



**Amere v Amere (Civil Appeal E019 of 2024)
[2026] KEHC 100 (KLR) (19 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E019 OF 2024
DK KEMEL, J
JANUARY 19, 2026**

BETWEEN

JACKSON OYIENGO AMERE APPELLANT

AND

SHADRACK OYIENGO AMERE RESPONDENT

(The appeal arises from the ruling of Hon. J.P Mkala, (RM) in Siaya CM's Succession Case No. 213 of 2019 delivered on the 27th November 2024)

JUDGMENT

1. The appeal arises from the ruling of Hon. JP Mkala (RM) dated 27th November 2024 in Siaya Chief Magistrate's Court Succession Cause No. 213 of 2019 wherein he allowed the Respondent's Protest dated 19th October 2020 and proceeded to revoke the grant issued to the Appellant on 10th December 2020 and further ordered cancellation of all titles which were to revert back in the name of the deceased and to await distribution by the court and further ordered a fresh grant be issued in the name of the Appellant and the Respondent.
2. Aggrieved by the aforesaid ruling, the Appellant filed his Memorandum of Appeal dated 11th December 2024 wherein he raised the following grounds of appeal:
 1. That the trial magistrate erred in fact and law by failing to fully analyze and evaluate the evidence presented by the Appellant as required by the law.
 2. That the learned trial magistrate erred and/or misdirected himself in law in finding that the Respondent who is not a beneficiary or liability of the deceased was entitled to be an Administrator and get a share of the deceased estate.



3. That the trial magistrate erred in fact and in law by finding that the Objector has locus to file any proceedings in the succession cause and that the succession court has jurisdiction to entertain the claim which concerns a land dispute.
4. That the learned trial magistrate erred and/or misdirected himself in law and fact by finding that the grant be revoked in the absence of the requisite application.
5. That the learned trial magistrate erred in fact and in law by failing to appreciate the evidence tendered by the Appellant and his witness with regard to ownership, occupation and use of the deceased's estate.
6. That the learned trial magistrate erred and/or mis-directed himself in law and fact by finding that only half of land Parcel No. North Gem/Got Regea/276 constituted the estate of the deceased without sufficient evidence and on the basis of an expired decree.

The Appellant therefore prayed that the appeal be allowed and the ruling of the trial court dated 27th November 2024 be set aside and costs be awarded to the Appellant.

3. This being the first appellate court, it is under obligation to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses testify and therefore it must make due allowance in that regard. See *Selle Vs. Associated Motors & Co. Limited* [1968] EA 123.
4. A perusal of the lower court record reveals that the Appellant petitioned for letters of grant as the Administrator and was subsequently issued with a grant of letters of administration intestate on 19/12/2019. That the Appellant later filed summons for confirmation of grant dated 6/10/2020 and duly filed the schedule of distribution. The Respondent later filed an affidavit of protest to the confirmation of the grant and is dated 19/10/2020. The protest and confirmation were heard via affidavits and the trial court later dismissed the Respondent's protest vide the trial court's ruling dated 10th December 2020 (Hon. J. Ong'ondo). The Respondent was aggrieved by the said ruling and lodged an appeal at the High Court vide Siaya HCCA No. E002 of 2021 which was determined by Aburili J on 28th July 2021 wherein the learned judge allowed the appeal and remitted the matter back to the trial court with directions that the protest and the confirmation be canvassed by way of viva voce evidence before another trial magistrate.
5. The matter was allocated to Honourable Wambani (CM) who briefly handled it but later re-allocated it to Hon. Mkala (RM) who finally heard the matter by way of viva voce evidence. The matter commenced for hearing in earnest on 26/6/2024.
6. Hezekiah Anyanga Oluchula (OW1) adopted his witness statement dated 19/10/2020 as his evidence in chief. He stated that the deceased was his elder brother.

