indian Supreme Court case of ***National Legal Services Authority vs Union of India and Others 2014*** where it was held that transgender persons are entitled to legal protection of law in all spheres of state activity. He also referred the Court to several international instruments which recognize and protect intersexual rights such as **The Universal Declaration of Human Rights, The Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, the African Charter on Human and People's Rights and the Covenant on Economic and Social and Cultural Rights**. In addition to those International instruments, he gave examples of countries such as Australia, Spain and Canada where laws have been enacted to protect intersexual persons

4. It was his further submission that corrective surgery for intersex children is not necessary unless there is a therapeutic need to conduct the surgery and that forced genital normalization, involuntary sterilization, unethical experimentation, medical display, reparative therapies or conversion therapies often lead to irreversible changes to the body and interferes with a child's right to family and reproductive health rights generally. He thus submitted that the Court should direct that such surgeries should be done only when the child is of age so that he/she can make an informed decision. He submitted therefore that Baby A's right to

physical integrity and self-determination have been violated because the extent or level of intrusion of the surgeries being performed by the Kenyatta National Hospital are not known.

5. He submitted in addition that there are no guidelines in place that would inform a decision whether to carry out a surgery or not and that the factors guiding the decision and the process vary from parent/guardian to the other and the child has no role to play in the whole exercise. That therefore the conduct of corrective surgeries without regulation is akin to experimenting on a human body in violation of **Article 27** of the **Constitution.** That therefore there is need for a set of rules to be promulgated to protect and promote the rights of intersex children and that the Court ought to intervene for the benefit of the said children.

6. It was also his submission that whenever need arises for corrective surgery to be carried out on an intersexual child, then certain rules and regulations as set out under **Article 19(2)** of the **UN Convention on the Rights of the Child** must be followed. In support of that position, he relied on the Columbian of ***Case Sentencia No. T-551/99*** where it was held that parents should be granted the right to consent to genital reconstruction surgeries on intersexual children under the age of five but that the decision should not be left to the full discretion of parents alone as it would be prone to abuse and instead that Courts ought to make declarations that all surgery on intersex infants that are therapeutic should be approved by a Court by way of judicial review. Further, that such a decision should be informed by set guidelines, the principle of *parens patriae* and the best interest of the child and in the event that there is disagreement as to whether or not to carry out corrective surgery, then there should be a moratorium and the operation postponed to a time when the child is able to participate in the decision making process.

7. It was also his contention that the statistics and data relating to intersexual children has not been collected and documented and as such it is impossible for those children to gain legal recognition without the said data being in place. That intersexual children are therefore marginalized and are vulnerable and also lack the appropriate legal protection mechanisms as guaranteed under **Article 27** of the **Constitution**. For those reasons, it is urged that they remain victims of inequality as they are not included in any known state policies or programmes and have no place in the national census and as such are placed in the position of second hand citizens. Mr. Chigiti for the above reasons thus urged the Court to grant the orders elsewhere set out above.

The 1st and 3rd Respondents' Case

8. In response to the Petition, the 1st Respondent, The Attorney General and the 3rd Respondent, The Registrar General of Births and Deaths, responded to the Petition through the Affidavit of one, Mutua G. M, Senior Registration Officer in the Department of Civil Registration under the Ministry of Interior and Coordination of National Government, sworn on 29th July 20914.

9. Mr. Mutua in his Affidavit acknowledged that it is the duty of the Director of Civil Registration to register and issue birth certificates to all registered children in Kenya. He stated further that the Petitioner has failed to demonstrate that E.A. aforesaid had lodged an Application for a birth certificate for "Baby A" with the 3rd Respondent and that the same was denied. That in the absence of the particulars and details of Baby A's birth, the 3rd Respondent is not in a position to know if the 2nd Respondent had forwarded any documents to its office in regard to the subject matter. He also deponed that the Court cannot be called upon to make additional provisions on an existing law or legislate on matters touching on intersexual people and registration of persons, as that is the work of Parliament.

10. Miss Mwangi for the 1st and 3rd Respondents further submitted that the 1st and 3rd Respondents have not violated the Petitioner's rights because apart from failing to lead any evidence to show that she attempted to get a birth certificate from the 3rd Respondent, she has also failed to demonstrate that Baby A has suffered for lack of a birth certificate. It was her submission that on the contrary, Baby A has been receiving treatment at a public hospital without discrimination despite her intersex status. It was her submission therefore that neither E.A's nor Baby A's fundamental rights and freedoms have been violated as alleged or at all.

11. In addition, she submitted that only Parliament can enact legislation in Kenya recognizing the introduction of "intersex" as a third sexual category and she referred the Court to the case of ***RM vs Attorney General & Others Petition No.705 of 2007,*** where it was held that it was not within the mandate of the Court to expand the meaning of the term "sex" when the Legislature has not done so.

12. Further, that the issues raised in the present Petition are *res judicata* given that the same were the subject matter in ***RM vs Attorney General & Others (supra)*** save the issue of data on intersex children. That even then, it is not the mandate of the 1st and 3rd Respondents to

keep data of intersex children and on the contrary, the 3rd Respondent's mandate is limited to registration of births based on information received from various hospitals and that it is in fact the function of the National Gender and Equality Commission to collect and keep such data.

13. As to whether the Court can issue an order directing the 3rd Respondent to register intersex children as a third gender in Kenya, Miss Mwangi submitted that the Court in ***RM's Case*** had addressed that issue and added that intersex children are properly provided for in the existing legal framework and they all fall in the sexual categories of female or male depending on their dominant sex.

