



**Mwambingu (Suing as a Legal Representative of the Estate of Jaffason Odhiambo  
Owanga - Deceased) v Ali & 2 others (Miscellaneous Civil Application  
E024 of 2024) [2025] KEHC 12829 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
MISCELLANEOUS CIVIL APPLICATION E024 OF 2024  
AN ONGERI, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**MERCYLINA MRUNDE MWAMBINGU ..... APPLICANT  
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JAFFASON  
ODHIAMBO OWANGA - DECEASED**

**AND**

**SAID ONDIMU ALI ..... 1<sup>ST</sup> RESPONDENT  
STARWAYS INTERNATIONAL FREIGHT AND FORWARDING .... 2<sup>ND</sup>  
RESPONDENT  
SHREEJI ENTERPRISES (K) LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Emanating from Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu  
Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited)*

**RULING**

1. The application coming for consideration in this Ruling is the one dated 19<sup>th</sup> June 2024 brought under Order 24, Rule 3, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1, 1A, 1B, 3, 3A, 79(g) and 95 of the *Civil Procedure Act* Cap 21 Laws of Kenya and all other enabling provisions of the law seeking the following orders:-
  - i. That this application be certified urgent and be heard exparte in the first instance and service thereof be dispensed with.
  - ii. That the applicant herein Mercylyna Mrunde Mwambingu be allowed to proceed with an intended appeal emanating from Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises



(K) Limited as the legal representative of the estate of the late Jaffason Odhiambo Owaga, the Plaintiff in the said suit.

- iii. That the Plaintiff in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited be substituted with the Applicant herein who is the legal representative of the estate of the late Jaffason Odhiambo Owaga, the Plaintiff in the said suit.
  - iv. That the Applicant be granted leave to amend the pleadings in consonance with the aforesaid substitution.
  - v. That the court be pleased to enlarge time and grant leave to the Applicant to file and serve Memorandum of Appeal out of time in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited in terms of the draft Memorandum of Appeal annexed hereto.
  - vi. That this Honourable Court do grant any other or further orders as it deems necessary in the circumstances in the interest of justice.
  - vii. That cost of this application be provided for.
2. The application is based on the following grounds:-
- i. That the Plaintiff in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited died on 10.9.2023 before this suit could be fully concluded.
  - ii. That judgment in Voi MCCC No. E080 of 2022 was later delivered on 29.1.2024 and the Applicant being aggrieved by the said judgment intends to appeal against the whole of the said judgment and cannot do so unless the Applicant is granted leave to be a party to the suit.
  - iii. That the cause of action has survived the death of the Plaintiff in Voi MCCC No. E080 of 2022.
  - iv. That the Applicant intends to continue with the Intended Appeal as personal representative of the Plaintiff in Voi MCCC No. E080 of 2022.
  - v. That the Applicant has applied and has been issued with letters of administration ad litem on 14.5.2024 to enable her to continue with the intended appeal as personal representative of the estate of the Plaintiff in Voi MCCC No. E080 of 2022 now deceased.
  - vi. That the intended appeal raises pertinent issues of fact and law.
  - vii. That failure by the Applicant to file an appeal within time was not deliberate.
  - viii. That the Respondents will not suffer any prejudice if the orders sought herein are granted.
3. The application is supported by the affidavit of Mercylina Mrunde Mwambingu the Applicant herein sworn on 19<sup>th</sup> June 2024 in which she deposed as follows:-
- i. That I am the Applicant herein hence competent to swear this affidavit.
  - ii. That I am conversant with the circumstances herein hence competent to depone hereto.
  - iii. That my husband, the Plaintiff in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises



(K) Limited died on the 10.9.2023 before the suit could be concluded and the cause of action has thus survived the death of my husband.