On cross examination, he stated inter alia; that the Petitioner is his nephew and the son of Shadrack Amere; that the land belongs to his grandfather and then passed to his father; that Shadrack Amere was the eldest son; that Parcel No. 276 was registered in the name of the eldest son Shadrack Amere who was to protect the land and that adjudication was carried out in 1963; that he was still young and could not tell how the father of the Petitioner got the land but he was categorical that it belonged to his grandfather; that Akonya had two sons Richard Oluchula and Samuel; that he is the 3rd son; that he has built in his father's land; that the land has not been divided; that parcel 275 has not been divided; that Shadrack Oluchula had a family.



On re-examination, he stated inter alia; that Jackson is the one who filed the petition for grant; that he lives in 275; that according to their father parcel 275 was to be shared between Daniel Anyanzwa and Shisia Oluchula; that he was to share parcel 276 with Shadrack Amere Oluchula; that during the adjudication, Shadrack was still young and so he could not legally hold title.

7. Daniel Dishon Anyanzwa Oluchula (OW2) testified that he is a businessman. He adopted his witness statement dated 19/10/2020 as well as his affidavit of protest sworn on the same date. He stated that there was a case between his father and Shadrack; that the land was divided into two equal portions between Shadrack Amere Oluchula and Hezekiah Amere Oluchula; that when they were at the High Court the land was No. 276; that an injunction was issued by the court; that the land has not been sub-divided into two portions – 1326 in the name of Jackson Oyiengo, Herene Amere Oluchula, Sarah Kenya, Patrick Amere; that Jackson sold the other part.

On cross examination, he stated inter alia; that Shadrack is his brother while he is the 3rd born; that Shadrack held the land in trust; that the land had no owner in 1965; that Richard Oluchula is the owner of the land.

8. Peter Oballa Maende (PW1) testified that he is a neighbour to the parties herein; that the land belonged to Joan Ayiecha who had three children namely Richard Oluchula, Samuel Wanyakwa and Muchema; that someone wanted to dispose her; that people decided that the land be sub-divided into two; that she decided to give Samuel the homestead while Richard was given the one portion and then another portion to her grandson; that they lived happily ever after.

On cross examination, he stated inter alia; that Joan was his aunt; that it is right/okay if Shadrack received the land from his father.

9. Jackson Oyiengo Amere (PW2) testified that he is a farmer coming from Mundorome village in Gem and the Petitioner herein; that he was born in 1986 and found his father holding a freehold title absolutely as parcel No. 276; that he has his mother by the name Florence Amere; that he has three siblings Sarah Amere, Pauline Amere and Pamela Amere; that when his father died in 2009, he left a title deed; that he filed succession in order to inherit the land; that they received an introductory letter from the chief; that the ruling was delivered on 10/12/2020; that his father did not leave documents that show that the land was to be divided; that upon succession they divided the land into 1326 and 1327 and that 1327 is in the name of the person who sponsored the succession; that their father did not claim any land from his father as he was satisfied with what his grandmother gave him; that he prays to court that it does not revoke the grant; that they are satisfied with the portion that they have.

On cross examination, he stated that his father used to live in his father's land before moving out and establishing his homestead; that he has seen the appeal. That he changed the land before the order was issued. That the land was sold by the family.

10. Parties thereafter filed and exchanged submissions. The trial court considered the matter and came up with the ruling which is the subject of the appeal.
11. The appeal was canvassed by way of written submissions. Both parties complied.
12. Vide submission dated 15th April 2025, the Appellant submitted that the trial court failed to exercise proper discretion by revoking the grant yet there was no formal application by way of summons for revocation of the same. The Respondent merely filed an affidavit of protest dated 19/10/2020 which presupposes that he was aggrieved by the Appellant's mode of distribution of the estate and therefore the protester ought to present his rival mode of distribution. It was also submitted that the Respondent did not even seek to be made an administrator and therefore it was erroneous for the trial magistrate to



purport to make him an administrator in the estate of the Appellant's father. Further, the trial court in revoking the grant without being requested for denied the Appellant a chance to challenge the same and therefore the Appellant's right under Article 50 of *the Constitution* was infringed.