14. On the issue of corrective surgery, Miss Mwangi submitted that the question whether parents have any role to play in determining or assigning gender can only be answered by a medical practitioner, and that the Petitioner should have availed evidence to support her arguments on that issue which evidence she had failed to provide. That it would be unfair for the Court to give blanket guidelines on such a sensitive issue and in any case Parliament was best placed to deal with it.

15. It was also Miss. Mwangi's submission that because the legal framework in Kenya recognizes intersex children, then if follows that they enjoy all the fundamental rights and freedoms in the Bill of Rights without discrimination.

16. Lastly, she submitted that the Petitioner has sought orders that cannot be granted and urged the Court to dismiss the Petition.

The 2nd Respondent's Case

17. The 2nd Respondent, Kenyatta National Hospital in response to the Petition filed a Replying Affidavit sworn on 13thJuly 2013 by Dr. Simeon Monda, the Acting Chief Executive Officer of the said hospital.

18. In his Affidavit, Dr. Monda stated that the Petitioner had failed to disclose any reasonable cause of action against the 2nd Respondent because "Baby A" was born at Aga Khan University Hospital and not at the Kenyatta National Hospital and therefore any entries in respect of that birth ought to be raised with Aga Khan University Hospital and not the 2nd Respondent. That the Petitioner had also failed to disclose the manner in which the 2nd Respondent has violated Baby A's rights to legal recognition, dignity and protection from inhuman and degrading treatment.

19. In addition to the above, Mr. Gitonga who presented the 2nd Respondent's case and submitted that none of the Respondents is under any constitutional or statutory obligation to give information concerning the number of intersex births and the population of intersexuals in Kenya.

20. It was his further submission that the appropriate forum for the Petitioner's complaints is the Legislature and that the Kenyan Courts cannot expound the meaning of "sex" if the Legislature has failed to do so. That the prayer for appropriate guidelines and regulations with respect to corrective surgery for intersex children should also be addressed to the Legislature which may then address the issue pursuant to a parent Act of parliament. In any event, he submitted that the Petitioner's case cannot be sustained because first, the isolation and identification of intersex persons as a unique sexual group would exacerbate the stigmatization of those persons since they will be exposed to constant questioning and treatment with suspicion. Second, it would be dangerous to assume that all intersex persons would readily accept whatever mark, sign or identity that may be assigned to them by the relevant authorities. Third, championing of a third category of persons known as intersexuals is itself a violation of those persons' constitutional rights and freedoms since it is tantamount to imposing a third category of sex without the intersexual's consent and lastly, assigning an identity to intersexuals will increase the practice of corrective surgery especially when the parents of intersex children are faced with the actual task of assigning their intersex children a third gender. It was therefore the 2nd Respondent's submission that the Petition herein ought to be dismissed with costs.

The 1st Interested Party's Submissions

21. The 1st Interested Party, the Kenya National Commission on Human Rights, is an independent constitutional commission within the meaning of **Chapter 15** of the **Constitution 2010.**

22. Miss Kabaya for the said Commission submitted that an intersex person is an individual who, because of a genetic condition, is born with ambiguous sexuality and thus cannot be differentiated as being male or female. That the term also refers to a person who has genetic, hormonal and physical features that are neither exclusively male or nor exclusively female, but are typical of both at once or not clearly defined as either. She added that the treatment of intersex persons by the Society raises important human rights issues because such persons have in the past been seriously stigmatized and have been subjected to a phenomenon referred to as 'intersex phobia' and invariably, 'trans phobia'. That the absence of public discussion and acknowledgement of intersexuality has therefore led to a lack of legal recognition for intersexuals as a distinct vulnerable group in need of protection by the law. Further, that the plight of intersexuals is exacerbated by the fact that there is no legal definition of intersexual persons and they have thus been exposed to discrimination since they remain unrecognized and unacknowledged. That the net result of all the above was that such above facts persons continue to suffer silently contrary to the provisions of **Article 29 (c)** of the **Constitution** and therefore this Petition presents an opportunity for the Court to break that silence and demystify the myths surrounding intersexual persons in Kenya and pave way for their full participation in all aspects of economic, social and cultural life.

23. It was her further submission that every Kenyan citizen by dint of **Article 12(1)**of the **Constitution** is entitled to the rights and privileges of citizenship, a Kenyan passport and any document of registration or identification issued by the State to its citizens. That the right of citizenship and nationality is also enshrined in **Section 11** of the **Children Act** which provides that every child has a right to a name and nationality from birth but despite that fact, intersex persons are not able to acquire nationality documents since there is a lacunae in the **Births and Deaths Registration Act** which does not include "intersex" as a gender category nor does it define the term "sex", generally. That for that reason, on occasion their gender is falsified because one must be registered as either male or female.

24. It was also Miss Kabaya's submission that **Article 27** of the **Constitution** also discriminates against intersex persons as it only makes reference to men and women but that fact alone should not be interpreted as an exclusion of other gender groups such as the intersex and therefore there is a need for enactment of legislation to recognize intersex persons as a different gender classification. She gave the example of South Africa which has enacted **The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000** which has defined the term "sex" to include intersex persons.

25. She added that the right to health of intersex persons under **Article 43(1)(a)** of the **Constitution** has also been violated because intersex individuals are discriminated against due to their sexual disposition and end up getting substandard healthcare services yet it is not their fault that they are born as intersexuals.

26. It was her further submission that in most cases, intersex children and persons are not given the opportunity to express themselves, parents or doctors make decisions on their behalf as to what sex or gender they would want the child to take up without consulting the child and or taking into account the interests of such a child. That corrective surgery to "correct" the genitals of an intersex child should not be allowed without the child's consent and such a decision should be left to the child when he/she reaches the age where he/she has the capacity to make that decision.

