



Sheikhan (Suing as Personal Representative/Administrator Ad Litem of the Estate of the Late Shariff Abdallah Sheikhan) v Public Trustee of Kenya (Family Originating Summons E001 of 2020) [2024] KEHC 8801 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 8801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS E001 OF 2020
G MUTAI, J
JANUARY 19, 2024**

BETWEEN

ALI SHARIFF ABDALLAH SHEIKHAN (SUING AS PERSONAL REPRESENTATIVE/ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE SHARIFF ABDALLAH SHEIKHAN) PLAINTIFF

AND

PUBLIC TRUSTEE OF KENYA DEFENDANT

JUDGMENT

1. Before this court is the Originating Summons dated 24th September 2020 and amended on 1st April 2022 seeking the following orders:-
 - a. That the Public Trustee be ordered to account and to render full accounts of the estate of the late Ahmed Sheikh Pate in respect of the distribution of all the properties comprising the estate in order to determine whether the distribution was rightfully conducted;
 - b. That all transfers, conveyance and other alienations of the properties comprising the estate of the Late Ahmed Sheikh Pate made to other persons who were not the rightful beneficiaries of the late Ahmed Sheikh Pate be declared to be void and all those properties to revert back to the estate.
 - c. That the Public Trustee be ordered to properly distribute the estate of the Late Ahmed Sheikh Pate under the supervision of this Honourable Court;
 - d. That any other orders as this Honourable Court deems fit to grant with respect to the following properties; parcel of land of Portion Number 965 Malindi; parcel of land of Portion Number 966 Malindi; parcel of land of Title Number Lamu/Island/Block 1/1033; parcel of land of



Plot Number 133 Mambroi; parcel of land of Lamu Block 1/362 and Parcel Number Lamu Block 1/1095; and

- e. That costs of this application be provided for.
2. The summons is supported by the supporting affidavit of Ali Shariff Abdallah Sheikhan.
3. He stated that the original proprietor of the suit properties was the late Ahmed Sheikh Pate, who was survived by two children, namely, Abubakar Ahmed (Deceased) and Sheikhan Ahmed (Deceased). Abubakar Ahmed(Deceased) was survived by Khadija Abubakar, Asma Abubakar, Fatma Abubakar and Nafisa Abubakar while Sheikhan Ahmed(Deceased) was survived by Sheriff Abdalla Sheikhan and Abdalla Sheikhan. Ahmed had three children, namely Ali Shariff Abdalla Sheikhan (himself), Swaleh Shariff Abdalla Sheikhan and Shufee Shariff Abdalla Sheikhan.
4. The Public Trustee was appointed as the administrator of the estate of the late Ahmed Sheikh Pate, which comprised a Parcel of land No. 965 Malindi, parcel of land No. 966 Malindi, parcel of land Title No. Lamu/Island /Block 1/1033; parcel of land Plot No. 133 Mambroi and parcel of land Lamu Block 1/362.
5. He further stated that he has all along known that the properties belong to his family; however, it has emerged that the said properties were entrusted to the office of the Public Trustee for distribution to the legal heirs of the late Ahmed Sheikh Pate. The said properties are, however, registered in the names of persons not related to the late Ahmed Sheikh Pate. That the transfers were done by the Public Trustee. The Public Trustee, however, failed to account for and or provide a complete account of the same. That the public trustee, having a fiduciary duty to the beneficiaries, failed to act in the interests of the beneficiaries by transferring the estate properties to other persons. He stated that the estate should be distributed to the rightful beneficiaries in the interest of justice.
6. In response, the Public Trustee, through Jafred Erima Maliro, Assistant Public Trustee, filed a replying affidavit sworn on 16th November 2020.
7. He opposed the Originating Summons and stated that it lacked merit, was misplaced and was an abuse of the court process.
8. He stated that the Applicant lacks locus standi to institute the suit herein on behalf of the estate of Shariff Abdallah Sheikhan as he has not proved that he is the appointed administrator of the alleged estate. That he also doesn't have locus standi to be sued as he is not the appointed administrator of the estate of Ahmed Sheikh Pate.
9. He further stated that the Applicant had not proved the existence and death of Abubakar Ahmed and Sheikhan Ahmed and how they are related to Ahmed Sheikh Pate. The Applicant had not proved that the deceased was the registered owner of the suit properties; thus, there exist no beneficial interests between the deceased, the Applicant and the alleged two sons of the deceased to create beneficial interests to the alleged Applicant's father and Sheikhan Ahmed. Further, the orders sought cannot be issued as there are no letters of administration or certificate of confirmation of grant in respect of the estates of Abubakar Ahmed and Sheikhan Ahmed. The orders sought cannot be issued as the estate of Sheikh Bate alias Sheikh Pate was distributed to the rightful heirs more than 30 years ago.
10. He averred that the titles of the suit properties have already passed to third parties, and it would be prudent to enjoin them in the suit to afford them an opportunity to defend their titles.
11. He further averred that he has already rendered full account of the properties forming part of the estate of Sheikh Bate alias Sheikh Pate. That the deceased herein died in 1914, and his estate reported



