



Voluntary Services Overseas v VSO Jitolee (In Dissolution) & 6 others; Non-Governmental Organisations Co-ordination Board (Defendant) (Commercial Civil Case E050 of 2019) [2021] KEHC 349 (KLR) (Commercial and Tax) (15 December 2021) (Ruling)

Neutral citation: [2021] KEHC 349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E050 OF 2019
DAS MAJANJA, J
DECEMBER 15, 2021**

BETWEEN

VOLUNTARY SERVICES OVERSEAS PLAINTIFF

AND

VSO JITOLEE (IN DISSOLUTION 1ST DEFENDANT

DAVID KITUSA 2ND DEFENDANT

STEPHEN KAHERU 3RD DEFENDANT

REGINA OMBAM 4TH DEFENDANT

ERIC KIMANI 5TH DEFENDANT

JACQUELINE NYAGA 6TH DEFENDANT

MWIHAKI MURAGURI 7TH DEFENDANT

AND

NON-GOVERNMENTAL ORGANISATIONS CO-ORDINATION BOARD DEFENDANT

RULING

1. What is before the court is the 1st Defendant’s Notice of Motion dated 4th April 2019 made inter alia, under Order 17 rule 2 of the Civil Procedure Rules. It seeks the following order:
 - (2) THAT this Honourable Court be pleased to direct the Non-Governmental Organizations Co-ordination Board set up under the *Non-Governmental*



Organizations Act No. 19 of 1990 be joined to this suit as the second Defendant and the pleading be amended accordingly.

2. The application is supported by the affidavit of the David Nzioki Kitusa, Chairman of the 1st Defendant, sworn on 4th April 2019. The Plaintiff opposes the application through the Grounds of Opposition dated 9th December 2019. Counsel for both parties made brief oral submissions in support of their respective positions.
3. Before I deal with the substance of the application, I think it is important to appreciate the background of the matter from the pleadings. The Plaintiff is an international development charitable organization which supports local Non-Governmental Organizations like the 1st Defendant (“the Defendant”) which is registered under the Non-Governmental Organizations Co-ordination Act, Act No. 19 of 1990 (“the NGO Act”) which establishes a Board (“the NGO Board”) to regulate the affairs of registered Non-Governmental Organizations.
4. The gravamen of the Plaintiff’s case against the Defendant is that it donated to the Defendant approximately KES. 1,710,047,433 to run its operations and acquire assets. In order to effectively operate and run its programs, the Defendant resolved on 26th February 2016 to voluntarily dissolve and become part of the Plaintiff. The process was commenced through the NGO Board while the Plaintiff registered a local branch called Voluntary Services Overseas.
5. The Plaintiff’s concern revolves around the fact that the Defendant’s Constitution provides that upon dissolution, residual assets after settlement of debts and liabilities shall not be distributed to members of the Defendant but shall be transferred to an institution having like objects as the Defendant or by agreement with the Plaintiff to an organization committed to promoting volunteerism and which prohibits distribution of assets and income among members. In order to meet this object, the parties entered into a Memorandum of Understanding dated 19th March 2016 under which it was agreed that the Plaintiff would register the local branch and the residual assets would be transferred to it. Unfortunately, the Defendant acted contrary to the Memorandum of Understanding and proceeded to dispose of the assets without recourse to the Plaintiff. The Plaintiff therefore seeks a raft of injunctions restraining the Defendants from disposing off the assets of the Plaintiff including motor vehicles, restraining the Defendants from dealing and or interfering with the Defendant’s bank accounts and mandatory orders compelling the Defendant to act in accordance with its Constitution and or in agreement with the Plaintiff. It also seeks an order for accounts.
6. The Defendant opposes the Plaintiff’s claim. The thrust of its defence is that it did not receive any financial or other support exclusively from the Plaintiff and that some of the funds received were conditional or dedicated to specific projects or purchase of specific assets. The Defendant states that while it encountered logistical and administrative challenges in running its programs within the region, it was understood that it would partner with the Plaintiff on condition that the Plaintiff would acquire legal status under the NGO Act and would, subject to approval of the NGO Board, take over the Defendant’s projects. The Defendant asserts that the Plaintiff failed to obtain legal status under the NGO Act and was instead incorporated as a Company limited by Guarantee.
7. The Defendant further denies that its Constitution gives the Plaintiff any mandate to control dissolution of the Defendant hence the Memorandum of Understanding does not have any legal consequences and is unenforceable as the Plaintiff failed to comply with the NGO Act. It therefore asserts that it cannot comply with the demands of the Plaintiff to deliver up the assets or deal with them as demanded by the Plaintiff. It contends that the court cannot grant the reliefs sought by the Plaintiff as this would be contrary to the NGO Act.



