



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**WINDING UP CAUSE 36 OF 1989**

**IN THE MATTER OF TURTLE BAY HOTELS LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**RULING.**

By a Petition presented on 31<sup>st</sup> August, 1989 Fitzval Remedios Santana De Souza (herein after called the Applicant) has prayed for certain reliefs under Section 211 of the Companies Act and alternatively that the Company namely Turtle Bay Hotels Limited (herein after called the Company ) be wound up by an order of the Court on the ground that it is just and equitable that the Company be wound up.

The Applicant has also applied by Chamber Summons that his application be heard exparte during the current Court Vacation and that the person named therein be appointed interim liquidator of the Company. The said application has been made under Sections 235, 234, and 237 of the Companies Act rule 27 of the Companies (Winding up) Rules and the inherent powers of the Court.

Section 235 of the Companies Act empowers the Court to appoint the Official Receiver to be the provisional liquidator at any time after the presentment of a winding up petition and before the making of a winding up order. I do not think that this Section empowers me to appoint any person other than the Official Receiver as the provisional liquidator. Therefore I cannot grant the applicant's prayer that Mr John Stuart Armitage may be appointed as the provisional liquidator as he is not the Official Receiver. If the application is successful, it is only the Official Receiver as defined under Section 230 of the Companies Act who can be appointed as the provisional liquidator. Mr Gautana appearing for the Applicant has conceded it.

The Applicant holds 63,158 shares registered in his name out of 200,000 ordinary shares of shs 20/= each which is said to be 31.6% of the total shareholding. The Applicant has stated that on or about 31<sup>st</sup> July, 1985 the Company unlawfully resolved in its Annual General Meeting to remove the Applicant from his position as Chairman of the Company also to remove him from his office as a Director. He has also stated that since then he has been wholly excluded from the affairs of the Company although he is the largest single Shareholder of the Company. He has also stated that in breach of the Act, he was not provided with copies of certain documents to which he was entitled and that despite the fact that the Company had made substantial profits no dividends had been declared to the Shareholders. He has stated that he was removed from his office as Director to enable he remaining Shareholders / Directors to unlawfully take out money from the Company; that the Directors of the Company are unlawfully paying themselves fat emoluments and are accorded free use of hotel accommodations to the exclusion of the applicant, that in order to take out money from the Company, the Directors have awarded Mr Halai a co-Director a contract in the sum of 18 million shillings for extensions to the hotel premises without calling any tenders; that the Directors have changed the Company's auditors and appointed another firm of auditors as the former auditors insisted that the Directors remuneration should be shown in the Company's annual balance sheets; that there have been negotiations for an amicable settlement of the dispute between him and other Members of the Company but they have broken down because, it is alleged, that the other Members of the Company do not wish to pay a fair price for the applicants shares. It has also been stated that there has been an attempt to evade income tax. The list of accusations is too long to be recounted here. Because of the

urgent nature of the matter I decided to hear it during the vacation.

On the affidavit evidence, I am satisfied that the Applicant has made out a prima case that the affairs of the Company are being conducted in a manner oppressive to him.

The appointment of a provisional liquidator can only be made when an effective petition pending. Here there is a Petition pending which on the face of it has merit. The object of the appointment is to protect the Company's assets and goodwill before the winding up order is made. The Court may limit and restrict the Powers of the provisional liquidator by the order appointing him under Section 235 of the Act:

I agree with Mr Gautama that if the application is ordered to be served there must be an interval between the Service and the Interparte hearing of the application. In that intervening period there can be interference with the Company's records. There can be destruction of evidence. I agree with him that it might become difficult to have a fair hearing of the application in the event. It is therefore in the interest of justice that an interim order should be made exparte. I therefore hereby appoint the Official Receiver to be the provisional liquidator of the Company to take immediate possession, custody and control of the Company's books of account, minute book and all other related records and documents. He is further empowered to allow the day to day business of the Company under his supervision. This order shall remain in force until further order of the Court.

The requirement regarding the statement of the affairs of the Company is deferred until after and subject to the final order on this application.

The Company and other respondents shall be served with the application for inter parte hearing on 19<sup>th</sup> September, 1989. Costs of the exparte hearing of this application shall follow the final result of the Petition.

**Dated and Delivered at Nairobi this 4th day of September , 1989**

**G.S PALL**

**JUDGE**