- to Public Trustee on 8th January,1976and registered as Mombasa Administration Cause No.68 of 1976. Further, the rightful heirs of the estate of the deceased, according to the letter from the District Commissioner, Kilifi District, are Sheikh Abubakar(Deceased), Shariff Mohamed (Deceased), Shariff Abdalla Sheikhana aka Sheriff Abdulla Sheikh Pate (Deceased), Shariff Nassir Alias Shee Nassir Abdulrehman (Deceased) and Mwanasha Shariff. He was issued with a grant of letters of administration on 2nd November 1976, vide Mombasa HCSC No.110 of 1976. The said deceased heirs were survived by their children, who are now the rightful heirs.
12. The Public Trustee further filed a Supplementary Affidavit sworn on 8th July 2022, vide which he opposed the Summons and reiterated the position he had taken in the Replying Affidavit.
 13. The Plaintiff filed a further affidavit on 28th July 2022 in which he stated that the grant of letters of administration ad litem was issued to him on 18th April 2016 and thus has locus standi to pursue this matter. There is no time limitation to fiduciary trusts and duties /responsibilities, particularly with respect to rendering accounts on the distribution of the estate.
 14. The matter was canvassed by way of viva voce evidence.
 15. The Plaintiff was the first witness. He produced the documents in his list of documents and relied on his witness statement and supporting affidavit sworn on 1st April 2022.
 16. It was his evidence that his grandfather owned various properties scattered across the Coast region, including Lamu County, Mambui and Malindi within Kilifi County. That his grandfather's properties were irregularly and unlawfully transferred to third parties who were already dead and not beneficiaries of the estate of the deceased by the Public Trustee.
 17. He urged the court to declare the transfers and conveyances effected by the Public Trustee void in law and revert the properties back to the estate of the deceased herein for distribution to the rightful heirs.
 18. During cross-examination, he reiterated the position in his affidavits and witness statement. He told the court that he didn't have the transfer documents as the Lands Office refused to give them to him. It was evidence that the documents at the Lands Office did not have the name of the deceased but that the original documents had the name of the deceased. He testified that the documents became available after the appearance of the Public Trustee. Further he got to know the public trustee was in charge of the estate of the deceased in 1980. He testified that he tried to follow up on the issue of administration with no success.
 19. It was his further evidence that he was not aware of the Public Trustee representative affidavit and didn't know whether it was wrong or not. He did not file any affidavit in opposition to it.
 20. During re-examination, he told the court that he had an issue with the division as they did not get their share from the subdivision.
 21. The second witness for the Plaintiff was Abdallah Ali Abdalla. He told the court that he was a grandson of Shariff Abdalla Sheikhan. He relied on his witness statement. He referred the court to a letter dated 22nd April 1985 written by the District Commissioner, which was annexed to the Defendant's Replying Affidavit to support his evidence that he was related to the deceased herein. He also stated that the Plaintiff is a beneficiary of the estate of the deceased.
 22. In cross-examination, he told the court that the Plaintiff is a beneficiary of the deceased herein. He testified that Plot No. 965 and 966 belonged to his grandfather and, after his demise, to his father.
 23. It was his evidence that the properties were sold fraudulently.



