



**Stay Online Limited v Koome & another (Commercial Civil Suit E357 of 2023)  
[2023] KEHC 22956 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22956 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E357 OF 2023  
JWW MONG'ARE, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**STAY ONLINE LIMITED ..... PLAINTIFF**

**AND**

**KIRIMI KOOME ..... 1<sup>ST</sup> DEFENDANT**

**UNITED BANK OF AFRICA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On April 14, 2023 Mr Kirimi Koome of PO Box 2828-00502, Nairobi and holder of National Identity Card number 23571324 Registered the Plaintiff company herein. He was the sole shareholder and subsequently the sole director of the Plaintiff. The nominal share capital of the Plaintiff at incorporation was Kenya shillings 100,000 divided into 1000 shares. All these shares were taken up by the said Mr. Kirimi Koome.
2. On August 11, 2023 the Plaintiff through the firm of Odhiambo and Kathyaka Advocates filed a plaint seeking the following prayers inter alia:-
  - a. A mandatory order do issue directing the 2<sup>nd</sup> Defendant/Applicant to remove the 1<sup>st</sup> Defendant/Respondent as a signatory to the Plaintiff's/Applicant's bank accounts being bank account numbers 55010160018302 (Kenya Shillings), 55010130016529(US Dollar Account) and 55010130016536 (EUR Account) domiciled at the 2<sup>nd</sup> Defendant/Respondent's Westlands branch and be replaced by the current director being Ambrose Wamari Obara.
  - b. An order directing the 1<sup>st</sup> Defendant/ Respondent to refund the Usd 100,000 illegal withdrawn and converted to his use.



3. Simultaneously as the plaint was filed, a Notice of Motion application was filed on August 11, 2021 under a Certificate of Urgency seeking the similar orders as the prayers in the suit was filed. When parties appeared before the court on August 15, 2023 the said application was compromised by the consent of the parties and the Accounts of the Plaintiff were ordered frozen until the matter was heard and determined in full.
4. Several things happened thereafter. A notice of Change of Advocates was filed and an appointment letter from the Plaintiff signed by the 1<sup>st</sup> Defendant was filed by the firm of Ombeta & Company Advocates, to represent the Plaintiff. Subsequently a consent was filed to withdraw the suit as filed from the courts and the same be marked as withdrawn. A subsequent notice was filed on August 22, 2023 withdrawing the suit against the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.
5. On September 5, 2023, the firm of Omwanza & Areba Advocates was appointed to represent the Plaintiff. The new firm of Advocates filed an application on September 5, 2023 seeking the following orders:-
  - a. Spent
  - b. That this Honourable Court be pleased and does issue an order and or finding that the Applicant/Individual (Ambrose Wamari Obara) is not a former member nor a current member of the company as set out under section 238 of the Companies Act, No 17 of 2015.
  - c. That the suit filed by the Applicant/Individual (Ambrose Wamari Obara) falls short of the requirement and the dictates of section 238 and 239 of the Companies Act, No. 17, Laws of Kenya
  - d. That the Court be pleased and does hereby vary, review, and set aside the consent dated August 15, 2023.
  - e. That pursuant to the above, the Honourable Court be pleased and does hereby issue an order dismissing the instant suit in its entirety for lack of jurisdiction.
  - f. That the Honourable Court be pleased to issue any further orders it deems just and equitable.
  - g. That costs for this Application be provided for.
    1. The Application is supported by the grounds set on its face and on the supporting affidavit of Raphael John Olwako, an officer of the Plaintiff. The 1<sup>st</sup> Defendant, Kirimi Koome has sworn an affidavit supporting the Plaintiff's application as filed. The affidavit of Kirimi Koome is sworn on September 8, 2023 and a supplementary and a further Affidavit sworn on 18<sup>th</sup> and September 19, 2023, respectively. A replying affidavit opposing the application was filed by one Ambrose Wamari Obara on September 16, 2023. In order to shed light to the true legal position of the ownership of the Plaintiff herein the court directed the Registrar of Companies to provide the records as held at the Companies registry by itself and in compliance thereto the Registrar filed the record through an affidavit sworn by Ann Kanake, Senior Assistant Registrar of Companies. The 2<sup>nd</sup> Defendant UBA bank, filed a response through an affidavit sworn by Mickey Matheka, the legal officer of the 2<sup>nd</sup> Defendant.

### **Analysis and Determination.**

7. The case before me presents an interesting scenario. There are two Advocates on record each purporting to represent the Plaintiff and each of the parties has a different shareholder and director.



The firm of Odhiambo and Kathyaka Advocates filed the original suit on August 14, 2023 and the Notice of Motion that was subsequently compromised by a consent of the parties. The said firm represented the Plaintiff and, in their documents, stated that the sole director and shareholder of the Plaintiff was one Ambrose Wamari Ombara on whose instructions they filed the current suit, in which they seek a mandatory injunction stopping the 1<sup>st</sup> Defendant, Mr. Kirimi Koome from continuing to run the affairs of the Plaintiff company and especially the various Bank Accounts held at the 2<sup>nd</sup> Defendant Bank, UBA Bank Kenya Limited. Interestingly, although the said application was filed under certificate of urgency, the Plaintiff then was quick to compromise the application and agree to a freezing of the bank Accounts of the Company.