13. The Appellant supported his grounds by relying on the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, where Mwita J. held thus:

“ [13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the Court to invoke section 76 and order to revoke or annul a grant. And when a Court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

Also, in the case of *re Estate of the late Kipleting Arap Choi* (Succession Cause 001 of 2022) [2023] KEHC 336 (KLR) (26 January 2023) (ruling) the court observed as follows:

“Section 76 of the Act permits the court to exercise its discretion to annul or revoke a grant of representation at any time. Although that window runs contrary to the time line provided for in the Act on the conclusion of the probate proceedings set at 6 months after gazettelement and making of the grant of representation it follows that binding precedents set by the court to state otherwise. The dictates of justice therefore demands that the issue of distribution be re-opened so that the objector may be heard upon the issue as to whether this is the right forum of convenience or her claim is to be adjudicated elsewhere.

My reading of the claim raised by the objector does not call for this court to revoke the entire certificate of the confirmed grant for that is likely to occasion prejudice or injustice of the other beneficiaries.

The content of the application can easily be canvassed by an order of setting aside the proceedings on confirmation of grant referred to by the objector.”

14. Also, In *Re Estate of Gitau (Deceased)* [2002] 2 KLR 43 Khamoni J while addressing this issue also expressed himself as hereunder:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa.

That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

15. It was submitted that the trial court made an error when it ruled that the Appellant's father held the suit land North Gem/Got Regea/276 in trust for the Respondent yet the trial court was a succession court which has no jurisdiction to determine issues of trusts. That the trial court was only required to ascertain the net estate of the deceased which was free for distribution and that any issues of trust



should be determined in the relevant court with the requisite jurisdiction. Reliance was placed in the case of *Re Estate of Solomn Mwangi Waweru (deceased)* [2018] eKLR where the court held:

“This Court M.K. Ibrahim J (as he then was) in a decision cited with approval by this Court In the matter of the Estate Peter Igamba Njoroge Nakuru Succession Cause Number 432 of 2009 had this to say on the issue of a probate court’s jurisdiction to resolve a claim based on land held in trust (and in our case purchase or transfer of land);

“I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objector’s father.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/ rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim or trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction of the court. This will only go to the question of costs.”

16. Also, in the case of High court succession cause number 864 of 1996 [2015] eKLR Musyoka J. held:

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the *Law of Succession Act* and the relevant



subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

17. It was therefore submitted that claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It was further submitted that it is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court. that at the time of filing the case the suit parcel L.P NO. NORTH GEM /GOT REGEA/276 was registered in the names of the deceased. That there was no evidence that the said parcel was registered jointly in the names of the deceased and a third party. Hence the Honourable court therefore fell into error with the finding that the Objectors were entitled to half a share the subject parcel, the court was bound by the status of the suit parcel as to the existing title and or search. In considering evidence out of the said documents and the Time barred decree of the Land Tribunal he exceeded his mandate. That the Honourable trial court erroneously took into account the proceedings and Judgement of the Land Dispute Tribunal No. SYA/69/96 delivered on 12/06/2001 as proof of concealment of material fact. That no evidence was led to show that the Appellant who was not a party to the Proceedings was aware of the said decision.
18. It was also submitted that in any case, even if the Appellant was aware of the decision of the Tribunal the onus of ensuring that the said orders were enforced rested with the Objector who was party to the said proceedings. That equity does not favour the indolent. In this particular case the judgement/decree of the court was made on the 12/06/2001.
19. It was also submitted that the succession cause was filed in 2019 which was 18 years since the decree was issued. Under Section 4(4) of the Limitation of Action Act “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”
20. It was further submitted that the matters delved into by the trial court were the preserve of the jurisdiction of the ELC court which has the mandate to hear and determine disputes relating to the environment, use and occupation of and title to land as provided for under Article 162(2) (b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*. Further, Section 13 of the *Environment and Land Court Act* further provides for the jurisdiction of the Court as follows:“(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.(2)In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes —(a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;(b)relating to compulsory acquisition of land;(c)relating to land administration and management;(d)relating to



public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and(e)any other dispute relating to Environment and Land.”