27. Lastly, it was Miss Kabaya's submission that there should be rules and regulations that guide any medical procedures that are to be performed on sexual minorities, particularly intersex children, and such regulations should have the best interests of the child as the guiding principle.

The 2nd Interested Party's Submissions

28. The 2nd Interested Party, the National Gender and Equality Commission is a Constitutional Commission established pursuant to the provisions of **Article 59(4)** and**(5)** of the **Constitution** and operationalized by the **National Gender and Equality Commission Act No. 15 of 2011.** Its primary mandate is to promote equality and freedom from discrimination as guaranteed under the provisions of **Article 27** of the **Constitution.**

29. Mr. Mbithi presented the 2nd Interested Party's case and it was his submission that sex concerns biological make up and therefore includes the intersex condition whereas gender is linked to societal expectations. That in that regard, an intersex person does not belong to the conventional male or female sexes and is therefore entitled to legal recognition in Kenya as provided for under international instruments such as the **Universal Declaration on Human Rights, Yogyakarat Principles, the Convention on the Rights of the Child, Convention on Elimination of all forms of Discrimination Against Women (CEDAW,)the International Covenant on Civil and Political Rights, African Charter on Human and People's Rights and International Covenant on Economic, Social and Cultural Rights**

that form part of the laws of Kenya. It was also his submission that the **Births and Death Registrations Act** should be interpreted with the alterations, adaptations, qualifications and exceptions necessary to bring it to conformity with the Constitution as provided for under **Section 7** of the **Sixth Schedule** to the **Constitution**. That therefore the term 'sex' should be interpreted to include "intersex'' and that in that regard the **Births and Deaths Registration Act** applies to Kenyans whether intersex or not. Further, that intersex children should be registered at birth as intersex meaning that the Application Forms for such registration must introduce a third sex known as "intersex" until such a time when corrective surgery is conducted to create the dominant biological sex of the child and thereafter the birth certificate can be amended accordingly as was held by the European Court of Human Rights in the case of ***W vs United Kingdom****(no citation provided).*

30. Further, that the apparent sex of an intersex child is ordinarily registered at birth which is a decision based more on guess work pending actual medical examination and determination that would reveal the dominant biological sex of the child and that in such instances the 'male' or 'female' marks in the birth certificate merely indicate gender as opposed to the actual sex of the child. That later in life, when the intersex realizes that the gender assigned at birth is not correct, then that error maybe rectified as was held in the case of ***Republic of the Philipines vs Jennifer Cagandahan, Supreme Court of the Philipnes, Second Division [G. R No. 166676, September 12, 2008].***It was therefore his argument that the condition of being an intersex is not a licence to deny intersex children identity documents such as birth certificates or other fundamental human rights and freedoms.

31. As to the availability of statistical data on intersex person in Kenya, Mr.Mbithi submitted that such persons indeed exist and "Baby A" is a good example of that fact. That such persons are also a marginalized lot due to the stigma and discrimination they suffer hence the need for a clear law on the subject.

32. As to whether there is need for corrective surgery for intersex children Mr. Mbithi submitted that there exists three schools of thoughts on the subject. The first school of thought deals with the dominant protocol where it is argued that it is important that early surgery and hormonal intervention is undertaken to conform the child's body to societal norms and minimize information given to the child and parents so as to avoid psychological trauma. Second, the middle ground approach emphasizes the need for disclosure of complete information to the parents and deference to the parental decision about whether surgical or hormonal treatment is in the best interests of the child and thirdly, there is the approach that a complete moratorium on all surgical and hormonal treatments that are not medically

necessary should be imposed so that when a child reaches the age of consent, it can determine whether he or she wants to undergo any surgical alteration. That from the above approaches to surgery, it is clear that there is consensus on corrective surgery but the point of disagreement is the timing of such surgery. That there also does not seem to be a differentiation in all the above schools of thought between 'sex' and gender and it was therefore his submission that corrective surgery should be done and consented to by an intersex child in line with the best interest of the child as was held in the Colombian Case, ***Judgment SU-337/99*** and such decisions should not be hurriedly taken. That doctors should in any event be compelled to provide full information of the known risks, future consequences and possible side effects in order to facilitate informed consents as was held in the German case of ***Re Volling Regional Court Cologne, 6 February 2008***.

33. Lastly, he urged the Court to allow the Petition and offer guidelines or order that guidelines should be developed by the relevant body that will ensure that decisions to undertake corrective surgeries are in the best interest of intersex children..

The 3rd Interested Party's Submission

34. The 3rd Interested Party, the Kenya Christian Professionals Forum Ltd is a company limited by guarantee comprising of Christian professionals from various denominations and from diverse professional fields in Kenya sharing common values on issues of family, life and religious freedom and social justices.