8. On September 5, 2023 the firm of Omwanza and Areba Advocates filed the current application yet again on behalf of the Plaintiff seeking to have the suit dismissed and the consent orders vacated. The said firm state that they represent the Plaintiff and act for and on behalf of Kirimi Koome, the 1st Defendant, who is the founding member and director of the Plaintiff and who, it is claimed, has never relinquished the ownership of the Plaintiff company.
9. The central question then the court must determine is who is the true shareholder and director Plaintiff? Section 2 of The [Companies Act](#) sets out the objectives of the Act as hereunder:-

“The objects of this Act are to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.”

It is therefore important to remember that the law envisions that behind a company there shall be a natural person or persons whose interests is being promoted by the Act. The English Case of Salomon vs. Salomon of 1867 established the Salomon principle that provides that a company is essentially regarded as a legal person separate from its directors, shareholders, employees and agents.” This means upon registration the law treats a company as a separate legal entity that can sue or be sued in its own name and own assets separately from its shareholders. However, because the law is cognizant of the fact this legal person cannot function without the input of the natural persons that created it, the [Companies Act](#) has in extensio set out the manner in which the business of this corporate person shall be carried out. The [Companies Act](#) establishes the Companies Registry which then becomes the depository of the important documents relating to ownership and membership of the corporate person. The Companies Registry oversees the formation of the legal person, its growth through changes effected by its members over its life cycle and even at dissolution, the manner and procedure of winding it up is to be found there.

10. In considering the case before me I invited the Companies Registrar to shed light to the records in the custody of the Companies Registry. I note from the affidavit of the Senior Assistant Registrar that the record is from its formation on April 14, 2023 to August 14, 2023 when the present suit was filed in court. Interestingly and from the record provided by the Registrar, various activities have taken place in the short four (4) months that this Company has been in existence. The Registrar has deponed that at formation the 1<sup>st</sup> Defendant, Mr. Kirimi Koome was the founding subscriber or shareholder and the sole Director of the Plaintiff. He took up all the 1000 shares of the company. The Registrar depones that the said Kirimi Koome was then removed from the company and replaced with one Ambrose Wamari Obara, but immediately, the Advocates for Mr. Kirimi Koome protested his removal and the Registrar rectified the Register and returned Mr. Kirimi Koome as the sole director and shareholder of the Plaintiff. The Registrar then notified Mr. Ambrose Wamari Obara of the rectification of the



Register who then lodged a complaint with the Registrar that he was the legitimate shareholder and director of the Plaintiff. Several correspondences ensued and the Registrar depones that the firm of Odhiambo and Kathyaka Advocates wrote to the Registrar advising it that one Desire Muhunyiza was the beneficial owner of the Plaintiff and had fallen out with Kirimi Koome and replaced him with Ambrose Wamari Obara. The said letter demanded that the Registrar rectify the Register to reflect the same.

11. Mr. Kirimi Koome in his several affidavits filed in this matter has vehemently denied that he relinquished the ownership and directorship of the Plaintiff voluntarily or at all. He states that there has been an attempt to forge his signature to reflect that he has ceded the company to Ambrose Wamari Ombara and his sponsor Deisre Muhunyiza and that he has indeed reported the attempted fraudulent activity to the Police and the matter is under investigations. He provides the OB number of the said report as OB No. 25/10/08/2023, lodged at Kilimani Police Station. Mr. Koome has in his several affidavits annexed copies of court orders used by Mr. Obara and his partners to take over the Plaintiff in a matter filed in the magistrate's court Milimani being CMCC Misc. No. E1202 of 2023 which was subsequently withdrawn after the court orders emanating from the said suit were disowned by the Court.
12. As stated above, the Companies Act has set up an elaborate procedure of incorporation, management and winding up or dissolution of Companies in the Statute. I note from the affidavit of the Registrar of Companies, there is no clear explanation on the procedure that was followed by the Companies Registry in updating or rectification of the Companies Register when changes to its ownership or management of the Plaintiff were made to remove Mr. Koome and replace him with Mr. Obara. From my understanding of Company law and procedure, a change of directors and shareholders where there is no dispute is usually accompanied by a Form of Annual Returns, and if the company is not a year old an interim Form of Annual Returns, that reflects who the outgoing directors and shareholders are and who the incoming directors or shareholders are or both. Accompanying the said Form of Annual Returns is the Resolution by the Board of Directors approving the Changes either at an Annual General Meeting of the Company or a Special General Meeting and the Minutes taken pursuant thereto. These documents together with a Transfer of Shares Form and a form signed by an Independent Accountant on the Nominal share Capital and the changes thereto, if any, duly stamped with the requisite Stamp Duty are then presented to the Companies Registrar who, upon being satisfied that the changes being affected reflect the will of the owners of the Company will then effect the changes in the Register.
13. From the affidavit availed by the Registrar of Companies, there is not placed before the court, the documents used to effect the changes of ownership of the Plaintiff. These documents have not been provided as evidence of the changes conducted in the Plaintiff company herein.
14. At the centre of the dispute in this matter is the control of the funds held in the various bank Accounts in the 2<sup>nd</sup> Defendant such that he who controls the Plaintiff then has access to these funds. To my mind, there is an element of fraud in the dealings of the transfer of the shareholding of the Plaintiff. While section 102 of the Companies Act recognises that a sole shareholder and director can incorporate and operate a company, the procedure for transfer of ownership and directors remains as I have explained above. It is the sole duty of the Companies Registrar to effect changes in the Register of the Companies for all companies registered in Kenya under the Companies Act. He is the sole custodian of the true records of who are the members and directors of a company and when a dispute similar to this one arises, the Registrar has a duty to the Court and in public interest as stated in the objectives the Companies Act under section 2, to produce the true record. The Registrar must act with vigilance to protect this duty.



