



**In re Estate of Harun Racho Kathetha alias Racho Kathetha Harun alias Racho Kathetha Haron Alias Racho Kathetha (Deceased) (Succession Cause 94 of 2018) [2023] KEHC 1118 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1118 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE 94 OF 2018  
MM KASANGO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**PIUS MUCHINA RACHO ..... 1<sup>ST</sup> OBJECTOR  
JOHN MWAURA RACHO ..... 2<sup>ND</sup> OBJECTOR  
CATHERINE WANJIRU RACHO ..... 3<sup>RD</sup> OBJECTOR  
RUTH NYAMBURA RACHO ..... 4<sup>TH</sup> OBJECTOR  
LYDIA NGINA THIONG'O ..... 5<sup>TH</sup> OBJECTOR  
MARY WANJIKU RACHO ..... 6<sup>TH</sup> OBJECTOR**

**AND**

**MOSES MUREITHI RACHO ..... PETITIONER**

***(IN THE MATTER OF THE ESTATE OF HARUN RACHO  
KATHETHA alias RACHO KATHETHA HARUN alias RACHO  
KATHETHA HARON alias RACHO KATHETHA (DECEASED))***

**JUDGMENT**

1. Harun Racho Kathetha (deceased) died on May 15, 2018. His first-born son, Moses Mureithi Racho (Moses) petitioned for grant of probate of written Will. That grant was issued to him on February 12, 2019. By summons dated September 11, 2019, Moses sought confirmation of that grant and for distribution of the deceased's estate be as per the written Will before Court, dated November 29, 2016.
2. A summons seeking revocation of the grant issued to Moses dated September 24, 2019 was filed by Pius Muchina Racho, John Mwaura Racho, Catherine Wanjiru Racho, Ruth Nyambura Racho, Lydia Ngina Thiongo and Mary Wanjiku Racho.



3. The court directed the summons for confirmation of grant of probate and the application for revocation of grant be heard together by viva voce evidence. In seeking revocation of the grant, the applicants brought forth the following grounds: -
  - i. That the proceedings to procure the grant of probate were defective in substance.
  - ii. That the grant was obtained fraudulently in that that petitioner deliberately made false statement and concealed matters of fact.
4. In the affidavit in support of the application for revocation of grant, the applicants alleged that the copy of Will given to them at the formal reading of the Will was different from the one filed together with the petition of grant in that the number of properties in both those Wills do not tally and accordingly, the applicants alleged the Will filed in this case as a forgery. That pleading led to this Court to order Moses to call his evidence first, that is to open the case to prove the validity of the Will.
5. The testator in this case left a written Will. The single issue for consideration by this court is:-

#### **Did the deceased die leaving a valid Will?**

6. Moses commenced his case by calling evidence of Stephen Warui Nguyai (Stephen). Stephen by his evidence in chief stated that he was a childhood friend of the deceased and their friendship continued to their adulthood. They were also in business with each other. He stated that in November, 2016, while he was in his home at Gatunguru village in Muranga county, he received a phone call from deceased whereby the deceased informed him that he had written a Will. Deceased told him that he had appointed Moses to be the executor of that Will. The deceased requested Stephen to be one of his witnesses to that Will. Stephen further stated on November 29, 2016 deceased called him and informed him the Will was ready for witnessing. Stephen said he went to deceased's shop in Thika town where he witnessed deceased sign the Will and he, Stephen signed as a witness. Stephen stated that deceased informed him he was also expecting the second witness Samuel Muriu Njoroge to witness his signature on the Will.
7. On being cross-examined contrary to what he stated in evidence in chief, Stephen stated that when he was required to witness the deceased's signature, he was having problems with his feet and he was unable to walk. He therefore conceded that the deceased signed the Will prior to him appending his signature as a witness. This is what Stephen further stated while under cross-examination:-

“Deceased called me on phone. The Will was brought to me by deceased's son called Moses Mureithi.

Moses Mureithi found me at my home. Deceased telephoned me. He said he did a Will. He requested I sign it because he wanted to take it to his advocate.

When Moses brought the Will the deceased had signed it.

But I did not see deceased sign the Will.

The first person who had signed is deceased, Muriu Njoroge – I signed last.

