

The Companies Act, 2015 as compared and contrasted with the Cap. 486

By Benjamin Musau

1) **Introduction**

The New Act has borrowed heavily from jurisdictions such as the United Kingdom and is both a consolidation of laws on companies in Kenya and a modernisation of statute law aimed at easing the doing of business in Kenya and to encourage the informal sector to formalise in order inter alia to access credit

2) **History of the Company Law Reform Efforts**

The efforts to reform Kenya's business laws have been ongoing for almost 2 decades. In 2015 the reforms became a reality with the enactment of this Act.

3) **Commencement**

Section 2 of the New Act empowers the Attorney General to operationalise the Act at such various dates as he may appoint. He appointed 6th November, 2015 as the date when various parts come into operation while the remaining parts will be commenced by notice in the Kenya Gazette.

4) **Salient features of the Companies Act, 2015**

a) Foreign Companies

One key development is that an applicant for registration of a foreign company must demonstrate that at least 30% of the company's shareholding is held by Kenyan citizen by birth.

b) The Company Secretary

Private Companies are not required to have a company secretary unless they have a paid up capital of five million shillings or more. This does not apply to Public Companies.

c) Recognition of Information Technology

E-mail address and other electronic address as means of communication are now recognised. Written resolutions may be circulated in electronic form or on a website.

d) Memorandum of Association

The role of the memorandum of association is greatly reduced for both existing companies and new companies and will contain very limited information: names of the subscribers; the fact that they wish to form a company; that they agree to become members of the company and, if the company has share capital, take at least one share in the company each. Information that was previously provided in the memorandum on formation will now be provided to the Registrar in the form of a series of statements made in the application for registration or in the articles.

e) One Man Company

A company can have one member and incorporated companies can reduce the members to one member.

f) Unrestricted objects of a company

Unless the articles of a company specifically restrict the objects of the company, its objects are unrestricted (abolition of the doctrine of *ultra vires*).

g) Fines and Penalties

The fines and penalties have been enhanced to reflect the current economic times. Imprisonment terms for indictable offences run from between one and five years, and in exceptional cases (e.g. fraud) 10 years.

h) Codification of the Common Law Offence of Fraudulent Trading

Section 1002 provides that where the business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, each person who knowingly participates in carrying on the business in that manner commits an offence.

i) Annual Financial Statements

Private companies are now required to file financial statements within 9 months after their accounting period while public companies must file within 6 months after their accounting period. Previously, private companies were not required to register financial statements.

j) At least one natural person as a director

All companies must have at least one natural person as a director and cannot just have corporate directors. It was possible for all directors to be non-natural (corporate) persons under the repealed Act.

k) Codification of Director's Duties

Director's Statutory Duties (general duties, equitable principles and fiduciary duties previously derived from common law) are now expressly provided for in the Act.

l) Disqualification of Directors

A director's disqualification order made under the Act or any other insolvency law provisions or any other enactment e.g. the Capital Markets Act and prohibits the person disqualified from performing certain actions including being a director, liquidator, supervisor of a voluntary arrangement and being involved with the promotion, formation or management of a company directly or indirectly.

m) Written Resolutions

Private Companies may pass resolutions instead of holding a physical meeting. Previously unless the articles of association were crafted to allow for written circular resolutions.

n) Share buy backs

A limited company having a share capital may now purchase its own shares including any redeemable shares.

o) Financial Assistance

A private company will be permitted to provide financial assistance for the purchase of its own shares if the company's principal purpose in providing the financial assistance is not to give it for the purpose of any such acquisition, but financial assistance for the acquisition of shares in a public company is still prohibited to be made by the company or its subsidiary company.

p) Public Offers of Securities

The Act introduces the public offer of securities by a public company which must be issued with trading certificate before conducting business or exercise a borrowing power. The Registrar will only issue a trading certificate to the company if satisfied that the nominal value of the allotted share capital of the company is not less than the authorised minimum.

q) Treasury Shares

This is the acquisition of own shares (must not exceed 10% of the nominal value of the issued share capital of the company at that particular time) by a limited company which may hold the shares or deal with them in accordance to section 529 or 530.

5) Incorporation Process under the Companies Act, 2015

Forms and public guidelines by the Attorney General have been published in the State Law Office website, and started to apply with effect from January 31, 2016. <http://www.attorney-general.go.ke/index.php/company-forms/>

6) Comparisons with Cap 486

a) Objects of the Company

The doctrine of *ultra vires* under the repealed Act has been abolished and the objects of a company are unrestricted unless restricted by the Articles.

b) Company Constitution Documents

i) Memorandum of the Company

Memorandum stating that the subscribers wish to form a company under this Act; and agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each.

ii) Articles of Association

The Act provides for different versions of model articles that may be prescribed for different descriptions of companies and a company may adopt all or any of the provisions of a prescribed version of model articles. It is permitted to develop detailed articles of association to meet specific needs.

c) Shareholders

The repealed Companies Act provided that a private company must have at least two shareholders. The New Companies Act provides that a company can have one member.

d) Company Charges

The deadline for registration of a charge is now 30 days from the day on which the charge is created, down from the current period of 42 days.

e) Annual Returns

Under Cap. 486 annual returns had to be filed within 42 days. This period has been reduced to 28 days under section 705(3) (b) the Companies Act, 2015 and in default the daily default provisions for penalties apply.

f) Execution of Company Documents

It is not mandatory for companies to have a common seal because a document signed on behalf of the company by two authorised signatories; or by a director of the company in the presence of a witness who attests the signature.

g) Company Names

Previously, company names ended with the word “Ltd”. Now, public limited companies may only be registered with a name that ends with the words “public limited company” or the abbreviation “plc” while the name of a private limited company must end with the word “limited” or the abbreviation “Ltd.”

h) Directors

Cap. 486 provided that a private company must have at least two shareholders and directors. The New Companies Act provides that a company can have one member and one director..

5) Conclusion

- a) The New Companies Act is a step in the right direction and should assist us in streamlining the business environment for economic growth and creation of employment opportunities.
- b) Provisions such as the 30% shareholding by a local investor in a foreign company must be repealed as this will discourage foreigners Investors.
- c) The provisions on offers to the public introduced in the Act need to be reconciled with the extensive provisions of the Capital Markets Act on ‘public offers’ as contained in the Capital Markets Public Offers Listing and Disclosures Regulations.
- d) The introduction of share buybacks will benefit public companies whose shares are undervalued, with such purchases enhancing value for continuing shareholders.
- e) The implementation timeline (9 months) is certainly over-ambitious considering that the 2006 English Act took almost 2 years to implement. It is likely that there will be chaos in effecting the tight implementation timetable as our early observations are that quite a number of the Registrar’s staff are not aware of the actual requirements of the impending changes.
- f) Nevertheless, we look forward to the best.



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