35. Miss Gitonga presented the arguments for the 3rd Interested Party and she submitted that the Petition as filed is not a representative suit of all intersex persons and urged the court not to give blanket orders but those that are only suitable to Baby A. That the Court orders sought should also only be made after a concerted public policy formulation process that would enable all stakeholders get involved because if the orders sought are granted, there would be drastic impact on the cultural, religious, social policy and legislative function on the understanding of gender in Kenya. She relied on the case of ***Community Advocacy and Awareness Trust & 8 Others vs Attorney General Petition No. 243 of 2011*** where it was held that the Court is not the appropriate forum of issuing guidelines and it was therefore her case that while rules, codes and regulations for managing intersex issues are necessary, the Court should allow the same to be developed by the relevant parties and stakeholders and particularly Parliament since it is the legislative arm of the Government. Further, that the least the court can do in such circumstances is give directions as to how the guidelines, rules and codes can be developed by the relevant parties and in that regard she relied on the ***Supreme Court Advisory Opinion No. 2 of 2012*** where it was stated that the Judiciary would

negate the principle of separation of powers if it takes legislative measures and designs policies. In any event, she claimed that the Court dealt with the issue of persons issues in the case of ***RM vs Attorney General and Others Petition No.705 of 2007*** and it was therefore her submission that instead of retrying the issues all over again, this Court should consider the question as to what actions the State undertaken since the **RM C*ase (supra)*** and give appropriate directions thereafter.

36. She therefore urged the Court not to grant the orders sought and that the Court should only grant those orders that are meant to safeguard the Interests and welfare of Baby A.

Amicus Curiae Submissions

37. The Amicus Curiae, the Kenya Human Rights Commission is a non-profit and non-governmental organization registered in Kenya with the mission of fostering human rights, democratic values, human dignity and social justice.

38. In its submissions, it claimed that under the provisions of **Article 3** of **Yogyakarta Principles,** everyone has the right to recognition as a person before the law. That persons of diverse sexual orientations and gender identities ought therefore to enjoy legal capacity in all aspects of their lives and no one, including a child, should be forced to undergo medical procedures including sex reassignment surgery, sterilization or hormonal therapy as a requirement for legal recognition of their gender identity and It submitted that it is inappropriate to define "intersex" as an intermediate gender identity and that conflating intersex with gender diversity denies legitimacy to intersex people particularly to those whose visual appearance is not androgynous or who identify their gender as female, male or both. Reliance was placed on the Nepal decision of ***Blue Diamond Society Writ No.917 of 2007*** where it was held that intersex persons ought to enjoy the same fundamental rights and freedoms as any other person. In that case, the Court also struck out laws that were discriminatory of intersex persons. Further, that in the Australian Case of ***Norrie vs NSW Registrar of Births, Deaths and Marriages (2013) NSWCA 145***, it was held that a person is entitled to have an entry in the Register of Birth indicating a sex other than male or female. The Court held that the word, "sex" does not bear a binary meaning and the Amicus Curiae thus urged the point that guidelines and policies were required for recognition of sex and gender including that of intersexuals as a third gender.

39. As to parental consent for corrective surgery, the Amicus Curiae submitted that Kenya should follow the example where the Colombian Courts have held that for an older child, the consent of such a child should be sought before corrective surgery is conducted but for a young child of less than five years, parental consent is sufficient but such consent should satisfy certain requirements i.e. that the same should be in writing, detailed information be provided to the parents so they can make an informed decision and also consider the possibility of and the alternatives to surgery should be considered. In addition, that parental consent should be given over a reasonable period of time to ensure that parents have time to fully understand the situation.

Determination

40. The Parties in this Petition framed what they considered as the issues for determination and having looked at those issues and bearing in mind the rival submissions made, I am of the view that the following are the issues arising for determination;

i. Whether the matter is *res judicata* in view of the decision in the ***RM Case (supra).***.

ii. Whether Baby A is an intersex person and if so, whether the baby suffers lack of legal recognition because of **Sections 2(a) and 7 of the Births, Deaths Registration Act** and whether these provisions are inconsistent with **Article 27** of the **Constitution.**

iii. Whether there is need for guidelines, rules and regulations for surgery on intersex persons.

iv. Whether there is need to collect data on inter-sex persons in Kenya and if so, who is mandated to do so.

v. Whether the reliefs sought can issue.

Whether the matter is *res judicata*

41. It was argued by some of the Respondents that the issues raised in this Petition are *res judicata* given that the same were the subject matter in ***RM vs Attorney General & Others (supra).***

42. In that regard, the principle of *res judicata* in civil law in Kenya is provided for under **Section 7** of the **Civil Procedure Act (Cap 21 Laws of Kenya)** which provides as follows;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

43. In addition, the doctrine of *res judicata* has also been upheld by various Courts in various other jurisdictions for instance in the case of ***Gordon vs Gordon 59 So. 2d 40 (Fla. 1952),*** *where* the Supreme Court of Florida stated that;

> ***"We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res judicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and determined in the initial action are foreclosed —no other matters which "might have been, but were not, litigated or decided…"***

The Court went on to state that;

> ***"…res judicata is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State, every justiciable controversy should be settled in one action in order that the courts and the parties will not be bothered for the same cause by interminable litigation."***

44. Further, in the case of **International Harvester Company vs Occupational Safety and Health Review Commission and the Secretary of Labour 628 F. 2d 982**, **1980** the United States Court of Appeals rendered itself in the following words;

> ***"[12]…we note that even where the technical requirements of res judicata have been established, a court may nonetheless refuse to apply the doctrine. This court does not adhere to a rigid view of the doctrine in the administrative context:***
>
> ***[13] The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor…"***

45. In India, the Court in **Swamy Atmandanda vs Sri Ramakrishna, Tapovanam [(2005) 10 SCC 51],** opined as follows*:*

> ***"[26] The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of ligation stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. [27] The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."***

46. In Kenya, the approach of the Courts has not been different from the above, as can be seen from the decisions in **Job Kipkemei Kilach vs Director of Public Prosecutions and 2 Others (2014) eKLR**, **Charo Kazungu Matsere and273 Others vs Kencent Holdings Limited and Another (2012) eKLR**, ***Karia and Another vs the Attorney General and Others (2005) 1EA 83)***and also in **Samuel Njau Wainaina vs Commissioner of Lands and 6 Others Petition No. 46 of 2012** where in the latter case, this Court held that;

