



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE E 050 OF 2019

VOLUNTARY SERVICE OVERSEAS.....PLAINTIFF/APPLICANT

VERSUS

VSO JITOLEE (In Dissolution)DEFENDANT/RESPONDENT

RULING

1. The dispute in these proceedings is about the sale of the assets of VSO Jitolee which is in the process of being dissolved.
2. Voluntary Services Overseas (VSO or the plaintiff) claims to have an interest in the assets, liabilities and operations of VSO Jitolee upon dissolution and has in the Notice of Motion dated 27th March 2019 sought the following orders:-
 4. THAT pending the hearing and determination of the suit herein, this Court grants interim order of injunction restraining the Defendant by itself or by its servants or agents or otherwise howsoever, from withdrawing, transferring and/or dealing with any amounts from the Bank Accounts Number 0108097436900 and 28080997436900 held with Standard Chartered Bank Yaya Centre Branch in the name of Voluntary Service Overseas and Fixed Deposit Accounts Numbers MM1126900025 and MM1204600006 held with Commercial Bank of Africa, Upper Hill Branch without the express agreement and/or approval of the Plaintiff.
 5. THAT pending the hearing and determination of this suit, this Court grants an interim order of injunction restraining the Defendant by itself or by its servants or agents or otherwise howsoever, from accessing, interfering, realizing, disposing and/or distributing any residual assets of VSO Jitolee including but not limited to motor vehicle *to wit* KCC 454V, KCC 456V, KCD 866T AND KCD 845T and/or taking further steps towards realization, disposal and/or distribution of the same without the express approval of the Plaintiff.
 6. THAT pending the hearing and determination of this suit, this Court grants an order that an account be taken between the Plaintiff and the Defendant to specifically determine the total sums refundable and assets surrenderable to the Plaintiff by the Defendant on account of the dissolution of the Defendant.
 7. THAT the costs of this application be awarded to the Plaintiff.
3. In a plaint presented to Court on 28th March 2019, VSO states that VSO Jitolee is constituted as a locally based Non-Governmental Organization (NGO) registered under the NGO Coordinating Act of 1990 registration rules NGOB/218/051/2005/0114(60). It is the case of VSO that it has been providing operational and financial support to VSO Jitolee and as at March 2016 had donated to the defendant the sum of approximately Ksh.1,710,047,433 to enable it run its operations and acquire assets.
4. That in a resolution dated 26th February 2016 the board of VSO Jitolee made a decision to voluntarily dissolve the organization. VSO asserts that pursuant to Article XXI of the Constitution of VSO Jitolee it was agreed between VSO and VSO Jitolee that the assets and liabilities of the latter be transferred to VSO. This it is said was reduced into a memorandum of understanding dated 19th February 2016.
5. The memorandum of understanding was followed through by a letter of intent dated 18th March 2016 in which VSO expressed its clear interest and intent of acquiring the assets and operations of VSO Jitolee without consideration.
6. The grievance of VOS is that VSO Jitolee appears to have reneged on its promise and is dealing with assets unilaterally without seeking the approval of VSO. Hence this suit.

