

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E138 OF 2025

**ST. JOSEPH MISSIONS OF MESSIAH IN AFRICA
CHURCH.....APPELLANT**

VERSUS

**ODPP.....
RESPONDENT**

RULING

Before this court is an application brought pursuant to Article 49, 50 and 165 (6) & (7) of the Constitution of Kenya and Section 362 of the Criminal Procedure Code, and rules on the enforcement of fundamental rights and freedoms seeking for orders;-

1. THAT pending the hearing and determination of this Application, this honorable court be pleased to stay and/or suspend the implementation and/or execution of the orders issued on the 10th day of November, 2025 at the Migori Chief Magistrate's Court in Migori Miscellaneous Criminal No. I C I 18 of 2025 formerly Rongo Miscellaneous Criminal Application E022 of 2025.
2. THAT pending the hearing and determination of this Appeal, this honorable court be pleased to stay and/or suspend the implementation and/or execution of the orders issued on the 10th day of November, 2025 at the Migori Chief Magistrate's Court in Migori Miscellaneous Criminal No. E1 18 of 2025 formerly Rongo Miscellaneous Criminal Application E022 of 2025.
3. THAT costs be provided for.

The application was premised on the grounds on its face and the affidavit sworn by MICHAEL ONYANGO KUS alleging that the trial magistrate determined a “strange” amended application instead of the one remitted for rehearing after a revision order; that the original application was materially amended without leave, contrary to directions; that unless a stay is granted, execution will render the intended appeal nugatory, given that once a body is exhumed, the substratum of the appeal is permanently affected. The Respondents did not file any response or submissions.

This application was served for directions on 27th January 2026 but the Respondents were not present and had not responded to the application. Directions were then taken for hearing of the application by way of written submissions and matter reserved for ruling on 19th February 2026.

A perusal of the CTS shows that the Respondents neither filed a response nor submissions.

This court is therefore left with no other option but to determine the application based on its grounds, the supporting affidavit, the Applicant’s submissions dated 2nd February 2026 and the ruling of the trial magistrate.

In the trial court Respondents sought for orders of exhumation of the body of Dan Ayoo Obura which was buried within the Applicant’s church compound for purposes of conducting post mortem to establish the cause of his death which was suspicious and mysterious.

The Trial Magistrate in the ruling delivered on 10th November granted the orders for exhumation in the following terms:

“In the instant case, it is apparent from the issues raised by the applicant that the aim of the application

is the allow the relevant government authorities carry out investigations on whether there was foul play in the death of Dan Ayoo Obura. In applying the rules as elaborated in the cases cited above, to the case at hand we must ask ourselves if the ^u exhumation of the body of the Deceased in the present case is imperatively demanded under the circumstances and is necessary for the due administration of justice"?

Is it necessary for the ends of justice to be served by eliminating all possible doubt? Are the issues raised by the applicant speculative and uncertain? Can the concerns raised be proved by other means?

In as much as I did not know the deceased and would therefore not know what his would wish done in the current situation, I must concur with counsel that the issue requires a delicate balance of the rights duties and responsibilities bestowed upon this court which cannot be taken lightly.

In the circumstances I would make a finding that questions raised by the applicant are not merely speculative and uncertain, and in order to meet the ends of Justice, I would accordingly find it necessary in the current case but would reveal evidence which will forestall any further speculation, suspicion or uncertainty that may exist and continue to haunt the parties if this is not done since the issues raised

cannot in my considered view be proved by any other means.

For the avoidance of doubt, the application for exhumation of the body of Dan Ayoo Obura herein is allowed with no order as to costs.”

Based on the above ruling, the grounds upon which the application is premised, the supporting affidavit and the submissions by the Applicant the issues for determination are:-

- **Whether the intended appeal is arguable and raises a prima facie case.**
- **Whether the appeal will be rendered Nugatory if the orders sought are not granted**
- **Whether the Applicant will suffer irreparable loss and prejudice if orders are not granted.**
- **Balance of public interest and administration of justice**

Although the Criminal Procedure Code PC does not expressly provide for “stay of execution” of exhumation orders, this court under Article 165(6) & (7) exercise supervisory jurisdiction over subordinate courts and combined with revisionary and inherent powers it has jurisdiction to prevent proceedings or orders that may render an appeal nugatory.

On whether the appeal raise a prima facie case the applicant must show that the appeal raises non-frivolous issues, not necessarily that it will succeed.

The applicant raises two central complaints that the trial court determined a **different/amended application** from the one remitted

for rehearing after the High Court revision order. That the amendment allegedly occurred without leave and contrary to the High Court's remittal directions. The Trial Magistrate indeed considered application dated 19th October 2025 and rendered the ruling which is the subject of the current appeal and application dated 10th November 2025.

From the record of the trial court in Migori CMC CR Misc No. E118 of 2025, the Applicants were served with the application dated 19th and they responded accordingly and also filed submissions before the court rendered the impugned ruling on 10th December 2025.

