

**DISCLOSURE OF BENEFICIAL OWNERSHIP OF COMPANIES IN
KENYA: AN ANALYSIS OF THE LEGAL FRAMEWORK**

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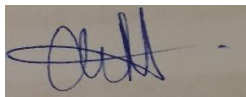
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Declaration

I, Cecilian Wangui Muhoro, affirm that this thesis is my original work and has not been presented to any other institute for the purpose of obtaining a degree.

Signed



Date: 3rd February, 2023

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This thesis has been submitted with my approval as a University of Nairobi School of Law supervisor.

Signed



Date: February 10, 2023

Dr. Njaramba Gichuki

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Dedication

To my daughters Ruth, Lisa and Melanie, and the wonder of their amazing company.

Acknowledgement

I wish to express my gratitude to my supervisor, Dr. Njaramba Gichuki. His careful supervision and comments enabled me to complete this study. His unselfish insights enabled me to have new viewpoints in every draft that I prepared. Thank you for your support.

Thanks are also due to my family for the constant encouragement while undertaking this pursuit. Special thanks to Baby Melanie for her special company as I conducted research. I am perpetually thankful.

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LIST OF ABBREVIATIONS

BO – Beneficial Ownership

BRS - Business Registration Services

EITI – Extractive Industries Transparency Initiative

FATF – Financial Action Task Force

OECD – Organization for Economic Cooperation & Development

CA – Companies Act

PPRA - Public Procurement Regulatory Authority

LIST OF CASES

1. Justine Nyambu v Jaspa Logistic [2017] eKLR.
2. Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR.
3. Ukwala Supermarket v Jaideep Shah & another [2022] eKLR.
4. Salomon v Salomon & Co (1897) AC.
5. Mugenyi & Company Advocates –v- The Attorney General (1999) 2 EA 199.
6. Multichoice Kenya Ltd v Mainkam Ltd & Anor. (2013) eKLR
7. HL Bolton Engineering Co Ltd v TJ Graham Sons Ltd [1957] 1 QB.
8. Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano (2014) eKLR
9. Dadoo (Pty) Limited v Krugersdorp Municipal Council [1920] AD 530 [6]
10. Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others (9/93) [1995] ZASCA 53; 1995 (4) SA 790 (AD); [1995] 2 All SA 543 (A).

LIST OF LEGISLATION

1. Companies Act (Beneficial Ownership Information) Regulations 2020.
2. Companies Act (Beneficial Ownership Information) Regulations 2022.
3. Companies Act, No. 17 of 2015, Laws of Kenya.
4. Data Protection Act, 2019.
5. Malaysian Companies Act, 2016.
6. Tanzania Extractive Industries Transparency and Accountability Act No. 23.
7. Tanzania Extractive Industries Transparency Regulations, 2019.
8. Tanzania Companies (Beneficial Ownership) Regulations, 2021.

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ABSTRACT

Disclosure of Beneficial Ownership is a significant tool that is able to be used to uncover criminals who employ various techniques to make vague their ownership and control of their illegitimately obtained assets. Because of the importance of disclosure of beneficial ownership, many states across the globe including Kenya have incorporated the concept in their legal framework. The Companies Act mandates each company to have a register of its beneficial owners. It is a requirement for companies to enter in the register information of their beneficial owners as provided by the regulations and to file with the Registrar the register within thirty days after conclusion of its preparation. It is also a requirement for companies to file with the Registrar changes to their beneficial ownership except the listed companies. The law on disclosure of beneficial is not effective. The quality of the information disclosed is not guaranteed as there are no devices in place to verify the information. The disclosure regime also raises privacy issues as the information sought to be disclosed is private information which is protected under the Data Protection Act. How such information will be made publicly available without infringing the right to privacy is a big challenge. Noncompliance with disclosure requirements attracts sanctions. These sanctions are too lenient to effectively deter noncompliance.

When fully executed, the disclosure of ownership regime and the public register will be a commanding tool for investigators, public regulators and presses to expose conflicts of interest and corporate malpractices. This will provide a much-needed base in the battle against corruption and other corporate misuses. However, there is a genuine need for reforms to increase the effectiveness of the disclosure regime and compliance.

CHAPTER ONE

INTRODUCTION

1.1. Background to the study

Disclosure of beneficial ownership is a concept calculated to fight monetary and economic crimes such as money laundering, tax dodging, corruption and terrorism funding. Crooks employ a variety of methods and tools to make ambiguous their ownership and control of unlawfully gotten resources. Ascertaining the true beneficial owners or individuals exercising control characterises a substantial task for prosecutors, law administration agencies, and intelligence experts across the world. Arrangements intended to make muddy beneficial ownership frequently apply a “hide-in-plain sight” strategy, making universal trade and market structures to look genuine. However, discernibility does not amount to transparency. Many of the apparatuses calculated to embolden business progress and growth, such as limited liability companies and nominee management services, may be used to enable money laundering, tax evasion, corruption and other corporate malpractice. The globalisation of commerce has only heightened this hazard, and countries now face the battle of enforcing domestic laws in a borderless commercial setting.¹

A beneficial owner is “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted...”.² A beneficial owner is also defined as “the natural, living person who ultimately owns, benefits from or controls (directly or indirectly) a company or legal arrangement”.³ This is different from the company’s legal owner, who may in veracity have slight or no control. Multifaceted and cloudy corporate

¹ FATF – Egmont Group (2018), Concealment of Beneficial Ownership, FATF, Paris, France, <www.fatf-gafi.org/publications/methodandtrends/documents/concealment-beneficial-ownership.html> accessed on 27 June, 2022.

² Financial Action Task Force (FATF), 2012 ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations’ < www.fatf-gafi.org/publications/fatfrecommendations/documents/internationalstandardscombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html> accessed on 26 June 2022.

³ Transparency International, 2017 ‘Beneficial Ownership Secrecy’ <www.transparency.org/en/corruptionary/beneficial-ownership-secrecy> accesses on 26 June, 2022.

structures established across different dominions make it stress-free to hide the beneficial owner, particularly in circumstances where nominees are used in their place and in cases where part of the corporation is established in a secrecy territory.⁴

In simple terms the beneficial owner is somebody who lawfully, contractually, or truthfully has authority to utilize or enjoy the income from a particular legal arrangement. In simpler terms, the beneficial owner is the natural being who is eligible to the benefits rising from the use of securities and the authority to exercise control and influence in respect of voting rights attached to an corporation's shares.⁵

The beneficial owner can be recognized in a two-pronged method. This is from the proprietorship perspective and from the control perspective. From the ownership perspective, a beneficial owner of a corporation is each individual who directly or indirectly through any contractual relationship or otherwise, has interests in the corporation. From a control standpoint, a beneficial owner is a sole individual with duty for controlling, managing, or directing a corporation, including a senior managers.⁶

Beneficial ownership disclosure is quite difficult and perplexing concept that requires accompanying legal reform to enact. In Kenya, the Companies Act⁷ was revised on 23 July 2019 to introduce section 93A which obliges companies to prepare and maintain a register of their beneficial owners containing specific data concerning the owners as set by Regulations⁸ made under the Act.

The Regulations feature the way the companies and their officials should observe their duties under the disclosure of beneficial ownership requirement. Following the new legislation, the

⁴ Theo Van der Merwe, 2020 'Beneficial ownership registers: Progress to date,'

<www.u4.no/publications/beneficial-ownership-registers-progress-to-date.pdf> accessed on 26 June, 2022.

⁵ Antonio Lopo Martinez, 'Beneficial Ownership Transparency: Accomplishment And Obstacles', PHD Thesis University of Coimbra; University of Salamanca, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820479>.

⁶ Ibid.

⁷ Companies Act, No. 17 of 2015, Laws of Kenya.

⁸ Companies Act (Beneficial Ownership Information) Regulations 2020.

Registrar of Companies rolled out the Beneficial Ownership (BO) E-register on 13th October 2020. The result of this is that all registered corporations are now anticipated to formulate a register⁹ specifying all the information relating to their beneficial ownership¹⁰ and file it with the Registrar in thirty (30) days of its preparation¹¹.

Although the introduction of a beneficial ownership regime is likely to strengthen the country's fight against financial crimes, it is necessary to examine the new regime's implementation and effectiveness since once information is made public, the focus should be on refining its quality and seeing how it can be used to progress accountability¹².

This paper seeks to examine how statutory disclosure regime is being implemented and the challenges facing the implementation. It further seeks to examine whether the new disclosure regime can resolve some challenges being experienced in corporate governance.

The paper traces the various steps taken over the past few years in the country's fight against financial and economic crimes, with particular reference to the recent introduction of a statutory disclosure regime. The events that led to the introduction of this regime, as well as the rationale of the statutory regime, will be examined. The paper then surveys the expected contribution of the disclosure regime to corporate governance and all stakeholders and provides some limitations of the regime. The paper makes recommendations as to how Kenya can attain the full benefits of the beneficial ownership disclosure requirement.

1.2. Statement of the problem

Beneficial ownership transparency is important as it adds to sustainable development, an impartial business atmosphere and improved public trust¹³. There is misuse of legal persons for

⁹ Ibid (n7) s93A (1).

¹⁰ Ibid (n7) s93A (2).

¹¹ Ibid (n7) s93A (3).

¹² Inter American Development Bank Organization for Economic Cooperation and Development, 'Beneficial Ownership Implementation Toolkit' <<https://publications.iadb.org/en/beneficial-ownership-implementation-toolkit>> accessed on 27 June, 2022.

¹³ L. Amin and M. Marin, 'Recommendations on Beneficial Ownership for OGP Action Plans', 2019 <www.transparency.org/files/content/activity/Rec_on_Beneficial_Ownership_Transparency_for_OGP_action_plans_-_FINAL.pdf> accessed on 27 June, 2022.

corruption, money laundering and terrorism funding. This misuse of legal persons led to the introduction of the requirement for companies in Kenya to disclose their beneficial owners through an amendment to the Companies Act, 2015. The legal framework is weak and suffers from implementation challenges related to disclosure of beneficial ownership of companies. As a matter of fact, disclosure of beneficial ownership does not effectively protect stakeholders especially investors from fraud when someone, intent on defrauding stakeholders, can simply disclose false and misleading information.

1.3. The objectives

In general, this study seeks to evaluate beneficial ownership requirement to look at what has been attained, what challenges have hindered development and where future improvements might be made. The study has the following specific objectives:

- a) To interrogate the law governing disclosure of beneficial ownership of companies to find out its benefits to corporate transparency.
- b) To assess the effectiveness of the law governing disclosure of beneficial ownership in fighting financial and economic crimes.
- c) To learn lessons from other jurisdictions
- d) To examine what should be done to make the law effective.

1.4. Hypothesis

- a) The law on beneficial ownership is innately not effective.

1.5. Research questions

- a) Is the law on disclosure of beneficial ownership effective?
- b) In what aspects is the law ineffective?
- c) What should be done to make the law more effective?

1.6. Scope of the study

The scope of this study is Kenya. The study however, looks into how other jurisdictions have applied the law on disclosure of beneficial ownership of companies and assess the foreign policies that Kenya may borrow in order to improve its beneficial ownership disclosure regime.

1.7. Justification of the study

The conclusions of this research are acceptable since it will assist the government and all stakeholders to understand the gaps in the law governing disclosure of beneficial ownership of companies. The study brings out the need to strengthen the existing legal framework. The study is similarly essential to the corporations by providing recommendations on implementation and compliance with the disclosure of beneficial ownership. This study appreciates that there are a number of solutions to this problem of beneficial ownership of companies to enhance transparency. There is need for numerous interrelated solutions which this study will explore and recommend.

1.8. Methodology

The research methodology applied in this study is Doctrinal Research Methodology. The process involves assessing different secondary sources and deducing conclusions based on the various findings. The research is meant to analyze the legal framework on disclosure of beneficial ownership in Kenya as well as writings of different authors both in Kenya and from other jurisdictions such as Panamas, USA, Uganda and Indonesia. The research also employs use of Law reports, statutes, articles and journals, websites and blogs and newspaper articles.

1.9.Theoretical framework

1.9.1. Introduction

Firms are societal entities and have definite social responsibilities. There is need for coordination between all stakeholders in a firm. These stakeholders are the owners of the firm, the executives, the employees, the contractors, the creditors, the clientele, the competitors, the government, and the society as a whole. However, the owners of these corporate entities have

used the entities to commit fraud and other crimes and no legal action is taken against the entity because its beneficial owners cannot be ascertained. This leads to losses to various stakeholders.

There are various theoretical viewpoints discussing the issues of corporate fraud and other economic crimes. This research will analyze two major theories of corporate governance specifically stakeholder theory and agency theory and their application to corporate fraud and other crimes.

1.9.2. Stakeholder Theory

Transparency and disclosure are key pillars of corporate governance. Many scandals have happened globally for lack of or unsuitable corporate disclosures. Diverse stakeholders use corporate disclosure to make decisions in their practice.¹⁴

This theory was propounded by R. Edward Freeman. He proposed ‘a new story of business’ which highlights the ideal of responsible entrepreneurship where purpose, values and ethics drive businesses and not just profits.¹⁵ Accountability of management is incorporated in this theory to apply to a wide range of stakeholders. The theory states that those in the organizations’ management have a wide range of stakeholders to serve – this includes the suppliers, employees and business partners. The theory focuses on decisions made by those in management level and interests of all stakeholders have essential value, all the interests are of equal value.

The study will borrow from this theoretical framework to emphasize on the need to observe to good practices and ethical values in the management of the corporations in order to avoid a negative impact to other stakeholders.

¹⁴ Nermeen F. Shehata, ‘Theories and Determinants of Voluntary Disclosure, Accounting and Finance Research’, 2014, Vol. 3, No. 1 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442486> accessed on 27 June 2022.

¹⁵Jordan Hodgkins, Ed. Freeman, ‘It Is Time to Replace the Old Story of Business with a New Narrative’, <<https://blogs.darden.virginia.edu>> accessed on 27 June 2022.

Corporate malpractices negatively affect the companies since it has seen some collapsing. The collapse of companies due to maladministration and fraud has both economic and social implications hence the theory stresses that the directors and the managers as a whole should ensure that the company is managed in a suitable manner to avoid shareholders losing their investment, loss of employment, creditors losing their money and the government losing tax income. This theory has been criticized for being too general thus cannot be operationalized in a way that allows scientific inspection.

The law on disclosure of beneficial owners supports stakeholder theory in that if a corporate entity perpetrates fraud, it will be possible to ascertain its owners and pursue them to make good the loss they have caused. This will make the lifting of the veil of incorporation to bear more fruits when the beneficial owners are known. It will also be easy to get the owners of a company to attend court for cross examination on behalf of the company. In the case of *Justine Nyambu v Jaspa Logistic*¹⁶ the court allowed for cross examination corporation officials on credit worthiness of a judgment debtors and ordered two directors to attend court to be examined on company's property and means of satisfying the decree. They were also to produce the company's books of accounts and documents to show its credit worthiness. If they defaulted to comply, the court would make further orders as it would deem to be appropriate including lifting the Company's Corporate Veil and pursuing the individual Directors/Shareholders to satisfy the decree.

1.9.3. Agency theory

The theory of agency tries to find out the problems created when one party, the agent, is performing for another, the principal. Agency is twofold: The actions and problems of identifying and providing services through the agents and the activities and problems of overseeing and rectifying agent activities (the principal side). Because all actions and

¹⁶ (2017) eKLR.

corrections have costs, it often does not pay the principal (or the agent) to insist on, or provide, perfect agency¹⁷. Corporations should therefore, routinely manage such imperfect conditions. This could be achieved by drilling the agent to do as perfectly as possible for the principal to ensure trustworthy behavior. Perfect performance by the agent increases transparency in corporate governance including increased and truthful information disclosure. It has been reasoned that managers should reveal information that would gratify the wants of different stakeholders¹⁸. The concept of disclosure of beneficial ownership supports the agency theory in that it pushes the agents of the company to act in the best interest of the company and its stakeholders knowing their identity is known to the world.

Dun & Bradstreet¹⁹ has contended that the use of clear information supply chain (a set of analytical technologies and suitable, precise and dependable data sources that combine a worldwide commercial network of private equity bodies) can aid increase the promptness and exactness of ending identification of beneficiaries consequently decrease the reputational jeopardy of individual firms. Agreeing with this idea, the purpose of the study is to provide tools that can be utilized by states around the globe to implement regulatory and supervisory frameworks to recognize and gather beneficial ownership information.

1.9.4. Conclusion

Both the stakeholder and agency theories describe the interconnection between the company and its main players such as the agents, clientele, employers, contractors, societies, employees and the government. These theories require responsible and transparent capitalism where businesses are not only driven by profit but by other values such as transparency that the

¹⁷ Barry M. Mitricky, 'Agency Theory', < <https://doi.org/10.1002/9781118785317.weom020097> > accessed on 27 June 2022.

¹⁸ Meek G.K. and others (1995), 'Factors influencing voluntary annual report disclosures by U.S., U.K. and Continental European multinational corporations', *Journal of International Business Studies*, 26(3), pp. 555–572. <<http://dx.doi.org/10.1057/palgrave.jibs.8490186>> accessed on 27 June 2022.

¹⁹ Dun & Bradstreet, 2017 'The Intricacies of Ownership and Control: Understanding Beneficial Ownership Structures', p9 < https://www.dnb.com/content/dam/english/dnbsolutions/supply-management/UBO-guide-170515_US.pdf > accessed on 27 June 2022.

concept of disclosure of beneficial ownership seeks to achieve. These theories are therefore, very relevant to this study.