- iv. That after my husband's death on 10.9.2023 the trial court thereafter delivered judgment in the said suit on 29.1.2024.
  - v. That being aggrieved by the said judgment, I instructed the firm of Mwakio Kirwa & Company Advocates who had been on record for us in the suit to appeal against the said decision but they delayed in appealing forcing me to approach the firm of Samuel, Mburia & Company Advocates to act for us.
  - vi. That my advocates on record has informed me which information I verily belief to be true that I can only continue with the appeal if the court grants me to be a party to the suit and in order to become a party to continue with the appeal as personal representatives of the deceased, leave for substitution of the Plaintiff in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited has to be granted by this Honorable Court.
  - vii. That I applied to court and was issued with letters of administration ad litem on 12.6.2024 to enable me continue with the appeal as personal representative of the deceased, the Plaintiff in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited.
  - viii. That it is for this reason that leave is sought to substitute the Plaintiff in Voi MCCC No. E080 of 2022 Jaffason Odhiambo Owaga versus Said Chidimu Ali, Starways International Freight & Forwarding and Shreeji Enterprises (K) Limited and to be allowed to continue with the appeal as personal representative of the Plaintiff (now deceased).
  - ix. That I am further informed by the said advocates, which information I verily believe to be true, that the time within which to file an appeal had lapsed and therefore the need for the court to extend the time within which to appeal and it is for this reason that leave is sought to file an appeal out of time in terms of the draft Memorandum of Appeal.
  - x. That therefore, failure to file an appeal within time was not deliberate but was caused by the delay of my said former advocates and their mistake should not be vested on me.
  - xi. That I believe there has not been inordinate delay in bringing this application.
  - xii. That I believe the intended appeal raises pertinent issues of law and fact.
  - xiii. That the Respondents will not suffer any prejudice if this application is granted.
  - xiv. That it is only fair and just and in the interest of justice that the prayers sought are granted and I be allowed to lodge and continue with the intended appeal.
  - xv. That I swear this affidavit in support of the application filed herewith.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by Thomas Kunga opposing the application in which he deposed as follows:-
- i. That I am the Branch Manager of First Assurance Company Limited, Mombasa Branch, the Insurance Company of the 2<sup>nd</sup> Defendant herein. I have the authority to swear this affidavit hence duly authorized and competent to swear it.



- ii. That I have read and understood the Plaintiff/Applicant application dated 19.6.2024, supporting affidavit and now make this replying affidavit in opposition to the prayers sought.
  - iii. That the Applicant's current advocate is improperly on record for not seeking leave to come on record after the judgment has been delivered in the lower court matter.
  - iv. That the Applicant's Counsel is yet to comply with this requirement of the law and therefore the application herein is an abuse of the process of court for reason it has been brought by a firm which is not properly before the court as they did not seek leave to enter appearance and file a notice of appointment and are thus busy bodies.
  - v. That the application is brought with inordinate delay and for this reason and above we pray the application to be struck out for being incompetent and abuse of court.
5. The respondent did not file any submissions. The applicant submitted as follows:
  6. That the applicant, MercyLina Mrunde Mwambingu, is the widow and legal representative of a deceased man who was the original plaintiff in a lower court case. She has filed an application seeking several orders from the High Court.
  7. That those orders include permission to proceed with an intended appeal from the lower court case, to be substituted as the plaintiff in that case in her capacity as legal representative, to amend the pleadings to reflect this substitution, and, crucially, to be granted an extension of time to file and serve her Memorandum of Appeal out of time.
  8. That the core argument is that this application should be allowed in the interest of justice.
  9. The applicant points out that the judgment in the lower court was delivered after the original plaintiff had already passed away.
  10. In response to the respondents' opposition, the applicant invokes the court's inherent powers under Section 3A of the *Civil Procedure Act* to make orders necessary for the ends of justice.
  11. The submissions heavily rely on the constitutional principle under Article 159(2)(d) that justice should be administered without undue regard to procedural technicalities. It is argued that a failure in procedure, such as a new firm of advocates not properly seeking leave to come on record, should not be a fatal blow to a legitimate claim.
  12. The applicant cited precedent case law which establishes that a party should not be punished for the mistakes or omissions of their advocate, and that blunders can be rectified so that a case can be determined on its merits, typically through the remedy of costs.
  13. The applicant further submitted that the application be allowed so that her appeal which has a high likelihood of success can be heard on its merits rather than dismissed on a procedural technicality.
  14. The issues for determination in this application are as follows:-
    - i. Whether the firm of Samuel, Mburia & Company Advocates is properly on record for the Applicant.
    - ii. Whether the Applicant should be substituted as the legal representative of the deceased Plaintiff in the lower court suit.
    - iii. Whether the Applicant should be granted an extension of time to file the intended Appeal out of time.



