



In re Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 312 OF 2008
WM MUSYOKA, J
JULY 22, 2022**

The High Court does not have jurisdiction in probate proceedings to entertain a suit or application relating to declaration of trust

Reported by Kakai Toili

***Jurisdiction** - jurisdiction of the High Court - jurisdiction of the High Court in probate proceedings - jurisdiction of the High Court vis-à-vis the jurisdiction of the Environment and Land Court - nature of the jurisdiction of the High Court under the Law of Succession Act - factors to consider in probate and administration matters - whether the High Court could determine a dispute on the ownership of assets of a deceased person - whether the High Court had jurisdiction in probate proceedings to entertain a suit or application relating to declaration of trust - Constitution of Kenya, article 162(2); Law of Succession Act, cap 160, section 47; Land Registration Act cap 300, sections 2 and 101; Land Act, 2012, sections 2 and 150; Probate and Administration Rules, 1980, rules 41(3) and 73.*

***Statutes** - interpretation of statutes - interpretation of the Law of Succession Act - nature of creditors in the context of the Law of Succession Act - what was the nature of a concept of continuing trust in the context of the Law of Succession Act - Law of Succession Act, cap 160, sections 3, 35(1)(b)(2), 36(1)(c)(3), 37, 41, 75A, 82, 83(g)(i) and 84.*

Brief facts

The applicants filed summons for revocation of grant and their case was that the deceased was registered as a purchaser of the suit properties in trust for them. Regarding one of the suit properties (suit property A), the applicants stated that it belonged to a settler farmer who had employed the deceased. The applicants claimed that they got together to buy that land from the settler, and fronted the deceased to lead them to buy the land. They further claimed that they raised the purchase money and the deceased entered into a sale agreement with the settler farmer and that the land was registered in his name. The other suit property (suit property B) was land that the deceased bought and settled on after he sold his portion.

The instant preliminary objection was to the effect that the court lacked jurisdiction to determine a claim based on trust, hence the same should be determined in a separate forum. The preliminary objection was at the behest of the administrator of the deceased's estate.

Issues

- i. Whether the High Court had jurisdiction in probate proceedings to entertain a suit or an application relating to declaration of trust.



- ii. Whether the High Court could determine a dispute on the ownership of assets of a deceased person.
- iii. What were the factors to consider in probate and administration matters?
- iv. What was the nature of the jurisdiction of the High Court under the Law of Succession Act ?
- v. What was the nature of creditors in the context of the Law of Succession Act?
- vi. What was the nature of a continuing trust in the context of the Law of Succession Act?

Relevant provisions of the Law

Law of Succession Act, Cap 160

Section 84 - Personal representatives to act as trustees in certain cases

Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof:

Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of those houses as provided by section 40.

Probate and Administration Rules, 1980

Rule 41 - Hearing of application for confirmation

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

Held

1. Jurisdiction was a preliminary issue that should be raised at the earliest opportunity, for a court should entertain a matter only where it had jurisdiction, where it had none it should down its tools. To the extent that it raised an issue of jurisdiction, it was a proper preliminary objection.
2. The probate court was constituted for one sole purpose, distribution of the property of a dead person. The law which governed that area of distribution of assets of a dead person was the Law of Succession Act. The preamble stated that it was an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons, and for purpose connected therewith and incidental thereto.
3. The central areas of concern in probate and administration were the dead person and his property. With regard to the dead person, what was of importance would be whether there was proof of his death; and, once that was established, the next consideration would be determination of the individuals entitled to the property. If he died testate, having left a valid will, it would be the individuals named as beneficiaries in the will; if he died intestate, without a will, it would be the persons entitled under the applicable law of intestacy. With respect to property, there was only one critical consideration, whether he owned any property. Modern property was subject to registration and whether a person owned a piece of property was evidenced by documents of registration or ownership.
4. The probate court only distributed assets that were undisputedly owned by the deceased. Assets that were unencumbered or the subject of ownership disputes were not undisputedly owned by the deceased, and were not available for distribution by the court until the encumbrances were removed or the ownership disputes resolved. Property available for distribution was defined in section 3 of Law of Succession Act as the free propriety of the deceased.
5. The design of the Law of Succession Act was that the mandate of the probate court was limited to distribution of the assets, and where a dispute arose on ownership of any asset, then the same should