24. In re-examination, he told the court that he only got documents /records from the Public Trustee in 2018.
25. PW3, Aman Mohamed Amin, told the court that he was relying on his witness statement dated 9th February 2023. It was his evidence that he was a neighbour to the late Ali Shariff at Shella Estate in Malindi in the 1980s and that he knew the family well as he used to visit them at Lamu Island and enjoyed close ties with them. He knew some of their family properties, including portions of land and houses, amongst others, within Lamu Island and the Mambui Area in Kilifi County.
26. It was his further evidence that he later learnt that upon the death of Ali Shariff's father, some files, including titles of his properties, were taken to the public trustee in Mombasa for distribution and or transfer to his beneficiaries. However, the same did not happen. The properties were unlawfully transferred to Mudhar Shee Ali, who was a caretaker of some of Ali Shariff's family properties in Lamu Island, and his brother Shariff Shee Abdulrehman, who are not beneficiaries of Ali Shariff. The properties transferred include Plot No. 965, 966, Plot No.1/362 and Plot No.133 Mambui in Kilifi County. Further, the two brothers are not beneficiaries of the estate of the late Sheikh Pate; thus, in the interest of justice, the properties ought to revert back to the estate of the deceased herein.
27. During cross-examination, he stated that he didn't know all the properties of the deceased as they come from Lamu.
28. The defendant did not call any witnesses. No evidence was thus adduced on behalf of the Defendant.
29. Once the hearing was concluded, the court directed the parties to file their written submissions.
30. The Plaintiff, through his advocates Machuka & Company Advocates, filed written submissions dated 25th May 2023.
31. Counsel reiterated the Plaintiff's position in his affidavits and submitted that this court has jurisdiction under Sections 11,17, and 23 of the Public Trustee Act to deal with this matter. Counsel urged the court to find that the Public Trustee has a duty to render accounts in respect of the estate of the deceased herein.
32. On the failure to include the current registered owners, counsel relied on the maxim nemo dat quod non habet and urged the court to find that an unauthorised transfer of title by any person other than the owner has no legal effect.
33. On limitation of time, counsel relied on Section 20 of the Limitation of Actions Act, which provides that no limitation to actions exists in respect of trust property or movable property of a deceased person.
34. In conclusion counsel urged the court to allow the Originating Summons as prayed.
35. The Plaintiff filed further submissions dated 21st July 2023. Counsel reiterated the Plaintiff's position and submitted that the records available indicate that the properties rightfully belonged to the deceased, who is the plaintiff's great-grandfather, and that all certificates of ownership were in possession of the defendant.
36. The defendant, on the other hand, through J. E. Maliro, filed written submissions dated 22nd June 2023. Counsel submitted on 11 issues for determination namely; whether or not the plaintiff lacks locus standi to institute these proceedings in respect of estates of Sheikh Bate alias Sheikh Pate, Shariff Nassir alias Shee Nassir Abdulrehman, Mwanasha Shariff, Shariff Mohamed, Sheikh Bate Bin Abubakar, Asma Abubakar Ahmed ,Fatuma Binti Abubakar, Khadija Binti Abubakar and Nafisa Binti Abubakar; whether the Public Trustee has powers to convert property of an estate into money



(sale); whether the suit is time barred; whether each estates of Sheikh Bate alias Sheikh Pate, Shariff Nassir Alias Shee Nassir Abdulrehaman, Mwanasha Shariff, Shariff Mohamed, Sheikh Bate Bin Abubakar, Asma Abubakar Ahmed, Fatuma Binti Abubakar, Khadija Binti Abubakar, Nafisa Binti Abubakar and alleged Ahmed Sheikh Pate are distinct entities and their accountability should be done through separate suits or respective succession causes; whether or not the plaintiff has a beneficial interest and or claim against the estate of Sheikh Bate alias Sheikh Pate; whether or not the court has an obligation and or duty to sure that all the precepts of natural justices are observed before a decision affecting substantive rights or interest of the registered owners of the subject properties is reached; whether or not the Public Trustee has accounted for Title No.965, Malindi, 966, Malindi, Lamu/ Island/Block 1/1033, Lamu Block 1/362 and 133, Mambroi, forming part of the estate of Sheikh Bate alias Sheikh And Ahmed Sheikh Pate; whether or not the Public Trustee has accounted for the estate of Shariff Abdalla Sheikhan alias Sheriff Abdulla Sheikh Pate which comprised of title of the said Plot No.553 Malindi; Whether Title No. Lamu/Block 1/362, Lamu/Island/Block 1/1033 and Lamu / Island /Block 1/1095 form part of any of the estates of deceased persons herein and whether they were ever dealt with by the Public Trustee at any point; and whether or not the Plaintiff is entitled to the relief sought.

