



**Kipkoisgei v Koech (Miscellaneous Case E022 of 2024)
[2025] KEHC 6580 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CASE E022 OF 2024
RN NYAKUNDI, J
MAY 20, 2025**

BETWEEN

ELVIS KIPKOISGEI PLAINTIFF

AND

DR SALLY KOECH DEFENDANT

RULING

1. Before this matter is a Notice of Motion dated 2nd October, 2024 seeking the following orders:
 - a. That pending the hearing and determination of this application inter-parties this Honourable court to order the body of the Later Francis Koech who passed on at Eldoret Hospital and the body being in the Eldoret Hospital Mortuary be preserved at the same mortuary where the body is lying.
 - b. Upon granting prayers 1 and 2 above this Honourable court be pleased to order the remains of the Later Francis Koech be interred in his home Nandi County, Kapiyet Ward Chepreoli Location where he has his home.
 - c. That the specimen for DNA be extracted for test for DNA
 - d. That any further costs to be incurred in cause of the litigation be met by the Respondent.
 - e. That the costs of this application be in the cause
2. It is supported by an affidavit sworn by Elvis Kipkosgei which states as follows:
 - a. That I am a male adult of sound mind and being the plaintiff applicant herein therefore competent to swear this affidavit and states as follows
 - b. That I am a legal son of the said lay canon Francis Koech Chapel who passed on the 24.9.2024 and his body is now preserved at Eldoret Hospital Mortuary.



- c. That there are plans to inter his remains on 3rd October, 2024 unless this court intervenes and issue stay orders
 - d. That the Respondent had prepared the program and omitted my name from my father Francis Koech
 - e. That I am ready and willing before the internment of the body of my late father we conduct DNA test to confirm the issue father and son and will let me rest my month confirms to me the late is my biological father therefore need to do DNA test to confirm
 - f. That the respondent is in hurry to burry my later father to disinherit me and have me without the father as the late used to pay for my up keep annexed hereto are the Mpesa statements confirming position of support
 - g. That the program already prepared by the Respondent does not constitute my name herewith annexed is the copy of the program.
 - h. That this being the only option remaining for me I request that the body by retained in the said Hospital until the sample for DNA are taken to facilitate the confirmation to enable me to rest from the subject which is bothered me for this period when he has died
 - i. That the prayers of the body being retained at the Eldoret Hospital mortuary be granted to facilitate the test for DNA which I am willing to pay for it
 - j. That it is for interest of justice and fairness that the orders herein sought be granted to avoid the humiliation for exhumation for the body after burial has taken place
3. The Application for withdrawal of suits is entrenched under Order 25 of the *Civil Procedure Act* and Rules. and the applicable principles are as stated in the following authorities: The Court of Appeal in Beijing Industrial Designing & Researching Institute V Legoon Development Limited (2015) eKLR stated as follows: “As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in Abayomi Babatunde v pan Atlantic Shipping & Transport Agencies Ltd & others, SC 1542002 identified those circumstances to include where:
- (i) a plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant,
 - (ii) a plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,
 - (iii) where by abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
 - (iv) a plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.
4. Likewise the Supreme Court in Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others SC APP NO 16 OF 2014 held that: “a party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.” It is useful to reproduce the provisions of Order 25 of the Civil Procedure rules, 2010 which provides for withdrawal, discontinuance and adjustment of suits. It reads: -



1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
 - (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
 - (2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
5. I have considered the application and the same meets the test set out in Order 25 of the Civil Procedure Rules for the orders to be granted by this court with no orders as to cost.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 20TH DAY OF MAY 2025

R. NYAKUNDI

JUDGE

