



**Mutunga & Company Advocates v Muithya & 2 others (Civil Appeal 97 of 2018) [2023] KEHC 22159 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 22159 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL 97 OF 2018  
F WANGARI, J  
APRIL 27, 2023  
(FAST TRACK)**

**BETWEEN**

**MUTUNGA & COMPANY ADVOCATES ..... APPELLANT**

**AND**

**BERNARD MUTISO MUIHYA ..... 1<sup>ST</sup> RESPONDENT**

**FABIAN MUTHUI ..... 2<sup>ND</sup> RESPONDENT**

**JACOB MOKI PAUL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. M. Murage, Chief Magistrate delivered on the 30th day of October 2018 in Kitui PMCC No. 338 "B" of 2013)*

**JUDGMENT**

1. This is an appeal that should never have been. Not that it has no merit but the very financial understanding of what constitutes human skill and labour. The appellant was not one of parties in the lower court matter. He was an advocate for the 1<sup>st</sup> Respondent. After some time, he had difficulties with the 1<sup>st</sup> Respondent. The applicant therefore applied to cease acting as an advocate for the 1<sup>st</sup> Respondent.
2. The application to cease acting is some of the most mundane applications ever. It is never contemplated to be opposed. It is worth listening if it is the opposite party complaining. It is grounded on the very trust the advocates hold for their clients. Once it ceases to exist, they are allowed to cease acting. In fact, the main purpose of making the application is to notify the client that all is not well and the advocate no longer desires to represent the client. Forcing the advocate to work for a client is servitude.
3. Article 30 of the [Constitution](#) provides;



30. Slavery, servitude and forced labour
- (1) A person shall not be held in slavery or servitude.
  - (2) A person shall not be required to perform forced labour.
4. The basis of this appeal is the ruling in the lower court matter, dated 30/10/2018 which dismissed the Notice of Motion dated 21/6/2018, filed by the Appellant seeking leave to withdraw from acting for the 1<sup>st</sup> Respondent. The Court misapprehended its role in this matter. Although the advocate assignment is not strictly employment, any forced instructions amount to slavery. The court has no jurisdiction to force an advocate to continue with a case. Indeed, an advocate need not to assign a reason to cease acting unless he is stealing a match on the opposing counsel.
5. In *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* [2015] eKLR, the court of appeal, Makhandia, Ouko & M'inotI, JJ.A.), had these to say: -
- “In our legal system, the advocate/client relationship has long been recognized as fiduciary relationship in which the client places his or her confidence, faith, reliance and trust in the advocate, whose aid, advice, opinion or protection is sought from time to time. The client gives the advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the advocate. These duties and responsibilities are provided for in the statute and the rules of conduct as we demonstrate below. The sets of rules that govern the advocates’ professional conduct arise out of the duty that they owe to the court, their clients, and fellow advocates. Section 80 of the *Advocates Act* stresses the advocate’s duty to a client;
- “ 80. Betrayal of trust
- Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence.”
- In addition, the *Advocates (Accounts) Rules* and the *Advocates (Deposit Interest) Rules* draw the permissible limits of dealings with funds received on behalf of and for the benefit of a client. The foregoing emphasises that an advocate must at all times act in the best interest of his client; that where he is required to invest he must do so prudently and avoid obvious risks and; that failure to account for funds held by an advocate on behalf of a client is in fact a criminal offence.
6. In the circumstances, it is my sincere finding that the Court went into a deep error. The court cannot and does not have jurisdiction to act out of mercy and sympathy. Further, it has no jurisdiction to order an advocate to proceed with execution or not to abandon his client.
7. I therefore allow the appeal with costs



## Determination

8. I therefore make orders allowing the appeal in the following terms: -
- a. The Appellant is allowed to cease acting for the 1<sup>st</sup> respondent in Kitui CMCC 338A of 2013-*Bernard Mutiso Muithya v Fabian Muthui and another*.
  - b. The Appellant to serve the 1<sup>st</sup> respondent with this decree within 14 days of extraction through his last known address of PO BOX [particulars withheld].
  - c. The 1<sup>st</sup> Respondent to bear costs of the appeal
  - d. The other parties to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of:**

N/A by the Appellant

N/A by the Respondent

Court Assistant, Guyo

