



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. E 050 OF 2019**

**VOLUNTARY SERVICE OVERSEAS.....PLAINTIFF/APPLICANT**

**VERSUS**

**VSO JITOLEE (In Dissolution).....DEFENDANT/RESPONDENT**

**RULING**

1. The Notice of Motion of 1<sup>st</sup> October 2019 seeks the following orders:-

1. That pending hearing and determination of the Application herein, this Honourable Court be pleased to vary its order of the 24<sup>th</sup> September 2019 and allow the Defendant/Applicant access limited to a sum of Kshs.10,000,000/= (Ten Million Kenya Shillings) out of funds held in the Defendant/Applicant's bank account held at Standard Chartered Bank Ltd. Yaya Branch, Nairobi.

2. That this Honourable Court be pleased to set aside or vary its Ruling dated 24<sup>th</sup> September 2019.

3. That the costs of this Application be provided for.

2. In the affidavit in support of the Motion, David Nzioka Kitusa avers that although the applicant applied to the NGO Board for permission to be wound up voluntarily, the winding up has not been concluded on account of some procedural delays on the part of the NGO Board. That, in the meantime, the applicant is still operational and has liabilities to settle and obligations to creditors and service providers.

3. A catalog of the Applicant's continuing obligations is given as follows:-

i. Cost of storage of its motor vehicle of Timau Plaza, Argwings Kodhek Road at an annual rent of Kshs.1,005,720.00 (One Million, Five Thousand Seven Hundred and Twenty Kenya Shillings) which amount is already due for the period February 2019 to January 2010.

ii. Annual Insurance Cover whose premium is Kshs.736,323.00 (Seven Hundred Thirty Six Thousand Three Hundred and Twenty Three Kenya Shillings).

iii. Pending claim in Court in CMCC 7283 of 2017 Betty Wafula –vs- VSO Jitolee of Kshs.1,521,396.00 as of 2018 and alleged interest and costs.

iv. Pending legal fees and disbursements associated with the present suit and others where legal services were rendered by the Defendant/Applicant's Advocates including cost of filing the Defendant/Applicant's statement of Defence and Counter-Claim in this suit estimated at over Kshs.100,000/=

4. The deponent says that the situation is so dire that the Applicant does not even have funds to pay for its statement of Defence and Counterclaim or to pay its lawyers for legal services. This is said to expose the Applicant to the danger of a default judgment.

5. This Court is further told that the effects of the orders issued on 24<sup>th</sup> September 2019 are to close the Applicant off from its own financial reserves and consequently granting the Respondent an unfair advantage as the present circumstances will lead to the Applicant collapsing for failing to meeting its obligations or even defend itself in Court in the present suit and in other matters pending in Court. The Court is urged to set aside the order completely or to vary it to allow the Applicant access its bank account without any hindrance or approval by the

Respondent.

6. As an alternative, the Court is told to allow the Applicant to access at least Kshs.10,000,000/= out of the funds held in the Applicants account at Standard Chartered Bank Limited, Yaya Branch Nairobi.

7. The Application is opposed through an affidavit of James Mwangi sworn on 11<sup>th</sup> October 2019. In it the Respondent states that the amounts held in the bank account constitute donor funding belonging to it and the same does not belong to the Applicant. He states that since the commencement of the dissolution process, the Applicant stopped and/or refused to engage the Respondent in the process as well as to cooperate with it to enable it acquire the assets, liabilities and operations of the Applicant.

8. The Respondent takes the position that the Applicant admits that a decision had been reached for its voluntary dissolution and that the Applicant is operating primarily for purposes of settling liabilities and obligations to creditors and service providers. For that reason, it is argued that the Applicant is not a going concern.

9. As to the obligations itemized, it is averred:-

[7] That no evidence has been tendered by the Defendant to demonstrate its purported liabilities to creditors and service providers or the alleged continuing obligations. The Defendant has also not demonstrated that it has pending law suits and/or judgments to be settled or even that it is unable to procure legal services to defend itself in this matter. The Defendant's claims in this regard are fallacious and have been construed with the intent of misleading the Court.

[8] That further, the Plaintiff has paid the motor vehicle parking costs for a period of one year from 1<sup>st</sup> April 2019 to March 2020. *Annexed hereto and marked as "JM-1" are copies of the Rent Demand Note and RTGS Payment Slips.*

[9] That it is also noteworthy that the date of the alleged assessment of the draft defence is the same date of the Application herein. The Defendant has not demonstrated that it did not have and/or could not procure the amount for required filing the said defence.

10. This Court has considered the arguments of Counsel and the cited authorities.

11. What this Court is asked to vary and/or set aside is an order of injunction issued on 24<sup>th</sup> September 2019. The power of a Court to make such an order is found in Order 40 Rule 7 of the Civil Procedure Rules, 2010:-

"Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order".

12. The order this Court is asked to vary and/or set aside was made after the Court had considered the application for injunction on merit, on the evidence and arguments placed before it. This is entirely different from a case where the orders sought to be varied or set aside were made *ex parte*.

13. For the reason that the Court would have made an order after considering a contested application, then there would have to be compelling reason why the orders will deserve setting aside or variation. Such circumstances would be exceptional and so the use of order 40 Rule 7 would be sparing.

14. Circumstances which deserve a revisit of an injunction granted after an *interparties* hearing would include circumstance when an order for review would be merited under the ordinary rules of review set out in order 45 rule 1 of the Civil Procedure Rules;

"Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review".