15. On the first issue regarding the propriety of the current advocates on record, the court finds the objection by the 1st and 2nd Respondents to be overly technical and without merit.
16. The record shows that the judgment in the subordinate court was delivered on 29<sup>th</sup> January 2024. The firm of Mwakio Kirwa & Company Advocates was on record for the Plaintiff at that time.
17. The present application was filed by a new firm, Samuel, Mburia & Company Advocates, on 19<sup>th</sup> June 2024. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides that upon judgment, an advocate shall not act for a party unless they have filed a consent from the previous advocate or have obtained the court's leave. While it is true that the new firm did not explicitly seek leave under Order 9 Rule 9 before filing this application, the applicant is seeking to pursue the appeal and it is not necessary to seek leave under Order 9 Rule 9 of the [Civil Procedure Rules](#).
18. This court is guided by Article 159(2)(d) of [the Constitution](#), which provides that justice shall be administered without undue regard to procedural technicalities.
19. The court's inherent power under Section 3A of the [Civil Procedure Act](#) is invoked to cure such an irregularity in the interest of justice.
20. The Applicant, a widow seeking to pursue a claim on behalf of her deceased husband's estate, should not be penalized for an oversight of her new counsel, which can be regularized.
21. The requirement of Order 9 Rule 9 is for the protection of the client and the previous advocate and is not intended to be a weapon to defeat justice.
22. Regarding the second issue, the application for substitution is merited. Order 24 Rule 3(1) of the [Civil Procedure Rules](#) is clear that where a plaintiff dies and the cause of action survives, the court shall cause the legal representative of the deceased plaintiff to be made a party to the suit.
23. The Applicant has demonstrated that she is the widow of the deceased and has obtained a grant of letters of administration ad litem for the specific purpose of pursuing this matter, which is a cause of action that survives death.
24. The Respondents do not contest the survival of the cause of action or her capacity as a legal representative. Therefore, the orders for substitution and to amend the pleadings to reflect the same are granted as prayed.
25. The third and most substantive issue is the prayer for extension of time to file an appeal out of time.
26. The power of this court to extend time is discretionary and is donated by Section 79G of the [Civil Procedure Act](#) and Section 95 of the same [Act](#).
27. The period for filing an appeal from a subordinate court is 30 days. Judgment was delivered on 29<sup>th</sup> January 2024, meaning the appeal should have been filed by 28<sup>th</sup> February 2024.
28. This application was filed on 19<sup>th</sup> June 2024, a delay of approximately three and a half months.
29. The principles upon which a court exercises this discretion are well settled, as outlined in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR, which includes the length of the delay, the reason for the delay, whether the appeal is arguable, and the prejudice to be suffered by the respondent.
30. The reason for the delay proffered by the Applicant is that her initial advocates, Mwakio Kirwa & Company, delayed in filing the appeal, forcing her to seek new representation.



31. While this explanation is not exceedingly detailed, it is plausible. Litigants should not be held entirely culpable for the failings of their advocates.
32. The delay, though not insignificant, is not so inordinate as to be inexcusable.
33. More importantly, the Applicant has exhibited a draft Memorandum of Appeal which raises several grounds challenging the trial magistrate's evaluation of evidence and application of the law.
34. Without making a definitive finding on the merits, the court is satisfied that the intended appeal is arguable and not frivolous.
35. Finally, the Respondents have not demonstrated any specific prejudice they would suffer beyond the usual prospect of having to litigate the appeal.
36. The prejudice to the Applicant, who would be permanently locked out from challenging a judgment she deems unsatisfactory, would be far greater.
37. The ends of justice demand that a party be given a hearing on the merits where possible.
38. Consequently, the application dated 19<sup>th</sup> June 2024 is allowed in the following terms:
  - (i) That the firm of Samuel, Mburia & Company Advocates is hereby granted leave to come on record for the Applicant in place of Mwakio Kirwa & Company Advocates.
  - (ii) That the Applicant, Mercylina Mrunde Mwambingu, is hereby substituted as the Plaintiff in Voi MCCC No. E080 of 2022 in place of the deceased, Jaffason Odhiambo Owanga.
  - (iii) That the Applicant is granted leave to amend the pleadings in the lower court suit to reflect the aforesaid substitution.
  - (iv) That the Applicant is granted an extension of time of 14 days from the date of this Ruling to file and serve her Memorandum of Appeal out of time in the terms of the draft annexed to the application.
  - (v) Costs of this application shall be in the cause.
39. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025 IN OPEN COURT  
AT VOI HIGH COURT.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistant: Millicent

