



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kakaa v Kadhis Court, Nairobi & another; Saad (Interested Party) (Petition 10 of 2020)  
[2022] KEHC 11090 (KLR) (Constitutional and Human Rights) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 10 OF 2020**

**HI ONG'UDI, J**

**MAY 31, 2022**

**BETWEEN**

**IMTIAZ KAKAA ..... PETITIONER**

**AND**

**KADHIS COURT, NAIROBI ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**RAZIA MAHMOUD SAAD ..... INTERESTED PARTY**

**JUDGMENT**

1. The petitioner filed the petition dated January 8, 2020 claiming a violation of numerous articles of Constitution. He therefore seeks the following reliefs:
  - a. Spent
  - b. That a declaration be and is hereby issued that all rulings and orders of Honourable Resident Kadhi Nairobi concerning the custody and maintenance of the children are unconstitutional and illegal for lack of jurisdiction.
  - c. That an order be and is hereby issued removing into this court quashing the said judgment, ruling and orders against the petitioner before the Nairobi Kadhi's Court in Case No. 68 of 2018 as far as custody and maintenance of the children are concerned.
  - d. That an order be and is hereby issued staying proceedings in the Kadhi's court case number 68 of 2018 on the matter of contempt of court touching on custody and maintenance of the children.



- e. Any other order that this honourable court may deem fit and just to grant.
- f. Costs of this petition be provided for.

### **The Petitioners' case**

2. His case is that, he and the interested party were husband and wife legally married though living separately and were blessed with three issues boys aged 8, 12 and 15 years. The interested party left home and took away the children to an unknown destination. He moved the Kadhi's court to stop her from removing the children from home away from school and/ or transferring them to a school unknown to him which the court granted in the interim.
3. By a decision delivered on September 3, 2018, the actual custody of the three minors was granted to the interested party vide Kadhi case number 68 of 2018. The petitioner was granted legal custody, free access to the minors during school holidays and on alternative weekends. He was further ordered to cater for school fees and all related expenses. Food was amounting to Kshs. 15,000/- while utilities amounted amounting to Kshs. 3,000/-. He was also ordered to cater for medical expenses as and when need arises. He being aggrieved appealed against the decision.
4. Subsequently the interested party moved the Kadhi's court vide application dated July 1, 2019 for enforcement of the impugned ruling. He raised the issue of jurisdiction vide preliminary objection dated September 18, 2019 which was overruled. His fear was that the Senior Resident Kadhi wanted to proceed to hear contempt proceedings against him having ruled that he had jurisdiction to preside over matters pertaining to children. This would have far reaching consequences on his rights to a fair hearing and his constitutional rights would be contravened.
5. Accordingly the Honourable Senior Resident Kadhi contravened articles 27, 45 and 53 of *the Constitution*, and disregarded the holding of the court in *Republic v Kadhi's Court & 2 others ex-parte T.I.* [2016] eKLR.

### **1<sup>st</sup> & 2<sup>nd</sup> Respondents' case**

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition dated November 16, 2020. The grounds are that:-
  - i. By dint of article 170(5) of *the constitution* and section 5 of the *Kadhi Court Act* the said court has jurisdiction to determine questions of Muslim Law relating to personal status, marriage and divorce or inheritance proceedings in which all parties profess the Muslim religion.
  - ii. Article 53(1) & (2) of *the constitution* of Kenya and section 4(3) of the *Children's Act* 2001 focuses on the best interest of the child as paramount in any matter regarding a child and the principles awarded in custody orders are contained in sections 82, 83, 84 & 85 of the *Children Act*.
  - iii. The court did not in any way act ultra vires as its jurisdiction is conferred by both the legislation and *the constitution*.
  - iv. The petition filed by the applicant has failed to raise the constitutional test as set out in *Anarita Karimi Njeru vs R* (1979) eKLR and thus there is no violation of the constitutional rights by the respondents.
  - v. Being guided by the decision in *Eggers v Eggers* (1967) it is well settled that a divorce court has continuing jurisdiction over its decrees for alimony separate maintenance and custody.



- vi. Allegations brought before this court are fraudulent and malicious with the intention to have the court interfere with the exclusive jurisdiction of the Kadhi's court.
- vii. The application is frivolous, vexatious and is an abuse and a waste of judicial time.
- viii. The application filed herein under certificate of urgency lacks merit and should be dismissed with cost to the respondents.