> ***"In this respect, I would do no better than quote the case of Edwin Thuo vs Attorney General & Another Nairobi Petition No.212 of 2012 (Unreported)where the court stated;***
>
> ***"The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.'In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated;'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ...."."***

47. I am in agreement with the above expositions of the law and it is therefore clear that for *res judicata* to apply, the issues in the matter before the Court must be directly and substantially in issue in the two suits and the parties must be the same or the parties under whom any of them claim or is litigating under, are the same. Applying that principle to the Petition before me I opine as follows;

48. In the Petition before me the parties are Baby A suing through her mother E.A and the CRADLE- The Children Foundations and the Attorney General, Kenyatta National Hospital and the Registrar of Births and Deaths with the Kenya National Commission on Human Rights, the National Gender and Equality Commission, Kenya Christian Professionals Forum Ltd as Interested Parties and the Kenya Human Rights Commission as *Amicus Curiae*. In

Petition No.705 of 2007, the Parties were R. M. as the Petitioner and the Attorney General, The Commissioner of Prisons, The Commissioner of Police, the Registrar of Births and Deaths, Hon. Evans Makori, Magistrate, as Respondents and The Kenya Human Rights Commission, The Kenya Gay and Lesbian Trust, the Kenya National Commission for Human Rights, the Legal Resources Foundation (LRF), The Children's Rights Advisory Documentation Legal Education Foundation (CRADLE), Kituo Cha Sheria, Centre for Human Rights, Education and Awareness for Women (CREAW) and the Kenya Christian Lawyers Fellowship as the Interested Parties. As can be seen therefore, on the face of it, the Parties in the two Petitions are not the same and therefore the first hurdle has been passed.

49. The next issue to consider is therefore whether this Petition raises the same the issues as those in **Petition No.705 of 2007**. In that regard, I understand the Petitioner before me to be claiming that Baby A has been denied the right to legal recognition and protection as an intersexual child and as such her/his rights under **Article 28, 29, 31, 43, 52** and **53** of the **Constitution** have been violated. In the Petition therefore as can be seen from the orders reproduced elsewhere above, (s)he has sought for orders *inter alia* that surgeries on intersex infants that are not therapeutic should be approved by the Court; that an order directing the making of guidelines and regulations should be made regarding surgeries on intersex children as well as an order directing the 1st Respondent to collect statistical data on all the intersexual children in Kenya. On the other hand, In **Petition No.705 of 2007**, the Petitioner had sought for the same orders among many others which are now not the subject of the instant Petition. I have already found above that the Parties in the two Petitions are not the same and obviously the facts are also not the same. The issue in contest in the Petition before me must therefore be viewed from the fact that the Petitioner is different from the one in **Petition No.705 of 2007**. And even if the two Petitions had raised the same issues, the Petitions must be determined based on their facts and evidence alone because invocation of the doctrine of *res judicata* in constitutional matters must be done only in the clearest of cases. It is therefore my finding that the Petition before me is not *res judicata.*

50. I now turn to decide the second issue for determination as framed above and to do so I will first deal with whether Baby A is an intersex person and then deal with the issue of legal recognition later.

Whether the Baby 'A' is an intersex person

51. It is not in dispute that Baby 'A' was born on 3rdMay 2009 and that the said baby has both male and female genitalia. The Court in the ***RM Case (supra)*** described an intersex person as follows;

> ***"In short, intersex is a term describing an abnormal condition of varying degrees with regard to the sex constitution of a person. The term intersex and the term hermaphrodite may therefore be used interchangeably. It appears however, that the current preference is for the term intersex rather than the term hermaphrodite."***

52. As to the evidence whether Baby 'A' is or not an Intersex child, I have seen the **Annexture marked 'EA-1'** and produced in the Affidavit of E.A sworn on 24th May 2013 in support of the Petition. That annexture is titled, **"Acknowledgment of Birth Notification (for Parents)"**. The sex of the said baby has been marked as **"male."** I have also seen **Annexture 'EA-3'** attached to the same Affidavit. The annexure is the **'Lab Request/Report Form'** allegedly for determining the sex of a child. In that form the sex of the baby has been marked with a question mark (?). I have seen no other medical report or doctor's opinion which would indicate that Baby 'A' is an intersex child or at the very least that the doctors have carried out an examination and tests in that regard. Neither the medical practitioners at Aga Khan University Hospital where Baby 'A' was born nor any of the doctors at Kenyatta Hospital where (s)he has been attending examination have sworn an Affidavit in that regard. Having so said however, the fact that the question mark sign was inserted in the Lab Request Form would only lead to one logical conclusion; that the usual categorization of a child as either male or female could not be made in respect of Baby A and most likely than not, the said baby is an intersexual. The fact that the Notification of Birth form indicated that the baby was male is only symptomatic of the fact that a baby by societal expectation must be categorized as either male or female and the case of **RM (Supra)** is a good example of that fact. In that case, although RM was an intersexual, he was socialized as a male and he had to suffer embarrassment when he was sentenced to death for alleged robbery with violence and was incarcerated with male prisoners even though he also exhibited female features including growth of breasts slightly larger than that of an average male.

