



**Kibicho (Suing Through Next Friend and Guardian Ad Litem Jemimah  
Wanjiru Kibicho) v Kibicho & another (Environment & Land Case  
182 of 2014) [2024] KEELC 833 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 833 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 182 OF 2014**

**JM MUTUNGI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**KIBICHO MIGWI KIBICHO (SUING THROUGH NEXT FRIEND AND  
GUARDIAN AD LITEM JEMIMAH WANJIRU KIBICHO) ..... PLAINTIFF**

**AND**

**EDWARD MUTHII KIBICHO ..... 1<sup>ST</sup> DEFENDANT**

**JAMES MURIMI KIBICHO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit through his next friend and guardian ad litem, Jemimah Wanjiru Kibicho and against his two sons, Edward Muthii Kibicho and James Murimi Kibicho for the reason that they fraudulently transferred his parcels of land LR Mwea/Tebere/B/ 2358 and 2359 (suit land) to themselves.
2. The Plaintiff's position is that he had six children and he had gifted his sons three acres of land each and one acre of land to his three daughters. He averred that the reason he gifted his children the said parcels of land was so they could cultivate and develop their portion, it was also his portion that he had not perfected any of those gifts and that in the year 2014, his two sons encroached into his position together with that of his wife without his consent. He further stated that it is at this point that they realized that his two sons, the Defendants had caused the transfer of LR/Mwea/Tebere/B/2358 and 2359 each measuring 2.02 hectares, to their names.
3. The Plaintiff further averred that there had been a dispute relating to the suit land which culminated to him together with his wife being charged in the Senior Resident Magistrate Criminal Court at Wang'uru, Criminal Case No. 1000 of 2008 for obtaining a sum of 650,000/- from Mary Wainoi Gichobi pretending that they would sell to her 3 acres of LR Mwea/Tebere/B/2358. The outcome of



the criminal case was that the Plaintiff was found guilty and sentenced to serve two years' Community Service Order at Red Soil Forestry Station to tend to seedlings. His wife on the other hand was found not guilty and acquitted.

4. The Criminal case against the Plaintiff and his wife was concluded on 27.11.2009. According to the Plaintiff, they became aware of the fraudulent act of the Defendants in the year 2014. He commenced the present suit by way of a Plaint dated 5<sup>th</sup> June 2014 seeking for orders that:

1. That alleged gift of land parcel Mwea/Tebere B/2359 and Mwea/Tebere B/2358 in the names of the defendants be and are hereby withdrawn.
2. That the name of the first defendant in the land parcel Mwea/Tebere B/2359 be removed and be replaced with that of the Plaintiff, while that of 2<sup>nd</sup> Defendant in Mwea/Tebere B/2358 be removed and be replaced with that of the Plaintiff.
3. That the defendants be removed from all portions of former L.R Mwea/Tebere B/32.
4. Cost of the suit.

5. The defendants filed their joint statement of defence on 30<sup>th</sup> July 2014 and denied the contents of the plaint. They claimed that they were both gifted the suit land by their father lawfully and through the legal process. They also claimed that after they had been given the suit land, they each sold 1 acre of their beneficial interest to Mary Wainoi Gichobi and also disputed the assertion that their father, Kibicho Migwi Kibicho had a mental illness. They prayed that the Plaintiff's suit be dismissed with cost.

6. The Plaintiff's Case

Jemima Wanjiru Kibicho testified on 20.03.2019 in support of the Plaintiff's Case as PW1. She adopted her witness statement dated 6.06.2014 and her further witness statement dated 7.04.2016 as her evidence. She testified that she had filed the case as the next friend and guardian ad litem of her husband due to the fact that he had a mental illness and was on drugs. She stated that she had filed the present case against her two sons who had fraudulently sub divided and transferred her husband's parcel of land LR Mwea/Tebere/B/32 into LR Mwea/Tebere/B/2358 and 2359. She testified that together with her husband, they had gifted their children portions of their land in which they gave their three sons three acres of land each and their three daughters were given one acre of land each. She stated that all their children took possession of their portions of land immediately and started developing them.

