



REPUBLIC OF KENYA



**Chef West Hotel Limited & another v Bett (Civil Case 11 of 2021)
[2023] KEHC 24014 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE 11 OF 2021
DO OGEMBO, J
OCTOBER 19, 2023**

BETWEEN

CHEF WEST HOTEL LIMITED 1ST PLAINTIFF

CHRISPINUS MUTSAMI MUTESHI 2ND PLAINTIFF

AND

LYNN MILDRED BETT DEFENDANT

JUDGMENT

1. The 2 Plaintiffs Chef West Hotel Limited and Chrispinus Mutsami Muteshi, filed this case against Lynn Mildred Bett, seeking several orders among which are:
 - i. A declaration that 300 shares transferred to the Defendant by the 2nd Plaintiff were held in trust and for the benefit of the 2nd Plaintiff.
 - ii. An Order for valuation of all the assets of the company by a duly registered court appointed registered valuer to file a report in court.
 - iii. An order directing either party to make an offer to buyout the other party at the market value for share of the company in line with their shareholding.
 - iv. In the alternative, an order directing that the company be wound up through a process of liquidation by either a court appointed liquidator or a liquidator proposed by the parties.
2. The Plaintiff has also asked of costs of the suit,
3. The Defendant denies the claims of the Plaintiff and has duly filed a statement of defence and a counter-claim.



4. In the defence and counter-claim, the Defendant has contended that the 2nd Plaintiff has occasioned fraud amongst others and prayed that the Plaintiff's suit be dismissed with costs. The defendant has also pleaded that a declaration do issue that Annex Chef West Hotel on South Teso/Agroromo/1315 is an asset of 1st Plaintiff and an order directing the Register of Companies to dissolve Annex Chef West Hotel Ltd. The Defendant has also prayed for costs of the suit,
5. The evidence of the Plaintiff was led by the 2nd Plaintiff himself who adopted his witness statement dated November 17, 2022 as his evidence in chief. The statement of the 2nd Plaintiff was simply that he is a director and a shareholder of the 1st Plaintiff, a company registered on 21/6/2016. That Defendant has purported to take over and run the company by herself to the exclusion of the 2nd Plaintiff. That the Defendant has failed to remit any collections nor pay taxes to Kenya Revenue Authority. That the Defendant has failed to pay Hotel creditors and continues to run down the hotel. And no meeting of Directors has been called while 2nd Plaintiff has fraudulently been removed as a signatory of the company's account. And lastly, that 2nd Plaintiff transferred his 300 shares of the company to the Defendant on the understanding that she would hold the same in trust for purposes of securing business tenders under the category of women, youth and persons living with disabilities. That the defendant has unilaterally and fraudulently removed 2nd Plaintiff from directorship of the company on claims that 2nd Defendant had resigned and forfeited his remaining 200 shares back to the company.
6. The 2nd Plaintiff was cross examined on his statement. He confirmed that Defendant is his former wife. That as a couple they jointly registered and owned property including Chef West Hotel, 1st Plaintiff. But that he has been locked out of the business after being removed from being a signatory. That when Chef West was incorporated, the shares were 50:50 between him and the Defendant, but he transferred 300 shares to Defendant in trust. That the Hotel stands on land registered in both their names.
7. The 2nd Plaintiff continued that Annex Chef West Hotel was incorporated in 2020 after the divorce of the parties. He denied ever getting a Notification of change of Directors from the Registrar, not notifications of shareholding. That the matter of his removal is being investigated by the DCI, Busia, after 2nd Plaintiff made a formal complaint. Also that the land on which Chef West sits is jointly owned and is subject of division of matrimonial property case before the court at Busia.
8. The 2nd Plaintiff called no witnesses.
9. The Defendant on the other hand, in her defence, testified that she runs Chef West Hotel since 2016 and she pays all dues including KRA. That the hotel is running. That in the hotel, the 2nd Plaintiff has 200 shares while she has 800 shares and not 50:50. She denied that 2nd Plaintiff has ever released any of his shares to her and that from inception it was 20:80. The Defendant further denied that she removed 2nd Plaintiff as a signatory to the bank account, but that he resigned voluntarily during their divorce. That 2nd Plaintiff went on to launch Chef West Annex where he has been the sole shareholder. That the same is on a Parcel No. 1315/South Teso/Amorong in their joint names. She added that Chef West Annex was built by proceeds from Chef West Hotel and the current shareholding of the same are 2nd Plaintiff and Lilian Achiro, at 300 and 200 shares respectively.
10. The Defendant denied that she has attempted to change the shareholding of Chef West Hotel and that the document the 2nd Plaintiff relies on as proof are false. She added that she has never seen any document from the Registrar showing any changes in the shareholding of the company. She we further that 2nd Plaintiff has taken over everything and even the matrimonial home. She otherwise confirmed that the court at Busia ordered for distribution at 50:50. Defendant suggested that 2nd Plaintiff should own Chef West Annex while she remains with Chef West Hotel.