21. It was submitted that in the case where there is ownership dispute involving the property belonging to a deceased person and a third party who is not a beneficiary, the practice is for the ownership dispute to be determined outside the succession Court and for the Succession Court to be furnished the determination of the Court that determined the issue of the disputed ownership.
22. The proceedings that gave rise to the Judgement of the Land Dispute Tribunal No. SYA/69/96 delivered on 12/06/2001 were between the actual deceased person and the Objectors. After the demise of the deceased, the Objectors ought to have pursued their claim elsewhere or in the very least not be made joint Administrators.
23. Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal, in owners of the motor vessel “Lillian s” vs. Caltex Oil (Kenya) ltd [1989] eKLR, stated:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
24. It was submitted that it was erroneous for the trial court to appoint the Respondent as an administrator yet he was not a person competent as such by dint of the provisions of Section 66 of the *Law of Succession Act* which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. The same provides as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

 - (a) surviving spouse or spouses, with or without association of other beneficiaries;
 - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V
 - (c) the Public Trustee; and
 - (d) creditors ...”
25. It was contended that the administrator in the instant cause, being a surviving son, had a right or entitlement to administration which was superior or prior to that of a brother/nephew of the deceased,



going by Section 66 of the *Law of Succession Act*. From a reading of Section 66 of *Law of Succession Act* the person given priority over an intestate is the surviving spouse and children.

26. In Re Estate of Solomon Mwangi Waweru(deceased) [2018] eKLR (supra) the honourable court held that,

“This Court M.K. Ibrahim J (as he then was) in a decision cited with approval by this Court In the matter of the ESTATE PETER IGAMBA NJOROGI, NAKURU SUCCESSION CAUSE NUMBER 432 OF 2009 had this to say on the issue of a probate courts jurisdiction to resolve A CLAIM BASED ON LAND HELD IN TRUST (and in our case purchase or transfer of land);

“I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position is law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors’ father.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.”

27. It was submitted that this case, since the spouse was not alive, the children of the deceased had priority to petition the court for letters of administration.
28. It was submitted that the learned trial Magistrate erred and/or misdirected himself in law and fact by finding that only half of L.R No. North Gem /Got Regea/276 constituted the estate of the deceased without sufficient evidence and on the basis of an expired Decree.
29. At the time of filing the case the suit parcel L.P NO. North Gem /Got Regea/276 was registered in the names of the deceased. It was further submitted that there was no evidence that the said parcel was registered jointly in the names of the deceased and a third party.
30. The honourable trial court therefore fell into error with the finding that the Objectors were entitled to half a share of the subject parcel.
31. The court was bound by the status of the suit parcel as to the existing Title and or search. In considering evidence out of the said documents and the Time barred decree of the Land Tribunal he exceeded his mandate.
32. The honourable trial court erroneously took into account the proceedings and Judgement of the Land Dispute Tribunal No. SYA/69/96 delivered on 12/06/2001 as proof of concealment of material fact.
33. No evidence was led to show that the Appellant who was not a party to the Proceedings was aware of the said decision.



34. In this particular case the judgement/ decree of the court was made on the 12/06/2001. The succession Cause was filed in 2019.

35. That was 18 years since the decree was issued.

Under SECTION 4(4) OF THE LIMITATION OF ACTIONS ACT: “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

36. The provisions of the above section do not exclude the succession court. At the end of 2019, the Court of Appeal revisited its M’Ikiara M’Rinkanya & Another V Gilbert Kabere M’Mbijiwe a decision in Koinange Investment And Development Company Limited V Ian Kahi Ngethe & 3 Others (Being sued as the Personal Representatives of the estate of Robert Nelson Ngethe (deceased)) [2019] eKLR where it held that an order of stay of execution stopped time from running against a decree holder.

37. The court stated:”36. In the M’Ikiara matter, the Court held that all post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgments are statute barred after 12 years. However, in that matter the proceedings to recover the land in dispute had been filed nearly 18 years after the final judgment of the Court of Appeal and were rightly held to be statute barred.37. Where a party is prevented from executing a lawful decree by a court order pending hearing and determination of an appeal against the decree, it would be unjust to hold that time still runs against the decree holder over the period when the appeal remains undetermined, and until the stay order is vacated.”