53. I shall therefore find and hold that Baby A is an intersexual as has been pleaded in the Petition.

Whether Baby 'A' suffers lack of legal recognition

54. The crux of the Petitioners' claim is that because of the provisions of **Sections 2(a) and (7)**of the **Births and Deaths Registration Act,** Baby 'A' lacks recognition as the baby has not been registered as a Kenyan nor been issued with a birth certificate to date. In that regard, **Section 7** of that Act states as follows;

> ***7(1) "It shall be the duty of every registrar to keep a register of births and a register of deaths and to enter therein, respectively, the prescribed particulars of every birth and death notified to him".***

Section 2(a) of the same **Act** has then set out what particulars are of concern to the Registrar as follows;

> ***"2. In this Act, except where the context otherwise requires; Prescribed particulars means;***
>
> > ***(a) as to any birth, the name, sex, date and place of birth and the names, residence, occupations and nationality of the parents". (Emphasis added)***

As is evident from the above provisions of the law, a record of the particulars of birth is required to register a birth which particulars include the sex of the child. The term" sex" has neither been defined in the **Births and Deaths Registration Act** nor in the **Interpretation and General Provisions Act Cap 2 (Laws of Kenya).**However Form 1, (The Register of Births) in the Schedule to the **Registration of Births and Deaths Act** indicates that the sex of a child is either male or female. There is no other categorization given including that of a child born with both female and male genitalia.

55. **Article 27(4)** of the **Constitution** forbids discrimination in the following terms;

> ***"27(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth". (Emphasis added)***

56. Although **Article 27(4)** prohibits discrimination on account of sex, the word "sex" has also not been defined in the Constitution. What then is the meaning of that word? The starting point would be to get the plain and ordinary English meaning. In that regard, the **Concise Oxford English Dictionary 11th Edition** defines 'Sex' as follows;

> ***"either of the two main categories (male and female) into which humans and most other living things are divided, on the basis of their reproductive functions, the fact of belonging to one of these categories, the group of all members of either sex".***

The **Black's Law Dictionary, 8th Edition** then defines the term as follows;

"***The sum of the peculiarities of structure and function, that distinguish a male from a female organism."***

From the above definitions, I will take it that the term "sex" refers to the categorization of persons into either male or female organisms based on their reproductive functions and their peculiarities of structure and function as organisms. As to the status of an intersex person, the Court in the **RM Case (Supra)** stated as follows;

> ***"Whether looked at from the religious point of view or from the scientific point of view, it is evident that the biological sexual constitution of an individual is acquired between the process of conception and birth. By the time of birth, the peculiarities are already fixed and the child either falls into the male or female category. In this regard we are persuaded by Corbett vs Corbett (supra) where Ormrod J. having had the benefit of the evidence of 5 highly qualified medical doctors, found it common ground between all the medical witnesses, that the biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed either by the natural development of the organs of the opposite sex or by medical or surgical means."***

57. Whereas in this Petition I do not have expert evidence on Baby A's exact attributes in the above context, in the **RM case (Supra)** the Court had the following to say regarding registration of RM's birth under the Act;

> ***"In requesting for the particulars of the sex of the Petitioner as whether male or female, the Births and Death Registration Act did not therefore exclude the Petitioner as an intersex person, because the Petitioner in fact falls within one of the two defined categories. The challenge was to determine at birth which side of the divide the Petitioner fell particularly, for purposes of registration of the birth i.e. whether male or female.***
>
> ***It may have been difficult to conclusively determine the Petitioner's gender at that early stage. The best that could be done at infancy was to adopt the category whose external genitalia and physiological features appeared more dominant at that stage. Indeed, this is what the Petitioner's mother appeared to have done by naming him " RM" and presenting him as a male child. Therefore, we are satisfied that notwithstanding the two categories of male and female identified in the schedule to the Births and Deaths***

Registration Act his birth could have been registered under that Act."

58. Applying the same reasoning in the instant Petition, while Baby A was accorded the male sex at birth, as is evident from the Acknowledgement of Birth document produced, the Respondents have claimed that the 1st Petitioner has never presented an Application for registration of that birth to the Registrar of Persons and that the said allegation was not controverted by the Petitioners but even then it is clear to me that every child has a right to a name, identity, nationality etc. To argue that merely because no application was made for registration then a claim for enforcement of such rights should be defeated, is to oversimplify a serious issue. The fact that the Lab Report Form from Kenyatta National Hospital had the "?" mark sign as to the baby's sex and may have created doubt as to whether the child was male or female is no reason to argue that the child's rights have not crystallized.

59. Later in this judgment, I will make necessary orders regarding the Application for registration but in the meantime, I must address the submission made that the term "sex" should be interpreted widely so as to include 'intersex' as a third category of sex. The Court in ***RM Case (supra)*** while dealing with the same issue expressed itself as follows;

"***We are weary of this argument for two reasons; firstly, in our view, the terms sex as used in Sections 70 and 82 of the Constitution encompasses the two categories of female and female gender only. To interpret the term sex as including intersex would be akin to introducing intersex as a third category of gender in addition to male and female. As we have endeavoured to demonstrate above, an intersex person falls within one of the two categories of male and female gender included in the term sex. To introduce intersex as a third category of gender would be a fallacy.***

Secondly, we are not persuaded that as a Court it is within our mandate to so expand the meaning of the term sex when the legislature in Kenya has not done so. We are aware that South Africa has specifically provided in their Promotion of Equality and Prevention of Unfair Discrimination Act No.4 of 2000, for the word sex to include intersex.We appreciate that the [present] circumstances are unique… What is worthy of note, is the fact that the inclusion of intersex in the definition of the term 'sex' in South Africa has specifically been provided for through legislation.