- be placed in another forum, and not the succession cause, for litigation and determination. That was the spirit of rule 41(3) of the Probate and Administration Rules.
6. Succession proceedings were not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution.
 7. Besides the provisions of the Law of Succession Act and the Probate and Administration Rules, the applicants had to also contend with the Constitution of Kenya, 2010 (Constitution), so far as the jurisdiction of the High Court was concerned, with respect to disputes over title to land and trusts over land related to title to the land.
 8. Article 162(2) of the Constitution envisaged a court with jurisdiction to handle disputes relating to title or ownership of land. Under article 165(5) of the Constitution the High Court should not exercise jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the Environment and Land Court Act, to handle the disputes stated in article 162(2). The Land Registration Act and the Land Act identified the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration, which was at the core of the instant application. Those provisions were in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.
 9. Section 47 of the Law of Succession Act did not grant the High Court elastic jurisdiction to grant such orders as it pleased. It had been equated with section 3A of the Civil Procedure Act as saving the inherent powers of the court. Section 47 of the Law of Succession Act merely stated that the High Court had jurisdiction to deal with applications and determine disputes that arose over matters that were governed by the Law of Succession Act, and pronounce decrees and make orders as could be expedient, in the context of the Law of Succession Act. It did not confer jurisdiction to handle disputes and applications that were not provided for under the Law of Succession Act.
 10. Inherent power was not saved under section 47 of the Law of Succession Act, but under rule 73 of the Probate and Administration Rules. The High Court could only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act. It said no more than that. The Law of Succession Act was divided into 8 parts, and the High Court was limited to handling applications that arose with respect to the matters that were governed in those 8 parts.
 11. The jurisdiction of the High Court came out clearly when juxtaposed against that of the Magistrates' Courts as set out in section 48(1) of the Law of Succession Act. The jurisdiction of the Magistrate's Court was not as wide as that of the High Court.
 12. Creditors, in the context of the Law of Succession Act, were the individuals and entities that the estate was indebted to, and who had been acknowledged as such by the personal representatives. It also included individuals and entities holding valid court decrees against the estate. Individuals and entities whose claims against the estate had not been acknowledged by the personal representative, and who did not hold any valid court decrees, were not creditors of the estate, but mere claimants. Their claims were yet to be proved or established against the estate. The place to establish or prove those claims was not within the succession cause, but in separate proceedings. That was provided under rule 4 of the 41(3) Probate and Administration Rules.
 13. Section 82 of the Law of Succession Act did not talk about trusts in general, but a continuing trust. The concept of a continuing trust was not interpreted in section 3 of Law of Succession Act. In the context of the Law of Succession Act it arose in two situations;
 - a. with regard to the life interest enjoyed by surviving spouses, under Part V of the Law of Succession Act as stated in sections 35(1)(b)(2), 36(1)(c)(3) and 37. A continuing trust arose where a spouse survived the deceased, and, at distribution in intestacy, the property should devolve to the surviving spouse in the first instance, and, upon determination of the life interest, to the children or other persons beneficially entitled in intestacy. Such a surviving,



- spouse held such property, during their lifetime, in trust for the eventual beneficiaries, be they children or others. It was a trust that continued during the lifetime of the surviving spouse;
- b. with regard to the interests of minor survivors or beneficiaries, that was to say the interests of those beneficiaries or survivors who were below the age of majority, section 41 of the Law of Succession Act provided that the interests of such minors was held in trust, during their minority, until they attained the age of maturity, when it should be conveyed or transmitted or transferred to them. The trust, in such case, would be continuing during their minority.
14. The term “continuing trust” was used expressly in sections 75A, 83(g)(i) and 84 of the Law of Succession Act, but it was the provision in section 84 which clearly brought out what “continuing trust” meant in the context of the Law of Succession Act, that was to say the life interest enjoyed by a surviving spouse and the trust held on behalf of a minor.
 15. Trust as used in the Law of Succession Act, particularly in Part VII, was limited to continuing trusts and other trusts in favour of beneficiaries or creditors. It was not used in the context that the applicants were using it in their application. The applicants had not established any trust, and the administrator therein could not be deemed to be a trustee on their behalf. They had to establish that trust against him, in proceedings commenced elsewhere, but not in those succession proceedings. The court did not have jurisdiction in the probate proceedings to entertain a suit or application relating to the declaration of trust.

Preliminary objection upheld.