38. In the case of Willis Onditi Odhiambo V Gaeway Insurance Co. Ltd [2014] eKLR the Court stated that an action may not be brought upon a Judgement after twelve years from the date of the delivery and in Mikiara Mrikiara& Another V Gilbert Kabeere Mmbijiwe [2007] eKLR the Court stated that a Judgement for possession of land should be enforced before the expiry of the 12 years.

39. In this umbrella, the Appellant has raised two issues, one being of jurisdiction and limitation of actions, which go to the root of the matters herein because should the Court find that the decree is statutory barred by way of limitation, then that would go to the jurisdiction of the Court as was stated in the case of BOSIRE OGERO V ROYAL MEDIA [2015]E KLR where the Court held that even if the issue of limitation which is intended to protect the Defendant from stale claims is not raised by a party , the Court cannot entertain a suit which it has no jurisdiction over.

40. It is trite law that the issue of limitation goes to the jurisdiction because it is a pure point of law and ought to summarily determine the outcome of the proceeding herein.

41. Finally, the principle behind the above provision is enshrined in the Maxim of equity that “Equity favours the vigilant and not the indolent”.

42. The Respondent should not be rewarded for being pusillanimous and failing to assert his rights. That, the Appeal be allowed with costs.

43. Vide submissions dated 11/6/2025 and amended 30/7/2025 learned counsel for the Respondent gave a brief history and background of the lower court matter before it landed in this court twice on appeal.

44. It was submitted that contrary to the assertions of the Appellant, it was submitted that from the onset the protest filed before the trial court was not a protest to issuance of grant, but rather a protest



to confirmation of the grant in the manner sought by the administrator/Appellant. In essence the protestors did not dispute the right of the administrator to administer the estate of the deceased but rather his attempt to distribute the property as the sole and exclusive beneficiary of the estate of the deceased. Indeed, on the first limb, the Respondent agrees with the Appellant that the Protestor never sought to be made an administrator to the estate of the deceased but be that as it may, it is clear that upon being issued with letters of administration the Appellant moved with haste to transfer the land to his name.

The Appellate court in its Judgment issued an order stopping the Appellant from selling the land. Despite being aware that he had been stopped from selling or dealing with the land the Appellant still proceeded to dispose parts of the land. On page 24 of the record of appeal, the Appellant confirms that indeed the land had been sold after the judgment of the High Court but that he claims that the land had been sold by his family members. This cannot be true because he was the sole administrator and fully responsible for the estate. Learned counsel contends that this confirms that he was not a fit and proper person to solely administer the estate of the deceased and that the magistrate exercised his jurisdiction in the interest of justice and also in the interest of securing the estate from wastage by appointing the protestor as a co-administrator and hence that decision cannot be faulted.

45. As regards the question whether the Respondent was entitled to a share of the subject estate, it was submitted that the main duty of a succession court is the distribution of the estate of the deceased but before such distribution is done the court has to be satisfied that the assets sought to be distributed at the confirmation stage which form part of the free property of the deceased. It is therefore the duty of the succession court to determine whether the property is free or it is encumbered and or whether there is any impediment to the distribution of such property.

Counsel placed reliance on Rule 40 (6) of the Probate and Administration Rules which stipulates that “Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection”. Again, under Rule 41 (1) of the Probate and Administration Rules stipulates that “After hearing the applicant seeking for confirmation of grant and each protestor then.....”

“The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning identities, shares and interests of the persons beneficially entitled and any other issues which has arisen including the interpretation of any will.”

46. It was submitted that the Affidavit of protest by the protestor Daniel Dishon Anyanzwa Oluchula enumerates reasons why the subject parcel of land North Gem/Got Regea/276 was not the free or exclusive property of the deceased even though the said deceased Shadrack Amere Oluchula appeared as the registered proprietor thereof. It is clear from the affidavit of protest that there was a court case before the land disputes tribunal regarding the subject parcel. It is clear that the said case was between Richard Akhonya Oluchula and Shadrack Amere Oluchula the deceased herein.