1.10. Literature review

1.10.1. Introduction

The problem of corporate crimes and the perpetrators going unearthed and unpunished is a major issue that has been discussed by various writers across the world giving numerous views. It is a key problem that has led to big monetary losses never to be recovered. This problem continues to take roots despite the introduction of the disclosure of beneficial ownership requirement in Kenya. There is need to interrogate the recent introduced legal provision on disclosure of beneficial ownership in Kenya to highlight the gaps in the law. The research is intended to fill the gaps in the law by coming up with hands-on recommendations to the problem.

1.10.2. The concept of disclosure of beneficial ownership

Rachel Etter-Phoya and others²⁰ note that it is not necessary to wait for another seepage to confirm what people already know: the dominant and affluent persons hide behind company and other legal vehicles to swindle state resources through corruption and divert public revenues by dodging and evading taxes. This study agrees with their study that disclosure of beneficial is a public good if implemented effectively. They further note that as long as there are loopholes and exceptions, beneficial ownership registration cannot be considered effective. The loopholes and exceptions should be eliminated, except for state corporations and corporations listed on a stock exchange that are generally excepted. Beneficial ownership registration cannot be said to be effective if, for instance, the responsibility to identify the beneficial owners of a body is relinquished since the entities in the ownership chain are foreign

²⁰ Rachel Etter-Phoya and others, 2020, 'Beneficial Ownership Transparency in Africa; The state of Play in 2020', <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3640402> accessed on 27 June 2022.

(e.g. legal situation in Germany until January 2020) or if entities are given too ample scope or vague conditions to determine that they are incapable to identify their beneficial owners. This study agrees with this view and seeks to provide more proposals on how the loopholes in the law on beneficial ownership may be sealed.

Marcos Cervantes²¹ concluded that the concept of “beneficial ownership” cannot be used to tackle some direct conduit schemes that are seen as treaty shopping without attracting negative consequences. The meaning of the term therefore should have some extension beyond its strict interpretation. This study agrees with the conclusion that the concept of beneficial ownership needs a broader interpretation in order to be effectively implemented. This paper seeks to give the concept of beneficial ownership a broader interpretation for better understanding of the concept and how to implement it.

FATF – Egmont Group²² notes that limited liability corporations (and alike companies in different jurisdictions) are more susceptible to misappropriation to conceal beneficial ownership than other kinds of legal bodies. This is owing to the easiness with which they are started, and how they are regularly used to yield multifaceted legal ownership structures. Further, the convenience and use of nominee administrators and owners (both official and informal) seem to aggravate the risks notwithstanding the law necessitating measures to avoid their misapplication. Nominees have been branded a principal enabler of indirect ownership chains. This study agrees with the literature. Given the susceptibilities associated with the use of nominees, this study further studies into the role those professional nominees play to identify the best means to tackle their misuse.

²¹ Marcos Cervantes, ‘Interpreting the Concept of “Beneficial Ownership’’, A thesis submitted in conformity with the requirements for the degree of Masters of Law Faculty of Law University of Toronto, 2009.

²² FATF – Egmont Group, 2018 ‘Concealment of Beneficial Ownership, FATF, Paris, France’, <www.fatf-gafi.org/publications/methodandtrends/documents/concealment-beneficial-ownership.html> accessed 27 June 2022.

John Hatchard²³ discusses the vulnerability of legal practitioners to involvement in money laundering and the critical importance for the practitioners to take relevant steps to avoid transactions used for money laundering and other corporate malpractices. It is worth emphasis that the formation of companies is completely lawful however, it is the requirement that legal practitioner addresses the risk as to whether such transactions are to be used for money laundering purposes. Failure to do so may led to disciplinary actions against legal practitioner. This study agrees that disclosure of beneficial ownership is a wide concept which affects diverse stakeholders hence the need to analyze the effectiveness of the law in dealing with disclosure requirements.

Wilson Prichard²⁴, argues that in theory the links between expansive information on beneficial ownership and better tax collection are forthright and convincing. Beneficial owners of wealth behind shell corporations have had their private wealth held overseas and is regularly masked from tax authorities by hiding their true identity. Beneficial ownership transparency is plainly intended to attack this kind of secrecy. This study agrees with the article since beneficial ownership information will not be useful to developing republic tax authorities if it is not made public to the nations hosting wealth held overseas. Only when beneficial owners of wealth can be identified will disclosure of beneficial ownership can only function effectively.

Denis Meunier²⁵, says that prompt registry updates would be required to attain reliability. Superlatively, the registry information should be centralized, freely available and calculated in an open data format with searchable fields. This would bring equality for businesses and governments to assess financial and reputational risks. Although privacy is key, public interest

²³ John Hatchard, 'Legal Practitioners as Potential Money Launderers: Beneficial Ownership Transparency And Peps: Solicitors Regulation Authority V Sharif', Denning Law Journal 2019 Vol 31 pp 189-197 <www.researchgate.net/publication/343899459_Legal_Practitioners_as_Potential_Money_Launderers_Beneficial_Ownership_Transparency_and_PEPs_Solicitors_Regulation_Authority_v_Sharif_2019> accessed on 27 June 2022.

²⁴ Wilson Prichard, 'Linking Beneficial Ownership Transparency to Improved Tax Revenue Collection in Developing Countries', Summary Brief 15, ICTD <www.ictd.ac> accessed on 27 June, 2022.

²⁵ Denis Meunier, 'Hidden Beneficial Ownership and Control: Canada as a Pawn in the Global Game of Money Laundering' <<https://ssrn.com/abstract=324609>> accessed on 27 June 2022.

is an overarching priority. This study concurs with the author that money laundering and terrorist funding are a hazard to the safety and safety of citizens and the governments should make their citizens' safety a top priority

1.10.3. Implementation of disclosure of beneficial ownership requirement

Riva Jalipa and Eva Danzi²⁶ observe that section 104 of the Companies Act²⁷ states that 'a company shall not admit, and shall not get into its registry of members, a notice of any trust, expressed, implied or constructive.' This contradicts the requirements of disclosure on beneficial ownership in the registries. The issue of Trust has been addressed by the new Companies Act (Beneficial Ownership Information) Regulations 2020. The article further argues that it is, to date, too soon to evaluate the impact of legislation introduced and individuate possible loopholes. The Article only identifies one loophole in Kenyan beneficial ownership law which has so far been addressed. This study seeks to identify more loopholes in the law on beneficial ownership on Kenya. This paper also intends to demonstrate that it is not too rapidly to evaluate the impact of legislation introduced.

Mark Fenwick & Erik P.M. Vermeulen²⁸ suggest that a call for more and firmer mandatory disclosure guidelines is not essentially the correct lesson - and perhaps even the erroneous lesson - to be taken from corporate misconducts. They suggest that hiding information in a universally connected society in which open *communiqué* represents the "new normal", becomes increasingly difficult. This is due to digitalization, modern communication technologies and social media that makes the immediate reproduction and quick global spreading of information easier than ever before. In an age of social media and computer-

²⁶ Riva Jalipa and Eva Danzi, 2020, 'The Case for Beneficial Ownership Disclosure, Discussion Paper on the policy frameworks promoting Beneficial Ownership Transparency in Africa' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3754859 > accessed on 27 June, 2022.

²⁷ Ibid (n2).

²⁸ Mark Fenwick & Erik P.M. 2016, 'Disclosure of Beneficial Ownership after the Panama Papers' Lex Research Topics in Corporate Law & Economics Working Paper No. 2016-3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777152 > accessed on 27 June 2022.

mediated networked technologies, it is not possible to expect to retain adverse information secret, at least in the standard for a long period. Corporate scandals and happenings such as the leaking of the Panama Papers have occasioned in lots of initiatives promoting firmer transparency guidelines. However, the doubt is that – grounded on how such regulations are presently functioning – further rules are improbable to better the situation and actually contribute to a positive change in corporations. This study disagrees with their suggestion and seeks to show that the law on disclosure of beneficial ownership is necessary though there are loopholes that need to be addressed.

Fianna Jurdant²⁹ suggests that an effective disclosure regime should be complemented with a mix of non-judicial and judicial devices that inspire beneficial owners to proficiently make disclosures and notify the company, other stakeholders and the market about the beneficial ownership and control structure and their intents. This study agrees with the suggestions and proceeds to discuss how the disclosure regime may be made effective by inventing non – judicial mechanisms to encourage sufficient and correct beneficial ownership information.

Theo Van der Merwe³⁰ argues that implementation of the disclosure regime remains a challenge even if many countries have made progress at the policy level to make it effective. There is low level of compliance once registers are rolled out, with many obligated entities failing to meet the time limit for submitting data. He recommends applying penalties that are effective, proportional and discouraging. These would include administrative actions, such as declining registrations or rejecting to continue with a wished activity till all demanded information is made available as it is the case in Tanzania. For example, refusing to register as companies' entities that fail to file the relevant beneficial ownership information until they comply or

²⁹ Fianna Jurdant, 'Disclosure of Beneficial Ownership and Control in Indonesia: Legislative and Regulatory Policy Options for Sustainable Capital Markets' < <http://www.oecd.org/daf/corporateaffairs/wp>> accessed on 27 June 2022.

³⁰Theo Van der Merwe, 2020 'Beneficial ownership registers: Progress to date', <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Beneficial-ownership-registers_2020_PR.pdf> accessed on 27 June 2022.

establish a commercial connection with selected non-financial businesses and professions. Sanctions for incomplete compliance or full compliance failure may also include forfeits and trial, including criminal sanctions. The author suggests that use of sanctions to ensure compliance. This study agrees with the recommendations and goes further to explore other ways of ensuring compliance.

1.10.4. Quantity and quality of the information disclosed

Justine Davila, Michael Barron and Tim Law³¹ argue that the central purpose of disclosure of beneficial ownership is to fight corruption and other financial flaws including money laundering as a tool for the earnings of corruption and other illicit doings. They further argue that the level of detection of the illicit activities is increased through improved access to information by law enforce and civil society. This acts as a preventive measure. It also enables proficient authorities to carry out more effectual and real enforcement, in particular using beneficial ownership information as a portion of the evidence which assists them to follow unlawful monetary flows, and to share this information through transnational legal aid and collaboration. This literature fails to consider a situation where inaccurate and insufficient beneficial ownership information is disclosed. Verification of the beneficial ownership information is crucial in order to have an effective beneficial information disclosure regime.

Paul Michael Gilmour³², suggests that full name, residential or business address, date of birth and an identification number obtained from an authorized source or inimitable identifier is some of the information of beneficial owners required to be disclosed. He however, notes that

³¹ Justine Davila and others, 2019 'Towards a Global Norm of Beneficial Ownership Transparency A scoping study on a strategic approach to achieving a global norm' <<https://adamsmithinternational.com/app/uploads/2019/07/Towards-a-Global-Norm-of-Beneficial-Ownership-Transparency-Phase-2-Paper-March-2019.pdf> > accessed on 27 June 2022.

³²Paul Michael Gilmour, 'The US Corporate Transparency Act: critiquing beneficial ownership disclosure requirements in the United States Faculty of Humanities and Social Sciences', <https://www.researchgate.net/publication/352572569_The_US_Corporate_Transparency_Act_critiquing_beneficial_ownership_disclosure_requirements_in_the_United_States > accessed on 27 June 2022.

such information is believed to be delicate information and so only authorized administrative authorities should have authority to reach the information and the information kept by the relevant authorities in a safe, nonpublic databank, using information security methods and techniques that are appropriate to protect non classified information systems at the maximum security level. He argues that this reasonably raises qualm as to whether the new processes introduced are truly transparent. This study agrees with this position since institutions such as financial institutions and insurance companies need access to beneficial ownership information in order to make informed financial decisions. A beneficial ownership registry is a platform where one can find out who owns a company or other legal entity. The registrar should have the power to ask companies for information about their owners, and to take action if the information in the registry is inaccurate. The register should be available to the public in an open data format, and should be free of charge.³³ This study seeks to investigate and make recommendations on access to beneficial ownership information particularly in case of suspicious transactions.

Knobel A.³⁴, argues that incorrect and untruthful information concerning beneficial ownership is injurious in the context of responding to illegal financial flows related to corruption, money laundering or terrorist financing. In connection with these authors, this study proposes a system that should be used by governments to automatically verify ownership information, both in terms of reality and in terms detecting red flags.

Rachel Etter-Phoya, Eva Danzi and Riva Jalipa³⁵, argue that if one wants to avoid having to register their legal vehicle's beneficial owners, they will need to make sure to structure it so

³³ Transparency International | G20 Position Paper May 2015, <https://www.transparency.org/files/content/activity/2015_TI_G20PositionPaper_PublicProcurement.pdf > accessed on 27 June, 2022.

³⁴ Knobel A., 'Beneficial ownership verification: ensuring the truthfulness and accuracy of registered ownership information', p69 <www.taxjustice.net/wpcontent/uploads/2019/01/Beneficial-ownership-verification_Tax-Justice-Network_Jan-2019.pdf > accessed on 17 June 2022.

³⁵ Ibid (n10).

that only the people who really own the vehicle are listed on the registration. This way, no one will be able to identify all of the vehicle's owners, which will help avoid registration requirements. An effective disclosure regime calls for disclosure of all owners no matter their shareholding or the level of control as this study will reveal.

Emile van der Does de Willebois and others³⁶, argue that on top of improving the data content in company registries, nations should endeavor to make it liberally available. Preferably, this would mean having in place free online access (without preregistration requirements or subscription fees), complete with search utilities that allow for wide cross-referencing of the data. This study agrees that disclosure of beneficial ownership may not achieve maximum efficiency if the information disclosed is not freely accessible. The authors further argue that commanding beneficial ownership requirements on paper is not enough. Nations require to dedicate sufficient incomes to effectively ensure compliance, including overseeing service providers and imposing civil or criminal consequences for disobedience.

Andres Knobel³⁷ argues that transparency of beneficial ownership is important because it helps to stop money from being used illegally. To make sure the beneficial ownership information is accurate, it can be difficult to verify it. This study agrees with the author that owning and controlling a legal vehicle can be an important indicator of potential abuse. Some people might use legal procedures to disguise their actions as being lawful, in order to get money or avoid taxes. If something is complicated, it can make it difficult to understand. true operations and functions of entities within a multinational group in order to engage in tax abuse or other abuses. Ownership chains can be complicated, and it can be hard to figure out who the real owner is at the beginning. This study provides recommendations on how the law may be made

³⁶ Emile van der Does de Willebois and others [2011] 'The Puppet Masters, How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It', The International Bank for Reconstruction and Development / The World Bank.

³⁷ Andres Knobel, 2022 'Complex Ownership Structures: Addressing the Risks for Beneficial Ownership Transparency', < <https://ssrn.com/abstract=4040794> > accessed on 27 June 2022.

more effective in dealing with complex ownership chains, especially where nominees and trusts are involved. We need to find out what the simplest thing we can do to solve the problem is.

Dean Kalant³⁸ surprisingly notes that a person starting a firm or limited liability company within the United States normally is obligatory to offer less information to the state of incorporation than is needed to obtain a bank account or driver's license. This inordinate lack of ownership transparency in the United States has been imminent over company formation for years. This study seeks to explore the quantity of beneficial ownership information that is sufficient to make the disclosure of beneficial ownership effective.

1.10.5. Effects of beneficial ownership disclosure on corporations

Dr. Avnita Lakhani³⁹, argues that companies must reveal their ownership information to investors so that they can keep track of who is responsible for the company's success. This can be a burden for controlling shareholders, who may be worried about their personal financial standing being revealed. It can also lead to less activism by shareholders, which can be bad for corporate growth. Finally, too much politics in the corporate world can be harmful to good governance. Although disclosure of beneficial has disadvantages as Dr. Avnita argues, this study is of the view that disclosure of beneficial ownership is a public good which if well implemented will have positive impact on corporate governance.

Even though Voitovych A.V and Liashenko I. V.⁴⁰ agree that the disclosure of beneficial ownership is a good concept they argue that the disclosure of information about the beneficial owners of a company can help prove that someone controls the company and can make it more likely that the company will be declared bankrupt. If the court examining the bankruptcy case

³⁸ Dean Kalant, 2009 'Who's in Charge Here? Requiring More Transparency in Corporate America: Advancements in Beneficial Ownership for Privately Held Companies,' 42 J. Marshall L. Rev. 1049. <<https://repository.law.uic.edu/lawreview/vol42/iss4/6> > accessed on 27 June 2022.

³⁹ Avnita Lakhani, 'Imposing Company Ownership Transparency Requirements: Opportunities for Effective Governance of Equity Capital Markets or Constraints on Corporate Performance' Chi.-Kent J. Int'l & Comp. L. Vol. XVI, 2015-2016 < <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1133&context=ckjicl> > accessed on 27 June, 2022.

⁴⁰ Voitovych A.V and Liashenko I. V., 2017, 'Disclosure Of Beneficial Ownership: Legal Aspects', <<http://essuir.sumdu.edu.ua/handle/123456789/72437> > accessed on 27 June 2022.

is provided with a bank questionnaire that the client (the debtor in this case) has filled out, including information about the beneficial owners and the corresponding supporting documents, this can be an important proof of control. There is a risk that the debtor will be declared bankrupt because of actions or inaction by the debtor's controlling persons, which puts them at risk of secondary liability for the company's obligations. The disclosure of beneficial ownership concept aims at transparency and not to place liability on persons unlawfully and therefore this study disagrees with the view that the disclosure of information about beneficial owners can potentially worsen the situation in some court cases.

Maya Forstater⁴¹, argues that there is still a lot we don't know about how effective these transparency initiatives are, so it's difficult to say whether they're worth the cost or not. Transparency is important in order to achieve our goals, but we should also consider how best to achieve the objective and weigh the pros and cons of different options. This study considers the costs associated with disclosing beneficial ownership to companies and states. Public registers are a way to keep track of what businesses are in a country. They're relatively cheap to set up and use, since they only require adding a few extra fields to an existing form. This study seeks to provide more ways to make disclosure of beneficial ownership cost effective.