She gave evidence that sometime in the year 2014, the Defendant encroached on her portion of land and that was when she realized that the suit land had been transferred in her sons' names without her consent and that of her husband. She further averred that this was done fraudulently due to the fact that the suit land was agricultural land and they had transferred it without the Land Control Board Consent. She claimed that her husband did not execute the Land Control Board Consent Form as he did not attend the Land Control Board meeting and she also claimed that her husband could not have executed the forms or obtained the consent as he was of unsound mind. She averred that she and her husband had been arrested in the year 2008 in connection with the suit land due to the reason that Mary Wainoi Gichobi wanted her to remove the caution that she had placed on the suit land. PW1 further stated that the defendants left the portions that they had been given and took possession of the suit land which comprised of 5 acres each. She prayed that the certificates of title in the name of the Defendant be cancelled and that she be granted the orders prayed for in the plaint.

7. On Cross Examination, PW1 stated that her husband had been the registered owner of the suit land. She further stated that she could not tell whether her husband was the one who subdivided the land into four portions but stated that he was mentally ill. She confirmed that her husband had sold portions



of the suit land to some third parties and that she had been a witness to some of the third parties agreements and that when her husband was convicted, he had been ordered to repay the money he had obtained from the intended purchasers and as such, they had to sell part of the land to raise the money. She reiterated that her husband had been unwell and he had been on medication since the year 2000.

Esther Njeri Kibicho, the daughter of the Plaintiff and the Defendant's sister testified as PW2. She adopted as evidence the joint statement she had filed together with her siblings. She stated that in 2009, their parents gave them portions of land and her brothers were each given 3 acres while they were given 1 acre each. PW2 stated that in 2014, the two Defendants left their portions and entered into their mother's piece of land. She further stated that their father was diagnosed with a mental illness and their mother had been caring for him. She testified that she and her three siblings were still cultivating the portion of land where they had been shown and that none had certificates of title to those portions. She stated that the land that they were given was Mwea/Tebere/B/32 and she was not aware that the same had been sub divided. On cross examination, she confirmed that her parents had been charged for obtaining money through false pretence. She reiterated that her father had a mental illness and as such he could not execute an agreement because he did not have capacity. She also confirmed that she was not aware that the suit land had been sub divided into four portions.

### **The Defendant's Case.**

8. Edward Muthi Kibicho the 1<sup>st</sup> Defendant testified as DW1. He adopted his witness statement dated 30.07.2014 and his bundle of documents as his evidence. He testified that he resides in the parcel of land which his father transferred to him. According to DW1, their father transferred 5 acres of land to each of his three sons. On Cross Examination he stated that his portion of land is Mwea/Tebere B/2359. He also testified that the Plaintiff was the mother and that the land that he owned was his father's. He stated that they attended the Land Control Board in the company of his mother, before the land was transferred in their names. He further stated that he had not exhibited any Land Board application form and or Land Board Consent. He stated that although he had not exhibited a medical report, his father was not mentally incapacitated.

DW2, James Murimi Kibicho adopted as evidence and relied on his witness statement sworn on 30.07.2014. On Cross Examination, he stated that his land was Mwea/Tebere B/2358 and that he had not sold it. He claimed that he was given the said land by his father during his lifetime. He testified that he accompanied his father to the Land Board for the consent before the transfer was effected. He stated that his mother was privy to the transaction at the Land Control Board. He also stated that his father did not have any mental illness that could impair his actions.

9. On 5.10.2022 and before the defence hearing, the matter came up for the hearing of an application for substitution of the Plaintiff who died on 12.04.2020. The Court allowed the application by granting the Plaintiff leave to amend the plaint to reflect the substitution. The Plaintiff filed her amended plaint on 4<sup>th</sup> November 2022.

### 10. Parties Submissions

Following the close of the trial, the parties were directed to file written submissions. The Plaintiff filed their written submission on 2.06.2023, while the Defendants filed theirs on 19.09.2023.