8. Turning back to the application, the Defendant states that the Plaintiff is not registered under the NGO Act yet it seeks to take over the assets of the Defendant which is duly registered and regulated by the NGO Board. It asserts that what the Plaintiff seeks to achieve in the suit would be contrary to the mandatory provisions of the NGO Act as the manner in which an NGO's assets are required to be safeguarded are provided for by the Act. The Defendant adds that the NGO Act has clear provisions including a Non-Governmental Organizations Council Code of Conduct 1995 which has set up a Regulatory Committee to entertain complaints. That it has an elaborate process including appeals under which any party may make complaints and which the Plaintiff has never invoked.
9. The Defendant further submits that the present suit is untenable as the issues raised by the Plaintiff fall within the jurisdiction of the Regulatory Committee. It accuses the Plaintiff of failure to join the NGO Board as a ploy to deny the court an opportunity to interrogate the NGO Act and therefore circumvent its provisions. It maintains that it is necessary to join the NGO Board as the 2nd Defendant in order for the court to effectively and completely adjudicate upon and settle all questions in the suit.
10. The Plaintiff opposes that application on the ground that neither the Plaintiff nor Defendant have raised any cause of action against the NGO Board and that neither party has sought orders or reliefs against it. In submits that in the circumstances, the order for joinder as sought by the Defendant cannot be granted. The Plaintiff contends that there are no common questions of law or fact to warrant joinder and that joinder will only delay and prejudice a fair trial of the suit.
11. The Defendant has invoked Order 17 rule 2 of the Civil Procedure Rules which deals with dismissal of a suit for want of prosecution. I do not think this is fatal and since the parties have submitted on the basis that the matter in issue is joinder hence neither party is prejudiced by citing the wrong provision. The proper provision for joinder of a defendant is Order 1 Rule 3 of the [Civil Procedure Rules](#) which provides for who may be joined in a suit as a Defendant as follows:

Who may be joined as defendants

3. All persons may be joined as defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where if separate suits were brought against such persons any common question of law or fact could arise.

12. The court has broad power under Order 1 rule 10(2) of the Civil Procedure Rules to order joinder of any party at any stage of the proceedings as follows:

Substitution and addition of parties

10(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.



13. The Court of Appeal in *Civicon Limited v Kivuwatt Limited & 2 others* MSA CA Civil Appeal No. 45 of 2014 [2015] eKLR expounded extensively on the applicability of Order 1 above and the duty of the court in considering joinder as follows:

Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or; whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

14. As regards joinder of a defendant, the Court of Appeal in *Pravin Bowry v John Ward & Another* NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU) where the Supreme Court of Uganda observed that:

A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.



15. From the brief summary I have set out above, the dispute between the parties concerns the assets of the Defendant which the Plaintiff claims should be dealt with in a specific manner; in accordance with the Constitution and the understanding between the parties. The Defendant, on the other hand, asserts that it is governed by the NGO Act and its activities including disposal of assets is regulated by the NGO Board. I hold that whether or not the NGO Board is joined to this proceedings, the issue raised by the Defendant are matters of law which the court can address even without the NGO Board present in the proceedings.
16. While the dicta in *Civicon Limited v Kivuwatt Limited & 2 others* (Supra) is clear that the issue of relief against the intended party is not a decisive consideration in determining whether to join a party, I agree with the Plaintiff that no relief is sought by either party against the NGO Board. Nothing is alleged about what it did or failed to do in the circumstances of this case particularly in relation to the reliefs the Plaintiff seeks against the Defendant. What the Defendant seeks is for the Court to obtain the NGO Board's opinion on the matters concerning its jurisdiction regarding the matters in issue. The NGO Board's opinion is neither relevant nor necessary to resolve the matters in issue. The court can address the issues of law, which involve statutory interpretation, raised by the Defendant. It can effectively and completely adjudicate the matter in issue without the presence of the NGO Board as a defendant or a party to the suit.
17. The Notice of Motion dated 4th April 2019 is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kahura instructed by Kaplan and Stratton Advocates for the Plaintiff.

Mr Kitulu instructed by Muema Kitulu and Company Advocates for the Defendants.