Vermeulen, E. P. M.⁴² argues that the disclosure regime can't be tightened because it would only protect minority investors. If we had a strict disclosure and reporting regime, it could be really hard to keep track of all the information we're supposed to be aware of. There are new disclosure and reporting requirements for the financial market that make it more difficult for people to make informed and considered choices about their investments. This makes it harder for smaller investors to get information they need to make sound choices. This means that if

⁴¹ Maya Forstater, 'Beneficial Openness? Weighing the Costs and Benefits of Financial Transparency', CMI Working Paper number 3 March 2017 < www.cmi.no > accessed on 27 June 2022.

⁴² Vermeulen, E. P. M., 2012, 'Beneficial ownership and control, a comparative study, OECD-Indonesia policy dialogue: Disclosure of beneficial ownership and control' OECD Corporate Governance Working Papers < www.oecd.org/dataoecd/41/38/50068886 > accessed on 27 June, 2022.

the rules and regulations try to target the person who owns the thing, even if they don't want to control it, that person may have to deal with that. This study seeks to explore the extent of information which will sufficiently make the disclosure of beneficial ownership more effective.

1.11. Limitation of the study

Disclosure of beneficial ownership is a novel concept in Kenya. There is little local literature that is enthusiastic to exploring the issue, hence the study relies mostly on foreign sources.

1.12. Chapter breakdown

1.12.1. Chapter one: Introduction

This is the introductory chapter that provides the general background of the study. The chapter also provides the general objective of the study, the justification and the various research questions the study seeks to answer as well as the theoretical framework. It further analyses the existing literature on the work and also the various gaps in the literature. It also concludes by providing a chapter breakdown of the subsequent chapters.

1.12.2. Chapter two: Historical development of disclosure of beneficial ownership

This chapter looks at the historical development of disclosure of ownership of companies in Kenya and the corporate scandals that led to the introduction of the disclosure of ownership regime.

1.12.3. Chapter three: The legal framework on disclosure of beneficial ownership in Kenya

This chapter reviews the law on disclosure of beneficial ownership in Kenya and how it is being implemented. The chapter assesses whether the effectiveness of the law on disclosure of beneficial owners.

1.12.4. Chapter four: Lessons from the legal framework in Malaysia, Tanzania and Canada

The chapter looks at the law in of disclosure of beneficial ownership in other jurisdictions and the lessons from those jurisdictions.

1.12.5. Chapter five: Recommendations and conclusion

This is the concluding chapter that provides the conclusion and recommendation of the study.

The conclusion is based on the review of the Kenyan legal framework and its implementation.

It finally concludes by suggesting various ways the Kenyan laws can be reformed to address the issue of corporate fraud and other crimes through disclosure of beneficial ownership.

CHAPTER TWO

THE HISTORICAL DEVELOPMENT OF DISCLOSURE OF BENEFICIAL OWNERSHIP IN KENYA

2.1. INTRODUCTION

The Companies Act, ⁴³ was amended on 23rd July, 2019 to introduce the requirement for inclusion of the names and specifics of beneficial owners of companies in the register of members.⁴⁴ The Act also provides for the establishment of a Central Register to contain the information provided.⁴⁵ The passage of this amendment was largely influenced by efforts to fight the growing spate of financial and economic crimes in the country especially corruption and to promote good governance. The statutory requirement of disclosure would mean that ultimate decision-making in a company, if hidden, can now be properly identified, and stakeholders like minority shareholders can take informed decisions in the exercise of their individual and collective rights. Following this introduction, this chapter covers the historical development of disclosure of beneficial ownership in Kenya, two major corporate scandals in Kenya, the concept of separate legal personality and the lifting of the corporate veil.

2.2. The rise of disclosure of beneficial ownership regime in Kenya

Following a chain of corporate scandals, Kenya joined the rest of the world in fight against corruption, tax evasion, money laundering and illicit finance in general. This led to the introduction of the disclosure of beneficial ownership requirements.

It is difficult and almost impossible to trace the history of the beneficial ownership in Kenya without looking into the global history. Today the global campaign to make beneficial ownership transparency a custom is the global initiative to fight corruption, tax evasion, money laundering, and illegal money generally. The global campaign to end world hunger started after

⁴³ Act No. 17 of 2015, Laws of Kenya.

⁴⁴ Ibid s93A .

⁴⁵ Ibid.

the fall of the Berlin Wall in 1989 and got a lot of support because globalization has changed the way countries and big businesses relate to each other. The Financial Action Task Force (FATF) is a global organization that helps to prevent money laundering and the financing of terrorism. It was founded in 1989. The organization's recommendations have changed over the years in order to reflect the best information available,⁴⁶ with beneficial ownership evolving by 2018 as the crucial subject in relation to universal development and battle against all dishonest finance in the 21st century.⁴⁷ In the same year, the FATF released their definitive Concealment of Beneficial Ownership report.⁴⁸

At the private segment consultative meeting in Vienna, Austria, the FATF proclaimed it has begun a task to find best practices for identifying beneficial ownership.⁴⁹ In 2012, the OECD changed the way it defines "beneficial owner" so that it is more specific.⁵⁰ The Global Forum on Standards in Tax Transparency is a group of 153 countries that work together to create global norms on who owns what and how it should be taxed. The FATF, or Financial Action Task Force, is a similar group of countries that focuses on anti-money laundering and terrorist financing. When these two groups work together, they create a more comprehensive understanding of who owns what and how to tax them properly. The EITI is a group that works to make sure companies in the extractives industry are transparent about who owns them. This is important because it helps to protect people and the environment. In 2016, EITI made sure

⁴⁶ Financial Action Task Force, 1990 "The Forty Recommendations of the Financial Action Task Force on Money Laundering," www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf accessed June, 19 2022.

⁴⁷ Financial Action Task Force, 'FATF Guidance – Transparency and Beneficial Ownership' (Paris: FATF/OECD, 2014); < www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficialownership.pdf> accessed June 19 2022.

⁴⁸ FATF – Egmont Group, 'Concealment of Beneficial Ownership', (Paris: FATF, 2018), www.fatf-gafi.org/media/fatf/documents/reports/FATF-Egmont-Concealment-beneficial-ownership.pdf accessed on 19 June 2022.

⁴⁹ Financial Action Task Force, "FATF Private Sector Consultative Forum, Vienna, 6-7 May 2019," <www.fatf-gafi.org/publications/fatfgeneral/documents/private-sector-may-2019.html> accessed June 19, 2022

⁵⁰ M L L Bladel, "Commentary on: OECD Model tax convention: Revised proposals concerning the meaning of "Beneficial Owner" in articles 10, 11 and 12, 19 October 2012 to 15 December 2012," accessed June 19, 2022, <www.oecd.org/ctp/treaties/BENOWNMLL_vanBladel.pdf>.

that beneficial ownership information is included in all of the measures that all of its members should be implementing. The OECD was revising its definition of "beneficial owner" and, in conjunction with the FATF, was developing a regime to make beneficial ownership information more transparent.

An expenses scandal in 2009 involving British members of the assembly in the dominion that provided the world the crucial legal outline for most corporate concealment legal frameworks, had a weighty effect on British civil governance.⁵¹ This informed its locus on beneficial ownership at the G8 summit in 2013. By 2018, this was being precisely recognized in parliament: "In spite of our self-image as a country that lives by the rule of law, the reality is that officials from autocracies around the world who are guilty of appalling crimes come to London to live safely and comfortably without much interference from us".⁵²

The 6th global Open Government Partnership Summit in Ottawa, Canada, in May 2019 created a beneficial ownership leadership group whose goal is to stimulate a worldwide shift towards unrestricted and open information on who owns corporations.⁵³

Since the 2000s, many Non-Governmental Organizations (NGOs) have started focusing on the issue of beneficial ownership. This is the legal way to identify who owns a company or other organization. It is a major obstacle to fighting corruption. Since 2011, large global corporations have been called "tax cheats" because they use secret jurisdictions to avoid paying taxes in places where they make a lot of money. In 2013, Britain took over from France as the G8's rotating leader. The yearly conference of the world's lushest nations "club" at Lough Erne in

⁵¹ Emily Maitlis, "MPs' expenses: The scandal that changed Britain," BBC News, March 25, 2019; <www.bbc.com/news/uk-47669589> accessed May 15, 2022.

⁵² Rt. Hon. Andrew Mitchell, "Sanctions and Anti-Money Laundering Bill [Lords]," Hansard Volume 636, <[https://hansard.parliament.uk/Commons/2018-02-20/debates/4203FE32-0E68-46CDBAAF-6F65D05050A2/SanctionsAndAnti-MoneyLaunderingBill\(Lords\)](https://hansard.parliament.uk/Commons/2018-02-20/debates/4203FE32-0E68-46CDBAAF-6F65D05050A2/SanctionsAndAnti-MoneyLaunderingBill(Lords))>. accessed June 19, 2022.

⁵³ Loren Treisman, "New at the OGP Summit: Open Ownership and UK Government launch a major collective action platform, and we scale up our help for implementers," Open Ownership, May 2019; <www.openownership.org/news/new-at-the-ogp-summit-openownership-and-uk-government-launch-amajor-collective-action-platform-and-we-scale-up-our-help-for-implementers/> accessed June 19, 2022.

June 2013 emerged with a set of Principles on Beneficial Ownership Transparency.⁵⁴ These were followed in October 2014 by the FATF Guidance on Transparency and Beneficial ownership.⁵⁵ A month after, the G20 restated this position with their High-Level Ideas on Beneficial ownership. Britain also originally sponsored Open Ownership⁵⁶ a beneficial ownership initiative that has developed a Beneficial Ownership Data Standard (BODS) technical instrument to help nations effecting beneficial ownership regimes.

In May 2015, the British parliament debated justification of open beneficial ownership registers informed directly by these series of leaks. "...in bearing down on money laundering, corruption, tax evasion, terrorist financing and fraud. Much of the money, as the Paradise Papers and the Panama papers make clear, passes through British Overseas Territories. Public registers help us understand who owns what and how these ill-gotten gains are flowing. The National Crime Agency has calculated that £90 billion is laundered through the UK each year – that is truly startling. This laundering is done, by and large, through British Overseas Territories which are central to this nefarious activity... 85,000 properties in the UK are owned by companies incorporated in our tax havens, and half of those properties in the UK are in just two London boroughs. Some 40 percent are acquired with Russian money and bought through shell companies incorporated in our tax havens. Sunlight is the best disinfectant..."⁵⁷

African countries have other nations to implement beneficial ownership regimes in acquiescence with the FATF and Global Forum requirements. At the 2016 anti-corruption summit, Ghana, Kenya, Senegal, South Africa and Tanzania decided to establish public beneficial ownership registers before 2020. These registers will help to ensure that important

⁵⁴ Gov.UK, "UK Presidency of the G8 2013," <https://www.gov.uk/government/topicalevents/g8-20>

⁵⁵ Financial Action Task Force, FATF Guidance – Transparency and Beneficial Ownership. (Paris: FATF/OECD, 2014; accessed June 19, 2022, < <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficialownership.pdf>> accessed June 19, 2022.

⁵⁶ Open Ownership, "What we do," < <https://www.openownership.org/what-we-do/>> accessed on June 29 2022.

⁵⁷ Andrew Mitchell, "Sanctions and Anti-Money Laundering Bill [Lords]," Hansard Volume 640, May 1, 2018; < [https://hansard.parliament.uk/Commons/2018-05-01/debates/9BE03BAC-2539-4951-88A2-9A8A20D7A1A3/SanctionsAndAnti-MoneyLaunderingBill\(Lords\)](https://hansard.parliament.uk/Commons/2018-05-01/debates/9BE03BAC-2539-4951-88A2-9A8A20D7A1A3/SanctionsAndAnti-MoneyLaunderingBill(Lords))> accessed June 19, 2022.

public assets are owned by the people who benefit from them, rather than by anonymous or corrupt individuals. The African Union High Level Panel on Illicit Financial Flows from Africa recommended that a public registry be established that would list the names of people or organizations who own or control them.⁵⁸ The African Union Assembly endorsed recommendations of the report in 2015. Following the announcement of 2018 as the African year of anti-corruption, the African Union Assembly assumed the Nouakchott Declaration calling for the formation of public beneficial ownership registers.⁵⁹ One may argue that this is a “lenient” law of the African Union, obligating all 55 nations to put into practice the provisions of the declaration. However, experts from the African Union say that in many African countries, the most readily available information about who owns beneficial ownership of infrastructure is the forms public servants are required to fill out under law. There is little evidence to support the use of wealth declaration regimes as a way to track and publicize the ownership of beneficial assets, and even if there were, it's unclear how useful this information would be for the public. Kenya is working to improve its engagement with the FATF, which is a global organization that helps to protect the safety of the world's financial systems. The FATF has rules about who can own companies, and Kenya has updated its laws to include this definition. However, Kenya has not yet agreed to sign up to the EITI, which would require companies to disclose their beneficial owners. Some local observers think that this requirement is too difficult to implement, and they argue that it is politically inconvenient for the government.⁶⁰

⁵⁸ United Nations Economic Commission for Africa ‘High Level Panel on Illicit Financial Flows from Africa, Illicit Financial Flow - Report of the High-Level Panel on Illicit Financial Flows from Africa.’ (Addis Ababa, undated); <https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf.> accessed June 19, 2022

⁵⁹ “Nouakchott Declaration,” (Declaration from Fourth Conference of African Ministers Responsible for Civil Registration, December 7-8, 2017), <<http://apaicrvs.org/sites/default/files/public/Nouakchott%20Declaration%20-%20Dec2017-English.pdf>.> accessed June 19, 2022

⁶⁰ EITI, “Opening up ownership: Africa - Harnessing the potential of the extractive sector,” <<https://eiti.org/BOAfrica18>> accessed June 19, 2022.

2.3. Financial Action Task Force (FATF) recommendations

The Financial Action Task Force (FATF) is an organization that helps to keep the global financial system safe from problems like money laundering, and the financing of proliferation of weapons of mass destruction and terrorist financing by developing and promoting policies. Their recommendations are considered the global standard for preventing these kinds of problems.⁶¹ The FATF is a group of experts who came up with guidelines to help stop people from laundering money and helping terrorists. These guidelines help make sure different parts of the world work together to track down criminals and stop them from doing bad things. The FATF is a group of experts who make recommendations about how to prevent money laundering and terrorism financing. If a country doesn't follow the FATF's recommendations, it may be added to a blacklist, which means it will not be able to do business with other countries..⁶²

The FATF is the first international organization to set standards on beneficial ownership. In 2012, the FATF strengthened its standards on beneficial ownership to make sure that information is available about who owns different types of assets and to reduce vulnerabilities like bearer shares and nominees.⁶³ Under the new standards, different types of ownership information will be distinguished. Basic ownership information, like the names of the people who own a company or trust right now, will be separate from beneficial ownership information, which will list the people who actually control a company or trust. Countries that want to comply with the standards will need to cooperate with other countries in order to get this information.

The FATF (an international organization that sets standards for financial crimes) published a guide on how to identify and track people who are using legal entities to commit financial

⁶¹ FATF (2019), 'Best Practices on Beneficial Ownership for Legal Persons', Paris, www.fatf-gafi.org/publications/documents/beneficial-ownership-legal-persons.html accessed June 19, 2022.

⁶² Ibid.

⁶³ Ibid.

crimes. The guide provides step-by-step instructions for accessing public information about legal entities and making requests for information from foreign law enforcement officials. However, implementing these measures is still difficult. As of 2014, only 11 out of 25 FATF members had been assessed, and only 4 out of 25 countries had achieved a substantial level of effectiveness in preventing the misuse of legal entities.⁶⁴

Under Regulation 24, Countries should take measures to prevent criminals from using legal entities to launder money and finance terrorism. To do this, countries should have accurate and up-to-date information on the ownership of legal entities. Countries that have legal entities that can issue bearer shares or bearer share warrants (which allow anonymous owners), or which allow nominee shareholders or nominee directors, should take steps to make sure they are not being used for money laundering and terrorist financing. Countries can also consider measures to make it easier for financial institutions and designated non-financial businesses and professions to access beneficial ownership and control information as set out in Regulation 10 and 22.⁶⁵

Under recommendation 25, countries should require that the trustees of any direct trust governed by their law obtain and maintain true, accurate and current beneficial ownership information in respect of the trust. This should include information about the settlor, trustee(s), trustee (if any), beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Countries should also require trustees of any trust governed by their law to have basic information about other regulated agents and service

⁶⁴ Ibid.

⁶⁵ R.24 applies broadly to “legal persons” meaning any entities, other than natural persons, that can establish a permanent customer relationship with a FI or otherwise own property. This can include companies, bodies corporate, foundations, anstalt, partnerships, or associations and other relevantly similar entities that have legal personality. This can include non-profit organisations (NPOs) that can take a variety of forms which vary between jurisdictions, such as foundations, associations or cooperative societies.

providers of the trust, including investment advisors or managers, accountants and tax advisors.⁶⁶

2.4. Kenya's compliance with FATF recommendations

Following the recommendations by FAFT, section 93A of the Companies Act of 2015 was introduced in the month of July 2019, through the Statute Law (Miscellaneous Amendments) Act. It states that companies registered in Kenya should have a register of beneficial owners with the pertinent information concerning such owners. Through a Legal Notice dated 18th February 2020, the Attorney-General further issued the Companies (Beneficial Ownership Information) Regulations, 2020 which effected section 93A of the Companies Act. The newest development in this area of the law is a public announcement issued by the Registrar of Companies directing that the beneficial ownership e-register is operational as from 13th October 2020.