We believe that the legislature in Kenya would, like South Africa, have provided specifically for such an interpretation of the term sex,

either in a statute or the Constitution, if the legislature was of the view that the circumstances of Kenya so warrants it. We are convinced that the term sex in Sections 70 and 82 of the Constitution need no interpretation beyond its ordinary and natural meaning which is inclusive of all persons including intersex persons within the broad categories of male and female. This is consistent with the international instruments giving everyone a right to legal recognition and equality before the law such as Articles 6 and 7 of the Universal Declaration of Human Rights."

60. As to whether Intersex persons fall with the category of 'other status,' the Court stated as follows;

"An argument was raised that intersexuals should be brought within the category of "other status" included in Article 2 of the Universal Declaration of Human Rights and Articles 26 of the International Covenant of Civil and Political Rights. Such inclusion, it was argued, would accord intersex persons a specific right against discrimination. We find that the invocation of the provisions of the international instruments to provide for another category of "other status" is not necessary because intersex persons are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex. Moreover, issues of sexuality are issues which cannot be divorced from the social-cultural attitudes and norms of a particular society. To include intersex in the category of "other status" would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time. We therefore reject the argument that we should adopt the criterion of "other status" included in the international instruments. Therefore the Petitioner as an intersex person is adequately covered by the law and has suffered no discrimination or lack of legal recognition."

61. Whereas the above finding was made in the context of **Sections 70** and **82** of the **Repealed Constitution, Article 27(4)** of the **Constitution 2010** must be read in its own context and language. It categorically states that there shall be no discrimination "on any ground" from that provision. An inclusive provision is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersexuals ought not to be discriminated against in anyway including in the issuance of registration documents such as a birth certificate. However, if I heard the Petitioner well, she also wanted the birth certificate, in the column reserved for sex to read "Intersex" and thus

creating a third category of sex. The case is made both for Baby A and other intersexuals and in that regard, I will hereby quickly dismiss the assertion by the 3rd Interested Party that any findings, in that regard must refer to Baby A only. That submission cannot hold water in view of **Articles 20(2)(b)** of the **Constitution** which allows the presentation of actions premised on the Bill of Rights by a person acting in the interest of a group or class of persons. The issues raised in the present Petition must be looked at in the wider context of the place of intersexuals in our society as opposed to the narrower and specific interests of Baby A who is only one such person in our Society.

62. Turning back to the issue therefore whether we should have a third category of sex call intersexuals, I would be persuaded by the reasoning that such a matter ought to be addressed by clear legislation. Whereas this Court can find and has found that Baby A and intersexuals are entitled to all rights under the Bill of Rights, to go further and create, by a judgment such as this one, a third categorization of sex would in my view be overstretching the mandate of this Court.

63. As to the question whether Baby A was in fact discriminated against in any way, sadly, the Petitioners failed to bring any evidence in that regard. Discrimination is not an academic matter. It should be based on real facts and tangible evidence – see the case of **Rukunga vs Rukunga [2011] eKLR** where evidence of actual discrimination against the right of married daughters to inherit their parents was produced and was found to be credible.

64. In the present Petition since no such evidence was produced, all I can I state is that whereas Baby A and other intersexuals are entitled to all rights under the Constitution, there is no basis for finding that such rights have been violated in any way.

Whether there is need for guidelines, rules and regulations for surgery on intersex persons

62. Mr. Chigiti strenuously urged this Court to direct the Legislature to make guidelines which would govern the process of surgery for genital correction for intersexuals. It was his submission in that regard that conducting corrective surgeries without regulations is akin to experimenting on a human body in violation of **Article 27** of the **Constitution**. That whenever a need arises and corrective surgery has to be carried out on an intersexual child, then certain rules and regulations must be adhered to. In particular, he submitted that parents

should be allowed to consent to genital reconstruction surgeries on children under the age of five but that the decision should not be left to the full discretion of parents as it is prone to abuse. He therefore urged the Court to make a declaration that all surgery on intersex infants that is therapeutic should be approved by a Court by way of judicial review orders be informed by set guidelines; be guided by principle of *parens patriae* and be guided by the best interests of the child. That in the event there is an disagreement as to whether or not to carry out a corrective surgery then there should be a moratorium and the operation postponed to a time when the child can be able to participate in the decision making process.

63. On their part, the Respondents and Interested Parties also made submissions reproduced above which are pertinent to the issue.

64. The issue raised above obviously is very pertinent to the determination of this Petition because Baby A is a minor of less than five years. As was held in the Colombian case of ***Sentensia T 551/99 (The Cruz Case)*** parental consent is required for corrective surgery for a baby of less than five years. However, in an earlier decision of ***Sentensia No. 54-337/99 (The Ramos Case),*** the Court had held that a child's consent was required for a baby above the age of 8 years. But if I understood Mr. Chigiti's argument on this aspect of the Petition, his point was that guidelines and regulations ought to be set to regulate intended corrective surgeries on intersex children in Kenya specifically noting out socio-cultural and economic circumstances.