11. On cross examination, the Defendant went on that the shareholding was never at 50:50 in incorporation. She denied the Plaintiff transferred his shares to her for purposes of winning tenders. She admitted that she has never called for an AGM of the company nor paid any dividends to the Plaintiff. She also admitted that she is not a director of Chef West Hotel Annex. She denied conspiring to remove 2nd Plaintiff from being signatory in the company account, but that 1st Plaintiff voluntarily removed himself when he went to Chef West Hotel Annex. She also denied incorporating another company, Gijomi Limited to divert funds from Chef West. Defendant also did not call any witness.
12. By consent of the parties, an order was made that the parties, file written submissions. Both sides duly complied and only filed their sets of submissions.
13. From the side of the Plaintiffs, it was submitted that the Defendant took over the running of the affairs of the 1st Plaintiff to the exclusion of the 2nd Plaintiff and thereby depriving 2nd Plaintiff of his rights as a shareholder. Reference was made to Section 14(3) of the *Companies Act* on rights of a member of the company. That there is no evidence produced to show that the Defendant allowed 2nd Plaintiff any of the above rights. The case of *Missa Misanga v Erai Musigire* (1966) EA 300 was relied upon on that:

“.....a shareholder has a perfect right to know what is going on at these meetings and dealings of the company. It may affect him individually, as a shareholder, as well as his liability as a Director and it has been sometimes held that even a Director who does, not attend board meeting is bound to know what is done in his absence.”
14. That the Defendant has never paid any dividend to 2nd Plaintiff and has diverted funds from the company to accounts of a new entity, Gijomi Company Ltd. That statements produced show that Defendant makes no deposit into the company account.
15. The 2nd Plaintiff has further submitted that the Defendant, in collusion with officers of the bank fraudulently removed the 2nd Plaintiff from being a signatory to company's bank account at KCB Busia Branch. That 2nd Defendant has even gone ahead to lodge applications with the Registrar of Companies to fraudulently remove the 2nd Plaintiff from directorship and also to manipulate the shareholding. That a purported resolution was duly submitted to show that the 2nd Plaintiff had relinquished his shares (200) back to the company. Lastly, that contrary to Section 27(5A) of the *Act*, the Defendant has failed to call for any board meeting of the company, which is a ground for winding up of the company (*Madbu Paper International Limited* case).
16. The 2nd Plaintiff further submitted that the 300 shares transferred by him to the Defendant was for Defendant to hold the same in trust for him. That when the company was incorporated in 2016, 2nd Plaintiff and Defendant held equal shares of 50:50 each. That 2nd Plaintiff later transferred to the Defendant 300 of his shares to hold in trust and for purposes of securing business tenders under the category of women, youth and persons with disabilities, whose requirement was that a woman had to be a majority shareholder in a company to qualify. It was submitted that same was held in trust (*L.N. v SMM* [2013]eKLR and *Rothmans v Freeman Mathews Treasure* (1985) Ch. 207).
17. The court was urged to consider the circumstances of the case and make a finding of existence of a trust (Peter Ndungu Njenga v Sophia Watiri Ndungu [2000]eKLR).
18. On the issue of a valuation order, the 2nd Plaintiff submitted that there is need for valuation of shares and the determination of the company's accounts, assets and liabilities. The Party relied on the case of *Edwin Kipng'eno Rono v Leawin Limited and Another* [2019]eKLR on the need of valuation in either a winding upon a buyout) and that the valuer should be appointed by the parties and in default by the



President of the Institute of Chartered Accountants and costs of same to be shared by the parties. The court was urged to order a valuation to determine the value of the shares and company assets.

