



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION CAUSE NO. 103 OF 2012**

**IN THE MATTER OF THE ESTATE OF OMAR ABDALLA TAIB (DECEASED)**

**1. HAFSWA OMAR ABDALLA TAIB**

**2. NAHIDA OMAR ABDALLA TAIB**

**3. HUSSEIN OMAR ABDALLA TAIB.....PETITIONERS**

**VERSUS**

**SWALEH ABDALLA TAIB.....RESPONDENT**

**RULING**

Before court was the summons dated 30<sup>th</sup> January, 2013 by which the applicants **HAFSWA OMAR ABDALLA TAIB, NAHIDA OMAR ABDALLA TAIB** and **HUSSEIN OMAR ABDALLA TAIB** as legal representatives and beneficiaries of the estate of their late father **OMAR ABDALLA TAIB** sought several prayers which included (but were not limited) to the following:

**“1. THAT protection orders to issue against Swaleh Abdalla Taib and Mombasa Cargo Tally Organization prohibiting interference and intermeddling with the assets and shares of the estate of the deceased are 50% in the Mombasa Cargo Tally Organization.**

**2. THAT a mandatory order directing Swalleh Abdalla Taib and Mombasa Cargo Tally Organization to make payments immediately in respect of the weekly allowance due from November, 2011 to date.**

**3. THAT a temporary injunction directed to Swaleh Abdalla Taib not to make any withdraws (sic) or payment in the accounts held by Mombasa Cargo Tally Organization Mombasa without the consent and signature of the applicants.**

**4. THAT this honourable court be pleased to freeze all the accounts held by Mombasa Cargo Tally Organization in all parts of the country and in all the bank branches including accounts No. 204686535 held in Kenya Commercial Bank Treasury Square Branch to protect the subject matter herein.**

**5. THAT the said Swaleh Abdalla Taib be called to account for all sums collected from the Mombasa Cargo Tally Organization jointly run by the estate of the deceased.**

6. **THAT in default he be condemned to criminal action under and by virtue of the provisions of section 45 (2) of the Law of Succession Act and/or any other orders that are deemed just and expedient that will meet the ends of justice including punishment of Swaleh Abdalla Taib.**

7. **THAT this honourable court be pleased to issue leave to the applicants to file winding up proceedings against Mombasa Cargo Tally Organization.**

8. **THAT costs of this application be paid for by the said Swaleh Abdalla Taib and Mombasa Cargo Tally Organization.”**

The respondent **SWALEH ABDALLA TAIB** did on 20<sup>th</sup> February, 2013 file his replying affidavit opposing the summons.

The genesis of the dispute is the business known as Mombasa Cargo Tally Organization. This was a business, which the petitioners' late father and the respondent had been running as a partnership since 23<sup>rd</sup> August, 1984. The business was involved in clearing and forwarding of cargo. Upon the demise of the petitioners father on 11<sup>th</sup> February, 2012 the petitioners obtained the necessary authority to administer his estate. The issue of how to realize the share of their late father came up, which led to the filing of the present summons.

On 28<sup>th</sup> August, 2013 the parties recorded a consent by which the respondents agreed to pay the estate of the late Omar Abdalla Taib the sum of Kshs. 6,349,471.00 in full settlement of the total net share of the estate in the profits, allowances and assets in the business known as Mombasa Cargo Tally Organization. Both parties appeared in court later and confirmed that this sum had been paid as agreed. Having reached a consent on the amount due to the petitioners as payout, the parties failed to reach any agreement of whether in addition any goodwill was payable to the petitioners and if so in what amount. By consent the parties agreed to file their submissions and leave it to the court to determine this aspect of the dispute. I have carefully perused the submissions filed by both parties. The petitioners submit that there are three issues which this court is being called upon to determine. These are

1. Whether there is/was a partnership.
2. Who were the partners?
3. Is goodwill payable?

However, my own finding is that points (1) and (2) have already been determined by way of the pleadings and through the consent. It is clear that there existed a partnership between the petitioners' late father and the respondent and this is why the parties agreed on the sum of Kshs. 6.34 million payable by the respondent as a buyout of the petitioners share in the business. The **only** question which this court was asked to determine was that of **goodwill** i.e. is goodwill payable as part of this buyout and if so in what amount. Black's Law Dictionary, 8<sup>th</sup> Edition defines Goodwill thus

**“A business reputation, patronage and other intangible assets that are considered when appraising the business especially for purchase.”**

At the outset it must be stated that this aspect of goodwill appears to have come up mainly as an afterthought on the part of the petitioners. In their summons filed on 30<sup>th</sup> January, 2013 no claim for goodwill was made at all. In the consent entered into on 28<sup>th</sup> August, 2013 reference was made in clause (1) to the (petitioners) estate's total net share of **“profits, allowances, and assets in the business known as Mombasa Cargo Tally Organization in full settlement .....**”

It is clear therefore that at the time the consent was being negotiated and at the time the consent was entered into there was no claim for goodwill at all. If goodwill was being claimed then I have no doubt that the applicants would have made mention of it in the consent.

When an owner of a business relinquishes a whole or part of a business he may make a claim for

goodwill. Goodwill is a subjective concept that varies from one business to another. It depends on various factors e.g. the length of time the business has been in existence, the ability of the business to draw customers, etc. It is not sufficient for a party to simply claim goodwill. It must in the first place be demonstrated that such goodwill actually exists. It is upon the person who makes the claim that a business has goodwill to prove the existence of that goodwill. The applicants have not demonstrated the nature of the goodwill that attaches to the business. They have not provided particulars of the nature of the business undertaken by the partnership, details of its customer ship, or the nature of the reputation built up by the business over time. No audit or valuation report has been supplied to enable the court to assess the value of the goodwill if any. I find firstly that the existence of goodwill has not been proved and secondly the value of such goodwill (if any) is not ascertainable. For the above reasons I disallow this prayer for goodwill. Costs of this application to be met by the applicants.

**Dated and delivered in Mombasa this 9<sup>th</sup> day of June, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

No appearance by either side

Court Clerk Mutisya