Statute Law (Miscellaneous Amendments) Act of 2019 was declared unconstitutional on 29th October, 2020 by the High Court of Kenya in *Constitutional Petition Number 284 of 2019 (as consolidated with Petition No. 353 of 2019)*⁶⁷ Thus the Statute was null and void for failure to involve the Senate in their passage. As stated above, this particular Act introduced section 93A of the Companies Act; the main provision on disclosure of beneficial ownership information by companies in Kenya. However, the Court in its Judgment deferred the nullification of the impugned Acts for a period of nine (9) months to enable the Respondents to comply with Article 110 of the Constitution and regularize the Acts.⁶⁸ The postponement of the nullification of the affected laws means that corporations still have an duty to comply with the laws and the guidelines on beneficial ownership information.

⁶⁶FAFT, 'What are the FATF's 40+9 Recommendations and Standards?', <https://www.syгна.io/blog/what-are-the-fatfs-409-recommendations-and-standards/> accessed on June 20, 2022.

⁶⁷ Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR.

⁶⁸ Article 110 of the Constitution requires that when any Bill has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.

Companies in Kenya now have to keep more records about their members and owners, and this can be expensive. This makes it harder for companies to do business, because they need to make sure everyone who is involved in their decisions knows who they are. This can be especially tricky when there are a lot of small shareholders, or when someone controls a lot of shares but doesn't actually do any work at the company.

2.4.1. Operationalization of the E-Register

The Beneficial Ownership E-Register is now live and operational by virtue of the Public Notice by the Registrar of Companies. All companies are required to submit a copy of their ownership register to the E-Register within 30 days. The office of the Attorney General has published a manual to help business owners submit their ownership information to the Registrar of Companies. The manual provides a step-by-step guide on how to navigate Business Registration Service portal.⁶⁹ The steps are complicated, and require sufficient training to enable all companies to comply with disclosure requirements.

The E-Register will make it easier to know who owns businesses. This will impact how many transactions businesses can do because it will be connected to other services that are offered on the Business Registration Services.

2.5. Corporate scandals in Kenya

As mentioned earlier in this study, a number of corporate scandals happened leading to Kenya joining the rest of the world in fight against corruption, tax evasion, money laundering and illicit finance in general. This led to the introduction of the disclosure of beneficial ownership requirements.

Corporate scandal influence the firms share price negatively, profitability and sales performance.⁷⁰ Thus, there is a close link between the corporate scandal and the firm's

⁶⁹ Office of The Attorney General, Beneficial Ownership e-Register Manual Version 1.0 October 23, 2020, <https://brs.go.ke/assets/downloads/Beneficial_Ownership_eRegister_Manual.pdf> accessed on June 26 2022.

⁷⁰ Mpiana Christian, 2017, 'Effects of Corporate Scandals on Financial Performance of Selected Firms Listed at Nairobi Securities Exchange', Research Report Submitted to the Chandaria School of Business in Partial

profitability and sale performance. This is because, when a company is involved in fraud, their customers and suppliers pull away, meaning that sales and supply in the company both decrease. These studies look into two corporate scandals in Kenya, which helped to introduce the disclosure of beneficial ownership.

2.5.1. Uchumi Supermarket Limited

Uchumi Supermarket Limited was started in 1975 by three Kenyan parastatal companies.⁷¹ Its incorporation was intended to build outlets for the impartial supply of merchandises and to create retail channels for Kenyan manufacturing. The shares of the company stock were listed on the Nairobi Securities Exchange (NSE) in 1992.⁷² The company was profitable until the year 2000 when it was unable to meet its duties to suppliers and was faced with enormous debts. The company was placed under insolvency and its stocks were suspended from trading at the Nairobi Securities Exchange. The company closed down in June 2006 after 30 years of business.⁷³ This was "one of the greatest corporate disasters in independent Kenya history".⁷⁴ A taskforce comprising of the then PS Secretary for Trade, Solicitor General and Investment Secretary decided that Uchumi Supermarket was in trouble because it had been doing very well in expanding, but then it ran into money problems because of its expensive plans.⁷⁵ In addition, the task force found there was inappropriate business model characterized by unsustainable merchandising policy. Other reasons, the taskforce said, were that there could have been a weak management and poor human resource policy as well as inappropriate financing policy.

Fulfillment of the Requirement for the Degree of Masters in Business Administration (MBA) <<http://erepo.usiu.ac.ke/11732/3505>> Accessed on August 2022.

⁷¹ Industrial Commercial & Development Corporation (ICDC), Kenya Wine Agencies Limited (KWAL) and Kenya National Trading Corporation (KNTC).

⁷² Puja Malhan, 'An Empirical Study of Customers Expectations and Perceptions of Service Quality; A Case Study of Uchumi Megastores in Kenya International Journal of Management and International Business Studies', ISSN 2277-3177 Volume 4, Number 3 (2014), pp. 275-284.

⁷³ The rise and fall of Uchumi Supermarket; The Star, < <https://www.the-star.co.ke/business/kenya/2019-11-04-the-rise-and-fall-of-uchumi-supermarket>> accessed on June 28, 2022.

⁷⁴ Ibid n48.

⁷⁵ The Business Daily, 'PS lists reasons for Uchumi collapse before Nairobi court', Sunday March 13 2011, <https://www.businessdailyafrica.com/bd/corporate/companies/ps-lists-reasons-for-uchumi-collapse-before-nairobi-court-1980400> accessed on 24 June 2022.

The board of directors of a supermarket chain were accused of conspiring to defraud the company and breaking the public's trust. However, the company was able to prove that the directors did not break any of their own company's internal procedures when they approved the sale.⁷⁶

The collapse of Uchumi was due to a board that was not functioning properly. This has been connected to corporate governance failures in well-established corporate governance regimes, such as those in the United States. In the case of Enron, directors were not properly monitoring the activities of the management team and their financial dealings, relying on the explanations given to them by the management.⁷⁷

In the Uchumi case, it became possible to prosecute the culprits since they were known. In cases where the beneficial owners of a company are not known, prosecution for wrong doing becomes impossible.

2.5.2. Cooper Motors Corporation (H) Ltd (CMCH)

In 2009 and 2010, there were boardroom wars at the Cooper Motors Corporation in Kenya. This is because the ownership structure and management of corporations in Kenya often prevent minority shareholders from getting their fair share of the company's profits..⁷⁸ According to Barako,⁷⁹ The company is formed by promoters. They have a lot of power and are in charge of steering the company in the direction they want it to go. This company has been very successful in the motor industry, but they have been misleading both the tax authorities and their shareholders.

⁷⁶ The Business daily, 'Uchumi case sheds light on corporate governance gaps in public companies', Thursday June 09 2011, <https://www.businessdailyafrica.com/bd/lifestyle> accessed on June 24, 2022.

⁷⁷ E.M. Ogongo, 2013, Corporate Scandals: An Analysis Of The Legal Framework Of Corporate Governance In Kenya, Thesis Submitted To The Faculty Of Law In Partial Fulfilment Of The Requirements For The Conferment Of Masters In Law. 2013.

⁷⁸ Peter Kiragu, 'CMC Saga Proves Rot in Corporate Leadership', The Nairobi Star, 23 September 2011.

⁷⁹ Dulacha G Barako, 'Determinants of Voluntary Disclosures in Kenyan Companies Annual Reports', (2007) 1 (5) African Journal of Business Management 118.

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.111.3766&rep=rep1&type=pdf> > accessed on 24 June 2022.

The Capital Markets Authority (CMA) suspended trading of the stock on the NSE on September 16, 2011 after discovering some deficiencies. The CMA then appointed a five-person Ad hoc Committee to look into the matter further ⁸⁰ and to give an opportunity to the persons adversely mentioned in the Reports. All three inquiries established that the directors had failed to guard the company's welfare, and embraced no mechanisms even when it was 'noticeable the management was running down the company'.⁸¹ Capital Markets Authority (CMA) suspended trading in CMC Holding shares for another 85 days in order to help resolve some outstanding matters. The CMA also put in place some measures to help ensure discipline in the company. A report from Webber auditors said the regulator did not follow the law when making a decision that was not in the best interest of investors. "In our considered opinion the suspension of an issuer's securities initiated by the CMA should only be done after a preliminary investigation of the circumstances which may demand the protection of investors," the report said. Webber auditors further said that before suspending any shares from trading at the stock market, the regulator should invite the company whose shares it intends to suspend to make a presentation explaining why such action should not be taken, but CMA never gave CMC that opportunity.⁸²

It would be easy to bring to book the culpable persons who knowingly act against the interests of a company like in the case of CMC Holdings when the owners of the company are known. This clearly links disclosure of the beneficial owners to fighting corporate scandals.

⁸⁰The Committee was appointed under Section 14 (1) of the Capital Markets Act which states that "the Authority may appoint committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority, and may delegate to any such committee such of its powers as the Authority may deem appropriate. The committee was to make recommendations to the board of the authority on findings and actions to be taken under the Capital Markets legal framework. Justice (Rtd) Ringera said 'the CMCH case is an exhibit of an appalling failure of corporate governance.

⁸¹ Moses Michira, 'End of an era as regulator ejects veteran directors' Business daily, August 5 2012, <www.businessdailyafrica.com/End-of-an-era-as-regulator-ejects-veteran-directors-/> accessed on 24 June, 2022.

⁸² The Business Daily, 'Audit queries regulator's suspension of CMC shares', Sunday April 01 2012,

2.6. Conclusion

Transparency of beneficial ownership is essential to prevent the misuse of companies, associations or other entities for money laundering or terrorist financing. The Financial Action Task Force is the global standard-setter for measures to fight money laundering and terrorist financing. Since 2003, the FATF Recommendations require countries to ensure that authorities can obtain up-to-date and accurate information about the person(s) behind companies, foundations and other legal persons. The Regulations and the E-Register will help to create greater transparency in the ownership of companies in Kenya. Notwithstanding, more time is needed to assess the implications of the disclosure obligations on companies in Kenya and the overall effect on anti-money laundering efforts.

CHAPTER 3

THE LEGAL FRAMEWORK ON DISCLOSURE OF BENEFICIAL OWNERSHIP IN KENYA

3.1. INTRODUCTION

Investor confidence in financial markets depends in large part on the existence of an accurate disclosure regime that provides transparency in the beneficial ownership and control structures of publicly listed companies.⁸³ This is particularly true for corporate governance systems that are characterized by concentrated ownership. On the one hand, large investors with significant voting and cash-flow rights may encourage long-term growth and firm performance. On the other hand, however, controlling beneficial owners with large voting blocs may have incentives to divert corporate assets and opportunities for personal gain at the expense of minority investors. Stakeholder rights (e.g. employees and creditors) cannot be properly exercised if ultimate decision makers in a company's affairs cannot be identified. The accountability of the board may also be seriously endangered if stakeholders and the general public are unaware of decision-making and ultimate control structures. Finally, regulators and supervisory agencies have a strong interest to know beneficial owners – in order to determine the origin of investment flows, to prevent money laundering and tax evasion and to settle issues of corporate accountability.⁸⁴

It is crucial for the functioning and development of financial markets that there is a strong regime of proportionate measures to identify beneficial ownership through disclosure and investigation mechanisms. In order to provide minority investors with adequate information about the ownership structure of a publicly listed company, it is key that control-enhancing mechanisms, which give controlling investors voting/control rights in excess of their cash-flow

⁸³ Vermeulen, E. P. M. (2012) Beneficial ownership and control, a comparative study, OECD-Indonesia policy dialogue: Disclosure of beneficial ownership and control. OECD Corporate Governance Working Papers, 2012. <<http://www.oecd.org/dataoecd/41/38/50068886.pdf>> accessed on July 2 2022.

⁸⁴ Ibid.

rights, are disclosed on a regular basis. The disclosure regime should be supplemented with a mix of public and private investigation and enforcement mechanisms, which encourage beneficial owners to effectively make disclosures and inform the company, other investors and the market about the control structure and their intentions. This chapter interrogates the Kenyan law on disclosure of beneficial ownership.

3.2. The Companies Act

The Registrar of Companies operationalized the Beneficial Ownership E-register on 13th October 2020⁸⁵. The effect of this is that all registered companies are expected to prepare a form or register setting out all the information relating to their beneficial ownership and lodge the same with the Registrar within thirty (30) days of its preparation. Prior to the enactment of the Companies Act, 2015, companies did not have any duty whatsoever to disclose information regarding their beneficial ownership. However, pursuant to the Companies (Amendment) Act, 2017 and subsequently the Statute Law (Miscellaneous Amendments) Act No. 12 of 2019 which introduced Section 93A, all companies incorporated or registered in Kenya are mandatorily required to keep a register of beneficial owners with the relevant information relating to the said beneficial owners as prescribed by the Companies (Beneficial Ownership Regulations) 2020.

Section 93A of the Companies Act require that every company shall keep a register of its beneficial owners and that company shall enter in its register of beneficial owners, information relating to its beneficial owners as prescribed in the regulations.⁸⁶ The company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation.⁸⁷ If a registry is to become an efficient tool, this development, including the

⁸⁵Kenneth Gathuma, 'Beneficial Ownership E-register Operationalized', press release October 30, 2020, <https://brs.go.ke/assets/downloads/Press_Release_BENEFICIAL_OWNERSHIP_E_REGISTER_OPERATIONALIZED_30th_October_2020_Approved.pdf>accessed on July 3 2022.

⁸⁶The Companies Act, s93A ss1.

⁸⁷ Ibid, ss3.

upgrading of resources specifically for this purpose, needs to be planned carefully. A registry is preferable to a paper-based one; and an online registry is preferable to a closed-network one. Such investments not only are desirable from corporate malpractices perspective, but also make the registry more business friendly.

The law does not provide for the time within which the register of beneficial owners is to be prepared. In other words, this prescribed timeline is open-ended, given the fact that different companies may prepare and complete their registers at different times. It would have been desirable to have a more definite timeline set out. In case of any amendment, a company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within fourteen days after making the amendment.⁸⁸ If a company fails to comply with a requirement of this section, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.⁸⁹ If, after a company or any of its officers is convicted of an offence under this section, the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding fifty thousand shillings for each such offence.⁹⁰ These penalties are rather lenient and are unlikely to serve as a deterrent for acts of disclosure in breach of the Regulations especially for multibillion companies with solid liquidity.

Inasmuch as the introduction of a beneficial ownership regime is likely to strengthen the country's fight against financial crimes, it is also necessary to examine the new regime's contribution to corporate governance. In essence, how does the statutory beneficial ownership

⁸⁸ Ibid, ss4.

⁸⁹Ibid, ss5.

⁹⁰Ibid, ss6.

regime promote effective corporate governance? For instance, the statutory requirement of disclosure would mean that ultimate decision making in a company, if hidden, can now be properly identified, and stakeholders like minority shareholders can take informed decisions in the exercise of their individual and collective rights.

3.3. Companies (Beneficial Ownership Information) Regulations, 2020

The BO Regulations describe a beneficial owner as the natural owner who ultimately owns or controls a legal person or arrangement or the natural person on whose behalf a transaction is conducted and includes those persons who exercise ultimate effective control over a legal person or arrangement.⁹¹ Pursuant to the BO Regulations, a person qualifies as a beneficial owner if the person: holds at least ten percent (10%) of the issued shares in a company either directly or indirectly; exercises at least ten percent (10%) of the voting rights in a company either directly or indirectly; holds a right, directly or indirectly, to appoint or remove a director of the company; and exercises significant influence or control; directly or indirectly, over the company. In this case significant influence means participation in the finances and financial policies of the company without necessarily having full control over them. The minimum threshold delimits the disclosure requirement. The definition of beneficial owner should not have a minimum threshold. All owners or parties for all legal vehicles whether domestic or foreign should be required to register. In that case, a beneficial person should be defined as any natural person who directly or indirectly through any contact, arrangement, understanding, relationship or otherwise ultimately owns or has a controlling ownership or exercises ultimate effective control through positions held in a company or is the ultimate beneficiary of a share or other securities in a company.

⁹¹ Companies (Beneficial Ownership Information) Regulations, 2020, r2.

Every company should take reasonable steps to identify any person it knows or has reason to know is a beneficial owner of the company.⁹² The company is required to give notice to the person it has identified as being a beneficial owner of the company requiring the person to provide the following information within twenty-one (21 days) from the date of the notice⁹³; copy of his/her National Identification Cards, Passports or Birth Certificate; copy of his/her PIN Certificate; his/her telephone number, email address and occupation; the nature of ownership or control the beneficial owner has in the company; the name of shareholder (if any) holding shares on behalf of the beneficial owner; and the name of the director appointed by the beneficial owner. The law does not provide for verification of the disclosed information. In that case, a person may disclose false information and there will be no way to tell. The company should prepare Form BOF1 which contains the required information and lodge the same with the Registrar of Companies within thirty (30) days of preparing the said Form.

In the event a Company believes it has beneficial owners but cannot identify or trace them, the Company should simply notify the Registrar of Companies of the challenge to identify or trace its beneficial owners so that the Registrar can note the same in the register of Beneficial Owners.⁹⁴ A company wishing not to disclose its beneficial owners can simply report to the Registrar that there are challenges in identifying or tracing the beneficial owners. The law should provide for steps the registrar should take in such a case in order to ensure the beneficial owners are identified and traced.

In the event a Beneficial Owner fails to provide the Company with Beneficial Owner's details to enable to the Company to disclose their information, the company should issue a warning notice stating that it is proposing to restrict the relevant interest of the beneficial owner.⁹⁵ The

⁹²Ibid r3.

⁹³Ibid r4.

⁹⁴ Ibid r11.