19. The 2nd Plaintiff lastly, submitted on the appropriate remedy the court should issue regarding winding up or buyout. That the circumstances, a winding up would be appropriate, but that an order of winding should not issue unless there is not alternative remedy (Vadga Establishment V. Yashrin Shretta & 10 Others, C.A. No. 83 of 2000). The case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 13 Others, Civil Appeal 63 of 2001) was further relied on. That if a reasonable offer is made for purchase of shareholding, the company ought not be wound up and that a proper formula ought to be provided for valuation of such shares so that the dissident shareholders go out of the company leaving it to the other shareholder to run. It was proposed a buyout on willing buyer willing seller. 2nd Plaintiff has prayed for the 5 orders as contained in the Plea.
20. On the Defendant's side, it was urged that the plaintiffs' suit be dismissed and that Judgment be entered in terms of the counter-claim dated 2-11-2022. First that the suit brought in the name of the 1st Plaintiff is incompetent as the 2nd Plaintiff did not exhibit any authority and seal to bring up the case.
21. That no valid resolution has been shown to instruct the law firm of Ochieng Opiyo & Company to institute the suit. (Leo Investments Ltd v Trident Insurance Co. Ltd [2014]eKLR and KCB v Stage Coach Management Ltd [2014]eKLR). It was pleaded that the case as brought in the name of the 1st Plaintiff be struck out with costs.
22. It was further submitted that this dispute is between 2 directors formally married as to the division and running of businesses of the 1st Plaintiff and Shieywe General Contractors and Suppliers Ltd. It was admitted that while married 2nd Plaintiff and Defendant jointly registered Chef West Hotel Ltd and Shieywe General Contractors and Suppliers Ltd.
23. Defendant denied that the 2 owned 50:50 shares in Chef West Hotel now that 2nd Defendant transferred his 300 shares on trust to the Defendant. That no evidence was shown of the shares being at 50:50, that the true position is that the Defendant held 80% and 2nd Plaintiff 20, a position that remained to date.
24. Further, that being a director of the company, the 2nd Plaintiff should not be heard to say he has been denied his rights as director since he is able to move appropriately. Also that the acts and threats of the 2nd Plaintiff has made it impossible for the Defendant to sit down with the 2nd Plaintiff. It was also denied that Defendant and officials of KCB fraudulently conspired to remove the 2nd Plaintiff as a signatory and no evidence was produced to prove same. That the 2nd Plaintiff on his own motion opted to cease being a signatory of the account, before incorporating another company of Annex Chef West Hotel and setting up an account for the same to the exclusion of the Defendant whereas same was established with proceeds from Chef West Hotel Ltd.
25. It was further submitted that contrary to Plaintiffs' assertion that the Defendant took sole management of the one Hotel in 2019 during the divorce, the defendant was in full control from the date of incorporation in 2016, a position she holds to date.
26. On the issue of management of Chef West Hotel Ltd, it was submitted the Defendant is complainant in payment of KRA dues. The Defendant also denied the evidence of the 2nd Plaintiff that she fraudulently attempted to remove the 2nd Plaintiff as a shareholder. That no document was produced from the Registrar of Companies to confirm the allegations. The Defendant has maintained that she is a stranger to the documents produced by the 2nd Plaintiff and the shareholding of the company remains at 80:20. On the other hand, the Defendant has contended that the 2nd Plaintiff has fraudulently



