



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 229 OF 2014

BETWEEN

ESTHER NYAMUIRU MUCHIRI PETITIONER

AND

THE DIRECTOR OF

PUBLIC PROSECUTIONS 1ST RESPONDENT

JAMES MBOCHI IGAMBA 2ND RESPONDENT

RULING

1. At the commencement of the hearing of this petition, Mr Chahenza, learned counsel for the 2nd respondent objected to the firm of *S.W. Ndegwa & Co. Advocates* from representing the petitioner on the grounds of conflict of interest. He referred to a sale agreement between the petitioner and the respondent in which two plots LR No. 22718/5 and 22718/6 were purchased by the 2nd respondent from the petitioner. According to the agreement the firm of *S.W. Ndegwa & Co. Advocates* acted for the purchaser, the 2nd respondent herein, and the vendor who is the petitioner. Mr Chahenza therefore submitted that Mr Ndegwa could not act on behalf of the petitioner on account of the conflict of interest.
2. Mr Ndegwa opposed the application on the ground that prior to the preparation of the agreement, the parties had already entered into an agreement so that his duty was to merely formalise the handwritten agreement between the parties. Counsel submitted that he did nothing further to the agreement in relation to the transaction. He states that the land subject of the agreement was part of a succession cause in which he acted for the petitioner, an administrator of the estate of one Francis Kimani Muchiri.
3. The petitioner has now been charged at ***Kiambu Criminal Case No. 889 of 2014*** for the offence of obtaining money by false pretences contrary to **section 313** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence are that on diverse dates, with intent to defraud, he obtained Kshs.13,000,000/00 from the 2nd respondent by falsely pretending that he was in a position to sell LR 22718/5 and LR 22718/6, a fact she knew was false. The complainant in the criminal matter is the 2nd respondent.

4. The duty of the advocate is to be loyal to his client. He or she must not divulge and information coming to his possession as a result of his engagement or use that information to the detriment of his client. These are the core obligations of an advocate. It is clear from the sale agreement that the firm of *S.W. Ndegwa & Company Advocates* acted for both the petitioner and vendor and the sale agreement is clear on that fact. In the circumstances, having acted for the parties, he was given information which would either be detrimental to one party or useful to the other. He must not be placed in a position where he may use such information to benefit one client over the other. In ***King Woolen Mills Ltd v Kaplan & Stratton Advocates (1990 – 1994) EA 244, 250*** where a dispute arose as to the validity of security documents prepared by the defendants, the Court of Appeal held that, “*The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client’s consent. That fiduciary relationship exists even after conclusion of the matter for which the retainer was created.*” *The Court further noted that the principle applies equally where an Advocate acts for two or more parties in the same transaction.*
5. It does not matter, that he did not progress the transaction, what matters is that the 2nd respondent was his client and is entitled to expect that any information reposed in him will not be used in favour of the other party against him.
6. Though this is a criminal matter, it pits Mr Ndegwa’s clients’ against each other. He cannot choose sides. I therefore uphold the objection and restrain the firm of *S.W. Ndegwa & Company Advocates* from acting for the petitioner in this petition.

DATED and DELIVERED at NAIROBI this 29th May 2014.

D.S. MAJANJA

JUDGE

Mr Ndegwa instructed by S. W. Ndegwa and Company Advocates for the petitioner.

Ms Spira, Prosecution Counsel, instructed by the Office of Director of Public Prosecution for the 1st respondent.

Mr Chahenza instructed by Soita and Associates Advocates for the 2nd respondent.