It was further submitted that it was undisputed that the case was determined against the deceased and the decision of the tribunal was for the subdivision of the suit land and for the same to be shared equally between Shadrack Amere Oluchula and Hezekiah Anyanga Oluchula. It was further added that it was also clear that the decision of the tribunal was adopted as Judgment of the court in Siaya Land Disputes Tribunal Miscellaneous Case No.41 of 2001. It is therefore evident that as at the date of the confirmation of the grant, the deceased herein was only entitled to a half share of the subject estate while the other half was to be transmitted to his biological brother Hezekiah Anyanga Oluchula



hence it was submitted that the trial magistrate did not error in finding that the Hezekiah Wanyanga Oluchula was entitled to a share of the subject estate.

47. As regards the question whether the Objector had locus standi to file proceedings in the succession cause regarding claims on a land dispute, it was submitted that the affidavit of protest, the Protestor/ Respondent states categorically at paragraph 14 that “.....we now propose that the subject property being North Gem/Got Regea/276 be shared equally between the immediate family of Shadrack Amere Oluchula (deceased) and Ezekiah Wanyanga Oluchula”. It is clear from the proceedings that having effected succession proceedings to the estate of their deceased father Richard Oluchula Akhonya and having acted as the administrator of the said estate, the protestor mainly took up this protest majorly on behalf of Ezekiah Wanyanga Oluchula as the administrator of the estate of their father Richard Oluchula Akhonya who had obtained a valid judgment against the subject estate. It was further added that the protest in essence sought to give effect to the valid judgment which confirmed that Hezekiah Wanyanga Oluchula was entitled to a half share portion of this land.
48. As regards the issue whether the trial court erred when it revoked the grant in the absence of summons for revocation of grant, it was submitted that the proceedings leading to the impugned ruling delivered on 27th November 2024 by the Honourable Hon. J.P Mkala were necessitate by the Judgment of the Honourable Lady Justice R.E Aburili delivered on 28th July 2021 in Siaya High Court Civil Appeal No. E002 of 2021. At paragraph 43 of the Judgment, the Lady Justice indicates that the Appeal was allowed. The Judge directed for a rehearing of the protest which in essence means that she had set aside the certificate of confirmation of grant. In addition, at paragraph 44 she directed that pending the hearing and determination of the protest, the Appellant herein and the other beneficiaries were directed not to dispose any portion of the land. Furthermore, the provisions of Section 47 of the *law of succession act* state that 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. Rule 73 of the Probate and Administration Rules provides that “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court”.
49. It was submitted that it is clear under the quoted provisions that the Orders given by the trial magistrate were within the mandate granted to him by Section 47 of the *Law of Succession Act* and Rules 41 and 73 of the Probate and Administration Rules.
50. It was also submitted that the conduct of the Appellant in selling a portion of the subject land after delivery of the decision of the High court while being aware that there were orders for preservation of the estate necessitated the orders of revocation of the grant issued to him solely. Be that as it may, the Appellant has not indicated what prejudice he has suffered because he equally remains an administrator.
51. Finally, learned counsel urged the court to dismiss the appeal with costs.
52. I have considered the record of the lower court and the submissions filed. I find the issue for determination is whether the appeal has merit.
53. It is noted that the Respondent had only filed an affidavit of protest to the Appellant’s summons for confirmation of grant and hence the Respondent was deemed to have been attacking only the Appellant’s schedule of distribution but not the grant itself. Indeed, there was no formal application by way of summons for revocation of the same. The Respondent merely filed an affidavit of protest dated 19/10/2020 which presupposes that he was aggrieved by the Appellant’s mode of distribution of the estate and therefore the protestor ought to present his rival mode of distribution. The Respondent also did not even seek to be made an administrator and therefore it was erroneous for the trial magistrate



to purport to make the Respondent an administrator in the estate of the Appellant's father. It is instructive that the Appellant had petitioned for letters of grant of administration intestate over the estate of his father and hence the Respondent was a stranger in the estate as he was not one of the beneficiaries thereto.