### **Interested party's case**

7. The interested party filed grounds of opposition dated 12<sup>th</sup> January 2020, replying affidavit sworn on February 12, 2020 and further affidavit sworn on May 3, 2021. The interested party's case in the mentioned documents is as follows:-
  - i. In the replying affidavit she admitted the contents in the petition and deposed that the petition is one of the ways of forum shopping to get the court to overturn the decision by the Kadhi. Despite the appeal having been filed in the high court, the petitioner filed an application for contempt of court against her at the Kadhi's court which was dismissed with costs.
  - ii. She deposed that in a similar application dated June 25, 2018, the petitioner moved the High Court in Misc. Application No. 365 of 2018 seeking warrants of arrest against her for contempt of court on the grounds that she picked the minors and produced them before the Kadhi which act was sanctioned by the Kadhi's court on 4<sup>th</sup> May 2018 without his permission.
  - iii. The issue regarding stay of proceedings at Kadhi court was sub judice as an application filed by the petitioner was pending determination at the High Court Civil Appeal No. 137 of 2018 and hence this court did not have the jurisdiction to hear and determine the same. Further, on the prayer to quash and nullify the Senior Resident Kadhi's decision of 28<sup>th</sup> November 2019, it was imperative for the court to consider the circumstances under which the said ruling was issued by the Hon. Kadhi.
  - iv. The application for execution for the petitioner to show cause why execution by way of committal should not issue was necessitated by the action of the petitioner failing to abide by the directions of the Kadhi's court which was also misconstrued as that of contempt of court.
  - v. The petitioner was estopped by conduct and record to deny the Kadhi's court jurisdiction to hear and determine the said application since he filed a similar application which was heard and determined by that Honourable court. Vide its ruling dated 3<sup>rd</sup> May 2019, the court reiterated the contemnor's prayer for the petitioner to be committed to civil jail. The same was heard and dismissed for lack of merit and cannot now be heard to dispute this court's jurisdiction to exercise jurisdiction they themselves invoked in the first place.
  - vi. On jurisdiction of The Kadhi's Court to hear and determine children matters, it was the petitioner who moved the Kadhi's court for orders touching on children welfare and cannot denounce the same jurisdiction thus estopped by conduct to do so. The same was sub judice as it was pending in Civil Appeal No. 137 of 2018.
  - vii. Whatever the petitioner was seeking to achieve in this matter could otherwise have been achieved in the civil appeal case filed at the High Court.
8. In the grounds of opposition, she raised the following grounds:-



- i. That the prayers sought in the application are sub judice and subject of proceedings pending in the High Court Civil Appeal No. 137 of 2018 filed by the petitioner.
  - ii. That the dispute between the petitioner and the interested party at the Kadhi's court did not raise constitutional issues and thus no violation of constitutional rights could be found.
  - iii. That there are alternative remedies available to the petitioner to utilize and is in fact utilizing them and this petition is merely a duplication of issues raised in the High Court Civil Appeal No. 137 of 2018.
  - iv. That constitutional applications cannot be used by the petitioner as a substitute to private law remedies or to judicial control of administrative action.
  - v. The applicant's application is an afterthought and meant to delay the execution process currently being undertaken by the interested party on behalf of the minors for the applicant's failure to comply with court orders.
  - vi. The application is an abuse of the court process and should be dismissed with costs.
9. In the further Affidavit, she deposed that the cause of action emanated from Kadhi Court Civil Case No. 68 of 2018 (*Imtiaz Kaka v. Razia Mahmoud Said*) where the Kadhi was bound to hear an application for execution of its orders dated 3rd September 2018. Being that the same was declared a nullity and so all orders emanating there from by the HCCA No. 17 of 2020 (*Imtiaz Kaka v Razia Mahmoud*), the cause of action was non-existent.

#### **Petitioner's submissions**

10. The petitioner filed submissions dated 11<sup>th</sup> May 2021 reiterating the contents of his case and raising six issues. It was his case that the Senior Resident Kadhi was creating laws that were suitable to himself, not donated to him by the Kadhi's Act, the *Children's Act*, case law and *the Constitution* of Kenya 2010 by bestowing upon himself powers to adjudicate on matters of custody, upkeep and maintenance of the children, hence void for being inconsistent with *the constitution*.
11. He further submitted that the Senior Resident Kadhi acted contrary to article 170 of *the Constitution* and that he faced imminent jail term for contempt of court and that he violated provisions of *Children's Act* sections 30, 31, 75, 82, 83(3), 87 and 90 and articles 3, 10, 53, 162, 165(6) (7) and 170(5) of *the Constitution*.
12. Relying on *Republic v Kadhi's Court & 2 others exparte* [2010] eKLR, he argued that the Children's court was the best forum for determination of the custody of minors irrespective of their religious persuasion. Further, relying on articles 165(6) and 170(5) of *the Constitution*, he argued that this constitutional application has merit.
13. In support of his case, he relied on the cases of *H.M.M vs K.J. D* [2014] eKLR; *A.A.I vs H.A.D* [2018] eKLR; *A.B.M.M vs S.M. Y & another* [2019] eKLR; *G.S.A vs A.S.A* [2014] eKLR; *Republic vs Kadhis Court Nairobi & 2 others Exparte T L* [2018] eKLR; *Noordin v Karim* [1990] eKLR; and Nairobi HCC Misc. App No. 123 of 2014 *J.A.O.O vs H.S.A* (2015) eKLR.

