

# When does goodwill qualify as property? Kenya Supreme Court clarifies

The concept of goodwill as property is often confusing as it is intangible, often impossible to separate from the underlying asset, difficult to value and legally ambiguous.

By Cecil Kuyo, Alfred Deya, Radhika Arora, Charles Omondi Oyeng' and Munene Njoroge <sup>22 Jul 2025</sup>



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Unlike real property, which can be seen, touched or independently valued, the value of goodwill is intrinsic; linked to the reputation of a business, and, in particular, the likelihood that existing customers will continue engage with the goods or services of the business.

Last year, the Court of Appeal in *Heineken East Africa Import Company Limited & Another v Maxam Limited* (the *Heineken* decision) held that investments made by distributors in Kenya may give rise to irrebuttable goodwill, which would then qualify as property.

Now, the Supreme Court has clarified the circumstances under which goodwill qualifies as a clearly identifiable and constitutionally protected property right, shedding light on the intersection of constitutional law and commercial principles, particularly in the context of distribution, investment, franchising and the termination of business relationships.

## Brief facts

Bavaria N.V. entered into a distribution agreement with Jovet Tanzania, which gave it the right to exclusive distribution of its branded non-alcoholic beverages in Kenya and Tanzania. Between 2006 and 2015, Jove Kenya entered into a private arrangement with Jovet Tanzania, which saw it market and distribute Bavaria's products in the Kenyan market.

In 2015, when Bavaria did not renew its distribution agreement with Jovet Tanzania in relation to the Kenya

market, Jovet Kenya filed suit, seeking exclusive distributorship of Bavaria's products in Kenya and orders that it had acquired goodwill in relation to the products in Kenya.



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Jovet Kenya claimed to have developed a market for Bavaria's brand locally by investing in infrastructure such as warehouses, branded outlets, delivery trucks, marketing campaigns and sales staff. Jovet Kenya argued that its sustained efforts had acquired significant goodwill for Bavaria's products in the Kenyan market; consequently, it claimed sole rights to market and distribute the products in Kenya.

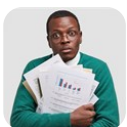
The High Court held that there was no contractual relationship between Jovet Kenya and Bavaria. As a result, the court dismissed Jovet Kenya's claim without addressing whether goodwill constitutes a form of constitutionally protected intangible property. At the appeal stage, the Court of Appeal affirmed the High Court's position, finding that the dispute was purely commercial, but equally did not see merit in addressing the underlying claim for goodwill.

The Supreme Court affirmed the decisions of the two lower courts on the basis that there was no contractual relationship between Bavaria and Jovet Kenya and consequently no proximate connection to establish constitutional violations. Nonetheless, it went ahead to determine whether goodwill is property and ought to be protected under Article 40 of the Constitution of Kenya.

## Key takeaways

In its determination, the Supreme Court highlighted the following principles:

- Goodwill is a form of property entitled to protection under Article 40 of the Constitution of Kenya.
- Goodwill qualifies as property when it is identifiable, whether independently or alongside other assets and when a measurable value can be attributed to it.
- A sub-distributor cannot claim goodwill through its parent company unless expressly stated in the principal agreement with the manufacturer.



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## What this means and notes for the future

This decision has several implications. Firstly, as goodwill is now a recognised property right that may be assigned a measurable value and transferred with the business to which it relates, it is imperative for businesses to be cognisant of the fact that claims for goodwill are no longer purely commercial in nature and any allegations of interference with goodwill may also be addressed as constitutional violations.

Secondly, businesses should endeavor to formalise their commercial relationships through clear written agreements. The concept of privity of contract limits contractual rights and obligations to the parties directly involved in the agreement. Without a direct contractual link, claims for goodwill may not be enforceable.

Thirdly, the terms of distributorship agreements should clearly define the legal consequences of any private arrangements with sub-distributors and agents. Such agreements should also define the rights and obligations of both the manufacturer and the distributor or its agent, including provisions related to goodwill.

Given the prevailing view from Kenyan courts that the unilateral termination of distributorship agreements is unavailable to manufacturers due to the inherent power dynamics in their contractual relationships with distributors, the principles of Article 10(2) of the Constitution of Kenya on equity and fairness should inform business relations where a dispute with respect to either termination or goodwill arises.

## ABOUT THE AUTHOR

Cecil Kuyo and Alfred Deya, Partners, Radhika Arora, Senior Associate, Charles Omondi Oyeng', Associate, and Munene Njoroge, Candidate Legal Practitioner, Bowmans Kenya

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