65. As was observed in the ***RM Case (supra)*** the issue of intersex persons is not academic anymore and it is alive and is very much here with us. The fact that doctors at the 2nd Respondent's Hospital are carrying out examinations and tests to determine Baby 'A's dominant sex is clear evidence that there is an urgent need to address the plight of intersex persons. I therefore agree with Mr. Chigiti and Miss Kabaya that there is an obvious lack of appropriate guidelines and regulations on how medical examinations and eventual corrective surgery, if needed, would be carried out. However this Court frowns upon the suggestion made that it should direct how such corrective surgeries ought to be carried out based on any of the proposed schools of thoughts as stated elsewhere above. It is not within this Court's mandate to direct Parties on the conduct of surgeries and the reason for saying so are obvious. Which law for instance mandates the Court to exercise such a mandate which is technical and professional? It is clear therefore that the Court does not have the means, the mechanisms or the force to use in such circumstances and it must be remembered that **Article 94(1)** of the **Constitution** has made it clear that the legislative function of the State is exercised by Parliament of behalf of the People. The Court's role under the provisions of **Article 165(3)(d)**

is limited to the interpretation of the law as handled down by the Legislature - See ***Mark Obuya & 5 Others vs The Commissioner of Domestic Taxes Petition No.383 of 2014.***

66. Having said so, I still believe that this Court has the mandate under **Article 23(3)** of the **Constitution** to grant **"appropriate relief"** where a matter of rights is raised. In that regard, time is now ripe for the development of rules and guidelines on corrective surgeries for intersex children especially minors such as Baby A. To my mind, the fact that an intersex person as defined elsewhere above does not fall within the definite criterion as being distinctively male or female should not negate his right as a human being in whom rights and freedoms are inherent. The fact that the **Births** and **Death Registration Acts** and the **Constitution** do not define the term "sex" does not mean that we should hide behind the traditional definition as we know it. In that regard, the words of the Court in ***Sentensia No.54-337/99 (The Ramos Case) and Sentensia T 551/99 (The Cruz Case)*** ring true. In the former, the Court stated thus;

> ***"Inter sexed people question our capacity for tolerance and constitute a challenge to the acceptance of difference. Public authorities, the medical community and the citizenry at large have the duty to open up a space for these people who have until now been silenced….we all have to listen to them, and not only to learn how to live with them, but also to learn from them".***

67. I agree and as admitted, there is currently no legal framework on intersex persons or any policies in place for them. It is the duty of the State to protect children born as intersexuals by providing a legal framework to govern issues such as their registration under the **Births and Deaths Registration Act,** examinations and tests by doctors, corrective surgeries etc. It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework governing issues related to intersex children based on internationally acceptable guidelines. These guidelines would inform those minded to carry out medical examinations and corrective surgeries on intersex persons of the procedures and guidelines to follow so as to act within the law and in line with the best interests of the child. I would therefore strongly urge Parliament to consider enacting legislation in that regard. This in my view ought to be done in close consultation with various interested stakeholders including all the Parties to this Petition in recognition of the principle of public participation as envisaged in **Articles 9** and **10** of the **Constitution.** The 1st Respondent must therefore move with speed and spearhead the enactment of such legislation.

Whether there is need to collect data on inter-sex persons in Kenya

68. The Petitioners urged the Court to consider the issue of data collection of intersex persons. The matter needs no extrapolation and on the same reasoning above, I also urge the 1st Respondent to consider the issue of collecting such data as relates to intersex children and persons. I therefore agree with the Petitioners that such data is important as it is crucial in making and designing policies to protect intersex persons as a group of marginalized persons. However, since Parties are not agreed as to whose function is it to collect such data, I will make an appropriate order at the end of this judgment.

What reliefs should issue

69. Whereas I have found no specific violation of the Petitioner's fundamental rights and freedoms as pleaded, and whereas I have merely reiterated Baby A's existing rights under the Constitution, this case has brought to the forefront the silent issues facing intersex children and persons. To that end, it is pertinent to note that Baby 'A' has never been registered to date and has not been issued with a birth certificate. I did not have evidence before me that there was a denial of such registration and I did not even hear the Petitioner to be contending that she indeed attempted to have such a registration. So with all those fats that in mind, what are the best orders that can issue in the circumstances?

70. I am aware that **Article 53(2)** of the **Constitution** has mandated all persons, including this Court, while deciding an issue involving a child to base their decisions on the best interest of the child. I have already stated elsewhere above that a child born as an intersex is no different from any other child and that under **Article 53** of the **Constitution** and **Section 11** of the **Children Act,** every child has the right to a name and nationality from birth which grants the child legal recognition and identity acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their intersex status. These rights are buttressed by international instruments like the **United Nations Convention** on the **Rights of the Child** and the **African Charter on the Rights and Welfare of the Child** under **Articles 7** and **9,** respectively. The final orders to be made below are therefore issued in that context.

While doing so, I will uphold the 2nd Respondent's objection to its joinder in the present Petition. As can be seen above, no complaint has been made against it and so there was no reason to enjoin it in the Petition.

Disposition

71. In summary, I have found that the Respondents did not violate any of the 1st Petitioners' rights as alleged and I have also not found any wrong doing on the part of the 2nd Respondent and therefore its protest in that regard is upheld. In the end, the final orders are as follows;

i. The 2nd Respondent is struck off these proceedings as it was improperly enjoined.

ii. The 1st Respondent shall submit to this Court within 90 days of this judgment information related to the organ, agency or Institution responsible for collecting and keeping data related to intersex children and persons, generally.

iii. The 1st Respondent shall also file a report to this Court within 90 days on the status of a statute regulating the place of intersexuals as a sexual category and guidelines and regulations for corrective surgery for intersex persons.

iv. The Petitioner shall move with speed and make an Application to the 3rd Respondent for the registration of Baby A. A report shall be forwarded to this Court in that regard within 90 days of this judgment.

v. There is obvious great public benefit in the determination of the matters raised in the Petition and therefore each party shall bear its own costs.

72. Orders Accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Chigiti for Petitioner

Mr. Terer holding brief for Mr. Ashitiva for 2nd Respondent

Mr. Gitonga for 3rd Interested Party

No appearance for other Parties

Oder

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 16/3/2015. Notice to issue.

ISAAC LENAOLA

JUDGE