Orders

- i. *Summons for revocation of grant dated October 2, 2018 struck out.*
- ii. *Leave of 28 days to move the Court of Appeal appropriately, for whoever would feel aggrieved granted.*
- iii. *Each party to bear their own costs.*

Citations

Cases

Kenya

1. *In re Estate of Nabashon Njeru Njagi (Deceased)* Miscellaneous Application 110 of 2007; [2008] KEHC 2151 (KLR) - (Explained)
2. *In re Estate of Henry Njau Ngotho* Succession Cause 1140 of 2002; [2016] KEHC 4993 (KLR) - (Applied)
3. *In re Estate of James Muiruri Kamau (Deceased)* Succession Cause 1 of 2002; [2018] KEHC 8581 (KLR) - (Applied)
4. *In re Estate of Julius Ndubi Javan (Deceased)* Succession Cause 720 of 2013; [2018] KEHC 8523 (KLR) - (Applied)
5. *In re estate of Kimani Kimithia* [2008] eKLR - (Explained)
6. *In Re Estate of Kipyego Chepsiror Kolil* Probate & Admin Cause 170 of 2005; [2007] KEHC 3449 (KLR) - (Applied)
7. *In re Estate of Mutugi Mbutii (Deceased)* Succession Cause 642 of 2014; [2018] KEHC 9106 (KLR) - (Applied)
8. *In Re Estate of Richard Karanja Javan – (Deceased)* Succession Cause 619 of 1991; [2014] KEHC 7568 (KLR) - (Applied)
9. *In re Estate of Stone Kathuli Muinde (Deceased)* Succession Cause 1828 of 2007; [2016] KEHC 3725 (KLR) - (Applied)
10. *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Applied)

Regional Court

Mukisa Biscuits Manufacturing Company limited v West End Distributors Limited [1969] EA 696 - (Applied)



Statutes

Kenya

1. Civil Procedure Act (cap 21) section 3A - (Interpreted)
2. Constitution of Kenya articles 162(2); 165(5) - (Interpreted)
3. Environment and Land Court Act (cap 8D) section 2 - (Interpreted)
4. Land Act (cap 280) sections 2, 150 - (Interpreted)
5. Land Registration Act (cap 300) sections 2, 101 - (Interpreted)
6. Law of Succession Act (cap 160) sections 3, 35(1)(b)(2); 36(1)(c)(3); 37; 41; 47; 48(1); 66; 75A, 82; 83(g)(i); 84; 97; part III, IV, V, VI, VII, VIII - (Interpreted)
7. Magistrates' Courts Act (cap 10) sections 7 (1), 48 - (Interpreted)
8. Probate and Administration Rules, 1980 (cap 160 Sub Leg) rules 41(3); 73 - (Interpreted)

Advocates

Mr Ondieki for the administrator

Mr Manyoni for the applicants

RULING

1. This is one of those matters that I took over from F Amin J on June 16, 2022. It was due for delivery of ruling on February 28, 2022.
2. The applications for determination are dated September 5, 2017 and October 2, 2018. They were for simultaneous determination as per the directions of November 13, 2019. One of the parties then filed a preliminary objection, and the court directed, on February 13, 2020, that the preliminary objection be canvassed by way of written submissions.
3. The preliminary objection in question is dated February 10, 2020, and is to effect that the court lacks jurisdiction to determine a claim based on trust, hence the same should be determined in a separate forum, and the entity called Lugari Harambee Market Self Help Group lacks *locus standi* to bring any action against the estate. The preliminary objection is at the behest of the administrator of the estate herein, Ibrahim Ngaywa.
4. From the record before me, only the objectors filed written submissions, dated February 2, 2020. In those submission, they argue 2 grounds. That this court has jurisdiction to handle the dispute, and that the preliminary objection does not amount to what is a proper preliminary objection. On jurisdiction they cite sections 47, 66 and 82 of the [Law of Succession Act](#), cap 160 Laws of Kenya. Section 47 to say that there is wide discretion to consider any issue; section 66 to argue that rights of creditors should be considered; and section 82 to submit that trusts are to be taken into account. [In re Estate of Mutugi Mbutii \(Deceased\)](#) [2018] eKLR (Gitari J) is cited to support these contentions. On whether the preliminary objection is a proper "preliminary objection," [Mukisa Biscuits Manufacturing Company limited vs West End Distributors Limited](#) [1969] EA (Sir Charles Newbold P, Duffus VP & Law JA) is cited to support the contention that the parties were not agreed on the facts in dispute, the fact that a trust existed.
5. What provoked the filing of the preliminary objection is the summons for revocation of grant that was filed herein on October 8, 2018, dated October 2, 2018, by the Lugari Harambee Market Self Help Group and Charles Nalika Cheloti and others. I shall refer to them collectively as the applicants. Their case is that the deceased was registered as purchaser of Kakamega/Lugari/689 and 1559 in trust for them. Regarding Kakamega/Lugari/1559, they say it belonged to a settler farmer, who had employed the deceased. The applicants got together to buy the said land from the settler, and fronted the deceased



