



REPUBLIC OF KENYA



**Mwobe v Elasto (Civil Appeal 6 of 2016)  
[2025] KECA 1513 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1513 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 6 OF 2016  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
SEPTEMBER 19, 2025**

**BETWEEN**

**CHARLES KATHUTI MWUBE ..... APPELLANT**

**AND**

**TERESIA KAGONDU ELASTO ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Nyeri  
(J.V.O Juma, J.) dated 17<sup>th</sup> March 1999 in HCCC No. 122 of 1995)*

**JUDGMENT**

**Background**

1. This is an appeal from the judgment of the High Court delivered on 17th March 1999, in which the High Court ordered the closure and consolidation of Title Numbers Ngariama/Ngiriambu/852 and 853 into the original Title Number Ngariama/Ngiriambu/719 allegedly owned by Mwobe Gathute. Teresia Kagondu Elasto is the respondent herein. Charles Kathuti Mwobe (the appellant), challenges that judgment and seeks remittal of the matter to the High Court for proper hearing and determination.
2. The respondent instituted proceedings against the deceased appellant and the Land Registrar, Kirinyaga, alleging fraudulent subdivision and transfer of her deceased husband's land.
3. The deceased appellant denied the claim, asserting that he lawfully purchased the land from the respondent's husband in 1965 for Kshs. 8,000. He maintained that a valid transfer was executed and a title deed issued in 1968.
4. Despite service, the appellant did not attend the hearing. The High Court, relying solely on the respondent's evidence, found that no land control board consent had been obtained, nor had the



deceased signed the mutation forms. It held that the respondent had proved her case and entered judgment accordingly.

5. Leave to file this appeal out of time was granted on 18<sup>th</sup> January 2016.

The memorandum of appeal dated 25<sup>th</sup> January 2016 seeks, inter alia, that the matter be remitted to the High Court for hearing on the merits.

6. The appellant faults the High Court for: proceeding without proof of proper service upon him or his counsel; ignoring counsel's statement of 17<sup>th</sup> September 1998 that he had lost contact with the appellant since 1996; fixing hearing dates without notifying the appellant or his counsel; receiving evidence without documentary support; proceeding without confirming service upon the Land Registrar or entry of default judgment against him; finding lack of land control board consent without supporting evidence; according undue weight to the respondent's evidence and shifting the burden of proof; recognizing the respondent as administrator of her husband's estate without grant of letters of administration; relying on an affidavit without considering its legal import; and determining proprietary rights without adequate proof.

### **Submissions**

7. At the hearing of the appeal, the appellant, acting in person, submitted that his late father had purchased the suit property in 1965, paid Kshs.8,000, and that the respondent's family thereafter vacated the suit property. He contended that the transfer was duly signed, title issued in 1968, and service of the hearing notice was concealed.
8. Mr. D. Githinji, learned counsel for the respondent raised a preliminary objection, submitting that the appeal was incompetent as no substitution had been effected following the death of the appellant in 2014. Citing authority, counsel submitted that only a duly appointed administrator may prosecute or defend proceedings on behalf of a deceased person's estate. Counsel further observed that the respondent herself had also died without substitution.
9. On the merits, counsel contended that the appellant failed to attend hearings, had no valid land control board consent, and had procured subdivision and transfer fraudulently. Counsel urged that the instant appeal be dismissed with costs to the respondent.

### **Determination**

10. We have considered the record, submissions by both parties, the authorities cited and the law. We discern the issues for determination in the instant appeal to be: whether the appeal was properly before this Court in view of the fact that the appellant and the respondent had both passed on without substitution; and if so, whether the High Court erred in its judgment in finding as it did.
11. As a first appellate court, we are enjoined to reconsider and re-evaluate the evidence afresh, mindful that we neither saw nor heard the witnesses: *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123; *Gitobu Imanyara & Others v Attorney General* [2016] eKLR.
12. It is common ground that the respondent died before the institution of the appeal but after the judgment of the High Court. From the record, the deceased respondent died in 2011. This Court (Waki, JA. – as he then was) on 19<sup>th</sup> July 2016, inter alia directed the appellant to apply for substitution of the deceased respondent pursuant to Rule 85(2) of the 2010 Rules (now Rule 87(2) of the 2022 Rules. On 25<sup>th</sup> July 2014, letters of administration intestate in respect of the estate of the deceased respondent were granted to Bernard Mwai Erasto.



13. The record also reveals that the deceased appellant, Mwobe Kathuti filed a notice of appeal on 3<sup>rd</sup> November 2011 and died on 20<sup>th</sup> January 2014 before the institution of the instant appeal. The record of appeal is dated 25<sup>th</sup> January 2016. From the record, subsequent filings were by his son, Charles Kathuti Mwobe (the appellant herein). From the record, the appellant herein filed an application for substitution before this Court dated 14<sup>th</sup> December 2017 which was allowed on 28<sup>th</sup> November 2023. It is notable that counsel for the respondent irregularly filed submissions despite the respondent's death and without substitution.
14. Rule 102 of the Court of Appeal Rules, 2022 provides that an appeal abates if no application for substitution is made within twelve months of a party's death. The respondent died in 2011. From the record, by the hearing date of the instant appeal, the substitution of the respondent had not been sought or granted. In the circumstances, Civil Appeal No. 6 of 2016 is hereby marked as abated as against the respondent under Rule 102 of this Court's Rules.
15. The order that commends itself to us is that each party shall bear its own costs of the appeal.
16. Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**JAMILA MOHAMMED**

**JUDGE OF APPEAL**

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**L. KIMARU**

**JUDGE OF APPEAL**

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**A. O. MUCHELULE**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