37. On the first issue, counsel submitted that the grant ad litem issued to the Plaintiff is limited to suing and preserving the estate of Shariff Abdallah Sheikhan. Thus, the Plaintiff lacks locus standi to initiate a suit against the estate of the deceased, making the Originating Summons dated 24th September 2020 and amended on 1st April 2022 null and void and ought to be dismissed on that ground.
38. On the second issue, counsel submitted that the estate of Ahmed Sheikh Pate is distinct from the Estate of Sheikh Bate alias Sheikh Pate, which is administered by the Public Trustee. The Plaintiff had not adduced any evidence to prove that Sheikh Bate alias Sheikh Pate and Ahmed Sheikh Pate are one and the same person.
39. On the third issue, counsel submitted that Section 11(1) of the *Public Trustee Act* is not applicable to the estates of Shariff Abdalla Sheikhan aka Sheriff Abdulla Sheikh Pate (Mombasa Administration Cause No.74 of 1985), Shariff Nassir alias Shee Nassir Abdulrehaman (Mombasa Administration Cause No.109 of 1988), Mwanasha Shariff (Mombasa Administration Cause No. 36 of 1989), Shariff Mohamed, Sheikh Bate Bin Abubakar, Asma Abubakar Ahmed, Fatuma Binti Abubakar, Khadija Binti Abubakar and Nafisa Binti Abubakar for reasons that the succession causes fell within the jurisdiction of the Public Trustee and thus there were no letters of administration issued to the Public Trustee. This court has no jurisdiction to deal with and or interfere with the distribution of the said estates as the decision of the Public Trustee is final under the above section.
40. Further, Section 11 of the *Public Trustee Act* is not applicable to the estates of Shariff Mohamed, Sheikh Bate Bin Abubakar, Asma Abubakar Ahmed, Fatuma Binti Abubakar, Khadija Binti Abubakar, and Nafisa Binti Abubakar as they were not administered or dealt with by the Public Trustee.
41. On the fourth issue, counsel relied on the *Public Trustee Act* and submitted that the Public Trustee has powers to convert into money (sale) immovable property/assets forming part of an estate provided all interested parties consent in writing to its conversion. Thus, the plaintiff's allegation of fraud and/or breach of trust cannot hold. The maxim of nemo dat and Section 20(1) of the *Limitation of Actions Act* do not, therefore, apply in this matter.
42. On the 5th issue, counsel submitted that the estates are distinct from each other and ought to be dealt with as such.
43. On the sixth issue counsel submitted that the Plaintiff is a stranger to the estate of Sheikh Bate alias Sheikh Pate and thus has no beneficial interest against the estate. Abdallah Sheikhan Ahmed has no



- relations with the family or the estate of Sheikh Bate alias Sheikh Pate, and thus, the Plaintiff cannot claim beneficial interest in the same.
44. On the 7th issue, counsel submitted that the failure to involve all the heirs or their representatives by the Plaintiff renders the suit fatally defective and ought to be dismissed with costs.
 45. On the eighth issue counsel submitted that the suit is time barred as the cause of action arose in 1990. Counsel relied on Section 2(2) of the *Limitation of Actions Act* and submitted that the plaintiff cannot recover trust property or movable property of a deceased person after a period of 30 years.
 46. On the 9th issue, counsel submitted that the Public Trustee has already rendered full account to the Plaintiff in respect of the said properties; however, the Plaintiff had not proved his beneficial right or claim against them.
 47. On the 10th issue, counsel submitted that the letter from the District Commissioner Kilifi dated 29th May 1985 had not been challenged by the Plaintiff, and thus, the heirs remain the same.
 48. On the 11th issue, counsel submitted that the said properties do not form part of the estate of the deceased person.
 49. On the twelfth issue counsel submitted that the Plaintiff is not entitled to the orders sought.
 50. In conclusion counsel urged the Court to dismiss the originating summons with costs.
 51. The Defendant filed Supplementary Submissions dated 11th August 2023. He submitted on five issues, namely, whether the right to call witnesses is elective or mandatory; whether or not the plaintiff lacks locus standi to institute these proceedings in respect of estates of Sheikh Bate alias Sheikh Pate, Shariff Nassir alias Shee Nassir Abdulrehman, Mwanasha Shariff, Shariff Mohamed, Sheikh Bate Bin Abubakar, Asma Abubakar Ahmed, Fatuma Binti Abubakar, Khadija Binti Abubakar and Nafisa Binti Abubakar; whether or not the Public Trustee has accounted for Title No.965 Malindi, 966 Malindi, Lamu/Island/Block 1/1033, Lamu Block 1/362 and 133 Mambrui, forming part of the estate of Sheikh Bate alias Sheikh Pate, whether the suit is time-barred and whether or not the court has an obligation and or duty to ensure that all the precepts of natural justices are to be observed before a decision affecting substantive rights or interest of the registered owners of the subject properties is reached.
 52. On the first issue, counsel stated the plaintiff has the onus to prove his case, which he has not done. The Plaintiff did not call for the production of any document relevant to the suit. It was submitted that the Plaintiff could not dictate who was to be called to testify. This being an old matter, it is very difficult to trace each and every heir and or interested party to come and testify on his behalf. He urged the court to allow each case to be accounted for through their respective succession causes.
 53. On the second issue counsel submitted that locus standi is paramount in all judicial and quasi-judicial proceedings. He submitted that the estate of Ahmed Sheikh Pate is distinct and totally different from the estate of Sheikh Bate alias Sheikh Pate, which is administered by the Public Trustee, and thus, the court ought to deal with the same as such. It was further submitted that the fact that the Plaintiff assisted the Public Trustee in the process of obtaining a provisional certificate is neither proof of his relationship with Sheikh Pate alias Sheikh Bate nor does it justify drawing the conclusion that Sheikh Pate alias Sheikh Bate and Ahmed Sheikh Pate are one and the same person.
 54. On the third issue, counsel submitted that the Defendant had rendered full accounts of the estate of Sheikh Pate alias Sheikh Bate by way of documentary evidence.



