



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 1 of 1986

**In the Matter of Renguti Gikambura Hotel Company Ltd and In the Matter of Companies Act
(CAP.486**

Laws of Kenya

JUDGMENT.

The Petitioner in this petition sought a winding up order. The only viva voce evidence given was by Mr Edward Nyaga a certified public accountant, in practice as an accountant in Nairobi, who also produced various reports prepared by him, and documents in support thereof, relating to an unaudited statement of affairs of the company (Ex.1) as at 30.6.86, and audited report and accounts of the company as at 30.6.86 (Ex. 5) and a suggested Goodwill Computation dated 13.6.86 (Ex. 6). At the conclusion of the evidence of Mr Nyaga it was ordered by consent that the petitioner was to be brought out from the Company and the quantum to be paid to the petitioner was to be determined by the court. In their final addresses both the learned advocates agreed that for the purposes of assessment of quantum only the audited account (Ex. 5) and the suggested goodwill computation (Ex.6) were relevant in addition to the evidence of Mr Nyaga.

Mr Nowrojee for the Petitioner accepted that figures and calculations given in the audited account report (Ex. 5) and the good-will computation (Ex. 6) Mr Nja for the company did not dispute the petitioner's share-valuation at a share-holding of 5/12 at shs 141,933 less what the Petitioner owed the company which was shs. 260,554/-. It is accepted by both the learned advocates that the petitioner therefore owed the company a sum of shs. 118,621/-.

Computation of goodwill with a five years base is also accepted by both the learned advocates.

On a 5 year base the accountant then computed the petitioner's share of the goodwill at shs. 594,631/15 cts which Mr Nowrojee accepted. The goodwill less the sum of shs 118,621/- which the petitioner owed the company left a sum of shs 476,010/25 cts which Mr Nowrojee contended was the correct amount to buy out the Petitioner. He prayed the petitioner to be awarded that sum with interest and costs.

Mr Njau submitted that certain expenses or outgoings which had been incurred before 30.6.86 but demanded after the said date should also be taken into account in the computation of the goodwill. There were as follows:-

1. (a) Auditor's fees - Auditor's fees Kshs. 13,250.00
- (b) 1984 Income Tax - Kshs. 7,132/-
- (c) 1985 Income Tax demanded but not paid Kshs. 48,618/-

Total Kshs 69,250/-

2. Bad debts (1) Solar Battery Services Kshs 19,099/-

(2) Jembe Posho Mills Kshs 55,778/-

Total Kshs. 74,877/-

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In addition to these items Mr Kiama Njau pointed out two other items which according to him had to be considered and allowed. One was the sum of shs. 10,000/-, referred to as “Extra ordinary income goodwill” on page 2 of goodwill computation (Ex.6). This figure was for a period of 6 months of 1986 and for one year should have been shs. 20,000/- and for 5 years it should have been inflated to shs. 1000,000/-. But on page 3 of the goodwill computation the figure of Kshs 10,000/- had remained unchanged even for one year and so the good will computation for 5 years had been reduced by shs. 50,000/- only and not shs 100,00/- Mr Njau wanted the total goodwill sum to be reduced by another shs 50,000/-

Finally Mr Njau referred to the income of shs 562,100 in respect of 22 room shown on page 3 of goodwill computation (Ex. 5) under the heading “Rooms Income”. He said two of these rooms were occupied by the manager and the head bar-man. Another room was used as a saloon mentioned on p. 17 of the Report and Accounts (Ex. 5) and had its own income of shs. 577/- per month. These 3 rooms, submitted Mr Njau, ought to have been omitted from the 22 rooms with the consequent proportional reduction in the “rooms income” as shown in the goodwill computation page 3.

Mr Nowrojee for the Petitioner conceded a reduction in the goodwill with regard to the Auditor’s fees of shs. 13,250/-. But he objected to any reduction on account of income tax paid by the company. These were statutory expenses payable under law and could not affect the goodwill.

I do not agree with Nowrojees view that being statutory obligation income tax does not form part of goodwill computation. To my mind these being necessary expenses which vary with the income must be taken into account when computing the nett income. The sum of shs. 69,250/- must be taken into account.

As regards the item “bad debts” I agree with Mr Nowrojee that there being no evidence led on this point the court cannot at this stage be asked to treat them as bad debts. I reject Mr Njau’s submission that the sum constituted by bad debts should be deducted from the goodwill.

With regard to the item “extraordinary income goodwill” Mr Nowrojee’s contention was that the computation showed that this item had been taken into consideration by the accountant. In any case he added, the accountant should have been cross-examined on that point. But to my mind the error is very obvious. Even a failure to cross-examine the account will not alter the fact that the figure shs. 10,000/- is for a period of 6 months only. In the computation of goodwill this figure has not been adjusted to the annual figure which should be shs 10,000/- with the result that in the goodwill computed on the basis of 5 years only a sum of shs. 50,000/- has been taken into account and not a sum of shs 100,000/- which should have been the correct amount at shs. 10,000/- for 6 months or shs. 20,000/- for a year. I accept Mr Njau’s submission and find that another sum of shs 50,000/- ought to be deducted from the goodwill.

I once again agree with Mr Nowrojee that there is no evidence before court on the manner in which the 2 rooms in question are being used. The court cannot now at this stage make a finding that one room is occupied by the manager and the other by the head bar-man. There is no evidence to that effect. As to the 3rd room being used as a saloon that has been taken into account by the accountant in his report and accounts (Ex.5 – p.17) and the net loss figure arrived at is shown in the computation of goodwill (Ex. 6). I reject Mr Njau’s claim for a reduction in the amount of goodwill on account of these 3 rooms.

The petitioner’s share of goodwill is 5/12 of shs 69,250/- in respect of fees and tax comes to

approximately shs 28,704/- . 5/12th of 50,000/- comes to shs. 20,835/- approximately. The total of the further deduction from shs 467,010/25cts found due on the petitioner comes to shs 49,539/- leaving the new amount due to the petitioner at shs 427,471/25 cts.

Interest in my view is awarded on liquidated amounts from the date of filing. Interest on amounts to be ascertained by court are normally awarded from the date of judgment. In this case interest is awarded from the date of judgment.

As regards costs Mr Njau said that costs should be granted to the Respondents because there was no need for a winding up action to have been filed. The petitioner should have opted from the start to being bought out. I have considered this submission but in my view the petitioner is entitled to costs. Following the consent order made on 8.11.89 I order that the petitioner be bought out from the company on payment of a sum of shs 427,471/25 cts by the share-holders jointly and or severally. The petitioner is awarded costs and interest at court rates from to-day. Judgment is entered accordingly.

February 14, 1990.

Cockar J.