⁹⁵ Ibid r5.

effect of the said restriction is that; any transfer of the beneficial owner's interest is void; no rights are exercisable in respect to the beneficial owner's interest; no shares may be issued in right of the beneficial owner's interest; and no payment may be made of sums due from the company in respect to the beneficial owner's interest.⁹⁶ This is a strict provision of the law that is likely to drive beneficial owners to disclose their information in order to avoid the restrictions. Whenever the Company has issued a warning and imposed a restriction it shall note this in its register and lodge it with the Registrar.⁹⁷

The use and disclosure of the beneficial ownership information is limited by law. The BO Regulations prescribe that as a general rule, beneficial ownership information shall not be made available to the public. A Company is only allowed to use or disclose information about the beneficial owner for purposes of communicating with the beneficial owner concerned, or in order to comply with either a court order or the regulations.⁹⁸ The rationale for this is to safeguard the beneficial owners' confidentiality and to preserve their right to privacy. Privacy is a human right, critical to individual autonomy, dignity and freedom. It enables us to protect ourselves from unwarranted interference in our lives. In most legal systems there are provisions to protect the privacy of individuals unless there is a clear public interest case.⁹⁹

The implication of this however is that a company's beneficial ownership information shall not be readily available to any member of the public by way of conducting a company search. The Registrar would only issue such information to a competent authority upon written request to the Registrar of Companies. How then will the information be of benefit to the stakeholder interested in using it for decision making? The rationale behind the disclosure requirements is

⁹⁶ Ibid r9.

⁹⁷ Ibid r7(2).

⁹⁸ Ibid r13(1).

⁹⁹ Article 19 (1999) The Public's Right to Know Principles on Freedom of Information Legislation <<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>> accessed on November 6 2022.

to alert minority investors to material changes in corporate control and ownership structures and to enable them to make an informed assessment of the effect of these changes. Still, there is more to be done. The effect of disclosure and reporting requirements depends largely on the scope and definitions of ownership and control. Even if the use of bearer shares is abolished or restricted, there are a number of other legitimate ways to conceal the true identity of the ultimate beneficial owner of a company's shares

The Regulations do not impose any specific deadlines as to the timelines within which a company is required to prepare its beneficial ownership register. The regulations require that once the register is prepared, the company must lodge the register with the Registrar of Companies within thirty (30) days. It is advisable that a company prepares such register as soon as possible as it is obliged to keep a register of beneficial owners in its offices failure to which the company may be liable for committing an offence which attracts a maximum fine of Kenya Shillings Five Hundred Thousand (Kshs.500,000/=).¹⁰⁰

The rationale for disclosure of beneficial ownership information is in the interest of creating an accurate public disclosure regime that provides transparency in the beneficial ownership and control structures of companies. This aids in not only promoting investor confidence and good corporate governance practices but also in uncovering tax evasion schemes, money laundering practices, corruption schemes, terrorist activities and other illegal activity involving either one or more companies. In view of the fact that the Beneficial Ownership E-register has been operationalized, companies need to comply with the BO Regulations by lodging their beneficial ownership information with the registrar the earliest possible to avoid the hefty penalties that come with non-compliance.

3.4. Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022

¹⁰⁰ Ibid, n97.

3.4.1. The background of the Regulations

On 5 July 2019, Kenya's Statute Law (Miscellaneous Amendments) Act, 2019, made amendments to the Companies Act, 2015, by introducing Section 93 A, which requires every company registered in Kenya to prepare and keep a register of its beneficial owners. This register discloses the personal information of the beneficial owners of a company, the nature of ownership or control they have in the company and the date they became or ceased to become beneficial owners. It further provides that a copy of the beneficial owners' register is to be filed with the Registrar of Companies within 30 days of its preparation or within 14 days following an amendment on the same. This provision was introduced with an aim of promoting transparency in the ownership structures of companies.

To give further effect to this amendment, the Attorney General published the Companies (Beneficial Ownership Information) (Amendments) Regulations, 2022 which gave further guidelines on, among others, the criteria for a person to qualify as a beneficial owner, the contents of the beneficial ownership register, the filing requirements with the registrar of companies and the restriction on disclosure of information contained in the beneficial owners' register.

3.4.2. Summary of the amendments

The criteria for identifying beneficial owners has been extended to include persons who jointly meet all of the following conditions: Directly or indirectly hold at least 10% of the issued shares in a company; have the power to directly or indirectly appoint or remove a director of the company; indirectly or directly exercise significant influence or control; directly or indirectly exercise a minimum of 10% of the voting rights in a company.¹⁰¹ Initially, the reference was only to individual persons or companies. This means that where control is exercised by two or

¹⁰¹ Regulation 3.

more persons jointly, each person shall be beneficial owners in equal measure. This amendment still does not address the issue of owners with less than 10% shares or voting rights.

The amendments have expanded the scope of disclosure of beneficial ownership information by companies to permit disclosures to: (i) A procuring entity (public entity), where the company in question participates in public procurement and assets disposal under the Public Procurement and Asset Disposal Act, 2015. (ii) A contracting authority, where the company participates in a public private partnership arrangement under the Public Private Partnership Act, 2013.¹⁰² The procuring entities in this case refers to public bodies such as the National government, County government, Constituencies, the Judiciary and the courts, Commissions established under the Constitution, Independent Offices established under the Constitution, State corporations, the Central Bank of Kenya, Public schools and universities, a company owned by a public entity among other public bodies. The contracting authority in this case being a state department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party. Initially, the principal regulations only permitted disclosure to a competent authority, which term referred to the attorney general, any criminal investigation authority established by law, law enforcement agencies, and the financial sector regulators including the Kenya Revenue Authority and the Financial Reporting Centre. Due to the huge financial flows involved in public procurement, the sector is very prone to corruption. Major corruption scandals in Kenya have revolved around public procurement.¹⁰³ Billions of shillings have been lost through under deals in procurement which takes years to trace and recover.

For the information to be disclosed to the procuring entity or contracting authority, the competent authority, Public Procurement Regulatory Authority (PPRA) or the Public Private

¹⁰² Regulation 4.

¹⁰³ Ethics & Anti-Corruption Commission (2015), 'An Evaluation of Corruption in Public Procurement; A Kenyan Experience; < www.eacc.go.ke> accessed on November 5, 2022.

Partnership Committee respectively must seek a written consent from the Registrar of Companies to request for such information from the company prior to requesting for the information.¹⁰⁴

The amendments have further given the Government authority to disclose beneficial ownership information of a company where such information affects the country.¹⁰⁵

The Beneficial Ownership Form (BOF 1) has been updated to include a section for indicating the connection that a person with indirect ownership has with the company. This can either be through appointment of a director or by holding shares on behalf of a beneficial owner.¹⁰⁶

All companies that seek and apply for tenders from the Government and public bodies will now be required to disclose information pertaining to the beneficial owners when submitting their bid applications, as part of the required documents.¹⁰⁷ This will play an important role in the verification process to ensure that the tenders are not awarded to restricted persons. Further, once a tender is awarded to a company by a procuring entity, the PPRA will publicize the beneficial ownership information of the company on their website and government portals.¹⁰⁸

The regulations have been upped to promote transparency in awarding public contracts to companies in Kenya, where the respective public bodies would seek to know the ownership structures of companies before engaging them.

While the intention of the Government is understandable, the publication of personal information of individual beneficial owners may create a real risk of breach of data privacy for the individuals, in contravention of the Data Protection Act, 2019 and constituent regulations.

In as much as the amendments do not clearly stipulate/limit the amount of personal information that may be held by the Public Procurement Regulatory Authority (PPRA), some of the

¹⁰⁴ Regulation 6.

¹⁰⁵ regulation 7.

¹⁰⁶ Ibid n99, Notice of Beneficial Owner Particulars, Second Schedule, Form BOF1.

¹⁰⁷ Ibid, n109.

¹⁰⁸ Companies (Beneficial Ownership Information) (Amendments) Regulations, 2022, r5.

information contained in the beneficial owner's register constitute sensitive personal data such as the financial investments in the company and residential address of the individuals. This is in addition to other personal information such as their name, nationality, national identification number, telephone number, postal address, email address, business address and occupation. If publicized, this information has the potential to fall into unauthorized hands without the additional consent of the individual affected. Therefore, it is important for the procurement officers and directors of companies seeking government or public bodies tenders to ensure that they understand the risk associated with the disclosures, prior to submitting their bids.

Again, the provision seems to contradict the confidentiality provisions under the Public Procurement and Asset Disposal Act which prohibit the disclosure of the contents of tenders, proposals or quotations during or after procurement proceedings. The amendments now make it mandatory for the PPRA to publish beneficial ownership information for successful companies that have been awarded a tender by the procuring entity as part of contract award in the Government Portal. This provision for publication calls for further deliberations on the extent of beneficial owner's information that may be published.

3.5. How to lodge the Beneficial Ownership with the Registrar of Companies.

The office of the Attorney General has come up with a manual whose aim is to provide a step-by-step guide on how to navigate Business Registration Service portal as well as to provide guidance on how to lodge Beneficial Ownership information with the Registrar of Companies.

¹⁰⁹ The users are directed to access the webpage <https://brs.go.ke/> and creates an account on e-Citizen for the first time or log into an existing account. Once logged in the beneficial ownership information can be lodged –:

a. During the initial registration of a company; or

¹⁰⁹ Office of The Attorney General, 'Beneficial Ownership e-Register Manual Version 1.0 October 23, 2020', < https://brs.go.ke/assets/downloads/Beneficial_Ownership_eRegister_Manual.pdf > accessed on July 2, 2022.

- b. As an update of the Beneficial Ownership register for existing companies; or
- c. As an amendment to the existing company's Beneficial Ownership information.

Lodging of Beneficial Ownership information is free of charge. The prerequisites for creating an e-Citizen account for a Kenyan Citizen are National Identification Number, valid email address and valid telephone number. Foreign Residents are required to produce Foreigner Certificate Number also known as alien card, valid email address, valid telephone number whereas e-Visa Visitors, that is, foreigners are required to avail Passport Number and a valid email address.¹¹⁰

The users are required to enter a percentage that the shareholder holds directly. Companies where the shareholder is a corporate body, all shares are held indirectly and the user will be required to provide the beneficial owners' particulars of that body corporate. Beneficial information may be updated by a Director, Director Shareholder, Company Secretary or authorized persons who must be added under access control.¹¹¹

The process of lodging information may pose a challenge to the technologically challenged persons. Phillip Ndeta¹¹² notes that the average level of computer literacy in Kenya is 55%. The typical internet user in Kenya is aged between 18 years and forty-five years and earns a salary. has attended college or completed undergraduate degree. This means the internet, due to the nature of its technology and costs is only relevant to educated Kenyans with stable jobs. There ought to be a help desk within the counties to assist those who are not able to lodge the information by themselves due to technological challenges.

3.6. Further reforms

In June, 2022, the Business Registration Services (BRS) invited the public for comments, reviews and submissions in respect of the ongoing review of the Beneficial Ownership

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Phillip Ndeta [2003], ICT Integration in Social & Economic Development; Kenya's Perspective, Greenwood Publishing Group.

Disclosure Framework. The Companies (Beneficial Ownership Information) Regulations, 2022 and The Partnerships (Beneficial Ownership Information) Regulations, 2022 were among the legislation under review.¹¹³

The registrar of companies invited the public for a Virtual Public Participation Meeting on 8th July 2022 at 9:30am to discuss the legislations under review. The move for public participation is noble. However, many Kenyans may not be able to participate in the virtual meetings due to technological challenges. Physical meetings in different parts of the country may be more incorporating and this study highly recommends them.

3.7.The concept of separate legal personality in relation to disclosure of beneficial ownership

The concept of separate legal personality is highly guarded under the Kenyan law. It limits liability of owners of the company and as such, the owners cannot be held accountable for the acts of a company. This poses the question that of what importance is the disclosure regime if the owners are not liable for the acts of the company? This study looks at the concept of separate legal personality and whether the concept is absolute.

A separate legal entity has its own legal rights and obligations, separate to those running and/or owning the entity. That person could be a company, limited liability partnership, or any other entity recognized by law as having its own separate legal existence.¹¹⁴ This legal concept is the backbone of companies being used for illegal economic activities without the owners of the company ever being known. In *HL Bolton Engineering Co Ltd v TJ Graham Sons Ltd*,¹¹⁵Denning LJ described companies as below:

¹¹³ The invitation was undated and titled Review Of The Beneficial Ownership Framework. The invitation was circulated to the public by different entities such as the Institute of Certified Secretaries (ICS) to its members.

¹¹⁴ Leigh Ellis (2020), 'Separate Legal Entities (Advantages & Benefits) in Business <<https://hallelis.co.uk/separate-legal-entities-meaning/>> accessed on August 24, 2022.

¹¹⁵ [1957] 1 QB p159.

A company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere [employees] and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

The separate legal personality concept was first recognized by courts in case law in the famous case named *Salomon v A Salomon & Co Ltd (1897) AC 22*, decided in 1897. In that case the House of Lords decided:

Once a company is incorporated, it has a separate legal existence to the shareholders of the company... [the company] must be treated like any other independent person with its rights and liabilities appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence.

3.7.1. Elements of separate legal personality

Company law gives recognition to the fact that a company possess its own legal personality to acquire rights and incur obligations that are distinct from those of the directors and shareholders. The concept of separate legal personality results in a number of legal consequences. First, it results in limited liability in the sense that the liability of shareholders for the company's debt is limited to the amount they have paid in the company for its shares and cannot be held personally liable for the debts of the company.¹¹⁶ Another element of separate legal personality is that the property and assets of the company belong to the company

¹¹⁶ *Multichoice Kenya Ltd v Mainkam Ltd & Anor. (2013) eKLR* . It was held that: - "I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since the famous case of *Salomon v Salomon (1897) A.C. 22*, Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity."

and not the shareholders or directors. This applies to debts and liabilities as well. Shareholders cannot be compelled to pay debts of the company.¹¹⁷ Separate legal personality also enables company to enjoy perpetual succession.¹¹⁸ This means that notwithstanding any changes in membership, the company will retain its legal identity and continue to exist.

In the case of *Foss vs Harbottle*¹¹⁹, the court upheld the principle of separate legal personality and held that when a company is involved in legal proceedings, the proceedings must be initiated in the name of the company and not in the name of the shareholders or directors. This means that a company is capable of being sued or suing.

3.7.2. Consequences of separate legal personality

It is clear that the concept of separate legal personality has significant legal consequences particularly with regards to debts and liabilities of the company. Separate legal personality affords greater protection for shareholders and directors in that they cannot be held liable for the debts and liabilities of a company. It therefore, can be said that once a company has been formed, a veil is placed between the company and its shareholders and directors which separates the company from its shareholders and protects them from liability for the debts and wrongful acts of the company. In the case of *Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Anor (2014) eKLR*, the court upheld the doctrine of separate legal personality when it stated that: -

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L* that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be

¹¹⁷ Companies Act, 2015 ss6 & 7.

¹¹⁸ *Ibid*, s2.

¹¹⁹ (1843) 2 Hare 461, 67 ER 189.

departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”.

As pointed earlier, the concept of separate legal personality is not absolute. The Kenyan law is alive to the fact that owners of companies may act fraudulently and in that case they ought to be held personally liable for their actions. If that becomes the case, the doctrine of lifting of the corporate veil comes to play.

3.8. Lifting of the corporate veil

As observed above, the law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In *Salomon v Salomon & Co. (supra)* where Lord Macnaghten affirmed the separation between the corporation and its members in the following undying words very worth of extensive quote:

The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act. However, there are some exceptions to the general rule.

However, the privilege of separate legal personality is not absolute and will not be upheld in instances of abuse. In that case the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favour of the economic reality prevailing in the circumstance. Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there

is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted.¹²⁰

The privilege of incorporation is not without its limits; and that Courts will disregard the corporate form and allow the piercing of the corporate veil so as to allow a creditor to reach the personal assets of shareholders or directors in certain circumstances. The piercing of the veil will serve no purpose if the beneficial owners of a company are not known.¹²¹

Lifting of a corporate veil is a drastic remedy which should be invoked only when there are compelling reasons to do so. The reluctance to use such a drastic remedy was applied in the leading South African case of *Dadoo (Pty) Limited v Krugersdorp Municipal Council [1920] AD 530* where the court noted that lifting of the corporate veil is an exceptional remedy which goes against the principle of separate legal personality.¹²² In yet another South African case, *Botha v Van Niekerk [1983] (3) SA 513*, the court held that the doctrine of piercing the corporate veil should only be applied where there has been unconscionable injustice and that all other potential remedies had been exhausted. Even where there is fraud or abuse, there is need to perform a balancing act between the need to uphold separate legal personality with the need to remedy the harm that has been caused any the abuse of the separate legal personality privilege.¹²³

¹²⁰ The Halsbury's Laws of England, 4th Ed para. 90.

¹²¹ *Ukwala Supermarket v Jaideep Shah & another [2022] eKLR*.

¹²² See also *Gumede v Bandhla Vukani Bakhathini Ltd 1950 (4) SA 60 (N) at 72*.

¹²³ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others (9/93) [1995] ZASCA 53; 1995 (4) SA 790 (AD); [1995] 2 All SA 543 (A)*.

In Kenya, courts have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company's alter egos have acted in fairly egregious manner. This is because Courts understand the benefits of limited liability as expressed in the statute.¹²⁴ The instances the veil of corporate personality may be lifted where the device of incorporation is used for some illegal or improper purpose.¹²⁵

The Companies Act, 2015¹²⁶ provides that if a 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. This Section does not define the term fraud. The doctrine of piercing the corporate veil is therefore not subject to any specific guidelines. Courts have struggled for years to develop and refine their analysis of this doctrine and each new action brings a different set of facts and circumstances into the equation and a separate determination has to be made as to whether the plaintiff has provided sufficient evidence of dominion or control, improper purpose or use and the ensuing damage. The question that arise is of what benefit is the concept of lifting of the corporate veil if the owners of the corporations are not known. This tell us that disclosure of beneficial ownership is key to lifting of corporate veil.