55. On the fourth issue, counsel relied on Section 20 of the *Limitation of Actions Act* and submitted that no particulars of fraud were brought against the Public Trustee. That time runs against titles that were sold by the heirs and transferred to third parties by the Defendant's action, which terminated the element of trust and fiducial obligation and or duty. Thus, the *Limitation of Actions Act* comes into play, making the suit time barred and a preserve of the Environment and Land Court to determine the issue of ownership.
56. On the fifth issue, counsel submitted that this court has a duty to ensure all the precepts of natural justice are observed before a decision is made.
57. In conclusion, counsel submitted that the originating summons is unmerited, incurably defective, bad in law, and an afterthought and ought to be dismissed with costs.
58. I have considered the originating summons, the responses therein, the viva voce evidence of the plaintiff and his witnesses and the rival submissions of both counsel and the issues that emerge are;
- a. Whether Ahmed Sheikh Pate and Sheikh Bate Alias Sheikh Pate are one and the same;
 - b. Whether the plaintiff has locus standi;
 - c. Whether the plaintiff is guilty of laches;
 - d. Whether the defendant owes the plaintiff and other beneficiaries fiduciary duty; and
 - e. Whether the defendant should be ordered to render full accounts in respect of the estate of Ahmed Sheikh Pate.
59. On the first issue, I note that the dispute as to whether the said names refer to one person or not has been a dominant issue in this matter. Paragraph 32 of the Defendant's Replying Affidavit, sworn on 16th November 2020 and filed on 19th November 2020, introduces Annexure 16(b), which is an affidavit sworn on 20th April 1989 by the Defendant's representative M. K. Richo, the Assistant Public Trustee confirming that he was the administrator of the estate of the deceased Sheikh Bate alias Sheikh Pate. He confirmed that the deceased was also known by the names Sheikh Abatta alias Sheikh Patte and Sheikh Batte Bin Sayid Ahmed. He also stated that the deceased was registered as trustee of the Wakf of Sayid Ahmed of Lamu/Block /1/362.
60. Accordingly, it is my view from the above annexure that Sheikh Pate alias Sheikh Bate and Ahmed Sheikh Pate refer to one and the same person. Further, the Public Trustee has not produced evidence to prove otherwise. It is, therefore, my view, and I accordingly find and hold, that Sheikh Pate alias Sheikh Bate and Ahmed Sheikh Pate are one and the same person.
61. On the second issue, the court in the case of Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR stated:-
- “Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.
- The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration



in cases of intestate succession. In *Otieno v Ougo* [1986-1989] EALR 468, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