#### **Interested party's submissions**

14. The interested party filed submissions dated January 17, 2022 through Ali & Company advocates. Counsel has raised two issues;
  - i. whether the issues raised in the petition are res judicata and/ or sub judice;



- ii. Whether there still exists a cause of action that supports the petition.
15. On the 1<sup>st</sup> issue and while, relying on section 7 of the *Civil Procedure Act* and the case of *Silas Make Otuke v A.G. & 3 others* [2014] eKLR he argued that the petitioner had filed similar claim in Civil Appeal (Family) No. 17 of 2020 seeking similar orders as those sought herein. The High Court handling the appeal in its judgment delivered on December 2, 2020 declared the proceedings at Kadhi's court unconstitutional hence matter herein is res judicata.
  16. On the 2<sup>nd</sup> issue, the dispute between the petitioner and interested party at the Kadhi court did not raise constitutional issues and thus no violation of constitutional rights. The cause of action was cured by the appeal decision hence no reasonable cause of action capable of being dealt with by this court.

### **Analysis and determination**

17. Having carefully considered the petition, the responses, parties' submissions, case law cited and the law I find the issues falling for determination to be as follows: -
  - i. Whether this petition offends the doctrine of res judicata
  - ii. Whether the petitioners rights were violated
  - i. Whether this petition offends the doctrine of res judicata
18. The interested party argued that the Civil Appeal case at the High Court in Civil Appeal No. 17 of 2020 was decided. The court held that the proceedings before the Kadhi's Court and ruling rendered by the court on 3<sup>rd</sup> September 2018 were all a nullity, thus the issue raised herein by the petitioner was put to rest and therefore res judicata and no existent reasonable cause of action. The petitioner on the other hand, maintained that it had raised weighty constitutional matters for this court to address. He however failed to directly address the raised issue of res judicata.
19. The issue of res judicata if affirmed affects the jurisdiction of this court to deal with the instant petition. The Court of Appeal in *Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 others vs. Eric Cheruiyot & 16 others* consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & another vs. Eric Cheruiyot & 15 others (2022) eKLR, a decision rendered on February 8, 2022 discussed the doctrine of jurisdiction as follows: -
  36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does



not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

20. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. held as follows:

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

Also see

- i In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011.
  - ii. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011.
21. The issue raised herein is on res judicata. It calls on this court to examine whether the decision rendered in the Civil Appeal case No. 17/2020 has an impact on the petition herein rendering it res judicata.
22. The *Civil Procedure Act* cap. 21 Laws of Kenya under section 7 provides for the doctrine of res judicata. It provides as follows:-

7. Res judicata

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 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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating



23. The rationale for this doctrine was discussed in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR where the court state as follows:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

Further that,

“... the general rule is that where a litigant seeks to re-open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (The finality principle) outweighs the public interest in achieving justice between the parties (the justice principle) and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because a competent tribunal has jurisdiction to decide wrongly, as well as correctly and if it makes a mistake its decision is binding unless corrected on appeal”

24. For operation of this doctrine in the case of *E.T. v Attorney General & another* (2012), eKLR, the court stated;

“ 53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of *Karia and Another v The Attorney General and Others* [2005] 1 EA 83, 89).

25. The court further stated,

“ 57. 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 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 v 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 v 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 ....’

Also see (i) *National Land Commission v Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another* [2019] eKLR

(ii) *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* (2017) eKLR,

ii. *George WM Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR

26. On the applicability of the doctrine to constitutional petitions, in *Silas Make Otuke v. Attorney-General & 3 others*, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v. The AG of Trinidad and Tobago* (1991) LRC (Const.) 1001, in which the Board was “satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata”.

(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

27. The Supreme Court in the case of *Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another* Motion No. 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner’s pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.