- to lead them to buy the land. They raised the purchase money, and the deceased entered into a sale agreement with the settler farmer, and the land was registered in his name. Some members of the group took up their portions of the land, developed them, and settled there to date. Kakamega/Lugari/689 was land that the deceased bought and settled on after he sold his portion. They have attached a variety of documents to support their case.
6. The deceased herein died on July 25, 2001. Search certificates for Kakamega/Lugari/689, dated July 8, 2008, show that the same is registered in the name of the deceased, while that for Kakamega/Lugari/1559 shows that it is registered in the name of Settlement Fund Trustees, as at July 8, 2008. A grant to administrator his estate was made, on March 6, 2009, to the administrator herein, his son, Ibrahim Ngaywa, who had listed both Kakamega/Lugari/689 and 1559 as assets in the estate. The grant was confirmed on September 19, 2013, and a certificate was issued, dated October 22, 2013, and signed by the judge, on November 1, 2013, distributing the two parcels of land amongst 13 individuals.
 7. I will start with the issue as to whether the preliminary objection meets the threshold. I note that it raises an issue as to the jurisdiction of this court to determine the dispute presented in the application dated October 2, 2018, as to whether the deceased herein held both parcels of land on behalf of or in trust for the applicants. Jurisdiction is a preliminary issue, that should be raised at the earliest opportunity, for a court should entertain a matter only where it has jurisdiction, where it has none it should down its tools. To the extent that it raises an issue of jurisdiction, it is a proper preliminary objection. See the *Lillian* case. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR (Nyarangi, Masime & Kwach JJA)
 8. Does this probate court have jurisdiction to determine the dispute framed in the application dated October 2, 2018? The starting point should be with the mandate of the probate court. The probate court is constituted for one sole purpose, distribution of the property of a dead person. The law which governs this area of distribution of assets of a dead person is the *Law of Succession Act*, cap 160, Laws of Kenya. The preamble says it is "An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons, and for purpose connected therewith and incidental thereto."
 9. The central areas of concern, in probate and administration, are the dead person and his property. With regard to the dead person, what is of importance would be, whether there is proof of his death; and, once that is established, the next consideration will be determination of the individuals entitled to the property. If he died testate, having left a valid will, it will be the individuals named as beneficiaries in the will; if he died intestate, without a will, it will be the persons entitled under the applicable law of intestacy. With respect to property, there is only one critical consideration, whether he owned any property. Modern property is subject to registration, and whether a person owns a piece of property is evidenced by documents of registration or ownership. What is in dispute here is land, what would evidence ownership of the subject property would be evidence of registration of the same in the name of the deceased. The probate court only distributes assets that are undisputedly owned by the deceased. Assets that are unencumbered or the subject of ownership disputes are not undisputedly owned by the deceased, and are not available for distribution by the court until the encumbrances are removed or the ownership disputes resolved. Property available for distribution is defined in section 3 of *Law of Succession Act* as the free propriety of the deceased.
 10. The design of the *Law of Succession Act* is that the mandate of the probate court is limited to distribution of the assets, and where a dispute arises on ownership of any asset, then the same should be placed in



another forum, and not the succession cause, for litigation and determination. That is the spirit of rule 41(3) of the Probate and Administration Rules, which states as follows; -

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the *Civil Procedure Rules* and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