Deceased telephoned me and told me to sign the Will which was being brought.

The Will was handwritten.”

8. On re-examination, Stephen stated that he first saw the Will when it was typed and he signed it.



9. Only one witness testified out of the six respondents seeking revocation of the grant. That witness was Mary Wanjiku Racho. In her evidence in chief, she relied on the affidavit in support of the revocation application. She further stated that the Will filed in this succession was not the Will that was read to them by the advocate. She also stated she doubted that the signature on the Will was that of her deceased father.

### **Analysis and Determination**

10. As stated before, what this court will determine following the evidence adduced is:-

#### **Did the deceased leave a valid Will?**

11. The statutory provision which provides what constitutes a valid Will is section 11 of the [Law of Succession Act](#) (cap 160). That section provides as follows:-

“No written will shall be valid unless:-

- (a) The testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator;
  - (b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;
  - (c) The Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”
12. It needs to be restated that on the validity of the Will being put to question, the executor bore the burden to prove the Will was valid. The Will before court has the signature of the testator and has two signatures of the two witnesses. The various requirements of a valid Will under section 11 of cap 160 is that each witness to a Will “must sign the Will in the presence of the testator.” The requirement that witnesses sign the Will in the presence of testator is imperative. As it will be recalled, the one witness to the Will who testified, since the other one did not testify, stated that he signed the Will brought to his home by deceased’s son Moses. That was when he signed the Will as a witness. That act of signing the Will as a witness in the absence of the testator renders the Will invalid. That holding is settled by the Court of Appeal decision in the case of [Ngengi Muigai & another vs. Peter Nyoike Muigai & 4 others](#) (2018) eKLR as follows:-

“28. The trial court examined the evidence of the two witnesses on attestation and was satisfied that although the two may not have been present at the same time with the deceased as he signed the Will, the provisions of section 11 (c) allowed the witnessing of a Will by the two witnesses at different times provided each signed in the presence of the testator when the testator acknowledges his signature...



29. With respect, we think the trial court was right in making that finding. We have examined the impugned Will which was produced in evidence and it contains three signatures. We have also examined the evidence of the advocate who drew up the document, Mr. Parbary, who swore that he was present with the deceased when he signed the Will at the house of Ngengi and the advocate attested it. He testified that the second attesting witness, Prof. Gitau was called to the house by Ngengi and when he came he witnessed the signature of the deceased in the presence of the deceased. Mr. Parbary was also present at that time.’
13. Stephen by his evidence stated that he signed a handwritten Will brought to him by the testator’s son, Moses. Later, he said he signed a typed Will but did not allude to having signed it in the presence of the testators as required under section 11 of the Act.
14. I therefore find and hold the Will before court was not properly executed as it failed to comply with the requirements of section 11 of the act. The Will was not properly executed or attested as the testator did not witness the witnesses.
15. In my humble view, the testator’s advocate failed to safeguard the deceased’s estate in leaving the testator to source witnesses to his Will and yet it would seem he lacked the legal knowledge of the legal requirements of a valid Will.
16. Having invalidated the Will, I do declare the deceased died intestate. His estate shall be distributed under intestacy law.

## **DISPOSITION**

17. The judgment of this court is that:-
- a. The Will dated November 29, 2016 is declared invalid in law.
  - b. The deceased’s estate shall be distributed under intestacy law according to the [Law of Succession Act](#).
  - c. Moses Mureithi Racho shall within 21 days from today appoint two other persons, one of whom shall be the deceased’s wife Mary Njoki, to be appointed as co-administrators of this estate with him. Failure to agree on co-administrators the court may invoke section 66 of cap 160 and appoint such co-administrators.
  - d. At the reading of this judgment a date shall be given for direction to be issued by the court for appointment of co-administration if need be.
  - e. Each party shall bear their own costs of the applications dated 14<sup>th</sup> September and September 24, 2019.
  - f. Orders accordingly.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 23<sup>rd</sup> DAY OF FEBRUARY, 2023.**

**MARY KASANGO**

**JUDGE**

**Coram:**

Court Assistant : Julia



Instructed by Gitau Mwara for the Respondent :- Mr. Gitau Mwara

Instructed by Namisi & Co. Advocates for the Applicants:- no appearance

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**

