

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**MISC. APPLICATION NO. E886 OF 2023**

**HON. JUSTICE ALEEM VISRAM**

**27<sup>TH</sup> NOVEMBER, 2025**

**BETWEEN**

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

**.....APPLICANT**

**AND**

**OMWANZA NYAMWEYA AND**

**AREBA OMWOYO**

**T/A OMWANZA & AREBA ASSOCIATES.....1<sup>ST</sup> RESPONDENT**

**IVY ATEKO INGATI.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction and Background**

1. Before the Court for determination is the application by Stay Online Limited (“the Company”) dated 28<sup>th</sup> December, 2023, seeking to review and set aside the Consent Order of 30<sup>th</sup> October, 2023 which directed its bank to transfer a total of Kshs. 74.3 Million plus interest from the Company’s account to the Respondents (“the Consent

Order”). The Company also seeks an order from the Court to reopen the matter and allow it to defend itself, arguing the dispute should be decided on its merits.

2. The application is grounded on the supporting affidavit of Ambrose Wamari Obara, sworn on 28<sup>th</sup> December, 2023. It is the Company’s position that the proceedings and the Consent Order were stage-managed and fraudulently obtained by the Respondents in collusion with a former representative, and that this was a scheme to unlawfully withdraw Company funds under the guise of legal fees. It contends that the application is prompted by a separate judgment delivered on 27<sup>th</sup> December, 2023, by the court (Mabeya J.) where the court declared Desire Muhinyunza as the beneficial owner of the Company and removed the previous director, Kirimi Koome. The Company’s deponent, Mr. Obara, claims to be a director of the Company and that his directorship is based on this new court order.
3. It is alleged that the Respondents did not inform the Court about the ongoing legal dispute over the control and ownership of the Company when they obtained the Consent Order; and the Company claims the money in the bank account is held in trust for its merchants, and that using it for legal fees is unlawful, and jeopardizes the Company's operations and relationships.

4. The Company argued that the Consent Order impedes the new management from implementing the said judgment that gave them control, and risks wastage of company assets.
5. The Respondents responded to the application through the replying affidavit of Omwanza Nyamweya sworn on 17<sup>th</sup> January, 2024. They deponed that they entered into formal Legal Services Agreements with the Company to provide legal representation in multiple court cases; and that before signing the Agreements, they conducted due diligence by obtaining official CR12 documents from the Business Registration Service, which consistently showed Mr. Koome as the sole director and shareholder of the Company. They referenced a ruling dated 29<sup>th</sup> September, 2023, in High Court Commercial Suit No. E357 of 2023, where the court found that Mr. Kirimi Koome was the true owner and director, while Mr. Obara had not been properly installed. They submitted that this ruling validated their client's authority at the relevant time.
6. The Respondents stated that a letter from the Registrar of Companies rectified and expunged Mr. Obara's name from the Company register and reinstated Mr. Koome, declaring documents showing Obara as a director, null and void. The Respondents asserted that the Consent Order was properly obtained and they provided details relating to issuance of invoices for their fees, after non-payment of which, they filed an Originating Summons. The Company, through its authorized CEO, Mr. Raphael

Olwako, responded and agreed to the facts in their summons, the Consent was thereafter recorded before a judge, and duly adopted as a court order.

7. The Respondents stated that the subsequent judgment of 27<sup>th</sup> December, 2023, which declared Desire Muhinyunza as the beneficial owner of the Company cannot be applied retroactively to invalidate the legally sound actions and agreements such as the Consent Order which was entered into by the Company's legitimate director prior to the date that that judgment was issued. They submitted that that the Respondent has not demonstrated any of the legal grounds required for reviewing a judgment, such as a mistake or an error apparent on the face of the record. The Respondents contended that they acted in good faith throughout, relying on official records, and court rulings, and accordingly the Consent Order is a valid and enforceable court order.