- removed her from directorship of Shieywe General Contractors and Suppliers Ltd and reduced her shares to 20.
27. As to the assets of the company, the Defendant submitted the company only owns movables. And that Chef West Hotel commissioned a second Hotel Annex Chef West Hotel established in South Teso/ Angorom/1315. That movables of the said second Hotel also constitute assets belonging to Chef West Hotel Ltd and that the establishment of the second Hotel was fraudulent and an attempt to deny Chef West Hotel Ltd its assets.
 28. The Defendant also submitted on whether Annex Chef West Hotel was wrongly and fraudulently incorporated. That the 2nd Plaintiff states the Annex was incorporated on 27-8-2019, 1 month after the Defendant moved out of the matrimonial home. That Lilian Achiro, the present co-director did not contribute to the establishment of the Annex, but that it was from loans and proceeds from Chef West Hotel Ltd. She also challenged the name of the second Hotel as being in contravention of Section 57 of Cap 486 on similarity of names and urged that the name be struck out. Defendant relied on *R v A-G and Another ex parte Kensington International Ltd and Another* [2015]eKLR.
 29. Lastly, the Defendant submitted that a buyout or winding up of the Hotel would not be a just conclusion of this matter as same would only disrupt the lives of the Defendant. That in the matrimonial property case, No. HCC 3 of 2019, the Judge observed that the parties had children, took loans and even accumulated wealth. That the 2 children are now sustained by the Defendant from proceeds of the Hotel. That the parties put up 2 Hotels which have run independently and the just and equitable solution would therefore be that the 2 Hotels continue running independently as they are and that plot numbers 405, 406 and 407 registered in both names be fully registered in the Defendant's name while South Teso/Angoromo/1315 on which Annex stands be registered in the name of the 2nd Plaintiff. That the parcels of land were already distributed at 50:50 in HCCC 3/2019.
 30. It was finally submitted that Annex Chef West Hotel be ordered to drop the name and that this court do order the winding up of Shieywe General Contractors and Suppliers Ltd upon payment of the 2nd Plaintiff to the Defendant of any accrued liabilities from June 2019. The Defendant prays that the Plaintiff's suit be dismissed with costs and Defendant's counter-claim be allowed with costs.
 31. I have considered the evidence submitted by the 2 parties, the 2nd Plaintiff and the Defendant. I have also considered the submissions that the sides have filed herein. For over 2 decades the 2nd Plaintiff and the Defendant were marked as husband and wife. They lived in their matrimonial home in Busia Municipality. The couple were blessed with 2 children. They worked hard together to acquire matrimonial home and other property in the form of land and buildings. All was rosy in the relationship till sometime in or around 2019 when due to certain irreconcilable differences, the couple divorced. The Defendant, consequently moved out of the matrimonial home while the 2nd Plaintiff stayed on, but now with a different spouse, one Lilian Achiro, allegedly a former wife to a brother of the Defendant.
 32. Consequent to the divorce of the parties, the parties filed HCCC No. 2019 at the High Court of Kenya, Busia and the court having heard the parties on the issue of division of matrimonial property found that the same should be distributed equally between the 2 parties i.e. the ratio 50:50. The cause however did not cover one property, the Chef West Hotel Limited the subject of this suit.

This case was first filed at the High Court in Busia, but for certain reasons was transferred for hearing before this court. Both the 2nd Plaintiff and the Defendant gave evidence in court, with each side calling 1 witness. Submissions were duly filed by the parties as have been analysed above. A number of issues have come up for determination in this case.



The first issue for determination is the issue of shareholding of the 1st Plaintiff as between the 2nd Plaintiff and the defendant. The parties had differing positions. In the evidence of the 2nd Plaintiff, when Chef West Hotel Ltd was incorporated each of them had 50:50 shareholding of the company, but due to need to enable the defendant to win Government tenders under category of women, youth and persons with disability, which require that such a tendering entity must have majority shareholding being a woman, the 2nd Plaintiff voluntarily transferred his 300 shares out of 500, to the Defendant to make her appear as a majority shareholder of the company so as to win Government tenders. The Defendant was to hold the same in trust to the plaintiff. The Defendant was to hold the same in trust to the Plaintiff.