54. The Respondent in his protest sought for a portion of the estate comprised in parcel number North Gem/Got Regea/276 on the ground that the same had been held in trust by the Appellant's father for the Respondent's father. It is noted that the trial court made an order of revocation of grant which had not been sought by the Respondent in his protest. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 of 2000*, Mwita J held thus:

“ [13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the Court to invoke section 76 and order to revoke or annul a grant. And when a Court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

Also, in the case of *re Estate of the late Kiplating Arap Choi (Succession Cause 001 of 2022)* [2023] KEHC 336 (KLR) (26 January 2023) (ruling) it was observed as follows:

“ Section 76 of the act permits the court to exercise its discretion to annul or revoke a grant of representation at any time. Although that window runs contrary to the time line provided for in the act on the conclusion of the probate proceedings set at 6 months after gazettelement and making of the grant of representation it follows that binding precedents set by the court to state otherwise. The dictates of justice therefore demands that the issue distribution be re-opened so that the objector may be heard upon the issue as to whether this is the right forum of convenience or her claim is to be adjudicated elsewhere.

My reading of the claim raised by the objector does not call for this court to revoke the entire certificate of the confirmed grant for that is likely to occasion prejudice or injustice of the other beneficiaries.

The content of the application can easily be canvassed by an order of setting aside the proceedings on confirmation of grant referred to by the objector.”

55. Also, In *Re Estate OF Gitau (Deceased)* [2002] 2 KLR 43 Khamoni J while addressing this issue also expressed himself as hereunder:

“ Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa.

That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong... While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

56. It is therefore clear that the trial court made an error when it ruled that the Appellant's father held the suit land North Gem/Got Regea/276 in trust for the Respondent yet the trial court was a succession



court which has no jurisdiction to determine issues of trusts. The trial court was only required to ascertain the net estate of the deceased which was free for distribution and that any issues of trust should be determined in the relevant court with the requisite jurisdiction. In the case of *Re Estate of Solomn Mwangi Waweru (deceased)* [2018] eKLR the honourable court held that,

“This Court M.K. Ibrahim J (as he then was) in a decision cited with approval by this Court In the matter of the Estate Peter Igamba Njoroge, Nakuru Succession Cause Number 432 of 2009 had this to say on the issue of a probate court’s jurisdiction to resolve a claim based on land held in trust (and in our case purchase or transfer of land);

“I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position is law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors’ father.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/ rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate. I therefore do hereby hold that this court has no jurisdiction to determine the claim or trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset. Nevertheless, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction of the court. This will only go to the question of costs.”

57. The issue of a trust as raised by the Respondent was a major one for determination by the trial court and that the trial court ought to have directed the Respondent to move to the Environment and Land Court where the same could be appropriately handled. In *High Court Succession Cause Number 864 of 1996* [2015] eKLR Musyoka J. held:

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under



the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

58. The issue of a trust as claimed by the Respondent against the estate of the deceased ought to be litigated in separate proceedings in that any adverse claims against the estate of a deceased should be determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court. It is instructive that at the time of filing the succession cause, the suit parcel LR No. North Gem /Got Regea/276 was registered in the names of the deceased. That there was no evidence that the said parcel was registered jointly in the names of the deceased and a third party. Hence the Honourable court therefore fell into error with the finding that the Objectors were entitled to half a share the subject parcel since the court was bound by the status of the suit parcel as to the existing title and or search. In considering evidence out of the said documents and the time barred decree of the Land Tribunal the trial court therefore exceeded its mandate. It seems the trial court erroneously took into account the proceedings and Judgement of the Land Dispute Tribunal No. SYA/69/96 delivered on 12/06/2001 as proof of concealment of material fact. The Appellant had not been a party in the said land dispute proceedings as can be seen from his evidence before the trial court that he only came to find that his father had already acquired a title deed as an absolute proprietor thereof. There was no evidence tendered to show that the Appellant was aware of the said tribunal decision. It was also upon the Respondent and his family to have acted proactively by ensuring that the tribunal orders were enforced. Nothing came out of the evidence of the Respondent as to what he had done with the said decree from 12/6/2001 up to the time the succession cause was lodged. It is noted that the succession cause was filed in 2019 which was 18 years since the decree was issued. Under Section 4(4) of the Limitation of Action Act “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

