

# **DEMYSTIFYING BENEFICIAL OWNERSHIP UNDER THE KENYAN COMPANY LAW FRAMEWORK**

## **1. INTRODUCTION**

The momentum for beneficial ownership can be traced to a meeting held in the month of June, 2013 by leaders from the Group of Eight (G8) Industrialized Nations in Northern Ireland where they agreed on a set of principles on beneficial ownership transparency.<sup>1</sup> The principles can be summarized as follows:

- Companies have a right to know who owns them and who are the ultimate beneficial owners;
- The beneficial ownership information should be available to the authorities through central registries;
- The trustees of an express trust should know the beneficial owners of the trust;
- Authorities should come up with strategies to mitigate against the risks in their respective anti-money laundering and counter financing of terrorism regimes;
- Misuse of financial instruments and shareholding structures in legal entities should be prevented;
- Financial institutions and professionals should be subject to strict anti-money laundering and counter financing of terrorism obligations; and
- Sanctions should be meted out to companies and legal entities that do not adhere to their obligations and national authorities should cooperate to combat the abuse of companies and legal structures for illegal activity.<sup>2</sup>

It can be argued that the objective of the G8 nations was to ensure legal entities are not used to commit illegal activities and if they did or were suspected of engaging in such activities the authorities would have recourse in pursuing the ultimate owners behind the said entities.

It is safe to state that in Kenya the beneficial ownership regime was introduced via amendments to the Companies Act, 2015. This brief article attempts to highlight the beneficial ownership legislation and the challenges encountered in implementing the same.

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<sup>1</sup> Liz Confalone, 'A Brief, Recent History of Beneficial Ownership Transparency on the Global Agenda' <[www.gfintegrity.org](http://www.gfintegrity.org)> accessed 1 February 2021

<sup>2</sup> UK Prime Minister's Office, 'G8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements' <[www.gov.uk](http://www.gov.uk)> accessed 1 February 2021

## **2. THE LEGAL FRAMEWORK**

### **a. THE ACT**

The Statute Law (Miscellaneous Amendments) Act, 2019 dated 9<sup>th</sup> July, 2019 amended the Companies Act, 2015 by introducing section 93A which makes it mandatory for every company to keep a register of its beneficial owners.<sup>3</sup> Companies are required to enter in the register information of their beneficial owners as provided by the regulations.<sup>4</sup> Companies are required to lodge with the Registrar the register within thirty days after completing its preparation.<sup>5</sup> All companies must file with the Registrar changes to their beneficial ownership. It should be noted that listed companies are exempted from filing changes to their beneficial ownership.<sup>6</sup>

### **b. THE REGULATIONS**

The Companies (Beneficial Ownership Information) Regulations 2020 hereinafter referred to as the regulations came into force on 18<sup>th</sup> February, 2020 vide Legal Notice number 12 of the same date.<sup>7</sup>

#### **a. Definition of a Beneficial Owner**

A beneficial owner of a company is defined as a natural person who:

- Holds either directly or indirectly ten (10) percent of the issued shares in the company;
- Exercises at least ten (10) percent of the voting rights in the company; or
- Holds a right to appoint or remove a director; or exercises significant control over the company.<sup>8</sup>

#### **b. The Beneficial Owners Register**

Companies are mandated to take reasonable steps in identifying their beneficial owners.<sup>9</sup> The beneficial owners register should capture the following details of the beneficial owners: full name, national identity card number/passport, personal identification number, nationality, date of

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<sup>3</sup> s 93A (1) Companies Act, 2015

<sup>4</sup> s 93A (2) Companies Act, 2015

<sup>5</sup> s 93A (3) Companies Act, 2015

<sup>6</sup> s 93A (4) Companies Act, 2015

<sup>7</sup> The regulations are made pursuant to section 93A of the Companies Act, 2015.

<sup>8</sup> Regulation 3 The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>9</sup> Regulation 3(3) The Companies (Beneficial Ownership Information) Regulations, 2020

birth, postal address, business address, residential address, email, profession, nature of ownership and the date the individual become a beneficial owner.<sup>10</sup> It should be noted that when a company is filing its register of beneficial owners for the first time there is a recommended format.<sup>11</sup> Similarly when a company is informing the Registrar of a change in its beneficial owners there is also a recommended format.<sup>12</sup>

### **c. Notices**

Companies are empowered to issue notices to individuals whom they have reasonable cause to believe are their beneficial owners to furnish their particulars.<sup>13</sup> An individual who receives such a notice is required to respond to the company within twenty one (21) days from the date of receipt of the notice.<sup>14</sup> Regulation 5 provides that companies shall issue a warning notice to any individual who fails to furnish their details as a beneficial owner. The regulations further provide that a copy of the warning notice should be kept in the register of beneficial owners.<sup>15</sup>

### **d. Offences and Penalties**

#### **• Failure to Comply with s 93A of the Companies Act, 2015**

A company and its officials who fail to comply with the provisions of section 93A (5) of the Companies Act, 2015 will be upon conviction be liable to pay a fine not exceeding Kes.500,000. If the company and its officials continue with the breach they will be liable upon conviction to pay a fine of Kes.50,000.<sup>16</sup> In order to avoid this hefty fine many companies have complied with the provisions of section 93A of the Act.