The application dated 19th October 2025 sought orders that:-

The court be pleased to issue orders authorizing the OCS Kamagambo Police Station and County Public Health Officer to exhume and supervise the exhumation of the body of the deceased Dan Ayoo Obura for purposes of conducting a post mortem examination to establish the cause of death;

The said application contends that the deceased body was buried without postmortem examination being conducted thereby causing doubt that the death may have been caused by un natural cause.

On the flip side the application that was initially filed in Rongo PMCCR Misc No E022 of 2025 dated 15th April 2025 sought for orders that:-

The court be pleased to issue orders to enable the Respondent allow the Applicant to exhume the body of the deceased buried within the church compound and conduct necessary investigations.

The said application was premised on the ground that the Applicants were investigating the mysterious death of P.C. Dan Ayoo Obura a police officer which occurred on 27th March 2025 and was buried on 28th March 2025 in the church compound against the wishes of his parents.

The Applicants sought that upon exhumation orders being issued the body should be taken to Migori County Teaching and Referral Hospital for post mortem to be conducted.

The application was also supported by the affidavit of Inspector Mboya Benjamin sworn on even dated reiterating the grounds above.

A consideration of the two applications reveal that the content and subject matter is materially the same save that the dates are different. In consideration that this court in Migori High Court Criminal Revision No E095 of 2025 ordered that the matter be remitted back to the subordinate court for fresh hearing, the matter started de novo and parties were at liberty to amend their pleadings and serve for hearing. In that regard the trial court on 10th November 2025 fixed the matter for hearing on 12th November 2025.

On 12th November 2025, it was confirmed that the Applicant had filed a response. The matter was then fixed for 17th November 2025 but parties had not filed submissions and a further date was fixed for 1st December 2025 to confirm submissions filed. On 1st December 2025 the matter was reserved for ruling on 10th December 2025.

The Applicants having participated in the proceedings in Migori CMC Misc. Cr. Application No E118 of 2025 and having raised no complaint

cannot rely on the said complain as a ground for staying the execution of the orders arising from the said proceedings. The applications are similar in substance and can not be said to be strange in the circumstances.

This court finds that the allegations by the Applicants are not true and as such do not constitute a properly arguable appeal.

Whether the appeal would be rendered nugatory without orders of stay, exhumation is an irreversible act. Once the body is exhumed, the substratum of the appeal disappears, restoration is impossible and even a successful appeal would be academic.

It has been held time and again that exhumation orders, once executed, cannot be undone, hence the appeal's subject matter would be destroyed. This satisfies the nugatory test. However, this court is also alive to the DCI's investigative role where crime is suspected to have been committed. The DCI is mandated to investigate any suspected offence, including suspicious or unnatural deaths; to collect evidence, preserve forensic material, and conduct investigations necessary for prosecutorial review; to act upon lawful court orders enabling investigative steps such as exhumation for postmortem.

Where the circumstances surrounding a death are suspicious, the State has a legitimate and compelling interest in establishing the cause of death, securing criminal justice and preventing concealment of crime.

The trial magistrate recognized this public interest in ordering exhumation. In Migori High Court Civil Appeal No. E102 of 2025, which was an appeal by the Applicants herein from the judgment in Rongo

PMCCC No. E011 of 2025 Justice Kiarie upheld the subordinate determination that the body of the subject deceased herein be exhumed as Applicants' evidence seemed doubtful and prompted questions about why a church organization would insist on burying one of its members. That decision being from a court of concurrent jurisdiction touching on the same subject matter can only be overturned on appeal. This court cannot sit on appeal over a coordinate court as the dispute has already been judicially settled for interim purposes.

Thus, even if the applicant's arguments were strong, the existence of a concurrent affirming judgment removes jurisdiction to grant contrary interim relief.

Further this court is under a duty to balance the competing interests being the dignity of the dead and proprietary interests of the Applicants, against the compelling public interest in unravelling potential foul play. The decision in Migori HCCA No. E102 of 2025 has affirmed the trial courts' decision to exhume the body and though it is in favour of different parties, the same decision is similar to the one sought by the Respondents and this court cannot make a contrary order granting the relief sought.

The application dated 10th November 2025 is therefore dismissed for failure to raise a prima facie case and for reasons that an order to exhume the body of the subject deceased is already made in a court of concurrent jurisdiction and this court cannot make a contrary interim order.

The DCI shall continue and complete its investigative processes in accordance with the law. The Applicants should be informed when the postmortem is being conducted so that they may participate by being allowed to provide their own independent pathologists.

Upon completion of forensic examinations, the remains of the deceased shall be handled with dignity in accordance with the orders made in Migori HCCA No. E102 of 2025.

The Applicants' appeal shall be listed for expedited directions within 60 days for directions on disposal. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 5TH DAY OF MARCH, 2026.

ONG'INJO

**HON. ANNE ADWERA-
JUDGE**

In the Presence of:

Victor - Court Assistant