#### **Analysis and determination**

8. The main issue for determination is whether the Consent Order ought to be reviewed or set aside in its entirety? In the event the above in affirmative, a secondary issue is whether the matter ought to be heard and determined afresh? The principles governing the setting aside of a consent order are well established. As submitted by the Company, in *Brooke Bond Liebig v Mallya* [1975] EA 266, Mustafa Ag. VP expressed the following principles:-

*The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their Advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.*

9. The Company further relied on *Flora N. Wasike v Destimo Wamboko [1985] KECA 149 (KLR)*, Hancox JA.,(as he was then) cited *Setton on Judgments and orders (7<sup>th</sup> edition) vol 1 page 124*, and reiterated that:-

*“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.” (Emphasis mine)*

10. The Company contended that the Consent Order was obtained by way of fraud and collusion and failure to disclose material facts to the court, including the pending proceedings in HCCOMM No. E481 of 2023. Having considered the pleadings, the record, and the parties’ submissions, I am not persuaded that the Consent Order

was obtained by fraud or collusion. Based on the record before me, it appears more likely, on balance, that it was obtained properly at the time it was issued. I say this for a number of reasons. First, it is unlikely that the Respondents acted unilaterally. It is clear that they based their retainers and subsequent court actions on multiple official CR12s which consistently showed Mr. Koome as the sole director and shareholder of the Company. A prior ruling of the court (Mong'are J.,) of 29<sup>th</sup> September, 2023, in ***Stay Online Limited v Koome & another [2023] KEHC 22956 (KLR)*** explicitly found Mr. Koome to be the legitimate director and owner of the Company and declared Mr. Obara's claim invalid. An Advocate is entitled and expected to rely on such a ruling from the same court system on the question of a company's ownership.

11. Second, the Respondents have also annexed the letter from Registrar of Companies dated 22<sup>nd</sup> August, 2023, which expunged Mr. Obara from the record and reinstated Mr. Koome as a director/shareholder of the Company, thus reinforcing Mr. Koome's authority to act on behalf of and bind the Company.
12. Third, the process followed by the Respondents to obtain the Consent Order was clear and transparent. The Originating Summons was served on the Company, and through its CEO, Raphael Olwako, who obtained a board resolution authorizing him to act, filed a Replying Affidavit. The contents of the said affidavit agreed to the facts as presented by the Respondents. The Consent Order was therefore a product of

negotiation and agreement between the parties as they were legally constituted at that time.

13. It is clear that the element of fraud and collusion raised by the Company is based on subsequent event, that is, the judgment delivered by Mabeya J., on 27<sup>th</sup> December, 2023, in HCCOMM No. E481 of 2023. However, this judgment was delivered nearly two months after the Consent Order was recorded, namely on 30<sup>th</sup> October, 2023. They could not have known that the court would reach a different conclusion down the road. I do not think the effect of that ruling amounts to fraud on their part.
14. Fraud requires an intentional deception or concealment of a current material fact. Whereas the Company's position hinges on the notion that the Respondents knew of the controversy over the control of the Company, from the Respondents' perspective, this "controversy" had already been resolved in the client's favour by the court ruling issued at that time and the Registrar's notice. They were acting for the director who at the material time appeared to be properly in office.
15. I am persuaded by the Respondents' submission that the judgment of the court in HCCOMM No. E481 of 2023 may not apply retrospectively, and may not retroactively invalidate the previous instructions. Company directors are presumed to have authority to act on behalf of the Company. Mr. Koome therefore had the legal authority to instruct Advocates and to settle the claim in question at the relevant time in

question, being 30<sup>th</sup> October, 2023. A judgment thereafter, declaring that authority as flawed may not automatically transform all prior actions into fraud.

16. To set aside the Consent Order on grounds of fraud requires greater evidentiary burden than the material placed before this court. The Company ought to have shown clear evidence that the Respondents knowingly relied on false information, or actively concealed the true state of affairs. It has not done so. To the contrary the version of events as put forward by the Respondents shows that they acted in good faith and based on official records available at the time.

17. Having found the above, the remaining issues are moot.

**Conclusion and Disposition**

18. Based on the reasons set out above I find and hold that the Application dated 28<sup>th</sup> December, 2023, is without merit. The same is dismissed with costs.

***Dated and delivered virtually via Microsoft Teams this 27<sup>th</sup> day of November, 2025***

**ALEEM VISRAM, FCI Arb  
JUDGE**

**In the presence of;**

**Court Assistant: Ivan**

.....for 1<sup>st</sup> Applicant

.....for 2<sup>nd</sup> Applicant

ORIGINAL