15. The Court in this matter is being invited to declare that one Ambrose Wamari Obara has no capacity to institute the present suit or even to enter into any consents on behalf of the Plaintiff. As explained above, this company is only four(4) Months old having been incorporated on June 14, 2023. Mr. Kirimi Koome was the original subscriber and sole director at incorporation. This fact has not been disputed. From the reading of the affidavit by Ms. Kanake of the Registrar of Companies, I am convinced that the proper procedure in removing Mr. Kirimi Koome from his own company and installing Mr. Ambrose Wamari Obara was tainted with irregularities and therefore the rectification of the Companies Register by the Registrar was proper in the circumstances. The Companies Record now reflects that the shareholder and director of the Plaintiff to be one Mr. Kirimi Koome, ID Number 23571324 and of P.O Box 2828-00502, Nairobi. Since shares are not mangoes to be traded and exchanged on the streets, proper procedures must be followed where such monumental changes are being implemented, hence the elaborate nature of the Companies Act that envisions every possible scenario in the life of a company and provides solution thereto.
16. I note that there is an invitation to this court to find a relationship between the Plaintiff and a like named company in the Republic of Rwanda. I will hesitate to make any pronouncement on the activities of the said company in Rwanda as the Court has no jurisdiction to do so. As stated earlier, there are proper procedures in our Companies Act on the formation of Companies including foreign owned companies with branches or operating in Kenya. There is no material placed before me to show the nexus between the two entities and nothing to reflect that there existed any relationship or at all between the two.
17. There is a principle in Banking law known as the Know Your Customer (KYC) principle. This principle is key to the tenets of Banking law and procedure. The 2<sup>nd</sup> Defendant has been enjoined in the current suit as the banker of the Plaintiff company. The 2<sup>nd</sup> Defendant did provide an explanation as to its role in the matter by the affidavit of its officer Mr. Mickey Matheka. The court has noted that there exists a dilemma in the mind of the 2<sup>nd</sup> Defendant as to who the signatories of the accounts held by them are. It is important that Banks warn themselves that the law has placed them in a fiduciary position to protect the deposits they hold for the true owners and to avoid being drawn into partisan disputes or even fraudulent dealings in entities. A Bank must never forget its role and where in doubt seek proper records from the custodian of official records or even invite the parties to hear their side of the story before rushing to make changes which may lead to liability attaching to the bank for actions not of their own doing. As stated earlier, the true custodian of the company's record is either the company itself or the Companies Registrar. Where in doubt, a bank must invite the Registrar to confirm the true position.
18. Having found that Kirimi Koome remains the true owner of the Plaintiff and the Ambrose Wamari Obara was not properly installed as owner and director, I find and hold that the suit and the application by the said Ambrose Wamari Obara to have been initiated without the proper authority and sanctions of the director and member of the Plaintiff, Mr. Kirimi Koome. The suit is therefore an abuse of the court process and is hereby struck out in its entirety and all consequential orders emanating therefrom vacated and set aside.
19. Costs follow the event. Because of the convoluted nature of the matter before me, each party to the suit will bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023**

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**J. W. W. MONG'ARE**

**JUDGE**

**IN THE PRESENCE OF:-**

**MR. ODHIAMBO, MR. DANSTAN OMARI AND MR. KIRAGU FOR THE PLAINTIFF – STAY ONLINE LIMITED (AMBROSE WAMARI OBARA).**

**MS. ATEKO AND MR. CLIFF OMBETA FOR THE RESPONDENT-KIRIMI KOOME.**

**MR. GITHINJI FOR THE 2<sup>ND</sup> DEFENDANT- UBA BANK LIMITED.**

**MR. OMWANZA NYAMWEYA- FOR THE PLAINTIFF- (STAYONLINE-KIRIMI KOOME)**

**AMOS - COURT ASSISTANT**