7. On its part VSO Jitolee states that it is both a local and an International NGO and independent a body corporate that cannot be controlled or regulated by the VSO.
8. Abridging on the history of the matter, the contention of VSO Jitolee is that upon its establishment VSO undertook to provide it with monetary and expert support which it continued up to 2016. The Defendant asserts that VSO is not the only donor organization supporting it and names others, being EASCOF, ALMANTE, CORE GRANT/RECRUITMENT, SNE SURVEY, DUTCH DIASPORA PROJECT, DAVID WALL & RTI TUSOME, DCW PROJECT and IREX.
9. Following certain disagreements, VSO international ceased to support VOS Jitolee and this precipitated a serious cash flow necessitating the Defendant to shut down various of its projects thus having difficulties in meeting its obligations. Hence, in February 2016, VSO Jitolee made the decision to voluntarily wind up and informed its project parties of the said decision.
10. That it is upon the declaration of intent to wind up that VSO escalated its push to inherit all assets of VSO Jitolee. VSO Jitolee says it had initially agreed to the said arrangements but that the NGO Board refused to approve the proposed surrender of the assets to an organization which is not registered under the NGO Act.
11. Following that refusal, certain assets of VSO Jitolee were placed in the custody of VSO. However so as to forestall wastage of the assets, VSO Jitolee nominated other organizations that qualified under the terms communicated by the NGO Board to take over its assets. Approval for that nomination has, however, not been forthcoming.
12. It is the defence of VSO Jitolee that it is merely a trustee of the assets under dispute pending the dissolution and approval of the assets to any organization nominated by the NGO Board. Further, that it cannot be wound up or taken over before it concludes several pending litigation in which it is involved. Some of which seek monetary compensation.
13. VSO Jitolee reiterate that a takeover of the assets by VSO is a gross violation of the law and were it to accede to the said take over then it would expose its board members to criminal sanction by reason of the provisions of Regulation 32 of the NGO Co-ordination Regulations. VSO Jitolee argues that if VSO were to obtain registration under the Act then the VSO Jitolee would have no cause to oppose the transfer of its assets to VSO.
14. In response to the position taken by VSO Jitolee, one James Mwangi swore a replying affidavit on 24th April 2019 on behalf of VSO. Three issues can be highlighted. One, that while VSO was not the only donor to the VSO Jitolee, it funded 85% of its operations. Second, that so as to obtain transfer of the assets, the plaintiff will seek tax exemption and if the same shall not be granted then it will pay the taxes sought. Lastly, the supposed refusal by the NGO Board to grant the approval to the proposed asset transfer has never been communicated to NGO.
15. This Court has given due regard to the evidence presented in the rival affidavits and the submissions of counsel.
16. In this interlocutory session the Court is asked to grant a temporary injunction and the principles applicable are the well-known principles set out in the decision of Giella vs Cassman Brown[1973] E.A 358 being:-
 - i. An application must show a prima facie case with a probability of success;
 - ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparably injury;
 - iii. When the court is in doubt, it will decide the application on the balance of convenience.
17. Secondly, the court will be basing its rendition on untested evidence and legal arguments that many not have exhaustively agitated. For that reason the court must be careful enough not to make any firm findings that may embarrass the trial court.
18. It is common cause that VSO was a major donor of the assets and operations of VSO Jitolee. It is also not in dispute that the Constitution of VSO Jitolee contemplated its dissolution and provided for the manner in which residual property will be dealt with in that event. The relevant provisions are found in Article XXI.
19. There is evidence that VSO and VSO Jitolee agreed that the residual assets of the latter would be transferred to VSO and this was reduced into an MOU.
20. As I understand the position of VSO Jitolee is that it is willing to abide by the terms of that understanding but it is facing two statutory hurdles. The first being an issue of Tax exemption and the second being approval under the provisions of the NGO Act.
21. Regulation 29 of the NGO Regulations provides:-
 29. (1) Any organization importing equipment for its activities in Kenya may, where there is sufficient proof that –
 - (a) the foreign exchange for such goods is not raised in Kenya; or
 - (b) the importation of such equipment will generate foreign currency for the country; or

(c) the importing organization has earned through income generating activities foreign exchange equivalent to the price of the imported equipment; or

(d) the cost of the imported equipment does not exceed thirty-five per centum of the total annual budget of the organization; or

(e) the price of similar goods in the local market exceeds the price of the imported equipment by least thirty per centum, apply through the Board in writing to the Minister for the time being responsible for finance for exemption of such goods from duty.

(2) The Board shall, on receipt of any application under this regulation, forward it to the Minister for the time being responsible for finance together with its recommendations thereon.

(3) Where an application lodged under this regulation is granted, the organization shall not dispose of any equipment in the respect of which duty is exempted save with the permission of the Board in the manner set out in Form 15 in the First Schedule.

22. There is no contention that the assets of VSO Jitolee or at least some were tax exempt and so any disposal of the same must receive the permission of the NGO Board.