28. How does this doctrine apply in constitutional petitions? It must be applied cautiously and sparingly. In *Okiya Omtatab Okiiti & Another v. The Attorney General and another* Petition No. 593 of 2013 [2014] eKLR Lenaola J. (as he then was) held as follows:

“For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of *Karia and Another v. the Attorney General and Others* (2005) 1EA 83). It therefore follows that the essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi v. National Bank of Kenya Ltd and Others* (2001) EA 177.

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.” [Emphasis added]

Also see (i) *Wycliffe Gisebe Nyakina v. Attorney General & another* [2014] eKLR,

(ii) *William Kabogo Gitau v. Ferdinand Ndung'u Waititu* [2016] eKLR

(iii) *Edward Okongo Oyugi & 2 Others v. The Attorney General* [2016] eKLR:

29. In *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR, the Supreme Court as regards the applicability of the doctrine to constitutional matters held that;

“(82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

(83) However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the *Danyluk Case* from Canada the court cited the dissenting opinion of Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public*



Safety), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated:

“The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.”

- (84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
- (85) In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.

30. Having considered the above decisions I find it imperative that I examine whether this instant petition really offends the doctrine of res judicata. The Civil Appeal No. 17/2020 in the Family Division was decided by a court of competent jurisdiction. The parties in the Civil Appeal are IK v. RMS ( the petitioner and the interested party herein). The only difference is that in the instant petition there is an addition of the Kadhi’s court, Nairobi and the Attorney General as respondents and R.M.S is sued as an interested party. The issues raised in the Appeal were basically on the jurisdiction of the Kadhi’s court to issue the orders on the matters of custody and maintenance of the minors and the same has been raised herein. The proceedings on contempt emanate from that order. In the appeal the decision of the Kadhis court was declared a nullity.
31. One may argue that the parties are not similar because there is an addition of two respondents. In the case of Omondi v. National Bank of Kenya (supra) the court was clear that the mere fact that there are additional parties does not bar the applicability of this doctrine. Further that the mere fact that a party has fashioned their reliefs or cause of action as new but which has been determined previously by a court of competent jurisdiction does not bar the applicability of the said doctrine.
32. Similarly the Supreme Court in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR while agreeing with the decision of the Court of Appeal the Supreme court on a case that had all parties not being similar held as follows:-

“(92) The answer may be found in Explanation no 6 of Section 7 of the *Civil Procedure Act* which provides as follows:

Explanation (6) “Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating



(93) The commonality is that the Appellants herein and the Applicants in Jr 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore they raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.

33. There is also the concept of judgment in rem. In the case of *Edward R. Ouko v Speaker of the National Assembly & 4 others [2017] eKLR* the court defined what a judgment in rem is. It held that ;

“ 24. This Court is aware that the Court in the petition has granted the conservatory orders which the parties herein conceded are in the nature of stay pending the hearing and determination of the said petition. That decision is in the nature of a decision in rem. These are a class of orders or judgements which are said to bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In this respect it was held in *Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116* that:

“In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

34. The High Court Civil Appeal case decision held that the Kadhi’s Court did not have the jurisdiction to handle and make the decision on matters of custody and maintenance of the minors. It further determined that such powers belonged to the children’s court. The orders by the Kadhi were declared a nullity. This was therefore a judgment in rem as it declared the position of the Kadhi with regard to his mandate under article 170 (5) of *the Constitution*. Based on the foregoing, I agree with the interested party that the instant petition offends the doctrine of res judicata and hence this court has no jurisdiction to handle the matter.

## **ii. Whether the petitioners rights were violated**

35. The petitioner made reference to number of constitutional provisions. The respondents and interested parties submitted that there were no constitutional violations and the petitioner has not demonstrated how the same were violated.

36. The principles to be followed are well in filing constitutional petitions set out in the case of *Anarita Karimi Njeru vs Republic (1979) eKLR* where the court stated that :-

“...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be ingraind.” (Emphasis added)



37. The case of *Memo Matemu vs Trusted Society of Human Rights Alliance* [2013] eKLR also reaffirmed the position in *Anarita Karimi Njeru* (supra).
38. I agree with the respondents and the interested party that the petitioner has merely mentioned constitutional provisions but has not demonstrated how the same were violated. Hence not met the threshold set out in the *Anarita Karimi* case.
39. Coupled with that is the issue raised by the interested party that the cause of action is inexistent. The High Court in the Civil Appeal case having declared that the decision by the Kadhi made without jurisdiction, it goes without saying that the consequential orders including contempt proceedings were null and void and of no legal consequence.
40. The upshot is that the petition lacks merit and is dismissed, with costs.  
Orders accordingly.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31<sup>ST</sup> DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. Ong'udi**

**Judge of the High Court**