These are the issues to have been dealt with by the appropriate court regarding the Respondent’s claim of a trust. The trial court obviously could not have delved into due to lack of jurisdiction as they were the preserve of the jurisdiction of the ELC court which has the mandate to hear and determine disputes relating to the environment, use and occupation of and title to land as provided for under Article 162(2) (b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*. Further, Section 13 of the *Environment and Land Court Act* further provides for the jurisdiction of the Court as follows:-“(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. (2)In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have



power to hear and determine disputes—(a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;(b)relating to compulsory acquisition of land;(c)relating to land administration and management;(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and(e)any other dispute relating to Environment and Land.”

It is trite that in a case where there is ownership dispute involving property belonging to a deceased person and a third party who is not a beneficiary, the practice is for the ownership dispute to be determined outside the succession Court and thereafter for the Succession Court to be furnished with the determination of the Court that determined the issue of the disputed ownership. It is noted that the proceedings that gave rise to the Judgement of the Land Dispute Tribunal No. SYA/69/96 delivered on 12/06/2001 were between the actual deceased person and the then Objectors. After the demise of the deceased, the Objectors ought to have pursued their claim elsewhere or in the very least not to seek be made joint administrators in the estate of the deceased who was alleged to have held the land in trust for the Respondent and others.

59. Going through the record of the trial court, it is clear that the key issue that emerges is that of jurisdiction which is at the core of exercise of power by a court. It is trite that where there is no jurisdiction, the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal, in owners of the motor vessel “Lillian s” vs. Caltex Oil (Kenya) ltd [1989] eKLR, stated:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

60. It is noted that the trial court appointed the Respondent as an administrator yet he was not a person competent as such by dint of the provisions of Section 66 of the [Law of Succession Act](#) which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. The same provides as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V



- (c) the Public Trustee; and
- (d) creditors ...”

61. It was contended by the Appellant that the administrator in the instant cause, being a surviving son, had a right or entitlement to administration which was superior or prior to that of a brother/nephew of the deceased, going by Section 66 of the *Law of Succession Act*. From a reading of Section 66 of *Law of Succession Act* the person given priority over an intestate is the surviving spouse and children. Learned counsel for the Respondent in his submissions pointed out that the trial court made the orders after the Appellant had violated a high court order directing that the suit property should not be disposed and thus the Respondent would then checkmate the Appellant regarding administration of the estate. If that is the position, then it can be seen that the order by the trial court was made with a view to punish the Appellant yet the Respondent was at liberty to institute contempt proceedings against the Appellant for violating an existing court order. There is no evidence that such a move was made by the Respondent.
62. An analysis of the entire record plus the submissions leads me to come to the conclusion that the claim by the Respondent against the estate of the deceased herein being one of trust ought to have been lodged in the environment and land court and that the Respondent ought not to have been made an administrator in the estate of the deceased yet he was not a family member. I find that the Respondent’s protest was misplaced and lacked merit and ought not to have been allowed. Further, it was erroneous for the trial court to treat the affidavit of protest as if it was a Summons for Revocation of Grant when none had been made by the Respondent. The affidavit of protest ought to have been dealt with just like that by the trial court instead of importing un-pleaded matters. Hence, the finding by the learned trial magistrate was in error and must be interfered with.
63. In view of the foregoing observations, it is my finding that the Appellant’s appeal has merit. The same is allowed. The ruling of the trial court dated 27/11/2024 is hereby set aside and substituted with an order dismissing the Respondent’s affidavit of protest dated 19/10/2020 and allowing the Appellant’s summons for confirmation of grant as prayed. Each party to bear their own costs of the lower court and in this appeal.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY JANUARY 2026.

D.KEMEI

JUDGE

In the presence of:

Wangatia.....for Appellant

N/A Ooro E.....for Respondent

Maureen/Kimaiyo.....Court Assistant