15. Another is where "circumstances of the suit have radically changed so that it is no longer necessary to have the injunction" (Munyao J in Felista Chemaiyo Sosten –vs- Samson Mutai E.L.C No. 942 of 2012) or that the injunction in its present form causes an injustice or unnecessary hardship to one of the parties.

16. In the affidavit in support of the Application, Mr. Kitusa makes a telling statement:-

"These facts are contained in my replying affidavit to the Plaintiff's Application dated 27<sup>th</sup> March 2019 which I swore on 10<sup>th</sup> April

17. It would be telling because it is a concession that the Applicant had raised similar issues when it responded to the Respondent’s application for injunction which was determined by the Ruling in question. I would therefore agree with counsel for the Respondent that as the Court has deliberated on similar issues, an order for setting aside or variation can only be considered if circumstances of the case have changed.

18. This Court is not told what is different now from 10<sup>th</sup> April 2019 when the Applicant’s earlier affidavit was filed and the application may be wholly unmeritorious. If the Applicant was dissatisfied with the Court Ruling then the avenue open to it was to prefer an Appeal. Well aware of this avenue, the Applicant filed a Notice of Appeal on 2<sup>nd</sup> October 2019 pursuant to Court of Appeal Rules 2010.

19. Having said that, the Court, at the time of making the Ruling, was sensitive of the possibility of costs such as of storage and insurance that would be associated with any delay in the dissolution as long as it was not completed. The Court therefore granted an injunction on the basis that reasonable costs and expense that would result from the grant of the orders would be borne by the Respondent herein. The Court then gave either party the liberty to apply. For that reason, the Court is willing to accept that this application can be construed as being made pursuant to that window.

20. So let me specifically consider the expenses that this Court is told is required to be paid. The first is costs of storage of the motor vehicles at Timau Plaza for the period February 2019 to January 2020. On this, there is evidence that the rental has been paid by the Respondent and nothing more should arise.

21. The Court is then told of the cost of an annual insurance cover at Kshs.736,323.00. This may well be a reasonable expense but no invoice has been shown to Court. While, for that reason, this Court is not able to make a specific order in that respect, I observe that this type of expense would fall in the category of expenses anticipated in order 39(a) of the Courts decision of 24<sup>th</sup> September 2016. Insurance premium on a reasonable cover would have to be borne by the Respondent upon presentation of proof of demand.

22. As regards to the pending claim in CMCC No. 7283 of 2017 Betty Wafula –vs- VSO Jitolee, this Court is not told that there is already Judgment against the Applicant. It is premature to provide for it.

23. There is then the bulk of the claim which is on legal fees broken down as follows:-

| No. | PARTICULARS   | AMOUNT (KSHS.) |
|-----|---|----------------|
| A.  | HCCA 102 OF 2019;<br>VSO JITOLEE –VS- BETTY WAFULA  | 314,240.00     |
| B.  | HC COM. ADM CASE NO. E050 2019;<br>VOLUNTARY SERVICE OVERSEAS –VS- VSO JITOLEE  | 2,182,000.00   |
| C.  | INTENDED APPEAL AND INTERLOCUTORY APPLICATION FROM DECISION IN HC COM & ADM CASE NO. E050 2019; VSO –VS- VOLUNTARY SERVICE OVERSEAS | 752,600.00     |
|     | TOTAL   | 3,248,840.00   |

24. The Applicant has found itself in a position where it has had to defend litigation and that comes with a cost. But the Respondent argues:-

“That there is no basis upon which the Court can consider and order release of funds to the Advocate as sought. It is not privy to the terms upon which fees was agreed with the Defendant and no basis has been laid. Further, without any particulars of the amounts, the same are arbitrary and unsubstantiated”.

25. The Applicant retorts that the legal fees payable to its lawyers are contracts containing privilege and confidential terms that cannot be

determined by the Plaintiff nor approved by the Court in this cause.

26. While the argument by the Applicant would ordinarily be a forceful argument, there is a dispute as to whether the assets of the Applicant including money can be disposed of, accessed or paid out without the express agreement and/or approval of the Plaintiff as the Defendant has commenced the dissolution process. In the Ruling of 24<sup>th</sup> September 2019, this Court took a view that the Respondents have made out a prima facie case with probability of success that such prior agreement or approval is necessary and for that reason preserved the assets of the company through an order of injunction.

27. Clearly then a plea to access the frozen funds must be justified. The Court is not seeking to peep into confidential matters as between a client and Advocate but requiring the applicant to justify and substantiate on the amounts sought.

28. The temptation would be to completely disregard the request for legal fees as it has not been demonstrated to be just and reasonable but for the fact that this matter must be defended at the pain of fees to an advocate, this court will make an order in that regard. Yet because i am handicapped in reaching what is reasonable as the Applicant has failed to justify the fees, this Court can only grant some arbitrary sum.

29. In a very limited way I grant the Motion of 1<sup>st</sup> October 2019 to the extent that the Applicant shall be allowed to access Kshs.750,000/=( Kenya Shillings seven hundred and fifty thousand) out of the funds held in its account at Standard Chartered Bank Limited Yaya Branch Nairobi for purposes of legal fees in this matter. Each party to bear its own costs.

**Dated, Signed and Delivered in Court at Nairobi this 13<sup>th</sup> Day of March 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Welende for Plaintiff/Respondent

Bichanga for Kitulu for Defendant

Court Assistant: Nixon