



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 965 OF 2010**

**BETWEEN**

**DAVID KARIUKI NAMU.....CLAIMANT**

**VERSUS**

**INSTITUTE OF POLICY ANALYSIS AND RESEARCH.....RESPONDENT**

**RULING**

1. Judgment was delivered in favour of the Claimant, on 10<sup>th</sup> April 2019, in the sum of Kshs. 4,185,133. The Claimant has not been able to execute. The assets of the Judgment Debtor have not been traceable.
2. The Claimant made an Application for attachment of what the Claimant thought was, the Respondent's property. Prof. Shem Migot-Adhola, alleged to be a Director of the Respondent, objected successfully to attachment.
3. The Claimant applies, through an Application dated 21<sup>st</sup> July 2020, to have Directors of the Respondent, Prof. Shem Migot-Adhola and Prof. Njuguna, summoned before the Court to be orally examined, as to the business and affairs of the Respondent, and/or property or properties of the Respondent, and/or the Respondent's means of satisfying the decretal amount.
4. The Parties agreed that the Application is considered and determined on the strength of their Affidavits and Submissions of record.
5. The Claimant submits that the Court has power to summon, under Order 22 Rule 35 of the Civil Procedure Rules, the Judgment Debtor, or in the case of a corporation any of its Officers, to be orally examined on the means of satisfying decree.
6. The Claimant anchors this submission on *H.C.C No. 1287 of 2000, Ultimate Laboratories v. Tasha Bio service Limited* where it was held that the Court has power to lift the corporate veil of the company and order the Director to personally discharge the debts of the Company. The purpose of oral examination is to unearth assets and other means of satisfying decree. Other decisions invoked by the Claimant include *Masefield Trading [K] Limited v. Rushmore Company Limited & Anor. [2008] e-KLR*, and *Postbank Credit Limited [in liquidation] v. Nyamangu Holdings Limited [2015] e-KLR*. The Claimant seeks discovery in aid of execution.
7. Prof. Shem Migot-Adhola is opposed to the Application. He relies on his Affidavit sworn on 8<sup>th</sup> October 2020 and Submissions dated 4<sup>th</sup> September 2020. It is conceded that the Court has the power to summon Directors. But the Applicant must first avail evidence to warrant oral examination of Directors. Prof. Shem Migot-Adhola was Chairman of the Respondent for a brief period, lasting the year 2015, when the Respondent ceased operations for lack of funding. The Memorandum and Articles of Association, show Prof. Njuguna and David Wainaina Gachuki are the Directors. There are no allegations of fraud made against the Respondent, to warrant lifting of the corporate veil. The Respondent is a separate legal entity from its members – *Salmon v. Salmon & Co. [1897] AC 22HL*. This submission is underscored in *Victor Mabachi & Anor.v. Nurturn Bates Limited [2013] e-KLR* and *Electrowatts Limited v Countryside Supplies & Anor [2014] e-KLR*. The Respondent submits that the Applicant must establish that the Respondent's Director/Officer, is in a position to provide information in the nature of discovery.

**The Court Finds: -**

8. The Court agrees with the Submissions made on behalf of Prof. Shem Migot- Adhola that whereas the Court has the power to summon Directors and Officers of a corporation, to be examined orally for purposes of establishing means of execution, the Applicant must first provide sufficient evidence to justify the summons.
9. The Affidavit filed by the Claimant on 29<sup>th</sup> July 2020 does not have the date it was sworn. It is not an Affidavit. It does not have any

extract from the Registrar of Companies, establishing that Prof. Shem Migot- Adhola and Prof. Njuguna Ng'ethe are Directors of the Respondent. A copy of Memorandum and Articles of Association exhibited by Prof. Shem Migot-Adhola, indicates Directors were Prof. Njuguna Ng'ethe and David Wainaina Gachuhi. That was in 1992, when incorporation was sought. There is no extract, to show who the current Directors are. Prof. Shem Migot-Adhola was non-executive member of the Respondent Foundation, and not privy to Respondent's books of account and properties. The Affidavit filed by the Claimant appears to have annexures unrelated to the Claim- letters on arbitration involving other Law Firms.

10. The Claimant seems to focus on Prof. Shem Migot-Adhola in his Application, after he successfully objected to attachment of his personal assets. He does not place any material before the Court, warranting the summoning of the 2 Professors. It is not clear if Prof. Njuguna Nge'the was served with the Application. The Replying Affidavit of Prof. Shem Migot-Adhola and his Submissions appear specific to him. The Court has not seen any Affidavit or Submissions relating to Prof. Njuguna Nge'the.

11. The Claimant relies on decisions which relate to piercing of the corporate veil, while in the same breath submitting that his Application ‘‘ is not an attempt to lift the corporate veil, but an opportunity to the Judgment-Debtor through its elected Officials, to be examined as [agents] of the Company, to show cause why they should not be committed to prison.’’ How would the Directors, be committed to prison without lifting of the corporate veil?

12. The Claimant ought to explore other ways of execution. He is not clear in his mind whether what he seeks is lifting of the corporate veil. The mode of execution under consideration, does not look legally and factually sustainable. From the decisions cited by the Advocates in their Submissions, the Court is satisfied there is no basis to issue summons as sought.

**IT IS ORDERED: -**

*a. The Application filed by the Claimant on 29<sup>th</sup> July 2020 is declined.*

*b. No order on the costs.*

**Dated and delivered at Nairobi, this 25<sup>th</sup> day of February, 2021.**

**James Rika**

**Judge**