As the courts struggle to refine the doctrine of piercing the veil of incorporation, it is worthwhile that they consider the concept of disclosure of beneficial ownership as well to maximize the benefits of lifting the corporate veil. The courts s

3.9. Conclusion

It is praiseworthy that Kenya did not wait for another corporate scandal to confirm what is already known: the powerful and wealthy hide behind corporate and other legal vehicles to loot

¹²⁴ Ibid.

¹²⁵ Mugenyi & Company Advocates –v- The Attorney General (1999) 2 EA 199.

¹²⁶ Ibid (n7), s1002.

state resources through corruption and drain public revenues by avoiding and evading taxes. The effect of lost public revenue is deep. It leads to governments failure in human rights obligations and inability to address fundamental social, economic and intersectional disparities. Kenya continues to take actions to address ownership secrecy domestically through reforms to the beneficial ownership legislation.

CHAPTER 4

LESSONS FROM THE LEGAL FRAMEWORK IN MALAYSIA, TANZANIA AND CANADA

4. Introduction

The Organization for Economic Cooperation and Development Principles of Corporate Governance state that the governance framework of listed companies should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.¹²⁷ This principle is uncontroversial. Without disclosure and transparency, managers and controlling shareholders have ample opportunity to pursue their own interest by taking advantage of the information deficits of other minority investors and stakeholders, such as creditors and employees. Policy makers and regulators tend to tighten the definition of “accurate disclosure” in the midst or aftermath of major corporate governance scandals or economic downturns.¹²⁸ Higher levels of disclosure and transparency are usually expected to deepen capital markets and attract foreign investors.¹²⁹

So far three legislative and regulatory approaches may be highlighted that appear on the spectrum for beneficial ownership and control rules and regulations. Even though all regimes can be characterized as “beneficial ownership” markets (where disclosure goes beyond the level of direct shareholders), there are some distinctions. The first position is characterized by a strict rules-based approach that companies can opt-in to.¹³⁰ An example of a jurisdiction that takes this position is Brazil. Malaysia is placed near the midpoint of the spectrum. The

¹²⁷ Ibid, n29.

¹²⁸ Pistor, K. and C. Xu (2003), “Fiduciary Duties in (Transitional) Civil Law Jurisdictions – Lessons from the Incompleteness of Law Theory”, in Mildhaupt, C. (ed.), *Global Markets, Domestic Institutions: Corporate Governance in a New Era of Cross-Border Deals*, Columbia University Press, New York.

¹²⁹ Skinner, A. (2011), “Commercial code: New law puts emphasis on transparency”, 13 December, The Financial Times Ltd, London, <www.ft.com/intl/cms/s/0/02ae6e00-20f1-11e1-> accessed on August 11 2022.

¹³⁰ Ibid, n117.

Malaysian disclosure regime contains a strict set of minimum disclosure requirements. Supervisory authorities (the Corporate Regulator, the Stock Exchange, the Central Depository and the Securities Commission) have some flexibility in the application of the rules. For instance, they are entitled to extend the application by requesting more information if deemed necessary. The United States occupies a “principle-based” position regarding the regulation and disclosure of beneficial ownership. For example, the Security Exchange Act of 1934 contains disclosure exemptions for investors who have no intention to exert control over the listed company. For purposes of lessons from other jurisdictions, we shall investigate the legal framework in Malaysia, Tanzania and Canada.

4.1. Malaysia

4.1.1. Introduction

One of the significant regulatory policies introduced in Malaysia under the Companies Act, 2016 (CA, 2016)¹³¹ is the concept of Beneficial Ownership (BO). Since the enforcement of the CA 2016 on 31 January 2017, companies have the obligation to notify and submit the BO information to the Registrar through the submission of annual return pursuant to section 68 of the CA 2016. Section 56 of the CA 2016 provides a general framework for companies to obtain the BO information from their shareholders. The underlying principle of section 56 is to empower companies to request the BO information from their shareholders and record such information in a separate part of the register of members. Once such information is obtained and recorded, companies have the obligation to notify the Registrar of the information and any changes thereto.¹³²

¹³¹Companies Commission of Malaysia (2020), ‘Guidelines for the Reporting Framework for Beneficial Ownership of Legal Persons’, issued pursuant to section 20C of the Companies Commission of Malaysia Act 2001.

¹³²Companies Act, 2016, Act 777 Laws of Malaysia, Published in the gazette in September 15 2016, <[https://www.ssm.com.my/Pages/Legal_Framework/Companies%20-Act%20-1965-\(Repealed\)/aktabi_20160915_companiesact2016act777_0.pdf](https://www.ssm.com.my/Pages/Legal_Framework/Companies%20-Act%20-1965-(Repealed)/aktabi_20160915_companiesact2016act777_0.pdf)> accessed on August 11 2022, s56(6).

The Guidelines for the Reporting Framework for Beneficial Ownership of Legal Persons were issued by the Companies Commission of Malaysia and came into effect on 1 March 2020. The questions that arise concern the enforceability of the Guidelines in that Section 56 of the CA, 2016 does not make it mandatory for companies to obtain beneficial ownership information from their shareholders. This may be a contributing factor as to why companies may be reluctant to actively comply with the BO reporting requirements if there is no strict legal requirement to do so. However, the guidelines will act as a guide to this paper.

4.1.2. Disclosure of beneficial ownership

The requirement to report the BO information applies to all companies including companies limited by shares, company limited by guarantee, unlimited companies and all limited liability partnerships.¹³³ Under the BO reporting framework, a company or a limited liability partnership is required to—

- (a) take reasonable steps to identify, obtain and verify the BO information;
- (b) record the BO information into the register of BO;
- (c) keep the BO information accurate and up-to-date and can be accessed in a timely manner;
- (d) update the BO information whenever there is a change to the particulars of the BO and then notify the Registrar;
- (e) keep the BO information and supporting documents at the registered office or where the register of members/register of partners is being kept;
- (f) give access to competent authorities, law enforcement agencies, the BO whose name has been entered in the register of BO and any other person authorized by the BO

In Kenya, disclosure of beneficial ownership applies to companies only and not limited partnerships. Limited Partnerships are one of the corporate vehicles in Kenya and therefore,

¹³³ Ibid n128, p8.

the requirement to disclose beneficial ownership should apply to them as well as it is the case in Malaysia.

In the case of a company, the roles and responsibilities of the various parties with regards to the BO information are as follows:

(a) Board of directors

The board of directors is ultimately responsible in ensuring that the company has exercised its powers under subsection 56(1), (2) or (3) of the CA 2016 in obtaining the BO information. The obligation also extends to ensure that once such BO information is received, the information must be entered into a separate part of the register of members as stated under subsections 51(1) and 56(4).¹³⁴

(b) Members of the company

If a member of a company has received a notice issued under subsection 56(1) or (3) of the CA 2016, the member has an obligation to inform the company whether he is the BO as defined by the CA 2016 or that the voting rights held by him is subject to an agreement or arrangement in which another person is entitled to exercise that voting rights.¹³⁵ The obligations of a member under these subsections also extend to the need to provide the particulars of the persons for whom the member holds the voting shares or the parties to the agreements or arrangements, as the case may be, to the extent that such other persons can be identified. A person who fails to comply with a notice issued under section 56 or has provided a false information or has made a statement recklessly commits an offence as stated under subsection 56(7). Kenya lacks a legal requirement not to disclose false information. There is need to introduce such a requirement to ensure that the disclosed information is correct. There also should a verification procedure to verify the correctness of the disclosed information.

¹³⁴ Ibid p10, para 13a.

¹³⁵ Ibid, para 13b.

If a person who is not a member of a company receives a notice from the company under subsection 56(2) of the CA 2016, the person has the obligation to inform the company whether he is the BO of the company as defined under the CA 2016¹³⁶. Similar to a member of the company, the obligations of such person also extend to the need to provide the particulars of the persons for whom the person holds the voting shares in his capacity as trustee to the extent that such other persons can be identified.

A person who fails to comply with the notice issued under section 56 or has provided a false information or has made a statement recklessly commits an offence as stated under subsection 56(7).

(c) Company secretary/Agent

In line with the duty of a secretary under subsection 102(1) of the CA 2016 to properly keep and regularly maintain the register of members, the secretary must ensure that the BO information is entered into in accordance with the requirement set out under subsection 56(4). In addition, a secretary is also responsible to lodge the BO information to the Registrar in accordance with the provisions under subsection 56(6).¹³⁷

The Kenyan legal framework does not provide the duties of company official in respect to disclosure of beneficial information. The officers of the companies may not know who is expected to do what towards compliance with the disclosure requirements. Separation of duties is critical to effective internal control because it reduces the risk of both erroneous and inappropriate actions. All units should attempt to separate functional responsibilities to ensure that errors, intentional or unintentional, cannot be made without being discovered by another person.

4.1.3. Exempted entities

¹³⁶ Ibid, para 13c.

¹³⁷ Ibid p12, para13(d).

As observed above, BO reporting framework applies to all companies incorporated or registered under the CA 2016. The author takes it that government-owned or stated owned companies are also required to comply with the guidelines unless exempted. The following companies and limited liability partnerships are exempted from the BO reporting framework:¹³⁸

(a) Companies which are licensed by Bank Negara Malaysia under the Financial Services Act 2013 [Act 758], Islamic Financial Services Act 2013 [Act 759], a prescribed development financial institution under the Development Financial Institutions Act 2002 [Act 618] or a licensed money services business under the Money Services Business Act 2011 [Act 731];

(b) Persons regulated under the securities laws as follows:

(i) Entity licensed or registered under the Capital Markets and Services Act 2007 [Act 671] (CMSA2007);

(ii) Stock exchange, derivatives exchange, clearing house and central depository approved under the securities laws;

(iii) Recognized self-regulatory organization (SRO) under the CMSA 2007; and

(iv) Private retirement scheme administrator approved under the CMSA 2007;

(c) Companies whose shares are quoted in a stock exchange, either local or foreign exchange;

(d) Companies whose shares are deposited in the central depository pursuant to the Securities Industry (Central Depositories) Act 1991 [Act 453]. The exemption under this subparagraph (d) only applicable if all the shares in a company remain deposited with the central depository.

Express statement of the exempted entities is a good tool to avoid over regulation of entities.

4.1.4. Timelines

A new company is required to obtain the BO information within 30 days after the appointment of a company secretary and to enter the BO information into the register of BO within 60 days

¹³⁸ Ibid p14, para17.

after the BO information has been obtained or received a company is required to notify the Registrar within 14 days from the date the BO information is entered into the register of BO.¹³⁹ For existing companies, they are mandated to notify the Registrar of the changes in the register of members within 14 days from the date the BO information is recorded in the register of BO. Further, to lodge annual return together with the BO information not later than 30 days from the anniversary of its incorporation date.¹⁴⁰ Timelines under the Malaysian law are not open ended like it is the case in Kenya. Strict compliance timelines enable the enforcement agencies to identify the non-compliant entities and take the appropriate steps to ensure compliance.

4.1.5. Definition of a beneficial owner

The CA 2016 defines BO as “the ultimate owner of the shares and does not include a nominee of any description”¹⁴¹. This definition must also be read with the concept of “interests in shares” under section 8 of the CA 2016. For the purposes of the BO reporting framework, the phrase of “the ultimate owner of the shares” covers both from the perspective of ownership and effective control. However, for companies limited by guarantee, the BO reporting framework extends only to effective control.¹⁴²

For company limited by shares “the ultimate owner of the shares” is an individual (natural person) who meets one or more of the following criteria:¹⁴³

- (a) Has interest, directly or indirectly, in not less than 20% of the shares of the company; The information in the register of members and the constitution (if any) will determine whether any individual or corporate entity has an interest in not less than 20% of the shares in the company.
- (b) Holds, directly or indirectly, not less than 20% of the voting shares of the company; Voting shares confer the right of the holder to vote on resolutions, either at general meetings or

¹³⁹ Ibid p18, para21.

¹⁴⁰ Ibid.

¹⁴¹ Ibid n129, s2(1)

¹⁴² Ibid n137, p23 para26.

¹⁴³ Ibid p23 para27.

otherwise, on all or substantially all matters and the right may vary depending on the types of shares. If the shares are directly owned, information in the register and constitution (if any) will determine if an individual or corporate entity has an interest of not less than 20% in the voting shares of the company.

(c) Has the right to exercise ultimate effective control whether formal or informal over the company; or the directors or the management of the company; An individual exercises ultimate effective control over a company when the recommendation made by him is always followed by the members holding a majority of the voting rights in the company. The recommendation refers to any recommendation or proposal which influence the decision of the company and can be made whether formal or informal. The individual is not necessarily a member or director of the company but consistently exercises dominant influence or control over the company or is regularly consulted for the decision of the board of directors.

(d) Has the right or power to directly or indirectly appoint or remove a director(s) who holds a majority of the voting rights at the meeting of directors; or Companies must consider an individual who may directly or indirectly appoint or remove a director who holds a majority of the voting rights at the meeting of directors must be considered by the company as having influence or control over the company.

(e) Is a member of the company and, under an agreement with another member of the company, controls alone a majority of the voting rights in the company. Control over a company may also be identified through the cumulative effect of an agreement which leads to the actual exercising of the control over a company. The phrase “ultimate effective control” refers to situations where the company, the directors or the management of the company, whether formal or informal, is accustomed or is under an obligation to act under the directions, instructions or wishes of that person. Requiring all owners of a company to disclose their information is a

good thing since it is possible for an individual to control a company, despite having what looks like a small stake, through the use of shell companies.¹⁴⁴

4.1.6. Obtaining the BO information

Legal entities in Malaysia are required to obtain the following information relating to the BO:¹⁴⁵

- (a) Full name;
- (b) Nationality;
- (c) Residential address;
- (d) Date of birth;
- (e) NRIC/Passport No.;
- (f) Type of BO (direct/indirect);
- (g) Criteria of BO (including percentage of ownership or capital contribution, if any);
- (h) Date of becoming/ ceasing to be a BO;
- (i) Whenever the BO information is received by a company pursuant to notices under subsection 56(1), (2) or (3) of the CA 2016 – the date of the notices and the date the BO information was received; and
- (j) Email address, where possible.

To enable legal entities to fully comply with the obligations relating to the BO information, including in the submission of annual returns or annual declarations and to ensure that the BO information is accurate and up-to-date and can be accessed in a timely manner, legal entities are required to carry out the following:¹⁴⁶

- (a) Obtain the BO information by sending out notices pursuant to subsection 56(1), (2) or (3) of the CA 2016 (Please refer to Annexure C of this guideline). Companies are required to send

¹⁴⁴ Ibid, n37.

¹⁴⁵ Ibid, p30 para37.

¹⁴⁶ Ibid, p31 para38.

a notice under subsection 56(1) at least once in a calendar year for the purposes of the submission of the annual return;

(b) Take reasonable steps to identify the BO of the company in the criteria described in Part II Section 3 of this guideline, as the case may be;

(c) Keep the BO information in the separate part of the register of members (register of BO) and to ensure the information is accurate and up-to-date and can be accessed in a timely manner by competent authorities, law enforcement agencies, the BO whose name has been entered in the register of BO and any other person authorized by the BO;

(d) Have an appropriate internal policy on BO reporting and to require shareholders to notify the company on the identity of the BO and when there are changes in the BO information. If necessary, such policy may be reflected in the constitution of the company or such other documents deemed appropriate by the company; and

(e) Give access to competent authorities, law enforcement agencies, the BO whose name has been entered in the register of BO and any other person authorized by the BO.

4.1.7. Verifying the BO information

A company or a limited liability partnership is obliged to conduct verification of the BO information when any of the following situation occurs:¹⁴⁷

(a) When an obligation arises to enter the name of a BO in the register of BO;

(b) When an obligation arises to enter the changes to the particulars of BO information in the register of BO;

(c) When an obligation arises to register a foreign company under the CA 2016 or a foreign limited liability partnership under the LLPA 2012; or

(d) As and when instructed by the Registrar from time to time.

¹⁴⁷ Ibid, p34 para41.

There is no requirement for verification of beneficial ownership information in Kenya. Without such verification, the accuracy of the information cannot be guaranteed. There is risk that the information contained in national registries of beneficial ownership will not be of sufficient quality. If the registry information is not entirely accurate and verified it may, for example, remain possible for the true beneficial owners of corporate entities to remain disguised, despite the appearance of transparency. In theory, an imperfect registry could nonetheless deter significant secrecy and abuse, owing to the heightened risk and difficulty of setting up such arrangements. However, it is equally possible that an imperfect registry may achieve very little if those committed to avoiding it find it relatively easy to do so.¹⁴⁸

4.1.8. Keeping of the BO information

The company or limited liability partnership must ensure that the BO information and the supporting documents to verify the BO information are in order and kept either at the registered office or at the same place the register of members or the register of partners is kept.¹⁴⁹

The BO information and the supporting documents must be kept for at least 7 years from the date a person ceases to be a BO. The BO information must be kept either in the national language or English language and may be kept either in physical or electronic form.¹⁵⁰ In Kenya, beneficial information is to be kept by the registrar of companies. According to BRS Statistics (Companies Registry) - 2019/2022 there were over 120,000 registered companies in Kenya. A register for all the companies will be a bulky one requiring a large database to keep the information. Kenya may borrow from Malaysia that the beneficial information to be kept by the companies themselves as opposed to the Registrar.

4.1.9. Access to BO information

¹⁴⁸ Ibid, n24.

¹⁴⁹ Ibid, p37 para49.

¹⁵⁰ Ibid, p31 para50-51.