62. The plaintiff herein stated that he is a great-grandchild of the deceased herein. He has brought this matter on behalf of his father, who is a grandchild of the deceased, the late Ahmed Sheikh Pate, and also on behalf of the grandchildren of the deceased herein from the household of Abubakar Ahmed (deceased). He was issued with grant ad litem in respect of his father’s estate, Shariff Abdallah Sheikhan, who died on 7th July 1983, on 18th April 2016, which is marked as “ASAS-1” in his further affidavit sworn on 28th July 2022.
63. It is trite law that grandchildren cannot inherit from their grandfather directly, only through their parents, and in cases where the parent is deceased, they get the share of their parents from the said estate. In this case, the Plaintiff has brought this suit as a personal representative /administrator of the estate of the late Shariff Abdallah Sheikhan, who is a grandchild of the deceased herein. The late Shariff Abdallah Sheikhan ought to have inherited from his grandfather’s estate through his father who is also deceased. Thus, the only surviving heirs are the great-grandchildren, who include the plaintiff. They are the only ones who can claim the same. The argument that the Plaintiff has no locus standi cannot stand. Further, it is my finding that the Plaintiff cannot bring a suit on behalf of the estates of Asma Abubakar Ahmed, Fatuma Bint Abubakar, Khadija Bint Abubakar, Shariff Abdulla Sheikh Pate and the estate of Nafisa Binti Abubakar as he is not the personal representative of the said estates.
64. Regarding the locus standi of the Public Trustee to be sued, the Defendant submitted that the Public Trustee is the appointed administrator of the estate of Sheikh Bate alias Sheikh Pate and not Ahmed Sheikh Pate. The letters of administration were issued on 9th November 1976. I have already found that the said names refer to one and the same person, and thus, this argument fails.
65. On the third issue, the Defendant has argued that the plaintiff is guilty of laches due to the lapse of time since the grant was issued and the filing of this suit.
66. The court in the case of *re Estate of Josephine Magdalena Motion (deceased)* [2016] eKLR stated that:-

“The *Limitation of Actions Act* prescribes periods for limitations of actions and arbitrations. My reading of the actions to which that statute applies is that it does not include succession causes or, at any rate, causes or actions governed by the *Law of Succession Act*. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the *Civil Procedure Act* and Rules. It does not envisage the special proceedings governed by such statutes as the *Law of Succession Act*.”
67. Further, the court in the case of *re Estate of the Late Jackson M’Riungu Muindi (Deceased)* [2018] eKLR quoted the case of *Smith vs Clay* [1767] ER 55, (1767) 3 Bro CC 646, (1767) 29 ER 743, where Lord Camden LC splendidly espoused on the application by courts of the doctrine of laches as follows:

“A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting,



the Court is passive, and does nothing.’ Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: ”Expedit reipublicae ut sit finis litium’, is a maxim that has prevailed in this court at all times, without the help of parliament.”

68. I have noted that there were ongoing activities and or exchanges between the Plaintiff and Defendant in respect of the estate of the deceased, which the Defendant has not rebutted. Further, what the plaintiff is seeking is the full accounts and distribution of the estate of the deceased herein to the rightful heirs, which falls under the *Law of Succession Act*. Therefore, it’s my view that the issue of laches does not apply in this case.
69. I will deal with the 4th and 5th issues together. The Plaintiff urged the court to order the Public Trustee to render full account of the estate of the deceased herein in respect of the distribution done.
70. The court in the case of re Estate of Julius Mimano (Deceased) [2019] eKLR stated that:-

“The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the *Law of Succession Act*. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been under were they to be alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries...

The point being made here is that the law commands rendering of accounts by personal representatives whether the deceased died testate or not. I have not seen any exception extended to any person or in respect of any circumstances. Whether the will the subject of the proceedings named only one beneficiary that would not preclude the personal representative in that case from complying with section 83(e) and (g) of the Act. He must, even then, render accounts as required by that provision.”

71. From the foregoing, it is evident that my view is that Defendant has a fiduciary duty to Plaintiff and or beneficiaries of the estate of the deceased person to render full account of the estate.
72. The upshot of the foregoing is that I have found merit in the Summons. Given that the true extent of the estate has not been established I direct the Parties herein to go for court-annexed mediation together with the other beneficiaries and any interested parties with the aim of agreeing on the beneficiaries of



the estate herein and the assets forming part of the estate and their current status within the next 60 days.

73. As this is a family matter I make no orders as to costs.

74. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JANUARY 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Matini, for the Applicant;

Mr Maliro, for the Respondent; and

Arthur – Court Assistant.