33. The Defendant on the other hand, has maintained that the 2nd Plaintiff has always had 200 shares in the company and that the shareholding of the company was never at 50:50 at the time of incorporation of the company 2016 June.
34. It is noteworthy that none of the parties exhibited to the court the original documents of incorporation of the company, which would have shed light on the number of shares each shareholder had and there the ratio of their shareholding. The absence of the documents of incorporation essentially leaves this court with the responsibility of determining who between the 2 sides proved their case on a balance of probabilities.
35. The 2nd Plaintiff has given a reason as to why he transferred his 300 shares to the Defendant. The Defendant has not denied that in order for a company to tender and win a Government tender under the category of women, youth and persons with disability, such entity must have as its majority shareholding a woman, a youth or a person living with a disability. There is no denying that this remains the position today and with good reason. To help uplift sections of the society regarded as marginalized. The incorporation of this company (1st Plaintiff) took place while the parties were in a happy union of holy matrimony. And this explains why the property acquired by the parties during this period were registered in joint names in equal shares. At least from the ones declared herein, South Teso/Angoromo/1315 and parcel numbers 405, 406 and 407 Busia Township. In Busia HCCC No. 3 of 2019, the court also ruled that the parties were entitled to the matrimonial property at the ratio of 50:50.
36. The Defendant has maintained that at incorporation, the shareholding of the Hotel was 20:80 in her favour. The Defendant has not given any explanation or reason as to why this would be the only matrimonial property they held with a different shareholding. Why would all the other matrimonial property be held at the ratio of 50:50 as found by the High court, except Chef West Hotel Ltd to be held at 20:80. The marriage and relationship between the parties was in harmony. The harmony is demonstrated in the matter in which the parties had their matrimonial property in joint names and in equal shares. It would therefore require the Defendant to give a reason why the parties would deviate from their norm and register the company, but now with a different shareholding. This is the Defendant failed to do.
37. The 2nd Plaintiff, on the other hand gave a reason as to why he transferred his 300 share to the Defendant. The reason given for the transfer is reasonable, truthful and has not been denied by the Defendant. And indeed the reason reflects the correct position with respect to the law of tendering aimed at ensuring that the marginalized sections of the society actively participate in winning Government tenders.
38. It is for this reason that I find this first issue in favour of the 2nd Plaintiff that indeed the 2nd Plaintiff transferred his 300 shares to the Defendant. And if the 2nd Plaintiff transferred his 300 shares to the



- Defendant in that manner, then the 2nd Plaintiff did so far the Defendant to hold such 300 shares in trust for the 2nd Plaintiff.
39. I accordingly align myself with the decision in *LN v SMM*[2013]eKLR cited by the 2nd Plaintiff that a trust can be created without using the word “trust”. And also *Peter Ndungu Njenga v Sophia Watiri Ndungu*(2000)KLR, that courts will not imply a trust save in order to give effect to the intention of the parties.
40. In our case, the 2nd Plaintiff has given the reason for transferring his 300 shares to the Defendant. His intention was obviously to enable the Defendant to submit and win tenders with the end result of expanding their common business dormain. In effect therefore, the transferred shares were to be held in trust for 2nd Plaintiff and would in no way confer any rights over the same to the defendant. And if the Defendant holds the 300 shares on trust for the 2nd Plaintiff. I without hesitation find that the shareholding of Chef West Hotel Ltd, the 1st Plaintiff is 50:50 as between the 2nd Plaintiff and the Defendant.
41. The other issue of whether the company, while run by the Defendant has held any annual meetings, declared any statements of accounts, the answer to this has been but he Defendant in her defence. That due to the irreconcilable differences, it has not been possible for the directions to convene any statutory meetings which any case either of them are at liberty to convene. This court can only observe that this company, being in clearly breach, risks sanctions from the Office of the Registrar of Companies.
42. The 2nd Plaintiff raised issues relating to fraudulent activities in the management of the company. Several examples were pointed out. The removal of the 2nd Plaintiff as a signatory to the company account 1183463928 with KCB, Busia Branch. Attempt to alter the shareholding of the company with the Registrar of Companies. Certain minutes of the meetings and resolutions by Directors, the Defendant, in her defence denies knowledge or involvement in the same. And the court was duly informed that these matters have been referred to the relevant investigative agencies. Apart from observing that these are serious allegations that only illustrate the extent of disagreements between the shareholders, it is only proper that the investigative agencies be left to finalise the investigations into allegations.
43. On the management of the company, it is on record that the company was incorporated in 2016 by both 2nd Plaintiff and the Defendants. There is no evidence produced by the 2 sides to show the specific responsibilities that each had in the management. This was a family business owned jointly by the 2 directors. Unless there is evidence to the contrary, and in view of the peace and harmony the parties enjoyed prior to the divorce, this court is convinced that it is safe to find that the business was jointly managed by both the 2nd Plaintiff and the Defendant.
44. The one fact is however clear and undisputed, that following the divorce, the management of the company has been squarely in the hands of the Defendant and to the exclusion of the 2nd Plaintiff.
45. And then there is the issue of Annex Chef West Hotel, it shareholding and assets and its relationship with Chef West Hotel Ltd. The evidence of the 2nd Plaintiff on the matter of Annex Chef West Hotel was that Annex Chef West Hotel was incorporated in 2000 well after the divorce between the 2nd Plaintiff and the Defendant in 2019. And that the shareholders are the 2nd Plaintiff and his spouse Lilian Achira at 50:50 ratio. That same was incorporate after the Defendant had moved out of the matrimonial home.
46. The Defendant on the other hand, had submitted that as at 27/8/2019, Annex Chef West Hotel was already established and furnished with monies from the 1st Plaintiff and herself with loans and proceeds