#### **• Failure to Comply with a Warning Notice**

An individual who fails to comply with a warning notice may have his interests in the company restricted.<sup>17</sup> The individual's rights as a shareholder may be limited for example the individual may not have the rights to vote in company meetings or may not receive his dividends when the company is paying the same out to shareholders.

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<sup>10</sup> Regulation 3(3) The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>11</sup> Regulation 3(5) The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>12</sup> Regulation 3(6) and 3(7) The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>13</sup> Regulation 4(1) The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>14</sup> Regulation 4(2) The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>15</sup> Regulation 5 The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>16</sup> s 93A(6) Companies Act, 2015

<sup>17</sup> Regulation 7(1) The Companies (Beneficial Ownership Information) Regulations, 2020

The regulations further provide the company shall be required to file such restriction within fourteen (14) days from its issuance with the Registrar of Companies<sup>18</sup> and notify the affected person in writing.<sup>19</sup>

- **Illegal Disclosure**

An individual who illegally discloses beneficial ownership information for other purposes which are different from what is provided by the regulations commits an offence and upon conviction will be liable to pay a fine not exceeding Kes.20,000 or to be imprisoned for a period not exceeding six months or to both.<sup>20</sup>

### **3. FILING**

#### **a. Listed Companies**

For Listed Companies, the beneficial owner's register needs to be completed on the Business Registration Services (BRS) section in the e-citizen profile of the director or company secretary that is linked to the Company.

#### **b. Private Companies**

Under the new Companies Act, private companies are not required to have a Company Secretary. Therefore the beneficial owners register can be completed on the BRS section in the e-citizen profile of the director that is linked to the Company.

### **4. THE CHALLENGES AND CONCLUSION**

#### **a. System Challenges**

Stakeholders have experienced some challenges when filling out their details of their beneficial owners in the BRS platform on the E-Citizen Portal. For example in some instances it is assumed the beneficial owners though citizens of Kenya are resident in Kenya which is not accurate. In other instances, the system assumes all company shares have been issued which is not always accurate.

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<sup>18</sup> Regulation 7(3) The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>19</sup> Regulation 8 The Companies (Beneficial Ownership Information) Regulations, 2020

<sup>20</sup> Regulation 20 The Companies (Beneficial Ownership Information) Regulations, 2020

Stakeholders need to share their feedback with the Attorney General's Office on the various system challenges they have encountered to ensure the issues are addressed.

### **b. Lack of Sufficient Stakeholder Engagement**

The Attorney General's Office and its departments did not engage and educate all the relevant stakeholders. Consequently, stakeholders were not sure of what was required of them. The failure to fully engage and educate all stakeholders led to the Business Registration Services Director General extending the deadline for companies to file their beneficial ownership details from 31<sup>st</sup> January, 2021 to 31<sup>st</sup> July, 2021.<sup>21</sup>

There is a genuine need for the Attorney General's office to educate all stakeholders of their obligations through various platforms. The education of stakeholders will enhance compliance.

### **c. A Lenient Fine for Illegal Disclosure**

The fine for illegal disclosure under the regulations is capped at Kenya Shillings Twenty Thousand (Kes.20,000). This does not provide much of a deterrent for illegal disclosures, ie disclosures which are not correct or misleading. The fine for illegal disclosure of beneficial ownership information should be in tandem with that of the unlawful disclosure of personal information under the Data Protection Act.

In conclusion, the introduction of the beneficial ownership regime is a step in the right direction in providing transparency in the Capital Markets and ensuring legal entities are not used to perpetrate illegal activities. The Attorney General's office should continue engaging and educating stakeholders to enhance compliance of the beneficial ownership provisions.

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<sup>21</sup> Office of the Attorney General and Department of Justice, 'Beneficial Ownership Information Submission- Deadline Extension for a Period of Six Months With Effect From 1<sup>st</sup> February 2021' <[www.brs.go.ke](http://www.brs.go.ke)>accessed 1 February 2021