23. Related to this issue of tax is Section 12 of the 3 schedule of the Customs and Excise that (Cap 472) which reads:-

12. (1) The following goods shall be subject to customs control -

(a) all imported goods, including goods imported through the Post Office, from the time of importation until delivery for home use or until exportation, whichever first happens;

(b) all goods under drawback from the time of the claim for drawback until exportation;

(c) all goods subject to export duty from the time when the goods are brought to a port or place for exportation until exportation;

(d) all goods subject to restriction on exportation from the time the goods are brought to a port or place for exportation until exportation;

(e) all goods which are with the permission of the proper officer stored in a customs area pending exportation;

(f) all goods on board an aircraft or vessel whilst within a port or place in Kenya;

(g) all dutiable goods and excisable goods on which duty has not been paid;

(h) all seized goods and all goods under a notice of seizure.

(2) where any goods are subject to customs control then -

(a) any officer may at any time examine those goods;

(b) except by authority or in accordance with this Act, no person shall interfere in any way with those goods:

Provided that the Commissioner may, permit the assembly of any vehicle, machinery or part processing of any other goods if he is satisfied that the vehicle, machinery or other goods will not lose their identity after the assembly or part processing.

(3) Where goods are subject to customs control, the Commissioner may permit the owner of those goods to abandon them to the customs; and on abandonment the goods may, at the expense of the owner thereof, be destroyed or otherwise disposed of as the Commissioner may direct and the duty thereon shall be remitted or refunded, as the case may be.

(4) A person who contravenes subsection (2) (b) shall be guilty of an offence and liable to a fine not exceeding five hundred thousand shillings

24. In answer to this position, VSO states that it will seek the permission required by the NGO Act and the waiver of tax from the minister responsible. And that if waiver is not granted then it will pay the taxes required. I take it that in so far as permission and tax exemption that can be available under the statutory framework have not been declined, it cannot be said that the provisions of the law in respect to tax exemption is an impediment to the agreed transfer of assets.

25. Let me turn now to another aspect. The case by VSO is that VSO Jitolee is undergoing a voluntary dissolution and that dissolution is governed by paragraphs 3 to 12 of the second schedule of the Act.

26. VSO Jitolee on the other hand point to Rules 17 of the NGO regulations as providing the manner in which its residual assets should be

disposed off.

27. Regulation 17 reads thus:

17(1) Where under section 16(1) of the Act the Board is of the opinion that the registration of any organization should be cancelled, it shall send to the organization a notification of intended cancellation in Form 9 set out in the First Schedule taking every reasonable precaution to ensure fairness in the exercise of its discretion.

(2) Where the Board cancels the registration of an organization, it shall send to the organization a notification of cancellation in Form 10 set out in the Schedule.

(3) The Board shall at the same time cancel the registration of any branches of the organization.

(4) The Board shall, unless an appeal is pending, notify the cancellation in the Gazette within twenty-one days thereof.

(5) Where an organization whose registration is cancelled under this regulation appeals under section 19 of the Act, the organization shall continue with its operations until the determination of the appeal.

(6) An organization whose registration is cancelled shall tender its assets or operations to other organizations with similar objectives within sixty days from the date of notification of such cancellation, provided that where there is an appeal, the period of sixty day shall run from the date of determination of such appeal.

28. Quite clearly and this is readily apparent from the wording of sub regulation 1, the provisions of the regulation are in regard to cancellation that is contemplated in Section 16(I) of the Act. Section 16 itself reads:-

16. (1) Subject to subsection (2), sections 14 and 15 shall not apply to goods imported in transit, or for transshipment, or as stores of an aircraft or vessel, unless the goods come within item 2 of Part A of the Eighth Schedule, or are goods of which the importation in transit, or for transshipment, or as stores for an aircraft or vessel, is expressly prohibited or restricting the importation of goods.

29. It would seem that Section 16 of the Act and therefore regulation 17 apply to involuntary dissolution. In that regard VSO may have a strong argument that the voluntary dissolution that VSO Jitolee seeks falls outside these provisions and should be regulated by Article XXI of the Constitution of VSO Jitolee.