The Plaintiff in her submissions raised three grounds for consideration.

1. Whether or not the Plaintiff had sufficiently corroborated her testimony.
2. Whether Kibicho Migwi Kibicho was mentally ill and if so, whether he had capacity to execute any valid land transaction



3. Whether the sub division of Mwea/Tebera B/ 32 into Mwea/Tebera/2358 and 2359 was unlawful.
11. Concerning the first ground, the Plaintiff submitted that whereas her testimony regarding her late husband's mental illness had been corroborated by her daughter's testimony and the list of documents from government hospital, the Defendants had failed to produce any evidence to the contrary. She relied on the Case of Khalif Haret Versus the Republic (1979) KLR 308 and Muchanga Investments Limited Versus Safaris Unlimited (Africa) Limited & 2 Others (2009) eKLR, to support her position.
12. In regard to ground number two, the Plaintiff submitted that the late Kibicho Migwi Kibicho, the registered owner of the suit land did not have capacity to execute any valid land transaction due to his mental condition. The Plaintiff relied on the doctrine of Res Ipsa Loquitur due to the fact that they had produced medical reports to that effect. She relied on Section 2 of the [Mental Health Act](#), Chapter 248 of the Laws of Kenya, which defines:

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse”.
13. In regard to whether the defendants illegally sub divided L.R Mwea/Tebera/B/32 into L.R Mwea/Tebera/B/2358 and 2359, the Plaintiff submitted that the subdivision was unlawful because the defendant did not comply with the statutory law governing transfer of land and that the person who allegedly transferred the land to them did not have a mental capacity to do so. She relied on the case of Kenya Women Finance Trust V Isca Adhiambo Okay (2014) eKLR and the case of Kariuki Versus Kariuki (1982) eKLR to buttress her position.
14. In their submissions, the defendants raised three issues for considerations:
  1. Whether the Plaintiff had capacity to institute this suit on behalf of Kibicho Migwi Kibicho who is said to be of unsound mind.
  2. Whether title numbers Mwea/Tebera/B 2359 and 2358 were lawfully transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  3. Who should pay the costs of this suit
15. In regards to the first issue, the Defendants submitted that there is no order emanating from the High Court to show that the Plaintiff had been appointed as the guardian Ad litem and Next Friend to Kibicho Migwi Kibicho. They relied on the case on RNO (suing as guardian ad litem and next friend to DOM Vs Moses Choge Chesire (2015) eKLR where the Court struck out the suit for having been instituted purportedly by a guardian Ad litem and Next of Friend who had not been properly appointed under Section 26 of the [Mental Health Act](#).
16. On whether L.R Mwea/Tebera/B/2358 and 2359 were lawfully transferred, the Defendants submitted that Kibicho Migwi Kibicho executed the transfer forms and transferred the suit land to the defendants. They placed their reliance on the Case of Registered Trustees Anglican Church of Kenya Mbeere Diocese Versus David Waweru Njoroge (2007) where the Court stated:

“Where a gift rest merely in promise (written or verbal) or unfulfilled intention it is competent and imperfect and the Court will not compel the intending donor or those claiming under him, to complete and perfect it..



An incomplete gift can be revoked at any time. No question of conscience enters into the matter for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete.”

17. The defendants also submitted that they acquired the suit land lawfully and that the Plaintiff had failed to prove any illegality and as such, their title should not be cancelled but rather, the same ought to be protected under Section 26 of the [Land Registration Act](#).

### **Analysis and Determination**

18. I have carefully considered the pleadings and the evidence proffered by the parties to buttress their diametrically opposed assertions and have considered their rival submissions, and the issues that arise are whether the Plaintiff had procedurally been appointed guardian Ad litem and Next Friend for Kibicho Migwi Kibicho in order to institute the suit as such; whether the suit properties Mwea/Tebere/B/2358 and 2358 were lawfully gifted and transferred to the Defendants by their father; and/or whether the land parcels Mwea/Tebere/1B/2358 and 2359 were fraudulently transferred and they registered in the Defendants names, and if so, whether they ought to be cancelled and the register rectified.
19. In the Plaint filed on 6<sup>th</sup> June 2014, the Plaintiff Kibicho Migwi Kibicho was said to be instituting the suit through Jemimah Wanjiru Kibicho as guardian Ad litem and Next Friend. The assertion was that the Plaintiff was of unsound mind and had mental condition and therefore had to act through a guardian Ad litem as Next Friend. A guardian Ad litem in regard to a person who is said to be of unsound mind has to be appointed through a legal process under the provisions of the [Mental Health Act](#), Cap 248 of the Laws of Kenya.

