



REPUBLIC OF KENYA



KENYA LAW
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**Wamaitha v Kago & 3 others (Miscellaneous Application 324 of 2023)
[2023] KEHC 26031 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 324 OF 2023
HM NYAGA, J
NOVEMBER 29, 2023**

BETWEEN

JOSEPHINE WAMAITHA APPLICANT

AND

JOSEPH MWANGI KAGO 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

MEDICAL OFFICER OF HEALTH NAKURU 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The applicant filed a Notice of motion under Certificate of Urgency dated 25th September, 2023 seeking the following orders: -
 1. Spent
 2. That this Honourable Court be pleased to issue orders to exhume the remains of John Gitonga Kago who was interred at Nakuru South Cemetery for the purpose of performing a post-mortem to ascertain the cause of death.
 3. That this Honourable Court does issue an order that the Applicant be issued with the relevant permit to exhume and re-inter the body of John Gitonga Kago by the 2nd and 3rd Respondents respectively.
 4. That the OCS Rhino Police Station to provide security during the exhumation.
 5. That costs be provided for.



2. The Application is premised on grounds on its face and supported by an Affidavit of the Applicant, Josephine Wamaitha sworn on the even date.
3. In a nutshell, the main reason why the Applicant wants the body exhumed is that the cause of death is unknown as the OB recorded at Rhino Police post indicates the cause of death as suicide whereas the death certificate indicates the cause of death as an Accident.
4. The Application is unopposed, despite service.
5. The only issue for determination is whether or not the body of the deceased should be exhumed for purposes of performing a post-mortem examination.
6. This court has inherent powers to order for exhumation of the deceased body, however, that power is discretionary. In the book "*The discretion of the Judge*" Royal Bank of Scotland Lecture [1990] Denning Law Journal 27, judicial discretion was defined as follows:

“ An issue falls within the judge’s discretion if, being governed by no rule of law, its resolution depends on the individual judge’s assessment of what is fair and just to do in a particular case. He has no discretion in making findings of fact. He has no discretion in his ruling on law, he has to choose between different courses of action, orders, penalties or remedies, he then exercises discretion. It is only when he reaches stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of discretion.”
7. In the instant matter, the Applicant deponed that the deceased died at home. At that time, she was not at home. She stated that she was overwhelmed and disoriented by grief and the 1st respondent took over and spearheaded the burial arrangement of the deceased, and that he proceeded to swear an affidavit to facilitate the burial of her late husband without performing a post mortem.
8. I have perused the Affidavit sworn by the 1st Respondent on 29th March 2023, seeking to waive the requirement of a post mortem examination. He deponed that the Applicant herein called him saying that she found the deceased had hanged himself after coming from church. The Applicant has not rebutted this position.
9. Be that as it may. I also note that the death certificate indicates the cause of death as accident. The alleged facts point to suicide. In the circumstances, the cause of death is uncertain.
10. To avoid mental anguish as deponed by the applicant, I think that it is only fair that she be granted the orders. No prejudice will be caused to anyone if the proposed exhumation is to proceed.
11. Accordingly, I allow the application in the interest of justice in the following terms;
 1. An order be and is hereby issued that the remains of John Gitonga Kago who was interred at Nakuru South Cemetery be exhumed for purposes of performing a post-mortem to ascertain the cause of death.
 2. An order be and is hereby issued that the Applicant be issued with the relevant permit to exhume and re-inter the body of John Gitonga Kago by the 2nd and 3rd Respondent.
 3. The OCS Rhino Police station is hereby ordered to provide security during the exhumation.
 4. The Applicant will bear all the costs of the exhumation and incidental thereto. She should seek advice on the same from all the relevant authorities.
 5. There shall be no orders as to costs of this application.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF NOVEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

Mr. Bitok for applicants

N/A for repondents