30. I now turn to the provisions of the Article which reads:-

Article XXI – Dissolution

An organization shall not be dissolved or wound up except by a resolution passed by cause and resolution of the board by a vote of two-thirds of the full board members. If valid votes from 2/3 of members are not cast then members will convene another meeting.

The organization shall not dissolve itself without prior consent in writing from the Non-Governmental Organization's Co-ordination Board and signed by three members of the board.

If upon the winding up or dissolution of the organization there remains after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed amongst the members of the Organization, but shall be given or transferred to some other institution(s) having objects similar to the objects of VSO Jitolee to VSO or by agreement with VSO to an organization that is committed to promoting volunteerism, and which shall prohibit the distribution of its or their income and property amongst its or their members to an extent at least as great as is imposed on the organization.

Provided that such institution(s) is/are to be determined by the members of the Organization at or before the time of dissolution, and in default thereof, by a judge of the High Court of Kenya, and if and so far as effect cannot be given to the aforesaid provisions, then to some other charitable object. The agreement shall be signed by the subscribers.

31. A reading of those provisions suggests that dissolution is a three stepped process. The first is the resolution by the board of the organization to dissolve the body. Once that resolution has been made then the dissolution cannot proceed without the prior consent of the NGO Board. After grant of consent then the next step is the manner of distribution of the residual assets of the organization.

32. Given the wording of the Article it is arguable whether the NGO Board can, in addition to giving consent to dissolve, impose its conditions in the manner of distribution of the residual assets. And this may be particularly doubtful where it accepted the formula or manner of distribution at the point of approving the Constitution of VSO Jitolee at registration.

33. That said VSO Jitolee has shown Court a letter of 12th July 2016 from the NGO Board in which it advised VSO Jitolee that it does not approve the transfer of the assets to VSO because it (VSO) is not registered as an NGO. VSO on the other hand asserts that the NGO Board has not communicated any such decision to it and has in fact made oral communication that the Board does not object to the proposed transfer.

34. In this scenario VSO Jitolee cannot be blamed for taking the position that the proposed transfer will not receive the sanction of the NGO Board. Yet because of the possible interpretation of the law this court has set out, VSO still has an expectation that the transfer will be

consented to.

35. It is in these circumstances that this Court is willing to hold that VSO has made out a prima facie case with probability of success.

36. As to whether irreparable harm will ensue if the injunction is not granted, it has to be borne in mind that VSO Jitolee is in the process of dissolution. If transfer of the assets to a third party happens then the assets may be beyond recovery by VSO. That may result in irreparable harm.

37. The two essentials for grant of a contemporary injunction have been satisfied. The Court is inclined to grant the Order but one concern of VSO Jitolee cannot be overlooked. For as long as the assets have not been transferred then there is costs of storage and insurance in respect to certain assets. In view of the fact that VSO Jitolee may not be to blame for the delay in transferring the property to VSO, then it should not shoulder the costs attendant to the delay. For that reason any costs as a consequence of the injunction will have to be met by VSO.

38. One further observation. As the party mounting the roadblock to the transfer agreed by VSO and VSO Jitolee may be the NGO Board, then it would seem inevitable that VSO will eventually have to seek some redress against the NGO Board. As there is no knowing how long the standoff will last or how long it will take to obtain or force an approval from the NGO Board, this court will grant either party herein the liberty to apply for the discharge of the orders it shall be granting presently.

39. Ultimately this court allows prayer (4), (5) and (6) of the Notice of Motion dated 27th March 2019 but on the following two conditions:-

(a) Reasonable costs and expense that result from the grant of these orders shall be borne by the plaintiff.

(b) Either party is at liberty to apply.

40. Costs of the Motion to VSO.

Dated, Signed and Delivered in Court at Nairobi this 24th Day of September 2019

F. TUIYOTT

JUDGE

PRESENT:

Maina holding brief Kitulu for Plaintiff

Muma Welende for Defendant

Court Assistant: Nixon