11. There is ample case law to the effect that succession proceedings are not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution. One such case is *In re estate of Kimani Kimithia* [2008] eKLR (Ibrahim J) where it was stated that succession proceedings were not the appropriate way to challenge the title of the deceased to assets said to comprise his estate, on claims that such assets were subject to a trust in favour of the claimant. It was stated that such claims ought to be subjected to separate proceedings, where the claimants have to prove the trust, and thereafter seek revocation of the title or partition, which requires declaratory orders on the existence of the trust. It was asserted that that was not the function of the succession cause, where the claimant was neither a beneficiary nor dependant of the deceased, and that succession proceedings were not appropriate for resolution of seriously contested claims against the estate by third parties. The court then held that It had no jurisdiction to determine the claim of trust or to grant relief related to it. See also *In re Estate of Richard Karanja Javan* [2014] eKLR (Musyoka J), *In re Estate of James Muiruri Kamau* (Deceased) [2018] eKLR (Ndng’u J), *In re Estates of Henry Njau Ngotho (Deceased)* [2020] eKLR (Machelule J), *in re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo J); *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR (Musyoka J), *In re-the Estate of Kipyego Chepsiro Kolil* [2007] eKLR (Ibrahim J) and *in Re Estate of Njagi Njeru (Deceased)* [2018] eKLR (Muchemi J)
12. Besides the provisions of the Law of Succession Act and the Probate and Administration Rules, the applicants have also to contend with the Constitution, so far as the jurisdiction of the High Court is concerned, with respect to disputes over title to land and trusts over land related to title to the land. Article 162(2) of the Constitution envisages a court with jurisdiction to handle disputes relating to title or ownership of land. Under article 165(5) of the Constitution, it is asserted, in no uncertain terms, that the High Court shall exercise no jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the Environment and Land Court Act, No 9 of 2011, to handle the disputes stated in article 162(2) The Land Registration Act No 3 of 2012 and the Land Act No 6 of 2012 identify the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration, which is at the core of the application herein, dated October 2, 2018. These provisions are in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.
13. For avoidance of doubt, the provisions that I have stated above says as follows.
 - “2 “Court” means the Environment and Land Court established by the Environment and Land Court Act, 2011 (No 19 of 2011), and other courts having jurisdiction on matters relating to land”



“101 Jurisdiction of court

The Environment and Land Court established by the *Environment and Land Court Act, 2011* (No 19 of 2011) and subordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

“2 “Court” means the Environment and Land Court established under the *Environment and Land Court Act, 2011*; No 19 of 2011.”

“150. The Environment and Land Court established in the *Environment and Land Court Act* is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

14. The applicants cite section 47 of the *Law of Succession Act* to support their contention that this court has jurisdiction to entertain the dispute in the application dated October 2, 2018. Section 47 states as follows.

“47. Jurisdiction of High Court the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

15. There is this notion that section 47 grants the High Court elastic jurisdiction to grant such orders as it pleases. It has often been equated with section 3A of the *Civil Procedure Act*, cap 21, Laws of Kenya, as saving the inherent powers of the court. I do not agree. Section 47 merely states that the High Court has jurisdiction to deal with applications and determine disputes that arise over matters that are governed by the *Law of Succession Act*, and pronounce decrees and make orders as may be expedient, in the context of the provisions of the *Law of Succession Act*. It does not confer jurisdiction to handle disputes and applications that are not provided for under the *Law of Succession Act*. Inherent power is not saved under section 47 of *Law of Succession Act*, but under rule 73 of the *Probate and Administration Rule*. The High Court can only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act. It says no more than that. The *Law of Succession Act* is divided into 8 parts, and the High Court is limited to handling applications that arise with respect to the matters that are governed in those 8 parts. Part I is on the preliminaries, and covers the commencement of the *Law of Succession Act*, its application, interpretation and the law applicable to succession. Part II is on wills and covers such matters as capacity, formalities, revocation, alteration and revival, construction, failure of dispositions, election, perpetuities, remoteness and accumulations. Part III provides for dependants. Part IV is on gifts in contemplation of death. Part V has the intestacy provisions. Part VI provides for survivorship. Part VII is on administration of estates. Part VIII is on miscellaneous provisions, covering rules, transitional provisions, repeals, amendments and saving provisions. The High Court has jurisdiction to handle disputes and applications that arise with respect to what is provided for in those areas stated above.

16. The jurisdiction of the High Court clearly comes out when juxtaposed against that of the magistrates courts as set out in section 48(1). The jurisdiction of the magistrate’s court is not as wide as that of the High Court. It is limited. Under the proviso to section 47 of Laws of Succession Act, magistrates courts can only exercise jurisdiction upon gazettment by the Chief Justice. Under section 48(1) of *Law of Succession Act*, there is pecuniary limitation of the jurisdiction of the that magistrates appointed under