from Chef West Hotel. One fact is clear. That the divorce between the parties was pronounced in December 2019 (paragraph 5 of amended Complaint). The Defendant has laid no claim to Annex Chef West Hotel. Her claim is only on the assets of the Hotel, allegedly bought using proceeds from Chef West Hotel Ltd. It has not been explained or proved how the 2nd Plaintiff would have developed Annex Chef West Hotel from proceedings of Chef West Hotel when in fact the 2nd Plaintiff had moved out of Chef West Hotel Ltd. He had no managerial role in the old Hotel. His name had been removed as signatory of the Bank account. No proof of transfer of any monies or equipment was shown to have been carried out from Chef West Hotel Ltd to Annex Chef West Hotel. And above all, had the Defendant had any financial interest at Annex Chef West Hotel, then she would have featured as a shareholder of the company at its incorporation. The fact that she was never a shareholder at the inception of the company can only mean that the Annex Chef West Hotel was incorporated after the divorce of the parties, leaving no possibility of the same being furnished by proceeds from Chef West Hotel Ltd.

47. As to the issue of similarity of the names, this court notes that the 2 entities are not on the same plot or contiguous to each other. The name of Annex Chef West Hotel before its incorporation must have been reserved for registration. The Registrar did not find the name as undesirable. In my view, I find the 2 names not the same as to bring any confusion. In any case, the Defendant has not shown any example of loss of business or clientele Chef West Hotel Ltd has suffered as a result of the establishment of Annex Chef West Hotel. The plea of the defendant that this court do struck out the name Annex Chef West Hotel is therefore not convincing and I decline to grant these prayers.
48. Then there is the issue of Shieywe General Contractors and suppliers Ltd. It was the prayer of the Defendant that this court do order the winding up of the company in view of the strained relationship of the parties. Yes the relationship between the parties is at its rock bottom. But is this the correct forum and manner in which this prayer may be pursued. I think not. No petition for winding up of the company has been presented or lodged before court.
49. The Companies Act gives very elaborate directions and procedure in case of prayer for winding up. In our instant matter, this application for winding up has been brought in an ordinary civil case between the parties. No petition has been presented to court. There is therefore no winding up cause before the court upon which the court can act. This prayer of the Defendant must therefore fail. I so find.
50. Lastly, is the issue of how the property in question (1st Plaintiff) may be distributed between the shareholders. Again the parties gave different opinions. The 2nd Plaintiff gave 2 options that could be adopted. First, that the property be valued (Edwin Kipngeno Rono v Leawin Ltd & Another [2019]eKLR) after which either of the parties be given the option to buy out the other. So that one party who is able to may buy out the other director. The 2nd Plaintiff also opined that a case of failure or inability, then the property may be sold and proceeds shared out to the shareholders in accordance with their shareholding. The Defendants' submission were that since she is the majority shareholder and one in charge of the property, and the property being her sole source of income and upkeep for the 2 children of the marriage, then the court should order that she solely retains Chef West Hotel Limited while the 2nd Plaintiff retains Annex Chef West Hotel.
51. This court has already made determinations hereinabove on the shareholding of both Chef West Hotel Limited and Annex Chef West Hotel, that whereas the ratio is 50:50 for Chef West Hotel Limited, the Defendant has not laid any claim over Annex Chef West Hotel where shareholders are the 2nd Plaintiff and his spouse Lilian Achiro.
52. Truth be told that the relationship of the 2 parties has irretrievably broken down. It is inconceivable that the 2 may continue jointly owning and managing the Hotel. Just like they divorced and have lived



