

REPUBLIC OF KENYA

High Court at Nakuru

Adoption Cause 7 of 2012

IN THE MATTER OF THE CHILDREN ACT

(Act No.8 of 2010)

IN THE MATTER OF BABIES S.O AND G.A

RULING

On 4th May, 2012, this court made, in favour of the applicants, W K K and S B, an adoption order in respect of two subjects, S O and G A (to be known as S K Y and G K Y). Prior to this date, on 25th August, 2008, the applicants had been granted an order by the Magistrate's Court at Nakuru to be foster parents of the subjects.

The applicants have now approached this court with a question as to the legal status of the applicants *vis à vis* the subject: whether the period between 25th August, 2008 and 4th May, 2012 qualifies for consideration as constituting "*legal custody*" of the subjects.

A magistrate court under the Children Act exercises a special jurisdiction, by virtue of the establishment of Children's Court. The orders of 25th August, 2008 were, in that regard, made in accordance with **Section 73** of the Act. That section donates to the Children's Court jurisdiction to entertain any matter of civil nature under Parts III, V, VII, VIII, IX, X, XI and XIII.

It must be noted right away from this that only adoption orders cannot be granted by that court. It follows therefore that the Children Court can grant orders relating to custody, maintenance, guardianship, care and protection, of children, including orders of foster care placement.

Having so stated, it must be emphasized that in terms of **Section 132(1)** a "*care order*" entrusting the care, control and possession of a child to a person (not being a parent) or to any institution can only be made by a court of law. The court having made a "*care order*" in favour of a person or an institution, it becomes the responsibility of the Manager of that institution together with the Director of Children's Services to place the child with a foster parent for a period to be determined by the Director (see **Section 147**). The procedures for foster care placement are contained in the **Fourth Schedule** of the Act (**Foster Care Placement Rules**).

The definition of the phrase "*foster parent*" under **Section 2** also provides the responsibilities of a foster parent to include caring for and maintaining the child.

The process of foster care placement is a legal process, backed by the law. The order by the magistrate made on of 25th August, 2008 did not strictly speaking confer foster care placement on the applicants; that had been done as required by law by the Director and AGC Baby Centre Nakuru. The subjects had been in actual and legal custody of the applicants for a period in excess of two (2) years prior to the making of adoption order.

An order of "*Legal Custody*" as defined in **Section 81(1)(c)** of the **Children Act** and in the United States DHS regulations at 8 CFR 204. 2(d)(2)(Vii)(A) would include an order made by the court or a recognized government entity – in this case the Director and Manager of the institution where the child has been placed by an order of the court.

In a nutshell, it is hereby confirmed that the custody of the subjects by the applicants prior to the making of the adoption order was legal.

Dated, Signed and Delivered at Nakuru this 9th day of October, 2012.

W. OUKO

JUDGE