- section 47, which is prescribed under section 7(1) of the *Magistrates Courts Act*, No 26 of 2015. Indeed, prior to the amendments in section 48 by the *Magistrates Court Act* No 26 of 2015, the jurisdiction of the magistrates was even more limited. First, the magistrate’s court, located in the same station with the High Court had no jurisdiction over probate and administration matters, and High Court had exclusive jurisdiction, Two, the magistrates courts had no jurisdiction to revoke grants made by the said courts, and the parties had to move the High Court for that purpose.
17. The point is that section 47 of *Law of Succession Act* does not more than state that the High Court is the court for the purposes of *Law of Succession Act*, and it exercises all the powers conferred upon the court by the *Law of Succession Act*. There is no power conferred on High Court, as a probate court, by section 47 to entertain disputes other than those provided for under the *Law of Succession Act*. So, if the provisions of the *Law of Succession Act* do not confer jurisdiction over a certain dispute, or state that there is no jurisdiction, then section 47 cannot provide refuge. Reference to provisions of the Law of Succession Acts includes, the rules made under the Probate and Administration Rules, by virtue of section 97 of the *Law of Succession Act*.
 18. The applicants cite section 66 of *Law of Succession Act*, which provides a guide on the persons who may be appointed administrators, and creditors are in that list. The argument is that creditors have a say in probate proceedings, and issues relating to them can be litigated in succession causes. Creditors, in the context of the *Law of Succession Act*, are the individuals and entities that the estate is indebted to, and who have been acknowledged as such by the personal representatives. It also includes individuals and entities holding valid court decrees against the estate. Individuals and entities whose claims against the estate have not been acknowledged by the person representation, and who do not hold any valid court decrees are not creditors of the estate, but mere claimants. Their claims are yet to be proved or established against the estate. The place to establish or prove those claims is not within the succession cause, but in separate proceedings. That is what rule 41(3) of the Probate and Administration Rules provides, and that is what the courts *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim J) and others, have pronounced.
 19. The applicants have also cited section 82 of *Law of Succession Act*, to argue that the administrator with a confirmed grant has to deal with the issue of trust. What the applicants do not appear to appreciate is that section 82 does not talk about trusts in general, but a “continuing trust.” The concept “continuing trust” is not interpreted in section 3 of *Law of Succession Act*. In the context of the *Law of Succession Act* it arises in two situations. One, with regard to the life interest enjoyed by surviving spouses, under Part V of the *Law of Succession Act* as stated in sections 35(1)(b)(2), 36(1)(c)(3) and 37. A continuing trust arises where a spouse survives the deceased, and, at distribution in intestacy, the property should devolve to the surviving spouse in the first instance, and, upon determination of the life interest, to the children or other persons beneficially entitled in intestacy. Such a surviving, spouse holds such property, during their lifetime, in trust for the eventual beneficiaries, be they children or others. It is a trust that continues during the lifetime of the surviving spouse. Two, with regard to the interests of minor survivors or beneficiaries, that is to say the interests of those beneficiaries or survivors who are below the age of majority, section 41 of the *Law of Succession Act* provides that the interests of such minors is held in trust, during their minority, until they attain the age of maturity, when it should be conveyed or transmitted or transferred to them. The trust, in such case, would be continuing during their minority.
 20. The term “continuing trust” is used expressly in sections 75A, 83(g)(i) and 84 of the *Law of Succession Act*, but it is the provision in section 84 which clearly brings out what “continuing trust” means in the



context of the *Law of Succession Act*, that is to say the life interest enjoyed by a surviving spouse and the trust held on behalf of a minor. Section 84 states as follows: -

“ 84. Personal representatives to act as trustees in certain cases.

Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof: Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of those houses as provided by section 40.”

21. Trust as used in *Law of Succession Act*, particularly in part VII, is limited to continuing trusts and other trusts in favour of beneficiaries or creditors. It is not used in the context that the applicants are using it in their application dated October 2, 2018. The applicants have not established any trust, and the administrator herein cannot be deemed to be a trustee on their behalf. They have to establish that trust against him, in proceedings commenced elsewhere, but not in these succession proceedings.

22. I believe I have said enough to show that this court has no jurisdiction, in these probate proceedings, to entertain a suit or application relating to declaration of trust, for that is what the applicants really seek in their application dated October 2, 2018. The jurisdiction of the court is limited in the manner demonstrated in the foregoing paragraphs. The preliminary objection dated February 10, 2020 has merit. I uphold it, with the result that I strike out the summons for revocation of grant dated October 2, 2018. Each party shall bear their own costs. There is leave of 28 days to move the Court of Appeal appropriately, for whoever shall feel aggrieved. It is so ordered.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS
22ND DAY OF JULY 2022**

W M MUSYOKA

JUDGE

Mr Erick Zalo, Court assistant.

Mr Ondieki, instructed by Gichaba Ondieki & Company, advocates for the administrator.

Mr Manyoni, instructed by Momanyi Manyoni & Company Advocates for the applicants.