Companies or limited liability partnerships must ensure that the BO information can be accessed in a timely manner by the competent authorities and the law enforcement agencies as and when required.¹⁵¹ Malaysia, just as Kenya, does not have a public register of beneficial owners. Countries such as the UK have planned to establish a public register which will enhance transparency. In the foreword, junior minister Baroness Neville-Rolfe said that the UK would be the first G20 country to establish a publicly-accessible register: ‘The UK Government has legislated to ensure that, from June 2016, we will be the first G20 country to establish a publicly accessible central registry showing who really owns and controls UK companies. This will open up a new era of corporate transparency in Britain and will help us to tackle corruption, money laundering and terrorist financing.’¹⁵²

4.1.10. Conclusion

It is not surprising that Malaysia is viewed as a regional leader in minority protection.¹⁵³ Malaysia’s disclosure system is very extensive and detailed. In this respect, it could be viewed as a rules-based system that offers a high level of disclosure and reporting requirements and, equally important, easy and electronic access to ownership and control information. Minority investors and other interested parties can find information going as far as the final layer of beneficial owners provided that the beneficial owner is considered to be a substantial shareholder who holds, either directly or indirectly, at least 5% of the outstanding shares.

4.2. Tanzania

4.2.1. Introduction

As part of the efforts to developing business and investment, Tanzania adopted the concept of Beneficial Ownership as a mechanism curb and keep tag on the aforementioned matters is

¹⁵¹ Ibid, p37 para52.

¹⁵² BIS, Beneficial ownership transparency: Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK, March 2016: page 3.

¹⁵³ World Bank IFC, “Doing Business 2011, Making a Difference for Entrepreneurs”, <www.doingbusiness.org> accessed on August 17 2022.

imposing a Beneficial Ownership reporting.¹⁵⁴ Beneficial Ownership Reporting is meant to reveal the persons termed as beneficial owners behind companies registered in Tanzania.

4.2.2. History of Beneficial Ownership in Tanzania

Going back to 2014, Tanzania was part of a pilot scheme by the Extractive Industries Transparency Initiatives (EITI), as one of its member countries.¹⁵⁵ The purpose for the EITI was to assess the feasibility of requiring the Beneficial Ownership information from companies in the Industry of Extractive Resources. The EITI is an Initiative that implements global standards to promote the open and accountable management of Extractive Resources, that is, oil, gas and minerals. Again, in March 2015, Tanzania participated in a seminar on beneficial ownership by EITI in UK to review the experience and lessons learnt from the Pilot Scheme countries that started to disclose the beneficial owner information.¹⁵⁶ The session among other things addressed issues of who the real owners of companies are as well as the lifting of the corporate veil. There were several other workshops held in Tanzania which focused on how to go about the reporting and disclosure of the information¹⁵⁷. The Workshop dealt with matters pertaining to drafting templates, defining a beneficial owner, and setting thresholds of ownership. Thereafter, in July 2015, Tanzania enacted the Extractive Industries Transparency and Accountability Act No. 23 of 2015 that requires all extractive companies, i.e., companies in the oil, gas, and mining industry to disclose names of shareholders. This is governed by section 26(1)(b) of the Act followed by the Tanzania Extractive Industries Transparency Regulations, 2019 which provided for further legislative basis for Beneficial Owners' disclosure in extractive companies. Lastly, in the year 2020, the government of Tanzania, through the

¹⁵⁴ Breakthrough Attorneys (2022), 'What You Should Know About Beneficial Ownership in Tanzania' <<https://www.printfriendly.com/p/g/Ja9tfz>> accessed on August 18 2022.

¹⁵⁵ Ibid, n26.

¹⁵⁶ Company Law Update: What You Should Know About Beneficial Ownership In Tanzania, 2020, <<https://breakthroughattorneys.com/what-you-should-know-about-beneficial-ownership-in-tanzania/>> accessed on 26 August, 2022.

¹⁵⁷A workshop by the National Resource Governance Institution (NRGI) and Global Witness held in Dar es Salaam in May, 2015.

Finance Act, 2020 amended several laws to add the Beneficial Ownership rules, including beneficial owners' definition and reporting.

4.2.3. Laws governing Beneficial Ownership in Tanzania

Beneficial Ownership in Tanzania is governed by a number of laws which have been enacted to facilitate the reporting of the BO information. The following are the Acts in play up to date;

4.2.3.1. The Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015

(TEITA)

This Act was enacted to govern transparency and disclosure requirements including among others, revenue disclosure, contract engagements, and also beneficial owners' disclosure. The TEITA Act imposes an obligation on Companies in Extractive Industry to publish information, including but not limited to, names of individuals who own interests in the extractive industry companies.¹⁵⁸

4.2.3.2. The Companies (Beneficial Ownership) Regulations, 2021

The regulations are made under section 483(2) of the Companies Act, 2002; these regulations were made to regulate the information that is required and the manner in which such reported should be made. The regulations also provide for the governance of the register of the B.O as well as the consequences of non-compliance.

4.2.3.3. The Companies Act, 2020

The Act was amended to include definitions of beneficial owner, arrangement and politically exposed persons; Inclusion of the particular of B.O. upon registration of Memorandum and Articles; and making and keeping entries for information of B.O.¹⁵⁹

4.2.3.4. The Anti-Money Laundering Act, (CAP 423);

¹⁵⁸ Section 16(1)(b) of the Act.

¹⁵⁹ Sections 14, 115, 129, 451A, 451B of the Act as amended.

The Act includes definitions of beneficial owner and requires legal entities to disclose information of beneficial owners.¹⁶⁰

4.2.3.5. The Trustees Incorporations Act (CAP 318)

This Act was amended to also include definitions relating to BO in Trusts as well as particulars needed to be reported for Trusts.¹⁶¹

4.2.3.6. The Income Tax Act [CAP 332 R.E. 2019];

This Act was amended to include among others, the definition of a BO and other matters related to the beneficial owners, such as, the extent of chargeable income, sources of income and so forth.¹⁶²

The law on disclosure of beneficial ownership in Tanzania is contained in numerous legislation. This has ensured wide coverage of entities required to disclose ownership. Unlike in Kenya where only companies are covered by disclosure of ownership requirement. The numerous legislation on beneficial ownership may lead to overregulation. It is no secret that excessive regulation, such as excessive taxation of any business or industry, can weaken or even kill it. The financial industry is particularly sensitive to excessive regulation given that capital can flow from one regulatory jurisdiction to another at almost the speed of light. Appropriate regulation and the rule of law can strengthen financial markets and the domestic economy by attracting flows of foreign capital. Excessive regulation has the opposite effect when it imposes costs that cause capital and companies to flee a jurisdiction.¹⁶³

4.2.4. Who is a beneficial owner?

A beneficial owner is defined as a natural person (i) who directly or indirectly ultimately owns or exercises substantial control over an entity or an arrangement, or (ii) who has a substantial

¹⁶⁰ Section 3 of the Act.

¹⁶¹ Sections 1, 2 and 15 of the Act.

¹⁶² Section 3 and 69 of the Act as amended.

¹⁶³ Richard Rahn 2006, The Danger of Over Regulation, Discovery Institute < www.dscovey.org/a/3762 > accessed on November 6 2022.

economic interest in or receives substantial economic benefit from an entity or an arrangement directly or indirectly whether acting alone or together with other persons, or (iii) on whose behalf an arrangement is conducted, or (iv) who exercises significant control or influence over a person or arrangement through a formal or informal agreement.¹⁶⁴

Notably, the Companies Act does not define what "substantial control" or "substantial economic interest in..." or "substantial economic benefit in..." a company means. In certain jurisdictions, there is a percentage reporting threshold for beneficial ownership. The definition of "beneficial ownership" introduced in the Companies Act closely follows the European position, however, in most European jurisdictions, the applicable threshold for reporting of beneficial owners is ownership or control of 25% of the capital or voting rights of the legal person. A threshold has not been prescribed in Tanzania. We also note that the beneficial ownership rules apply to both private and public companies incorporated in Tanzania (unlike in other jurisdictions such as Malaysia, there is no carve-out for listed companies).

4.2.5. Details to be disclosed and filing requirements

Details of beneficial ownership to be filed with the Registrar of Companies include¹⁶⁵: full name (including any former or other name); date and place of birth; telephone number; nationality; national identity number, passport number or other appropriate identification; residential, postal and email address (if any); place of work and position held; nature of the interest including the details of the legal, financial, security, debenture or informal arrangement giving rise to the beneficial ownership; and oath or affirmation as to whether the beneficial owner is a politically exposed person or not.

A company is required to take reasonable steps to identify its beneficial owners and enter their particulars in its register of members and beneficial owners¹⁶⁶. If a person ceases to be a

¹⁶⁴ The Companies (Beneficial Ownership) Regulations, 2021, r2.

¹⁶⁵ Ibid, r3(1) and Form 14b.

¹⁶⁶ Ibid, r3(2).

beneficial owner, is obligate to file a notice to that effect to the Registrar by filling in form No. 14c prescribed in the Companies (Forms) Rules within thirty days from the date of cessation¹⁶⁷. Failure to provide the required information within the prescribed to makes the company and every officer, shareholder and beneficial owner of the company will be held jointly and severally liable for late filing.¹⁶⁸

4.2.6. Change in beneficial owners

In case there is change of beneficial owners, the changes should be forwarded to the Registrar within 30 days¹⁶⁹. This includes when there is a transfer or transmission of shares or an increase or reduction of share capital or a restructuring of a company's share capital or changes in the voting rights leading to any change in beneficial ownership.¹⁷⁰ Non-compliance to notify the Registrar of any changes result in the documents relating to such change failing to be registered¹⁷¹. Moreover, notices of changes in beneficial ownership have to be signed by at least one director of the company or the company secretary and a certified copy of the official identification document for every beneficial owner shall be submitted to the Registrar¹⁷².

4.2.7. Cessation of a beneficial owner

The Registrar has to be notified where a person ceases to be a beneficial owner within 30 days from the date of cessation by filing form No. 14c.

4.2.8. Declaration of beneficial interest

A person who does not hold beneficial interest in shares but is a member of a company shall file with the company a declaration to that effect by filling form No. 14d within 30 days from the date his name is entered in the register of members.

¹⁶⁷ Ibid, r3(3).

¹⁶⁸ Ibid, r3(4).

¹⁶⁹ Ibid, r5(1).

¹⁷⁰ Ibid, r5(2).

¹⁷¹ Ibid, r5(3).

¹⁷² Ibid, r5(4).

It is to be noted that where changes occur in the beneficial ownership of the shares, the Registrar is to be notified within 30 days from the date of change, making a declaration of such change in form No. 14d.

Regulation 4(2) of the Regulations requires persons who hold or acquire a beneficial interest in shares of a company not registered in his name to file with the company a declaration disclosing the interest in form No. 14e within 30 days after acquiring such beneficial interest in the shares of the company and where change occurs in the beneficial interest in such shares, the Registrar is to be notified as well.

4.2.9. Consequences of failing to make the requisite disclosures

Any person who fails to file beneficial ownership details with the Registrar of Companies commits an offence and is liable to a fine of not less than TZS 5 million but not exceeding TZS 10 million¹⁷³.

The author notes that the power of the Registrar to refuse to register any document of a company if the beneficial ownership information has not been submitted is a more relevant penalty than the fine. The refusal to register documents should also apply if the Registrar is not satisfied that the company has provided accurate and up to date information on the beneficial owners of the company as required by the Act and shall communicate his decision to the company accordingly. The effect of this provision is that it could prevent a company from taking certain essential corporate actions, for example registering share transfers, appointment/termination of directors, changes in share capital, etc. which may lead to significant operational challenges. This is a good lesson for Kenya.

4.3. Canada

4.3.1. Introduction

¹⁷³ Ibid, r10.

The Canadian government is often said not to have done enough to fight white collar wrongdoing. However, it appears to be responding to calls to action. In its Annual Budget¹⁷⁴ the Government of Canada announced the implementation of a beneficial ownership registry for corporations in Canada. The Budget proposes to provide \$2.1 million over two years to Innovation, Science and Economic Development Canada to build and implement a publicly accessible corporate beneficial ownership registry by 2025 in order to better catch those who attempt to launder money, evade taxes, or commit other complex financial crime.

4.3.2. Money laundering, corruption and beneficial ownership in Canada

Canada's anti-money laundering regime¹⁷⁵ includes, among other things, rigorous client identification requirements commonly referred to as “know your client” rules or “KYC”. These rules include the collection of beneficial ownership information of companies with which regulated entities do business. In the anti-money laundering context, beneficial ownership information is used to prevent the abuse of corporate vehicles for money laundering or other criminal purposes. The Canadian federal government is bolstering Canada's anti money laundering regime by bringing forward plans to introduce a beneficial ownership registry in 2023.¹⁷⁶ A beneficial ownership registry would require corporations to register and verify the identity of companies' beneficial owners, making it more difficult to use shell companies to conceal criminal activity. The need for this is not news: most anti money laundering experts believe beneficial ownership disclosure is the top measure to combat money laundering. Accounting bodies have been recommending Canada have a registry for several years.¹⁷⁷ ‘Shell

¹⁷⁴ The budget was released on April 19, 2021.

¹⁷⁵ This is authorized under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (the PCMLTFA) and administered by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).

¹⁷⁶ Stephen Vincent , 2022 “Follow the (AML) Leader” – Canada Fast-Tracks its Beneficial Ownership Registry, Part 1, <<https://www.regulationtomorrow.com/ca/anti-money-laundering-ca/follow-the-aml-leader-canada-fast-tracks-its-beneficial-ownership-registry-part-1/>> accessed on September 24 2022.

¹⁷⁷ Expert Panel on Money Laundering in BC Real Estate, “Combatting Money Laundering in B.C. Real Estate” at p 2, online: <<https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/real-estate-in-bc/combatting-money-laundering-report.pdf> > accessed on September 24 2022.

companies' are those that do not undertake activities themselves, but are containers for owning assets. The ultimate beneficiaries are not necessarily the same as the legal owner, which can be another company, a lawyer, or an associate. While all companies are recorded on an official government registry, often this only includes a contact person, not details of the legal or beneficial owner. The majority of shell companies (including those with nominee owners) are used for ordinary, legal purposes, but they can also be used as 'getaway vehicles' for crime.

Cases of serious transnational financial crime including grand corruption, tax evasion, sanctions-busting, terrorist finance and money laundering tend to involve companies and trusts that cannot be traced back to their real owners.¹⁷⁸

4.3.3. Definition of beneficial owner

The term beneficial owner is not defined in Canadian law with regard to company registration. The Proceeds of Crime (Money Laundering) and Terrorist Financing Act – Canada's anti-money laundering legislation – also does not define beneficial owner, but further regulations¹⁷⁹ to the act provide what type of beneficial ownership information must be collected by financial institutions. These include:

- (a) in the case of a corporation, the names of all directors of the corporation and the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the shares of the corporation;
- (b) in the case of a trust, the names and addresses of all trustees and all known beneficiaries and settlors of the trust;

¹⁷⁸ Van der Does de Willebois, E., Halter, E., Harrison, R., Park, J.W. and Sharman, J. (2011) *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*. World Bank.

¹⁷⁹ Cross-border Currency and Monetary Instruments Reporting Regulations; Financial Consumer Protection Framework Regulations; Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations; Proceeds of Crime (Money Laundering) and Terrorist Financing Registration Regulations; Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations and Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations.

(c) in the case of an entity other than a corporation or trust, the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the entity; and

(d) in all cases, information establishing the ownership, control and structure of the entity.

Within this framework, the requirement covers some of the key issues such as the beneficial owner being a natural person, but it does not mention ultimate control and limit the exercise of direct or indirect control to the equivalent of a percentage of share ownership.

The Kenyan legislation on beneficial ownership does not require financial institutions to collect ownership information of entities they offer services to. This requirement would expand the scope of disclosure which will lead to more entities disclosing their beneficial ownership information.

4.3.4. Acquiring accurate beneficial ownership information

Current laws and regulations do not require legal entities to maintain information on beneficial ownership. Consequently, there is also no requirement that the beneficial ownership information is maintained within Canada. There is also no requirement for a nominee shareholder to declare to the company if they own shares on behalf of a third person. Shareholders are also not legally obliged to inform the company regarding changes in share ownership.

4.3.5. Access to beneficial ownership information

Timely access to beneficial ownership information by competent authorities in Canada is restricted¹⁸⁰. As there is no beneficial ownership registry and legal entities are not required to maintain beneficial ownership information, authorities have to rely on the information collected by financial institutions and other legal entities or on basic information contained in security registers, but access to those is also restricted. Moreover, Canada does not have a

¹⁸⁰ Transparency International, 'Canada Beneficial Ownership Transparency' <https://www.transparency.org/files/content/publication/2015_BOCountryReport_Canada.pdf> accessed on September 24 2022.

central company registry and information collected in the majority of provinces is insufficient to support the identification of the beneficial owner. In the majority of provinces, with the exception of some such as Alberta, Manitoba and Quebec, company registries do not even include information on shareholders.¹⁸¹ Only the names of directors are recorded. Moreover, there is no guarantee that the information recorded in the province registries is accurate and current as registry authorities are not required to verify the information provided by legal entities upon registration.

4.3.6. Trusts

Canada has a domestic trust law and also allows the administration of foreign trusts¹⁸². However, there is no statutory duty in Canada for trustees of a trust to retain records on the beneficiaries or settlors of the trust. Nevertheless, trustees under Canadian common-law rules must account for their administration of the trust to those who have an interest in the trust. This may result in a practical need for the trustees to retain records of the beneficiaries. If the trust is documented by way of a trust deed, the beneficiary information will normally be included in the trust deed, but this document is not filed with a governmental authority and there is no registration requirement for trusts.

4.3.7. Bearer shares and nominees

Federally incorporated entities are permitted to issue bearer shares. There are no requirements that bearer shares need to be converted into registered shares or held with a regulated financial institution or professional intermediary¹⁸³. If a client is a corporation that can issue bearer shares, then enhanced due diligence is required as bearer shares allow the identity of beneficial owners to be hidden. Financial institutions should thus take reasonable measures to mitigate the risks,

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ OSFI Guideline B-8: Deterring and Detecting Money Laundering and Terrorist Financing <https://www.imolin.org/doc/amlid/Canada/OSFI_Guideline_B-8.pdf> accessed on September 25 2022.

including for example requiring the immobilization of shares and requiring corporations to replace bearer shares with shares in registered form, among others.