separate lives, their interests in the business can only be separated. And in my view, sale of the property and proportional division of the proceeds from the same is viable option. And having in mind the fact that this is a business / property that the parties put up with their own sweat, it is only reasonable and logical that they be accorded the opportunity to buy out the other who is not able to take up the mantle. This after property has been duly and professionally valued.

53. However, in case none of the parties is able to buy out the other, then the inevitable must be allowed to take place. The property must be put up for sale and be sold and the parties to share out the proceeds in the correct ratios.
54. The Defendant challenged the inclusion of the 1st Plaintiff as a party in these proceedings on the basis that no resolution was passed by the Directors to give authority to the advocate to act for the company. Indeed no such resolution has been shown to court. The reasons for this are obvious. Due to the differences between the 2 Directors, it has been impossible for the Directors to call for any meeting to pass any resolution. But as it were, from the pleadings, the evidence and even the submissions of the parties, there is no claim made in favour of or against the 1st Plaintiff.
55. Authorities cited by the Defendant of *Leo Investments Ltd v Trident Insurance Ltd* [2014]eKLR, *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd*, HCC 391 of 2000 and *KCB Ltd v Stage Coach Ltd* [2014]eKLR, which are persuasive to this court are in support of the position of the Defendant. For counsel to institute proceedings on behalf of the company, he ought to have first obtained a resolution of the shareholders of the company. Notwithstanding the differences of the shareholders, in the absence of such a resolution giving the authority and instructions, the suit brought in the name of the 1st Plaintiff must fail. I allow this objection and accordingly struck out the suit as brought by 1st Plaintiff.
56. Considering the above observations, I am convinced that the 2nd Plaintiff has proved his case against the Defendant on a balance of probabilities. I therefore enter Judgment in favour of the 2nd Plaintiff and order as follows: -
 - a. A declaration that the 2nd Plaintiff transferred his 300 shares in Chef West Hotel to the Defendant to hold in trust for him. And that the 2 parties hold 50:50 shareholding of the 1st Plaintiff.
 - b. A valuation of all the assets of the company be undertaken by a registered valuer appointed by the 2 parties. Such appointment to be done by the parties within 60 days of the date of this order. In default of the parties appointing such a valuer as ordered, either party would be at liberty to approach the President of the Institute of Chartered Accountants to appoint a valuer to value the property. Costs of the valuation shall be charged on the property. The Valuation Report to be filed in court.
 - c. That either party to be at liberty, upon the property being valued, to make an offer to the other party to buyout the other party. Such offer must be made within 60 days of receipt of the Valuation Report. Acceptance of the same and buyout or payment to the other party must be within 30 days of making the offer to buy out the other party.
 - d. That in default of order(c) above, the company would be wound up through a process of liquidation by either a court appointed liquidator or a liquidator proposed by the parties.



e. Each party share have own costs of this suit.

DATED, SIGNED AND DELIVERED AT SLAYA THIS 19TH DAY OF OCTOBER, 2023.

D.O. OGEMBO

JUDGE