Section 2 of the [Mental Health Act](#) defines “persons suffering from mental disorder” as follows: -

“person suffering from mental disorder” means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”

20. The issue whether the said Jemimah Wanjiru Kibicho who purported to act as guardian Ad Litem to Kibicho Migwi Kibicho was legally appointed and therefore legally empowered to institute the present suit goes to the jurisdiction of the Court to entertain the suit. The Court will thus deal with the issue of capacity of the Plaintiff to institute the suit as a Preliminary issue as a decision on the issue one way or the other will have a bearing on the other issues.

Section 26 of the Act provides for custody, management and guardianship and it provides as follows:-

- (1) The court may make orders— (a) for the management of the estate of any person suffering from mental disorder; and (b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person. (2) Where there is no known relative or other suitable person, the Court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.
- (3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the Court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance



and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

It is therefore clear having regard to the above provision that it is the Court that is given power to make an order regarding management of the estate of any person suffering from mental disorder. The Court under Section 2 of the Act is described as the “High Court”. In my view it is the appointment of a guardian Ad Litem of a person by the Court that gives such a person the capacity and/or locus standi to represent a person who has mental disorder. A person cannot on their own appoint themselves a guardian Ad Litem for a person who has mental disorder or is of unsound mind.

21. In the instant case, the Plaintiff, Jemimah Wanjiru Kibicho did not furnish any evidence that she had lawfully been appointed as guardian Ad Litem for her husband, Kibicho Migwi Kibicho (deceased) to enable her to institute the present suit on behalf of her husband’s estate. No order appointing her as guardian Ad Litem was exhibited to demonstrate that she had been lawfully appointed. Indeed, she never averred that she had made any application before the Court to be appointed as a guardian Ad Litem. The Plaintiff exhibited a medical report dated 25<sup>th</sup> May 2011 from the Psychiatrist Kerugoya District Hospital which indicated Kibicho Migwi Kibicho could be suffering from mental disorder. The report in my view could only have been used to support an application for a guardian Ad Litem under the *Mental Health Act*, and of itself could not confer Jemimah Wanjiru Kibicho the status of a guardian Ad Litem.

In the Case of RNO (Suing as guardian Ad Litem and Next Friend to DOM –vs- Moses Choge Chesire (supra). Munyao, J having held that the suit had been instituted by a person who had not been validly appointed to manage the property of a mentally disabled person, struck out the suit. He stated as follows:-

6. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. RNO was appointed by the Subordinate Court which has no jurisdiction. Her appointment having been made by a Court without jurisdiction, is therefore null and void. She cannot therefore purport to bring a suit to protect the estate of DOM assuming that he is truly of unsound mind.

7. This suit is therefore a non starter and I have no option but to strike it out with costs. -----“

I agree with Judge Munyao’s exposition of the law. In the present suit Jemimah Wanjiru Kibicho, having not been formally appointed as guardian Ad Litem for Kibicho Migwi Kibicho had no capacity to purport to institute a suit to protect his estate. The suit was a nullity abinitio.

22. Having come to the conclusion that the suit was a nullity abinitio, I need not consider the other issues as to do so would be an exercise in futility. The suit is for striking out and I accordingly order the suit struck out for incompetence and for being an abuse of the process of the Court. I have taken account of the fact that the parties are all close family members being mother and sons and I accordingly order that each party will bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LINK AT KERUGOYA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.

**J. M. MUTUNGI**

**ELC - JUDGE**



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