4.3.8. Nominee shareholders and directors

Nominee shareholders and directors are allowed in Canada¹⁸⁴ and there is currently no requirement that they should disclose the identity of the beneficial owner(s). There is also no requirement for professional nominees to be licensed or keep records of the persons who nominated them.

4.4. Conclusion

Based on the above jurisdictional analysis, it is evident that disclosure of beneficial ownership has been in execution process for some years. It was crucial for the concept to be fully implemented worldwide to cater for several purposes which include prevention and exposure of corruption, money laundering, illicit financial flows and acts of such nature. Imposition of this concept ease conduction of due diligence to uncover persons relating to established businesses, their source of income and trace their business activities even where it is indirect. Imposition of beneficial ownership concept strives in increasing of trust and accountability in the management of registered entities by keeping tag on matters such as tax evasion, revenue collection enhancement, and overall improvement of the global investment climate.

The Kenyan and Tanzanian disclosure regimes are characterized by stringent and inflexible transparency which do not provide optional investigative mechanisms that listed companies and public agencies can opt into at their own discretion. As seen above, Malaysian listed companies, for instance, may request their shareholders to unveil detailed beneficial ownership information beyond the legal and regulatory requirements. Likewise, the Registrar of Companies at the Companies Commission may submit a similar request. Section 317(1) of

¹⁸⁴ Government of Canada, ‘Directors & Officers’ <<https://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06643.html>> accessed on September 25 2022.

Capital Markets & Services Act 2007 is a good example. The sections require that if you are a director of a company, you have a duty to tell the company about any shares you own. The Securities Commission may ask for this information if they think it is necessary.

The Malaysian government has put in place a system to make sure that information about the beneficial owners of companies is disclosed when necessary to avoid information overload. The government also sets guidelines for how companies should handle this information, but these guidelines are not legally binding since section 56 of the CA does not make it mandatory for companies to obtain beneficial ownership information from their shareholders.

The rules and regulations that are put in place to protect the public are only effective if the government officials who are responsible for enforcing them are able to do so. In Malaysia, this has been a concern because there are a lot of laws and regulations in place, but few people are actually enforcing them.”¹⁸⁵ This is the case in Kenya where over two years down the line, the registrar of companies is yet to take any steps to enforce compliance with disclosure requirements.

In Malaysia, just as it is in Kenya and Tanzania, the disclosure requirements of listed companies don't always let you see all the information that's relevant to understanding their control and ownership structure. For example, some shareholders may have arrangements that give them more control than they would if the information were publicly available. In order to provide an accurate picture of a company's control and ownership, it's important to disclose any control-enhancing mechanisms as well.

For Canada, the disclosure regime is scattered in a number of statutes. This notwithstanding, Canada is yet to establish a register of beneficial owners thus making the disclosure of beneficial ownership very ineffective in terms of access to beneficial ownership information. The major lesson from Canada is that financial institutions may be effectively used to collect

¹⁸⁵ Ibid.

beneficial information for the entities the offer services to. Most companies are likely to seek services loan facilities from financial institutions.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5. Introduction

Recent years have seen an increase in the demand for information on the true owners of corporate entities, in order to help identify tax dodging schemes, offshore personal wealth, and to help fight corruption and organized crime.¹⁸⁶ This effort remains in its infancy, but has made important strides as various jurisdictions have begun to keep registers of beneficial owners. The results of a study done on Kuwaiti companies illustrate that the average collective disclosure level is 44 per cent.¹⁸⁷ Some of the model companies do not fully comply with the disclosure requirements. The standards that have been disclosed to the high level are usually very high, with an average of 89%. A lot of people in Kuwait want to tell the government about their problems, but they don't always feel comfortable doing so. However, the amount of information that is being shared has gone up from what was revealed in earlier studies.. Kuwait is just one of the many countries whose level of disclosure is relatively low. This chapter looks at the challenges facing implementation of the disclosure requirements in Kenya and make recommendations for reforms.

5.1. Practical challenges to compliance

5.1.1. Privacy concerns

One of the reasons why beneficial ownership requirements are important is that they help protect the privacy of people who are affected by them. These requirements make sure that no one can easily access the personal information of people who are affected by them.. The Companies Act (Beneficial Ownership Information) Regulations 2020 provide that beneficial

¹⁸⁶ Wilson Prichard, 'Linking Beneficial Ownership Transparency to Improved Tax Revenue Collection in Developing Countries' <www.ictd.ac> Summary Brief Summary Brief Number 15, accessed on August 28, 2022.

¹⁸⁷ Issa Dawd, (2018) "Aggregate financial disclosure practice: evidence from the emerging capital market of Kuwait", *Journal of Applied Accounting Research*, Vol. 19 Issue: 4, pp.626-647, [https:// doi.org/10.1108/JAAR-12-2015-0103](https://doi.org/10.1108/JAAR-12-2015-0103).

ownership information shall not be made available to the public.¹⁸⁸ However, a company may disclose information about its beneficial owner with the inscribed consensus of the beneficial owner or as per the court order.¹⁸⁹ The Registrar of Companies is also authorized to use information concerning a beneficial owner to communicate with the beneficial owner.¹⁹⁰ The Registrar can provide information on who owns a company or other organization if a competent authority asks for it in writing¹⁹¹ The term competent authority has been widely defined to include “the Attorney-General, any criminal investigation agency established by law, law enforcement agencies, authorities that supervise and monitor the financial sector, including the Financial Reporting Centre and the Kenya Revenue Authority.”¹⁹² The restricted access to beneficial ownership information poses a challenge in that the investors may not have access to the necessary information in order to make informed decisions.

5.1.2. Lenient penalties for unlawful disclosure

Someone who discloses beneficial ownership information in breach of the Regulations is liable to be charged and upon sentence to a fine not exceeding Kshs. Twenty thousand (approx. USD 195) or jail term not more than six months, or to both.¹⁹³ These penalties are rather lenient and are unlikely to serve as a deterrent for acts of disclosure in breach of the Regulations.

5.1.3. Shareholders with complex structures

Sometimes companies have shareholders, such as pension schemes, private equity funds, and state corporations. These companies have complicated ownership structures, so it can be hard to figure out who the individual beneficial owners are. There are also entities such as companies limited by guarantee, which in some cases have hundreds of members where none of the members have significant control/ownership interest in the company. Despite their many legal

¹⁸⁸ R13 (1).

¹⁸⁹ R13(2).

¹⁹⁰ R13(3).

¹⁹¹ R13 (5).

¹⁹² Ibid, r2.

¹⁹³ Ibid, r12.

and legitimate uses, legal vehicles can be abused for many reasons, such as to help people do things that are illegal, such as money laundering and private equity dividend recapitalization, and so on. This includes things like money laundering, private equity dividend recapitalizations, and other activities that are not allowed by law. If there are a lot of different people or organizations controlling a legal vehicle, that could be a sign that the vehicle might be used for abusive purposes. Sometimes people can hide their corrupt activities by using complex legal vehicles. For example, they might try to hide money they've stolen or avoided paying taxes on. Group complexity can make it harder to see the true workings of entities within a multinational group, which can lead to tax abuse or other problems.¹⁹⁴

Some people argue that government regulations already try to address the problem of complex business organizations by requiring entities to identify their beneficial owners. However, this may not always be effective, because it can be hard to find out who the beneficial owners of an organization are. Governments may decide to require entities to do this even if the organization is very complex, in order to reduce the risk of these organizations being used to conceal illegal activity. To attain more effective disclosure, regulated entities such as banks may be required to identify the beneficial owners of the entities to which they provide services.

5.1.4. Nominee shareholding arrangements

Every typical nominee connection among parties now obliges disclosure¹⁹⁵. Under such arrangements, if one wants to hold shares in their name, but don't want to take on the responsibility of owning and managing them, they could sign up for a trust. This would give someone else (usually a lawyer) the power to manage the shares on your behalf, and they would usually agree to do this under a "bare trust" arrangement. Now, we will need to know the true owner of the shares in order to properly value them. Disclosure of beneficial ownership under

¹⁹⁴ Ibid, n142.

¹⁹⁵ Companies (Beneficial Ownership Information) Regulations, 2020, r3 (2) (a).

this arrangement pose a challenge since the scheme allows a person to keep their real shareholder identity hidden from other shareholders, while still allowing them to reap the benefits of ownership. The technique can assist to maintain secrecy.

5.1.5. Local participation requirements

If you want to operate a company in a sector with compulsory local shareholding requirements, like telecommunications, insurance, engineering, or pharmaceuticals, you will need to think about alternative structures that take into account the relevant governing requirements, company law issues, and tax considerations.

5.1.6. Timelines for compliance

Companies must file a register of beneficial owners with the Registrar of Companies within 30 days of completing the process.¹⁹⁶ This prescribed timeline is open-ended, given the fact that different companies may prepare and complete their registers at different times. It would have been desirable to have a more definite timeline set out like it is the case in Malaysia. As stated in chapter four, when a new company is formed in Malaysia, it must get the business registration information (BO) within 30 days after the appointment of a company secretary and must enter the BO information into the register of business officers within 60 days. A company must notify the Registrar within 14 days from the date the BO information is entered into the register of business officers. Kenyan companies are encouraged to prepare such register as soon as possible to avoid being liable for committing an offence of noncompliance.

5.1.7. System Challenges

Some people have had trouble filling out their information about who owns their assets on the E-Citizen Portal. Sometimes people who are considered to be the beneficial owners of a company, even if they are citizens of Kenya, are actually living in another country. That's not always accurate. The company's records might not always reflect the actual number of shares

¹⁹⁶ Companies Act, s93(8).

that are available for people to own.¹⁹⁷ Stakeholders need to tell the Attorney General's Office about the problems they've been having with the system. This will help make sure the issues are fixed.

5.1.8. Beneficial Ownership Information Effectively Collected and Shared

The push to improve collection of beneficial ownership information is important in order to improve tax collection. This information is required to be complete and of high quality, and needs to be available to the tax administrations of low-income countries. Although we're making progress, it's still not certain whether we'll be able to achieve our goals. The first risk is that the information in national registries of beneficial ownership will not be accurate. This can happen, for example, if the registry information is not entirely accurate and verified. This could allow the true beneficial owners of corporate entities to remain unidentified, even though they may seem transparent. An imperfect registry could help to discourage secrecy and abuse, since it would be more difficult to hide things from the registry. On the one hand, it is possible that an imperfect registry may not be very effective in preventing crimes. However, on the other hand, it is also possible that people who want to avoid being registered can easily do so. The second risk is that if most countries develop good registers of who owns beneficial ownership of companies, a few non-compliant dominions could weaken any aggregate impact by providing an easy way to keep the ownership secret.

5.2. Recommendations

This study proposes amendment to the Companies Act and the Companies (Beneficial Ownership Information) Regulations, 2020 to reflect the recommendations below.

5.2.1. Application of beneficial ownership provisions

¹⁹⁷ Demystifying Beneficial Ownership Under the Kenyan Company Law Framework, <<http://candrgroup.co.ke/wp-content/uploads/2021/02/Demystifying-Beneficial-Ownership-Under-the-Kenyan-Company-Law-Framework.pdf>> accessed on September 24 2022.

The law should require that all vehicles, including legal ones, be registered in the name of the person who benefits from their use. All organizations which are separate from natural people and are allowed to operate in a country's economy must register their owners. This is important so that people can know who really benefits from these organizations' activities. This is a type of organization where people can work together to achieve a common goal. They are usually called companies, but there are other kinds, too. For example, partnerships can be with other companies, or with limited liability. Finally, there are private foundations and trusts. Any foreign legal structure with a resident participant should be required to register with the government in the country where it is located. For example, a foreign law trust with a resident trustee would need to register in the United States. This will ensure that the companies do not metamorphose to other legal vehicles which are not required to disclose their beneficial owners.

5.2.2. Bearer shares

A bearer share is a sort of share that doesn't need to be registered with a specific person or business. The share will not be registered on any share registry, so whoever holds the share certificate (or certificate of ownership) has full ownership of the share.¹⁹⁸ Bearer shares are a type of share that are not commonly used because they are difficult to track. There is no way of knowing who owns these assets other than showing the physical share certificate, which is just a piece of paper. Kenya does not have a law or directive banning bearer shares. This study suggests that all bearer shares should be prohibited or at least immobilised by a government authority. The government should make sure that no more bearer shares exist, because if they do, it could make it very difficult for people to know who beneficial and legal owners of companies are.

5.2.3. Definition of beneficial owner

¹⁹⁸ < <https://www.sumup.com/en-gb/invoices/dictionary/bearer-share/> > accessed on September 26 2022.

A beneficial owner is defined as a natural individual who hold at least 10% of the issued shares or exercises at least 10% of the voting rights.¹⁹⁹ The definition of beneficial owner must not have a minimum threshold. As is the case with companies in Botswana, registration should be required for all owners or parties to all legal instruments, whether domestic or foreign. The Companies Act in Botswana defines a beneficial person as “any natural person who directly or indirectly through any contact, arrangement, understanding, relationship or otherwise ultimately owns or has a controlling ownership or exercises ultimate effective control through positions held in a company or is the ultimate beneficiary of a share or other securities in a company”.

5.2.4. Information to be disclosed

Companies should provide accurate ownership information when they register something with the registrar of companies. This information will help protect the property and make it legal. This information should be all about the legal owner of the vehicle. This includes their name, date of birth, address, national identification number and tax personal identification number. They also control the legal vehicle (for example, ownership, voting rights, the right to appoint majority of the board of directors), and the proportion of their proprietorship or control. The time when they became a legal and/or beneficial owner should also be included. If relevant, the legal series or nominees through which the beneficial owner exercises control should also be listed.

5.2.5. Verification of beneficial ownership information

There is no requirement for verification of beneficial ownership information in Kenya. Without such verification, the accuracy of the information cannot be guaranteed. The government should take responsibility of verifying who is the beneficial owner of a company, and if

¹⁹⁹ Ibid, n195.

someone fails to do this, they may be subject to sanctions. This includes criminal penalties and the inability to operate the company legally.

5.2.6. Accessibility of beneficial information

Public registries where people can find out who owns what should be available. This information can help people and businesses. The Open Government Partnership helps governments make their information available to the public in an easy-to-use, open data format and make sure it's always up to date. Domestic action is important.²⁰⁰ There is need to keep making progress on public beneficial ownership disclosure so that everyone can know who owns the companies and how they are benefiting society. Publicly sharing information across jurisdiction will allow government regulators and watchdogs access to information for investigations, asset recovery, contracting, and more.

5.2.7. Enhanced penalties for noncompliance

A person who fails to disclose beneficial ownership information may be liable to be charged with a crime and could get a fine of 500,000 Kenyan shillings. It is recommended that the enforcement system consist of more formal mechanisms suspension of voting rights, restrictions of share transfers and sometimes even imprisonment sanctions. The formal sanctions are usually imposed following a judicial or administrative procedure. In Malaysia, the judicial enforcement mechanisms are typically made up of fines or imprisonment or both. Further the law may also incorporate a number of informal measures. It could very well be argued that the formal measures should be viewed as a last resort. The enforcement agency may first try to get the person in breach to comply with, observe, or enforce the rules. Or, the agency may give the person in breach a written notice of the rule violation, impose a condition,

²⁰⁰ Abugre and others, Vulnerability and Exposure to Illicit Financial Flows Risk in Africa; Rachel Etter-Phoya, Markus Meinzer and Shanna Lima, 'Tax Base Erosion and Corporate Profit Shifting: Africa in International Comparative Perspective', Journal on Financing for Development, Forthcoming <<http://uonjournals.uonbi.ac.ke/ojs/index.php/ffd>> accessed 28 August 2022.

or give the person a reprimand. In the author's view, the speed and flexibility of the non-judicial procedures are attractive measures for listed companies and their investors.

5.2.8. Sufficient Stakeholder Engagement

Apart from amending the law, this study recommends sufficient stakeholder engagement. The Attorney General's Office didn't reach out to all the people who could have helped them understand how this decision would affect the community. The stakeholders were confused because they didn't know what was necessary of them. The Business Registration Services Director General decided to extend the time limit for corporations to file their beneficial ownership details by six months. This was because the government did not fully engage and educate all stakeholders.²⁰¹ The Attorney General's office is genuinely required to educate and make everyone aware of their legal obligations. This will help ensure everyone is following the rules.

5.3. Conclusion

The way that investors feel confident about the markets is based in part on the fact that companies are required to disclose the identity of the people who own and control them. If there are a lot of different people who own a company, it is harder for them to make decisions together. This can lead to problems, like when the different people in charge don't agree on what to do. Some investors, or "large ones," want companies to do well over the long term, as this usually leads to increased profits and better performance. On the one hand, controlling beneficial owners with a large voting block may have the incentive to sidetrack company assets and prospects for individual advantage at the expenditure of sectional investors. On the other hand, however, governing beneficial owners with a small voting block may not have the same incentive to do this. Having put in place the beneficial ownership disclosure regime, the next

²⁰¹ Office of the Attorney General, 27th January, 2021, BENEFICIAL OWNERSHIP INFORMATION SUBMISSION - DEADLINE EXTENSION FOR A PERIOD OF SIX MONTHS WITH EFFECT FROM 1st FEBRUARY 2021 < <https://brs.go.ke/index.php> > accessed on September 26 2022.

task is implementation and companies should do their part and take all reasonable steps to promptly collate the information required and arrange for the preparation of the beneficial ownership registers and their subsequent lodgment with the Registrar of Companies, in compliance with the law. The relevant government agencies should ensure compliance.

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